

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 11 December 2014

TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding
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***

Confidential

**Reasons for the Decision on Admission of Certain Evidence Connected to Witness
495, rendered on 17 November 2014**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

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Trial Chamber V(A) (the 'Chamber') of the International Criminal Court (the 'Court'), in the case of *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, pursuant to Articles 64 and 69 of the Rome Statute (the 'Statute') and Rule 112 of the Rules of Procedure and Evidence (the 'Rules'), here now delivers these **reasons** for the Decision on Admission of Certain Evidence Connected to Witness 495, rendered on 17 November 2014.

I. PROCEDURAL HISTORY

1. On 19 September 2014, during the course of the testimony of Witness 495, the Chamber raised the question whether there could be an issue concerning Articles 55(2) and 69(7) of the Statute in relation to recordings of an interview between the witness and investigators of the Office of the Prosecutor (the 'Prosecution') on 13 September 2013 (the 'Witness Interview'). Upon request from the parties, the Chamber directed counsel to make written submissions on the matter.¹ In the meantime, the Chamber contingently reserved its ruling on the admissibility of certain evidential material associated with or deriving from the Witness Interview.
2. On 22 September 2014, the Defence for Mr Ruto (the 'Ruto Defence'),² the Defence for Mr Sang (the 'Sang Defence') (together, the 'Defence'),³ and the Prosecution⁴ filed their observations. The Prosecution requested the Chamber to admit into evidence all available audio recordings and associated transcripts/translations of the Witness Interview.⁵ The Defence requested that, pursuant to Article 69(7) of the Statute, the Witness Interview 'and its fruits' should not be admitted into evidence.⁶

¹ ICC-01/09-01/11-T-140-CONF-ENG ET, page 30, line 19 to page 31, line 3; page 32, lines 5-11.

² Ruto Defence observations on Article 55(2) interview conducted with P-0495 ('Ruto Defence Observations'), ICC-01/09-01/11-1530-Conf.

³ Sang Defence Observations on Exclusion of Prosecution Interview with P-495 on 13 September 2013 ('Sang Defence Observations'), ICC-01/09-01/11-1534-Conf.

⁴ Prosecution's submissions regarding issues of Articles 55(2)(d) and 69(7) of the Rome Statute relating to P-0495 ('Prosecution Submissions'), ICC-01/09-01/11-1535-Conf with confidential annexes A and B.

⁵ Prosecution Submissions, ICC-01/09-01/11-1535-Conf.

⁶ Ruto Defence Observations ICC-01/09-01/11-1530-Conf, para. 20. See also Sang Defence Observations ICC-01/09-01/11-1534-Conf, para. 23.

3. On 17 November 2014, the Chamber ruled on the admissibility of the material associated with or deriving from the Witness Interview. The Chamber rejected the admission into evidence of the material, indicating that reasons would follow.⁷

II. SUBMISSIONS

4. The Ruto Defence submitted that the evidence resulting from the Witness Interview should not be admitted, as the integrity of the proceedings would be seriously damaged if the Chamber relies on evidence obtained as a result of this unfair process,⁸ because:
 - a. It appears that there has been a breach of Article 55(2) of the Statute, which casts substantial doubt on the reliability of the evidence;⁹
 - b. Witness 495 did not voluntarily waive his right to be assisted by counsel, because he was not properly and fully informed of the content of that right;¹⁰
 - c. Witness 495 was only informed of the 'bare right' to have a lawyer present, but none of the 'practical mechanisms' to effectively and immediately access the right were explained;¹¹
 - d. Witness 495 was informed of his right to counsel in a manner he did not understand and in an irregular manner (while being put in a taxi, in three minutes, with insinuations, in a rush, without clarity, etc.);¹²
 - e. The witness was questioned just 10 minutes after his 'effective detention';¹³
 - f. The voluntariness of the interview is questionable, as the witness thought he would otherwise be arrested, if he did not cooperate and submit to the interview;¹⁴

⁷ ICC-01/09-01/11-T-152-CONF-ENG ET, page 3, lines 17-24.

⁸ Ruto Defence Observations ICC-01/09-01/11-1530-Conf, para. 2.

⁹ Ruto Defence Observations ICC-01/09-01/11-1530-Conf, para. 2.

¹⁰ Ruto Defence Observations ICC-01/09-01/11-1530-Conf, paras 3-6.

¹¹ Ruto Defence Observations ICC-01/09-01/11-1530-Conf, para. 7.

¹² Ruto Defence Observations ICC-01/09-01/11-1530-Conf, paras 7-11.

