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TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuccion
Judge Robert Fremr

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
THE PROSECUTOR v. WILLIAM SAMOEI RUTO and JOSHUA ARAP SANG**

PUBLIC
with Confidential Annex A and
Confidential, *EX PARTE*, Prosecution and VWU only Annexes B, C and D

Public redacted version of
Prosecution's ninth application pursuant to Regulation 35(2) of the
Regulations of the Court, 12 September 2014, ICC-01/09-01/11-1511-Conf

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

1. The Office of the Prosecutor (“OTP” or “Prosecution”) requests the authorisation of Trial Chamber V(A) (“Chamber”) to include 45 further items on its List of Evidence (“LoE”) pursuant to Regulation 35(2) of the Regulations of the Court and Articles 64(6)(d) and 69(3) of the Rome Statute (the “Application”). The 45 items relate to witnesses P-0516 and P-0524 and consist of previously (or soon to be¹) disclosed items of evidence such as screening notes, transcripts of interviews, reports and other documents relating to these witnesses that were collected in the context of the Article 70 investigation throughout the course of 2013 and 2014.

2. For the reasons more fully explained below, these items are now assessed to be relevant to the evidence of witnesses P-0516 and P-0524, witnesses against whom a summons to appear has been issued.² P-0516 and P-0524 are scheduled to appear as the [REDACTED] witnesses in the September 2014 trial session.³ A summons has successfully been served on P-0516.⁴ The Prosecution has collected evidence in the context of the Article 70 investigation with respect to both witnesses and intends to lead P-0516 and P-0524 on this evidence, or alternatively, confront them with it during their examination. The bulk of this evidence⁵ did not exist when the Prosecution filed its LoE and thus could not have been included therein. As such, the Prosecution seeks their inclusion on its LoE.

3. P-0516 and P-0524 have both ceased cooperation with the Prosecution and refused to testify voluntarily. The Prosecution has reasonable grounds to believe that the withdrawal and/or recantation of these witnesses has been

¹ Seven audio recordings related to P-0516 have not yet been disclosed to the Defence, for reasons set out below. However the Defence have received disclosure of the transcripts of these recordings. The Prosecution is currently preparing the audio materials for disclosure on an urgent basis and once any necessary redactions have been applied, will disclose them at the earliest opportunity.

² ICC-01/09-01/11-1274-Corr2.

³ ICC-01/09-01/11-1439-Conf, para. 6.

⁴ ICC-01/09-01/11-1480-Conf, ICC-01/09-01/11-1480-Conf-Exp-Anx6 (P-0516).

⁵ All but five items.

materially affected by improper interference, in the form of a concerted and elaborated witness interference scheme. The Prosecution intends to use this evidence (a) to prove that P-0516 and P-0524 were improperly interfered with and as such either recanted their prior statements and/or withdrew their cooperation with the Prosecution; (b) to prove that their interference was part of a wider witness interference scheme in which *other* Prosecution witnesses have been approached; and (c) to assist the Chamber with its overall assessment of evidence and determining matters related to alleged witness corruption.

4. The Prosecution can also not rule out that P-0516 and P-0524 may be adverse to the Prosecution, and as such, may need to put to them prior conflicting accounts they have provided regarding the PEV. In this regard, the Prosecution notes that P-0524 has deposed to an affidavit withdrawing his cooperation. In addition, the Prosecution also intends to use the evidence appended in Annexes B, C and D to support any application it may make for the admission of the prior statements of these and other witnesses.⁶

5. The Prosecution submits that the addition of these 45 items will not cause unfair prejudice to the Accused, as the bulk of the materials have previously been disclosed to the Defence as either Rule 77 material or as potentially exonerating material.⁷ All items previously disclosed as Rule 77 material or as potentially exonerating material were re-disclosed as incriminating evidence. Those with previous redactions to the targets of the Article 70 investigation have been re-disclosed with the redactions lifted. Any prejudice to the Defence is outweighed by the cogency of the information contained in these items which is essential for a proper assessment of the evidence of these witnesses and to ensure that the Chamber has before it necessary evidence for the determination of the truth. Further, as noted in the Chamber's "Decision on the Prosecution's Application for Addition of Documents to its List of Evidence",⁸ ("3 September 2014

⁶ Under Rule 68(2) and/or Article 69.