¹³ Ruto Defence Observations ICC-01/09-01/11-1530-Conf, para. 13

- g. The witness was informed of his right to counsel and was interviewed in English, although he is not able to fully and clearly express himself in that language;¹⁵ and
 - h. The witness was interviewed for some 12 hours, he was searched and his mobile phone taken away from him.¹⁶
5. The Sang Defence submitted that the evidence resulting from the Witness Interview should be excluded as it is unreliable, antithetical and damaging to the integrity of the proceedings.¹⁷ The Sang Defence argued that:
- a. The Prosecution has to prove convincingly and 'beyond reasonable doubt' that a suspect voluntarily waived his or her right to legal assistance – such waiver must be explicit, unequivocal and informed;¹⁸
 - b. The interview should have been conducted in complete voluntariness and the suspect must have been fully informed of his rights and the possible consequences of conducting such interview and, at the minimum, such informed consent requires that the suspect be made aware of his right against self-incrimination, to be presumed innocent and to remain silent;¹⁹
 - c. Voluntariness can be undermined by 'lack of an adequate on-the-record clarification of what has been discussed off-the-record' or fear of prejudice or a hope of an advantage (*i.e.* promises of protection or assistance);²⁰
 - d. The record of the interview is incomplete and the initial discussion with the witness was not captured, thus creating doubt as to his voluntariness and as to whether he fully understood that he was a suspect;²¹

¹⁴ Ruto Defence Observations ICC-01/09-01/11-1530-Conf, para. 14.

¹⁵ Ruto Defence Observations ICC-01/09-01/11-1530-Conf, para. 15.

¹⁶ Ruto Defence Observations ICC-01/09-01/11-1530-Conf, paras 16-17.

¹⁷ Sang Defence Observations ICC-01/09-01/11-1534-Conf, para. 3.

¹⁸ Sang Defence Observations ICC-01/09-01/11-1534-Conf, para. 7.

¹⁹ Sang Defence Observations ICC-01/09-01/11-1534-Conf, para. 8.

²⁰ Sang Defence Observations ICC-01/09-01/11-1534-Conf, para. 9.

²¹ Sang Defence Observations ICC-01/09-01/11-1534-Conf, para. 13.

- e. The witness was interviewed in English, although he does not fully express himself in that language;²² and
 - f. The right to counsel was explained inadequately and the waiver was thus clearly uninformed,²³ as simply reading out the rights of the suspect is insufficient.²⁴
6. The Sang Defence also contended that the Prosecution investigators should have known that a duty counsel on standby was necessary, as the violation occurred as a result of a 'sting operation'.²⁵
7. The Prosecution submitted that there was no violation of the witness's right to be questioned in the presence of counsel under Article 55(2) of the Statute. In order to provide an account of the factual events which transpired during the Witness Interview, the Prosecution provided a solemn declaration of one of the investigators present during the whole interview (the 'Solemn Declaration').²⁶
8. The Prosecution contended that there was no violation to Article 55(2) of the Statute because:
- a. In the initial encounter with Prosecution investigators, the witness was succinctly informed of his rights and the fact that his assistance was voluntary (this was done briefly, given the public environment);²⁷
 - b. At no time was the witness forced to accompany Prosecution investigators;²⁸ and
 - c. Although the initial contact was not recorded (because the device was not properly activated), the witness later placed on record the events that

²² Sang Defence Observations ICC-01/09-01/11-1534-Conf, para. 16.

²³ Sang Defence Observations ICC-01/09-01/11-1534-Conf, paras 17-22.

²⁴ Sang Defence Observations ICC-01/09-01/11-1534-Conf, paras 10-11.

²⁵ Sang Defence Observations ICC-01/09-01/11-1534-Conf, para. 22.

²⁶ Solemn Declaration, ICC-01/09-01/11-1535-Conf-AnxB.

²⁷ Prosecution Submissions, ICC-01/09-01/11-1535-Conf, para. 5.

²⁸ Prosecution Submissions, ICC-01/09-01/11-1535-Conf, para. 6.

were not recorded and confirmed that he had been told of his right to have a lawyer present and remain silent or leave at any time.²⁹

9. The Prosecution further submitted that, even if the Chamber were to find that there was a violation of Article 55(2)(c) and (d) of the Statute, this was a technical violation that was cured when Prosecution investigators fully informed the witness once they were in a private location.³⁰ Thus, in its view, the evidence provided by the witness was given after he was fully informed of his rights.³¹ Furthermore, the Prosecution submitted that this was not a pre-arranged meeting, but a real-time operation in which the witness was intercepted. Accordingly once the witness was fully informed of his rights (when he was in a private location with Prosecution investigators), he signed his waiver.³²
10. In the alternative, the Prosecution argued that even if there was a breach to Article 55(2) of the Statute, the materials should not be excluded as they do not cast doubt on the reliability of the evidence obtained by the Prosecution investigators.³³ Thus, in its view, the admissibility of the evidence would not be antithetical to or seriously damage the integrity of the proceedings and was rectified at the first reasonable opportunity and no unfairness is caused to the accused persons.³⁴ Furthermore, the Prosecution submitted that the witness is not the accused in these proceedings and admission of this evidence will thus not affect his rights, especially given that he received assurances under Rule 74 of the Rules.³⁵

III. ANALYSIS AND CONCLUSIONS

11. The following items have been identified as resulting from the Witness Interview, where an issue under Articles 55 and 69 of the Statute could have arisen:

²⁹ Prosecution Submissions, ICC-01/09-01/11-1535-Conf, para. 6.

³⁰ Prosecution Submissions, ICC-01/09-01/11-1535-Conf, para. 7.

³¹ Prosecution Submissions, ICC-01/09-01/11-1535-Conf, para. 7.

³² Prosecution Submissions, ICC-01/09-01/11-1535-Conf, paras 8-10.

³³ Prosecution Submissions, ICC-01/09-01/11-1535-Conf, paras 12-13.

³⁴ Prosecution Submissions, ICC-01/09-01/11-1535-Conf, paras 14-15.

³⁵ Prosecution Submissions, ICC-01/09-01/11-1535-Conf, para. 15.

- a. KEN-OTP-0114-0468 (Audio),
- b. KEN-OTP-0130-0462 (Transcript),
- c. KEN-OTP-0114-0469 (Audio),
- d. KEN-OTP-0130-0478 (Transcript),
- e. KEN-OTP-0130-0507 (Transcript),
- f. KEN-OTP-0130-0540 (Transcript),
- g. KEN-OTP-0130-0563 (Transcript),
- h. KEN-OTP-0130-0566 (Transcript),
- i. KEN-OTP-0114-0470 (Transcript),
- j. KEN-OTP-0130-0585 (Transcript),
- k. KEN-OTP-0114-0471 (Audio),
- l. KEN-OTP-0129-0760 (Transcript),
- m. KEN-OTP-0130-0610 (Translation),
- n. KEN-OTP-0114-0472 (Audio),
- o. KEN-OTP-0129-0765 (Transcript),
- p. KEN-OTP-0130-0617 (Translation)

12. As earlier indicated, the Prosecution sought the admission of these items as evidence in the case; and the Defence opposed their admission. The Chamber rejected the admission into evidence of the material.³⁶ The Chamber hereby sets the reasons for its decision.

13. From the materials made available to the Chamber, and from the averments of the parties, it appears that the witness interview at the material time consists of two parts at least. On the one part, there was an initial unrecorded conversation at the point of initial contact (the 'Point of Initial Contact') between the witness and the two Prosecution investigators that conducted the interview. There was also a later recorded interview (the 'Recorded Interview').

³⁶ ICC-01/09-01/11-T-152-CONF-ENG ET, page 3, lines 17-24.

14. It may be accepted that on 13 September 2013, Witness 495 met with Witness 613 in a hotel.³⁷ As Witness 495 was leaving the hotel, he was immediately approached on the road by two Prosecution investigators. That was the Point of Initial Contact. There was a dialogue apparently between the investigators and the witness at that point. As part of that dialogue, the subject of the right to counsel *may* have been discussed.³⁸ There is a critical dispute on what occurred in this part of the encounter. The witness alleged during his testimony before this Chamber that as part of the dialogue in this part of the encounter, the Prosecution investigators had threatened to arrest him if he did not submit to an interview by them.³⁹ The Prosecution does not accept that allegation.⁴⁰ There is no recording of that part of the encounter.⁴¹
15. The substantiation of the witness's allegation of such a threat would have significant import on the question of whether the witness had truly voluntarily waived his right to the presence of counsel during the subsequent interview. That is to say, if indeed, the Prosecution investigators had made the threat as alleged by the witness, the witness's waiver of the right to counsel may not have been a choice of free will, but could have been the product of the immediate pressure generated by that threat. Such a state of affairs may then not readily accommodate the contention that reading out the right to the presence of counsel more fully on the record, during the subsequent interview conducted a short while later in the absence of the counsel that may not have been freely waived, would easily afford a cure to the error that had occurred before.
16. It may also be accepted, on the basis of the Solemn Declaration that the conversation quickly moved to a quiet location, about 20-30 metres away from the

³⁷ Witness 495, ICC-01/09-01/11-T-140-CONF-ENG ET, page 4 lines 9-12. The Prosecution alleges that, during this meeting, Witness 495 offered Witness 613 an undisclosed amount of money and a house in exchange for her withdrawal from the ICC process. See Prosecution's Eighth Application for In-Court Protective Measures for Five Witnesses, 28 August 2014, ICC-01/09-01/11-1470-Conf-Red, para. 26.