⁷ See Annex A for details relating to the disclosure dates of all items in Annexes B, C and D.

⁸ ICC-01/09-01/11-1485-Conf.

Decision”), the addition of these items to the LoE is without prejudice to the Chamber’s discretion to admit the said evidence in the record of proceedings.⁹

Confidentiality

6. The Prosecution submits this Application and Annex A as Confidential, as it contains personal and identifying information related to the witnesses which must remain concealed from the public. Annexes B, C and D are submitted as confidential *ex parte* as they contain full unredacted versions of the materials which are the subject of this Application. The Defence have access to all of these items *via* the Ringtail database. A public redacted version of this Application will also be filed.

Urgency

7. P-0516 and P-0524 are scheduled to appear on [REDACTED] September 2014 respectively.¹⁰ Although it seems likely that their testimony will not commence on those dates given the delay occasioned by *inter alia* the late start of the current witness’ testimony, the Prosecution respectfully requests that the period for the filing of responses be shortened to enable the request to be decided prior to the appearance of the witnesses.

Statement of facts

8. On 9 July 2012, the Chamber issued its “Decision on the schedule leading up to trial”, where it, *inter alia*, ordered the Prosecution to submit its witness list and LoE by 9 January 2013.¹¹
9. On 29 April 2014, the Chamber issued its “Decision on Summons and Request for State Cooperation”, wherein it ordered, *inter alia*, a summons to be issued for P-0516, and P-0524 to appear as witnesses in this case.¹²

⁹ *Ibid.* at para.38.

¹⁰ ICC-01/09-01/11-1442-Conf.

¹¹ ICC-01/09-01/11-440, para.13.

10. On 22 August 2014, the Prosecution filed a corrected version of its eighth application pursuant to Regulation 35(2) of the Regulations of the Court.¹³ The Defence for Mr Ruto filed its Response on 27 August¹⁴ and the Defence for Mr Sang also filed a Response on 26 August,¹⁵ albeit out of time. With leave of the Chamber, the Prosecution filed further submissions on 28 August.¹⁶
11. The Chamber issued its 3 September 2014 Decision, granting the Prosecution's application to add documents related to P-0604 and P-0495 to its LoE.

P-0516

12. P-0516's identity and statements were disclosed to the Defence on 18 February 2013.
13. [REDACTED].¹⁷
14. P-0516 was supposed to meet with [REDACTED] but failed to attend the meeting. The Prosecution tried but failed to make contact with P-0516 from July until December 2013.
15. In December 2013, the OTP [REDACTED] received information that P-0516 wanted to be contacted by the Prosecution. On [REDACTED], OTP investigators contacted P-0516, who stated that he had heard the Prosecution had "a case" on him. P-0516 subsequently agreed to meet with investigators in [REDACTED].¹⁸
16. The Prosecution organised to meet with P-0516 on [REDACTED] 2014, but he did not appear at that meeting. Investigators contacted him again on [REDACTED] and P-0516 agreed to meet with them the following day. P-0516 expressed

¹² ICC-01/09-01/11-1274-Corr2.

¹³ ICC-01/09-01/11-1463-Conf-Corr.

¹⁴ ICC-01/09-01/11-1466-Conf.

¹⁵ ICC-01/09-01/11-1467-Conf.

¹⁶ ICC-01/09-01/11-1471-Conf.

¹⁷ See ICC-01/09-01/11-1120-Conf-Exp and ICC-01/09-01/11-1120-Conf-Red, paras.44-47 for further details.

¹⁸ [REDACTED].

concern [REDACTED] about being forced to attend court.¹⁹ P-0516 did not show up at the scheduled meeting.