³⁸ Solemn Declaration, ICC-01/09-01/11-1535-Conf-AnxB, para. 6.

³⁹ ICC-01/09-01/11-T-140-CONF-ENG ET, page 4, line 17 to page 5, line 5.

⁴⁰ Prosecution Submissions, ICC-01/09-01/11-1535-Conf, para. 2.

⁴¹ Solemn Declaration, ICC-01/09-01/11-1535-Conf-AnxB, para. 8.

Point of Initial Contact, where the Prosecution investigators spoke briefly to Witness 495.⁴² It appears that the end of this encounter was partly recorded (the 'First Recorded Encounter').⁴³ From there, Witness 495 accompanied the investigators to a hotel where he took part in the interview, the transcript of which had been submitted for admission into evidence of the Recorded Interview.⁴⁴

17. In the Solemn Declaration it is averred that on approaching Witness 495 – at the Point of Initial Contact – one of the investigators 'activated a recording device to record our conversations'.⁴⁵ It is also averred in the Solemn Declaration that '[d]uring a break of the substantive interview [...] I was advised by [the second investigator] that the field recording device had not recorded our initial conversation with P495. As a result of this information I then placed on record what had transpired during our initial meeting with P495.'⁴⁶
18. The Recorded Interview was not conducted in the presence of counsel. The Defence contended that this was a forensic flaw that stands in the way of the admission into evidence of the Recorded Interview and the evidential materials associated with or derived from that interview. The Prosecution submitted in the main that although there was no recording of the dialogue at the Point of Initial Contact (in order to show that the right to counsel was properly availed to the witness), the Recorded Interview and a signed waiver indicate that the witness had voluntarily waived his right to counsel. The Defence contended that there is much on the record to show that the waiver of the right to counsel was not voluntary.
19. The issue thus engaged was whether the Recorded Interview and the other evidential materials derived from it might be admitted into the trial record as evidence, in the face of the question surrounding whether the witness's right to counsel had been respected.

⁴² Solemn Declaration, ICC-01/09-01/11-1535-Conf-AnxB, para. 5.

⁴³ KEN-OTP-0130-0462_R01, at pages 463-464, lines 2-43.

⁴⁴ Solemn Declaration, ICC-01/09-01/11-1535-Conf-AnxB, para. 7.

⁴⁵ Solemn Declaration, ICC-01/09-01/11-1535-Conf-AnxB, para. 5.

⁴⁶ Solemn Declaration, ICC-01/09-01/11-1535-Conf-AnxB, para. 8.

20. Article 69(7) of the Statute provides:

Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if:

- (a) The violation casts substantial doubt on the reliability of the evidence; or
- (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings.

21. Article 55(2) of the Statute guarantees the right to presence of counsel, among other rights, for suspects whom the Prosecution intends to question; and the suspect must be informed of those rights before the questioning begins. The requirement upon the Prosecutor as to these rights is not only that they must be respected; but also that the rights must be made clear to the suspect in the substance of their indication in Article 55(2) of the Statute. As regards the right to the presence of counsel or its waiver, the right is indicated in the following terms:

2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned:

[...]

- (c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and
- (d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

22. It should be fair to observe that before the Point of Initial Contact, the Prosecution investigators had formed the view that they had 'grounds to believe' that Witness 495 was a person who 'has committed a crime within the jurisdiction of the Court and [a] person [...] about to be questioned [...] by the Prosecutor'. He was thus a person to whom Article 55(2) of the Statute applied at the Point of Initial Contact.

23. Rule 112 of the Rules requires the Prosecution to create an evidential record the object of which is to show that the suspect's right to counsel, in particular, was respected by the Prosecution. The Chamber considers that Rules 111 and 112(2) of the Rules required the Prosecution to prepare a written, signed record of the

questioning for the portion of the interview where the recording device was allegedly not working. The Prosecution has not done so.

24. More specifically on the question of waiver, Rule 112(1)(b) provides: '[a] waiver of the right to be questioned in the presence of counsel *shall* be recorded in writing *and*, if possible, be audio- or video- recorded.' [Emphasis added.] The provision apparently suggests that the Prosecution *must* audio-record or video-record the waiver of the right to counsel, whenever it is *possible* to do so — and, in writing, in any event.⁴⁷ But a further question may also be engaged as to the intendment of Rule 112(1)(b), in light of the production of a signed waiver — the *act* of which was not audio- or video-recorded, although the recorded interview does contain portions in which the witness apparently acknowledged that he had waived his right to presence of counsel (an occurrence that the witness now effectively claims to have resulted from a threat made off record). In the present case, the Prosecution makes no submission that the act of signing the written waiver was audio or video recorded, or why it was not possible to do so. Perhaps, the Prosecution did not feel called upon to submit on the matter. For present purposes, the Chamber does not decide the question whether the Prosecution's failure to audio- or video-record the *act* of signing the written waiver constituted a violation of Rule 112(1)(b) for that

⁴⁷ It is noted that the Appeals Chamber has held that, when a Rule 112 recording of a statement is created, the Prosecution is not required to create an additional record of the person's statements under Rule 111. See *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled "Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation", 17 February 2012, ICC-02/05-03/09-295, OA 2, para. 28 [Appeals Chamber]. This holding is distinguishable from the present case, as there is no Rule 112 recording of this particular portion of the interview. It is important to stress that the Appeals Chamber's decision in *Banda and Jerbo* deals with the requirement to record statements. In that sense, the central principle of that decision is not readily applicable to the distinct question of recording waiver of the right of presence of counsel, as that issue was not the focus of that decision. For one thing, there is a certain pragmatism and good sense that is readily appreciable in that decision, which is not necessarily engaged as regards the matter of recording of waiver of presence of counsel. In *Banda and Jerbo*, the Defence complaint was to the effect that although audio or video recording of a witness's interviews has been disclosed, there would be a violation of the Prosecutor's obligations if the written statements (produced from the same interviews) are not also created and disclosed. But, were such a complaint to be accepted, it would mean that the prosecution must in every case also devote resources to the task of reducing to written statements (for purposes of disclosure) what may be very voluminous audio or video recordings (which it has disclosed to the Defence). Such duplication would be needless and even possibly wasteful. It made perfect sense for the Appeals Chamber to reject such an outcome. But the good sense of that decision does not necessarily extend to overriding either the also good sense implicated in the express language of Rule 112(1)(b), which says: 'A waiver of the right to be questioned in the presence of counsel *shall* be recorded in *writing and*, if possible, be audio- or video-recorded'. [Emphasis added.]

reason. However, it is sufficient to note that it would have been advisable, at least, to have audio- or video-recorded the *act* of signing the waiver, where it was possible to do so, as the best evidence of the voluntariness of the waiver. This would be in keeping with the reasons for requiring the audio- or video-recording of the waiver, whenever possible.

25. In the Chamber's view, whenever there is an absence of the audio- or video-recording of the waiver, and the suggestion is made or implied that it was not 'possible' to audio- or video-record the waiver, a mere failing on the part of the Prosecution staff or their equipment may not readily satisfy the exacting and exonerating requirements of impossibility, without a very clear explanation of the fullest circumstances of such failings. To arrive at a view that it had not been 'possible' to audio- or video-record the waiver, the fullest explanation needs to address the following considerations, among others, that may also be implicated in the particular circumstances of the case: What was the factual reason for the failing? What due diligence steps had been taken ahead of time to ensure (or at least militate) against such a failing? In the absence of such fullest explanation, for purposes of determining that it was truly not possible to audio- or video-record the waiver, it will be all too easy to make avoidable mistakes – or employ systems and equipment prone to avoidable faults – and then hope later to receive easy remission for the failings on grounds that it was not 'possible' to audio- or video-record the waiver. The right to counsel – a most important right indeed – would then have been rendered nugatory.
26. The Chamber is fully mindful of the possible complaint that the assessment of the question of impossibility of ensuring the recording that Rule 112 requires should take into account the circumstances presented when investigators finally approach a crime suspect that is the subject of a 'sting' operation, when the encounter occurs in circumstances that are not ideal to ensure that there is no failure, by human error, in the operation of the recording equipment – such as, (according to the submissions of the Prosecution) might have been the case here.

27. In the Chamber's view, however, such considerations would not automatically resolve the question of lack of possibility of audio- or video-recording the waiver of the right to counsel during the encounter, such that cures the failure to audio- or video-record the waiver. This is because the law generally allows criminal investigators to investigate crimes and even to conduct arrests, without requiring presence of counsel during the investigation or the eventual arrest; provided that all that is done at the point of any eventual arrest is simply to arrest the suspect and nothing more. Indeed, this proviso particularly casts in evident relief the requirement that any eventual arrest must be done in a manner that fully respects the suspect's right to remain silent – a right guaranteed under Article 55(2)(b) of the Statute. And the right to silence is a right that is appreciably related to the right (guaranteed under Article 55(2)(d) of the Statute) to presence of counsel at any time that the investigators choose to embark upon the course of questioning or interviewing the suspect. In other words, at any time that the investigators choose to embark upon the questioning of a person whom *they have formed the reasonable belief as having committed a crime within the jurisdiction of the Court*, they have a duty to ensure that avoidable human error is not the reason for the failure to audio- or video-record the waiver of the right to counsel as required by Rule 112. Avoidable human error would include the use of faulty recording equipment, as they are so easily replaced in this day and age of great ubiquity of mobile phones that are able to audio- or video-record events of interest.
28. All this is to say that the law generally allows investigators ample room to investigate a crime and conduct arrests outside the presence of counsel for the suspect or accused. But whenever the law requires investigators to respect the right to counsel, that right must be meaningfully respected in the manner prescribed by law. The respect of the right in its substance and manner is not readily avoided by a perfunctory averment or suggestion that it was not 'possible' to do so in the circumstances prevailing at the time.