17. On [REDACTED] 2014, the Prosecution was able to establish contact with P-0516 once more. P-0516 stated that he had wanted to meet the Prosecution in [REDACTED].²⁰
18. On [REDACTED] 2014, the Prosecution again spoke to P-0516 by telephone, [REDACTED]²¹ [REDACTED]²² He indicated to the Prosecution that he and his family were being [REDACTED].²³
19. On [REDACTED] 2014, the Prosecution once again spoke to P-0516, [REDACTED] to meet the OTP at an arranged rendezvous point.²⁴ Again, P-0516 did not turn up at the arranged meeting. Although the Prosecution attempted to call P-0516 in the days following, no contact was established until [REDACTED].
20. On [REDACTED] 2014, the OTP spoke to P-0516 *via* telephone, where he agreed for a meeting on [REDACTED], however he cancelled this due to personal reasons. A meeting was arranged for [REDACTED], but the witness did not show.²⁵
21. The Prosecution continued its attempts to contact P-0516 throughout [REDACTED] 2014, and managed to contact him again on [REDACTED], when he told investigators that [REDACTED]²⁶
22. On [REDACTED], P-0516 again spoke to investigators by telephone [REDACTED].²⁷

¹⁹ [REDACTED].

²⁰ [REDACTED].

²¹ [REDACTED].

²² [REDACTED].

²³ [REDACTED].

²⁴ [REDACTED].

²⁵ [REDACTED].

²⁶ [REDACTED].

²⁷ [REDACTED].

23. On [REDACTED], the OTP made arrangements to meet P-0516 in person on [REDACTED],²⁸ a meeting which did not take place. On [REDACTED], the Prosecution once again spoke with P-0516 by telephone, where P-0516 indicated his willingness to meet the following week.²⁹ The last time the OTP spoke with P-0516 was on [REDACTED] 2014.³⁰ The Prosecution has been unable to reach or meet him since.

P-0524

24. P-0524's identity and statements were disclosed to the Defence on 17 April 2013.
25. The day after the identity of the witness was disclosed to the Defence, [REDACTED] withdraw his co-operation with the Prosecution. [REDACTED].
26. On [REDACTED] 2013, the witness sent an email to the OTP Public Information desk announcing his intention to withdraw as a Prosecution witness. This information was formally communicated to the Prosecution on [REDACTED] 2013, with an accompanying affidavit where he re-iterated that he was withdrawing as a witness for the Prosecution and gave reasons therein for his withdrawal.³¹
27. [REDACTED].³²
28. [REDACTED]. Since then the Prosecution has been unable to communicate with or meet the witness.

Submissions

Variation of the time and authorisation to disclose further evidence

29. The overarching objective of a trial is a fair proceeding at which the truth is established. The Trial Chamber, by virtue of Articles 64 and 69 of the Statute, has

²⁸ [REDACTED].

²⁹ [REDACTED].

³⁰ [REDACTED].

³¹ [REDACTED].

³² [REDACTED].

the authority to manage the trial, with due regard for the rights and obligations of the parties, and to request all evidence it considers necessary for the determination of the truth. In managing the trial, the Chamber has the power to fix time limits, but also to vary those time limits by virtue of Regulation 35(2) of the Regulations of the Court: “After the lapse of a time limit, an extension of time may only be granted if the participant seeking the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control.”

30. This Request is filed after the 9 January 2013 deadline to file the Prosecution’s LoE because the relevant events concerning the proposed additional evidence and/or the Prosecution’s awareness of the witnesses’ withdrawal as witnesses and potential hostility took place well after the 9 January 2013 deadline.
31. Although P-0516 ceased contact with the Prosecution in [REDACTED] 2014, and the OTP received a withdrawal affidavit from P-0524 in [REDACTED] 2013, it is only in light of the findings of the Article 70 investigation over the course of the last year, and pattern of witness interference and recantation that has emerged, that the Prosecution concluded that it may require the documents which are the subject of this application when examining³³ these witnesses.