29. The Prosecution Solemn Declaration is insufficiently illuminating to assist the Chamber in reaching a conclusion that it was not possible to audio- or video-record the waiver at the Point of Initial Contact. First, it contains the declaration of one of the investigators who informs as follows: 'On approaching P495 [the second investigator] activated a recording device to record our conversations. I introduced myself to P495 and we moved off the road to a quiet location about 20 metres away where we could have a conversation off the road and uninhibited by noise'.⁴⁸
30. It is to be noted that the Chamber does not have the direct averment of the second investigator informing that he did indeed activate the recording device, or that he had done so in the correct way. And there is no information specifying how the investigator that wrote the Solemn Declaration came to the testimonial conclusion that his colleague did activate the recording device, or that it was done correctly. Second, the fullest extent of the factual circumstances offered to explain the absence of the audio- or video-recording of the waiver at the Point of the Initial Contact is this: 'During a break of the substantive interview [REDACTION] I was advised by [the second investigator] that the field recording device had not recorded our initial conversation with P495.'⁴⁹ There is no suggestion offered as to why the recording device 'had not recorded' the initial conversation. These averments are, thus, simply insufficient to permit the Chamber to conclude that it was not 'possible' to audio- or video-record the witness's waiver – at the Point of Initial Contact – of his right to the presence of counsel during the Witness Interview.
31. In the absence of any recording of the encounter between the witness and the Prosecution investigators at the Point of Initial Contact, it is not possible to have a clear view of what was said then. That is to say, it is impossible to determine whether or not the witness had been explicitly threatened as he claims to have happened.

⁴⁸ Solemn Declaration, ICC-01/09-01/11-1535-Conf-AnxB, para. 5.

⁴⁹ Solemn Declaration, ICC-01/09-01/11-1535-Conf-AnxB, para. 8.

32. But, it is not necessary, for present purposes, to make that finding. For, the resolution of the question presented does not entirely depend upon a finding that the investigators had explicitly threatened the witness, as he claims, with an arrest if he did not submit to an interview. Besides the question as to whether the threat was explicitly made, it is important also to rule out that the manner of the initial encounter and dialogue between the investigators and the witness had not reasonably left him with the impression that his arrest by the investigators was an immediate prospect that he could possibly avoid by agreeing to the interview and by waiving his right to counsel, even if he did not really understand that he had the right to presence of counsel in the manner and circumstances that the right was being explained to him, or that he was indeed truly waiving the right. This is not to say that there is a requirement upon Prosecution investigators to eliminate a suspect's subjective predisposition to perceive the kind of threat alleged by this witness. But there is a requirement upon Prosecution investigators to take reasonable care to avoid conducting themselves in a manner that permits an objective basis for such a threat to be left in the mind of the suspect, even when the investigators had no intention whatsoever to convey such a threat.
33. In light of the foregoing considerations, the Chamber considers that in the specific circumstances of this case and on the basis of the information available to the Chamber at the time of this litigation, the Chamber is unable to determine that the witness's right to counsel was fully availed to him, as required by Article 55(2) of the Statute. The transcript of the First Recorded Encounter sufficiently indicates the failing. It shows the right to counsel explained to the witness in the following dialogue:
- [00:00:01. Start of transcript]*
Interviewer 1: [...] that I want to use you to assist us in our investigation. Do you understand that?
Interviewee: Yes.
Interviewer 1: Alright, and you're happy to do that?
Interviewee: I have no problem.
Interviewer 1: OK.
Interviewer 2: Say that just again about the lawyer.

Interviewer 1: Ah listen, I'm going to explain your rights to a lawyer, if you want one present. But you also have the opportunity to waive that right. OK? But I'm going to go into more detail.

Interviewee: I don't understand about the lawyer.

Interviewer 1: OK. We have to give you, when anybody is questioned by us, we have to give you the opportunity to have a lawyer present if you wish. Now you can say no I don't want a lawyer present, I'm happy to take part in the interview. Or you can say oh yes I want a lawyer present during the interview. OK? What I'm saying to you is that's your choice. But I want you to assist us in our investigation. OK? You can waive your rights to a lawyer, I have a document for that, or you can have a lawyer present. OK? But what I'm saying is I would like you now to come with us and put the allegations to you so that I can get you to assist us. You know exactly what I'm talking about, OK. You understand what I'm talking about. You know the evidence that we have.

Interviewee: Yes.

Interviewer 1: Then you will understand why I need your assistance. OK? Do you understand what I'm saying?

Interviewee: So even though I don't have any lawyer around, I don't know which lawyer should I take [...]

Interviewer 1: Alright.

Interviewer 2: If you feel you need one.

Interviewee: Pardon?

Interviewer 2: If you feel that you need one.

Interviewer 1: It's a matter for yourself. You either have one or you don't have to have one. You don't have to have a lawyer present, we're giving you the option of whether you want one present or not. But our position is here we need your assistance and we need it [...]

Interviewer 2: Soon.

Interviewee: Yeah, we can continue with the session.⁵⁰

34. The Chamber is of the view that the orientation of that initial dialogue revealed in the First Recorded Encounter, as it concerns the right to counsel, was directed with disproportionate pressure towards the investigator's urgent need to interview the witness than in a balanced and careful explanation to the witness: (a) that he had a right to the presence of counsel during the interview, and (b) that the choice to waive that right was *entirely* his own to be made without overbearing pressure.
35. The evident stress repeatedly placed on making the right to counsel contingent upon *if the witness felt that he needed it* is unfortunate, especially in the circumstances in which the overriding stress seemed to be on the investigator's declared *need* of the witness's 'assistance' to be had in the manner of the subsequent interview.

⁵⁰ KEN-OTP-0130-0462_R01, at page 0463, lines 2-32.

36. The indicated contingency (that the right to presence of counsel was available if the witness felt that he needed it) specifically puts in issue whether the investigators had clearly and amply revealed to the witness the nature of the information in their possession about the suspect's involvement in criminal activity, in a way that would enable him to make an informed decision as to whether he really *needed* to avail himself of his right to the presence of counsel during the contemplated interview. Such clear and ample revelation (to the suspect) of evidence of his criminal activity might then inform the question whether he was waiving the right to the presence of counsel, notwithstanding the information that the investigators had revealed to him to have been in their possession about his suspected involvement in criminal activity. It is not readily apparent from the record that the investigators had revealed to the witness the information in their possession about the witness's involvement in criminal activity, prior to repeatedly stressing to the witness that his right to counsel depended upon *if he felt that he needed* to assert the right. Such is the difficulty with the repeated stress that the Witness's right to counsel was to be exercised *if he felt that he needed* to avail the right.
37. It is further to be considered that stressing to a suspect that his right to the presence of counsel during the contemplated interview was contingent upon *him needing to feel a need for it*, is fraught with the added danger that the suspect (who is not familiar with the relevant law) might be left to worry that asserting the right to the presence of counsel, before the suspect had been advised of the information in the possession of investigators about his criminal activity, might be viewed by the investigators as evidence of consciousness of guilt. It may explain why the suspect – at that stage – may purport to waive the right to the presence of counsel, in the possible hope of deflecting greater attention of the investigators. It is indeed considerations like that, that make the right to presence of counsel both so delicate and so critical in situations of crime suspect interviews.
38. It is better, therefore, for the investigators to: (a) simply advise a suspect of his right to the presence of counsel during an interview and his prerogative to waive that

right without pressure; and (b) give the information in a manner that does not detract from the suspect's understanding of the right.

39. In light of the dialogue quoted above from the First Recorded Encounter, the Chamber deems it important also to observe that the record of the interview ought to reflect that the suspect was allowed a reasonable opportunity to (a) digest the information given to him about his right to the presence of counsel; and then, (b) indicate whether or not he was exercising the right to counsel or whether he was waiving it. It is not enough to read out the right to counsel rapidly and then move on to the substantive interview in rapid succession of the proceedings, with no room permitted the witness to indicate his choice let alone that he had digested the information given to him.
40. Beyond the foregoing observations, it is reasonable to take the view that a palpable pall of pressure had been present during the interview in other ways tending to militate against the view that the interview – conducted in the absence of counsel – was truly voluntary. Notable in this connection is the fact that at a point in the interview, the investigators saw fit to remind the witness that they had 'requested' him to attend the interview voluntarily. But the witness's spontaneous response was significantly as follows: 'To be honest, I didn't understand that [...] because you told me [...] I think you have not requested. You told me that I want to interview you [...] If somebody wants to interview you and then he wants [...] and request is quite different'.⁵¹ Witness 495 also said that '[f]rom the word go, the way you started approaching me all along has meant to be afraid of doing anything apart from listening from what he says.'⁵²
41. In light of the above, the Chamber is unable to conclude that the witness's waiver of the right to the presence of counsel that was procured by the investigators had been attended by the degree of procedural safeguards commensurate to its

⁵¹ KEN-OTP-0130-0478_R01, at page 0485, lines 228-233.