Relevance of the items

32. In its 3 September 2014 Decision, the Chamber noted that while the present case should focus on the guilt or innocence of the Accused and crimes with which they are charged, it was satisfied that in view of the allegations of interference, the addition of documents related to P-0604 and P-0495 had a “contextual or circumstantial bearing ... especially where the context or circumstances include the possibility that the witnesses may have recanted the statements previously

³³ Or cross examining, as the case may be.

given to the Prosecution” and that “some aspects of the Article 70 allegations are potentially relevant in the present case”.³⁴

33. The Prosecution submits that the Chamber, in its quest for the determination of the truth, must have before it *all* relevant evidence. The Prosecution submits that the documents are relevant (a) to the issue of the witnesses’ credibility and the reason for their withdrawal of cooperation and/or recantation; (b) for the purposes of cross-examination if the witnesses are adverse; (c) for corroboratory purposes with respect to *other* witnesses which the Prosecution alleges have been interfered with through a wider witness interference scheme; and (d) for the Chamber’s overall assessment of the evidence and the determination of conflicting versions relating to alleged witness tampering. The Prosecution submits that this additional evidence will be relevant to the Chamber’s determination of a contemplated Prosecution request to admit prior statements of one or more of these witnesses pursuant to Article 69 and/or Rule 68.

Relevance of additional documents related to P-0516 (Annexes B and C)

34. The Prosecution requests permission to add to its LoE: (a) a screening note relating to P-0516,³⁵ (b) seven audio recordings of conversations between [REDACTED] and P-0516 and their corresponding transcripts,³⁶ and (c) 12 Investigator Reports.³⁷
35. P-0516 had been summoned to appear on [REDACTED] September 2014. When P-0516 was initially interviewed he agreed to appear as a witness, however since [REDACTED] 2013 he has ceased contact with the Prosecution. The Prosecution is mindful of the fact that P-0516 may give evidence adverse to its case, particularly given the evidence that he has been successfully corrupted by those behind the witness tampering. As a result, the Prosecution may need to put to

³⁴ ICC-01/09-01/11-1485-Conf, paras.30, 36-37.

³⁵ [REDACTED].

³⁶ [REDACTED].

³⁷ [REDACTED].

him his prior statements, including information he provided to the Prosecution during his screening.³⁸

36. The Prosecution's and Defence's competing versions as to who has been corrupting Prosecution witnesses and for what purpose has become a central issue in this trial. The evidence appended in Annexes B and C is clearly relevant to the determination of this issue, as it demonstrates that P-0516 fears for his safety. Through evidence of other witnesses, the Prosecution will show that P-0516 has indeed been interfered with, which has resulted in his reluctance to cooperate with the Prosecution, and ultimate withdrawal as a Prosecution witness. The Prosecution will argue at the relevant time, that the fact that the existence of a conspiracy to corruptly induce Prosecution witnesses to withdraw or recant – if accepted – is a factor that supports the veracity of their original evidence implicating the Accused. Conversely, the concerted efforts to corruptly prevent the testimony of Prosecution witnesses render implausible the Defence version that the Accused are the innocent victims of a conspiracy to falsely implicate them in the PEV.
37. Finally, the evidence listed in Annexes B and C will assist the Chamber in its overall assessment of the evidence provided by P-0516 and other witnesses, and in determining matters related to alleged witness interference, which have been raised by both Defence teams.

Relevance of additional documents related to P-0524 (Annex D)

38. The Prosecution requests permission to add to its LoE: (a) a statement taken from P-0524 taken in the context of the OTP's investigations into witness interference,³⁹ (b) a screening note,⁴⁰ (c) 12 Investigator Reports,⁴¹ (d) three letters from P-0524 detailing his basis for withdrawing his cooperation from the Prosecution,⁴² and

³⁸ [REDACTED].

³⁹ [REDACTED].

⁴⁰ [REDACTED].

⁴¹ [REDACTED].

⁴² [REDACTED].

(e) an affidavit purportedly deposited to by P-0524 withdrawing his testimony [statement] and cooperation with the Prosecution.⁴³

39. P-0524 has been summoned to appear on [REDACTED] September 2014.⁴⁴ The documents are contemporaneous reports that are useful in cataloguing the witness' interactions with the OTP. Additionally, they provide detailed information relating to his decision to withdraw as a witness. There is also material that supports the Prosecution's theory of 'witness interference',⁴⁵ albeit indirect. [REDACTED]. These documents are therefore material to support any application the Prosecution may make for the admission of his prior statement under Rule 68 and/or Article 69 and are also relevant in examining the witness to ensure that the Chamber is placed in a position to assess his credibility.
40. [REDACTED],⁴⁶ and his recanting affidavit,⁴⁷ suggest that the witness is likely to be adverse to the OTP. This necessitates the use of relevant material to put to this witness to ensure that the Chamber is not deprived of useful evidence.