⁵² KEN-OTP-0130-0566_R01, at page 0574, lines 281-287.

importance. The waiver of the right must be clearly voluntary, in the manner of 'a knowing and intelligent relinquishment of a right'.⁵³

42. The original question raised and mostly litigated by the parties is whether there is an issue of violation of Article 55(2) of the Statute, engaging the application of Article 69(7). Nevertheless, the Chamber considers that the substance of the matter (dealing, after all, with the admissibility of the concerned evidence) is adequately disposed of on the basis of Article 69(4). It is to be noted, in particular, that Article 69(4) is not exhaustive as regards what the Chamber may take into account in making a ruling on the admissibility of any evidence. It is, thus, open to the Chamber to consider – as is here the case – that the Prosecution is required (pursuant to Article 55(2)) to question Witness 495 in the presence of counsel, unless the witness is shown to have voluntarily waived the right to counsel. In the Chamber's view, any such waiver must be shown to have been clear and unequivocal and 'a knowing and intelligent relinquishment' of the right. The facts in this matter are these: (a) the witness was not questioned in the presence of counsel; and (b) the circumstances in which the witness was questioned does not permit the Chamber to conclude that the witness had waived the right to counsel in the manner of a clear and unequivocal and 'a knowing and intelligent relinquishment' of the right.
43. In those circumstances, the determination whether the right to counsel (under Article 55(2) of the Statute) has been *positively violated*, may not be an inevitable step in a ruling on admissibility of the concerned evidence.⁵⁴ In the current situation, the particular circumstances attending the questioning of this witness, strongly recommend the exercise of the Chamber's discretion to exclude the relevant

⁵³ See: *Pishchalnikov v Russia*, Judgment, 24 September 2009, application 7025/04, para. 77 [ECHR].

⁵⁴ Judge Fremr considers this step should be taken. He agrees that rejecting the admission of the materials concerned pursuant to Article 69(4) of the Statute is justified, but in his view, the Chamber would only arrive at such a conclusion after first having considered whether a violation under Article 55(2) of the Statute occurred. If the Chamber were to find that such a violation occurred, it could consider rejecting admission on the basis of the more specific provision, i.e. Article 69(7) of the Statute. When such a violation is not found to have occurred, it would then still be appropriate for the Chamber to turn to the conditions of Article 69(4) of the Statute and consider whether the probative value of the evidence balanced against the possible prejudice that this evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, stands in the way of admission.

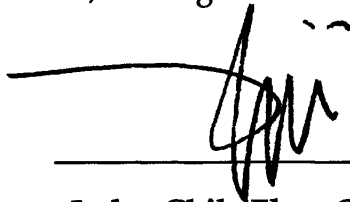
evidence – simply as a function of gauging the probative value of the evidence to the *merits* of the case before the Chamber, measured against the possible prejudice which the admission of the evidence may cause to a fair trial or to a fair evaluation of the testimony of the concerned witness. The Chamber considers that in the particular circumstances of the present case, the difficulties identified above warrant the Chamber's exercise of the discretion to reject the implicated evidential materials on the basis of Article 69(4).

44. It is important, however, to stress that the Chamber's decision in the present case is specific to the particular circumstances of Witness 495's testimony as a witness in the present case. Furthermore, the decision takes into account information available to the Chamber at the time of the present decision. The decision is without prejudice to the particular circumstances of any other proceeding in which the events and interviews in question may be an issue, also taking into account any further information that may become available to such other proceeding.

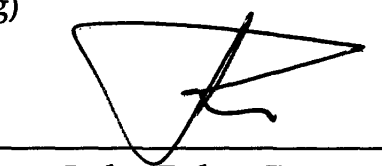
IT IS FOR THE FOREGOING REASONS, THAT THE CHAMBER IN ITS DECISION OF 17 NOVEMBER 2014

REJECTED the admission into evidence of the material listed in paragraph 11 above.

Done in both English and French, the English version being authoritative.



Judge Chile Eboe-Osuji
(Presiding)

Judge Olga Herrera Carbuccion

Judge Robert Fremr

Dated 11 December 2014

At The Hague, The Netherlands