Addition of items to the LoE is not prejudicial to the Accused

41. The Prosecution submits that the addition of the 45 items is not prejudicial to the Accused for a number of reasons. All of the items have been (or soon will be) disclosed to the Defence with sufficient notice prior to the witnesses' appearance at trial.⁴⁸ Moreover, when first disclosed, the materials contained relatively few substantive redactions. All of the redactions previously applied to the targets of the Prosecution's Article 70 investigation have also now been lifted.
42. Further, the Defence teams have been on notice of the Prosecution's intention to rely on these sorts of items since 22 August 2014 when the Prosecution filed its application in respect of P-0604 and P-0495, indicating that it intended to file a

⁴³ [REDACTED].

⁴⁴ ICC-01/09-01/11-1455-Conf.

⁴⁵ [REDACTED].

⁴⁶ See paragraph 28.

⁴⁷ [REDACTED].

⁴⁸ The Prosecution appends a table in Annex A which indicates when the items that the Prosecution seeks to add to its LoE were first disclosed to the Defence.

similar application in respect of the remaining summonsed witnesses at the earliest opportunity.⁴⁹

43. Additionally, as noted by the Chamber in its 3 September 2014 Decision, “adding items to the list of evidence is not the same as admitting those items into evidence, or even submitting them for admission into evidence”.⁵⁰ Whether the Prosecution is permitted to use these items, and if so, in what manner, will be determined at a later time.
44. With respect to P-0516 (Annexes B and C), the screening note, and three of the Investigator’s Reports were previously disclosed to the Defence as potentially exonerating material or material falling within the ambit of Rule 77 on or before 6 May 2014. On 28 August 2014, the Prosecution re-disclosed these documents as incriminating material, with all redactions to targets of the Article 70 investigation lifted. 15 items (totalling 45 pages) were disclosed for the first time on 28-29 August 2014. One item (of eight pages) was disclosed on 9 September 2014. The audio recordings of the transcripts of conversations between [REDACTED] and P-0516 have not yet been disclosed. In light of the Chamber’s recent oral ruling,⁵¹ the Prosecution is preparing these recordings for disclosure to the Defence on an urgent basis and will disclose them as soon as the necessary (limited) redactions have been applied.⁵²
45. With respect to P-0524 (Annex D), the screening note, six Investigator’s Reports, three letters and two statements were previously disclosed to the Defence as potentially exonerating material or material falling within the ambit of Rule 77 on or before 16 May 2014. On 1 September 2014, the Prosecution re-disclosed these documents as incriminating material. Of the remaining six documents (totalling seven pages), three were disclosed for the first time as incriminatory

⁴⁹ ICC-01/09-01/11-1463-Conf-Corr, fn.3.

⁵⁰ ICC-01/09-01/11-1485-Conf, para.38.

⁵¹ ICC-01/09-01/11-T-133-CONF ENG ET, p.18, lns.5-15, p.21, ln.24 to p.22, ln.1.

⁵² See Annex A.

material on 1 September 2014, and the other three were disclosed for the first time as incriminatory material on 9 September 2014.⁵³

46. The items do not bring new facts to the matters charged in the Prosecution's Document Containing the Charges, but as outlined above, provide information with respect to interference that the Prosecution contends P-0516, and P-0524 have been exposed to.

Relief requested

47. The Prosecution requests the following relief:
- (a) Pursuant to Regulation 35(2) of the Regulations of the Court, variance of the Chamber's deadline to submit all its documents on the Prosecution's LoE by 9 January 2013.
 - (b) Pursuant to Articles 64(6)(d) and 69(3) of the Rome Statute, authorisation to include 45 items listed in confidential Annex A to the Prosecution's LoE.
 - (c) The shortening of the time frames for responses, as the Chamber sees fit.



Fatou Bensouda, Prosecutor

Dated this 2nd day of December 2014

At The Hague, the Netherlands

⁵³ See Annex A.