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Date: 12 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***

Public

**Public Redacted Version of Sang Defence Response
to Prosecution's Supplementary Request
to its Eighth Application pursuant to Regulation 35(2) of the
Regulations of the Court (ICC-01/09-01/11-1512-Conf)**

Source: Defence for Mr. Joshua arap Sang

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

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I. INTRODUCTION

1. On 12 September 2014, the Prosecution filed a '*Supplementary Request to its Eighth Application pursuant to Regulation 35(2) of the Regulations of the Court*',¹ wherein it seeks to add an additional 11 items to its List of Evidence ("LOE") in relation to [REDACTED] concerning witnesses P-604 and P-495.² The Prosecution has already sought³ (and been granted) permission to add 80 items to its LOE for the purpose of providing contextual or circumstantial bearing to the circumstances wherein the witnesses may have recanted the statements given to the Prosecution.⁴ The Defence for Joshua arap Sang ("Defence") objects to the addition of the 11 supplementary materials as the Prosecution has not shown that it was – in the terms of Regulation 35(2) – unable to file the application within the time limit for reasons outside of its control.
2. Due to the belated filing of the Prosecution's Supplementary Application, and in accordance with the Trial Chamber's instructions,⁵ the Defence files this response on an expedited basis. The Defence files also this response as confidential as it relates to an application of the same classification; it is willing to file a public redaction version following the Prosecution's provision of the same.
3. Also, the Defence notes that the Prosecution's three recent Regulation 35(2) applications have been unnecessarily difficult for the Defence to respond to because in the confidential redacted version available to the Defence, there is no clear or comprehensive list of materials that the Prosecution seeks to add. For instance, in this Supplementary Application, there is no list of ERNs for the audios, which serve as the basis for the transcripts of [REDACTED]. This makes it hard for the Defence to identify with certainty the materials, which are under discussion. Particularly given the urgent and expedited nature of the filings and responses, the Defence asserts that it is not too much to ask for the Prosecution to make the subject of its requests known with specificity.

¹ ICC-01/09-01/11-1510-Conf ("Supplementary Application").

² Supplementary Application, para. 2.

³ ICC-01/09-01/11-1463-Conf-Corr, Corrected version of "Prosecution's eighth application pursuant to Regulation 35(2) of the Regulations of the Court", 21 August 2014 ("Application") and ICC-01/09-01/11-1474-Conf-Red, Addendum to Prosecution's Corrected Version of Prosecution's eighth application pursuant to Regulation 35(2) of the Regulations of the Court", 21 August 2014, ICC-01/09-01/11-1463-Conf, 29 August 2014.

⁴ ICC-01/09-01/11-1485, 3 September 2014 ("Decision").

⁵ Via email to the parties on 12 September 2014.

II. APPLICABLE LAW

4. The ordinary rule, pursuant to Article 64(3)(c) of the Rome Statute, is that all incriminating material must be disclosed 'sufficiently in advance' of the start of the trial. Rule 76 requires the Prosecution to provide the Defence with the names of witnesses whom the Prosecution intends to call to testify and copies of any prior statements made by those witnesses 'sufficiently in advance to enable the adequate preparation of the defence'. Indeed, pursuant to Rule 84, any necessary orders which the Trial Chamber shall make for the disclosure of documents or information and for the production of additional evidence must be done in such a way so as to avoid delay and *ensure that the trial commences on the set date* (emphasis added). Thus the Statute and the Rules emphasize the need for all incriminating disclosure that will be relied upon at trial to be made sufficiently in advance of the start of the trial.
5. This Trial Chamber has previously held that the expression "sufficiently in advance" of trial is an expression of "no fixed meaning", but that at its core, its "aim is to avoid prejudice to the Defence, which is always an issue that is relative in light of the particular circumstances in which the matter is to be considered".⁶
6. However, the Prosecution files its application to belatedly add 11 incriminatory materials to the List of Evidence pursuant to:

Regulation 35(2) of the Regulations of the Court

The Chamber may extend or reduce a time limit if good cause is shown and, where appropriate, after having given the participants an opportunity to be heard. 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.

Article 64(6)(d) of the Rome Statute

⁶ ICC-01/09-01/11-899-Conf, Decision on the Prosecution's Requests to Add New Witnesses to its List of Witnesses, 3 September 2013, para. 19. (The Chamber ultimately allowed the Prosecution to add P-604 and P-613 to its list of witnesses, one week prior to the start of trial, but directing that all relevant disclosure be made the day prior to the start of trial, and that the two witnesses only be called among the last witnesses of the prosecution case).

In performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary: Order the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties.

Article 69(3)

The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.

III. SUBMISSIONS

7. The Defence concedes that the additional 11 items, which the Prosecution now seeks to introduce, are relevant for the same purpose as those recently admitted. Essentially the items are the underlying audios for transcripts and translations previously disclosed to the Defence and added to the List of Evidence by the Chamber.⁷ They fall into two different categories. The first category contains audios of [REDACTED] and other individuals. The second category consists of audios of interviews conducted with witness P-495 [REDACTED].
8. Given the Chamber's previous Decision, the Defence is constrained from arguing that these materials should not be admitted due to lack of relevance. However, the Defence does dispute the Prosecution's explanation for why it refused to disclose the audios in question in a timely manner,⁸ and submits that the audios should not be admitted due to this initial non-disclosure. To seek an extension to add materials after the expiration of a deadline, Regulation 35(2) requires that the Prosecution demonstrate that it was "unable to file the application within the time limit for reasons outside his or her control". In these circumstances, the Prosecution was not unable to do so, but rather chose not to do so, based on an errant understanding of its disclosure obligations.
9. Though the audios were obviously in the possession of the Prosecution at the time that the transcripts and translations of the [REDACTED] were disclosed, the Prosecution did not disclose the audios. Instead, the Prosecution states that it did not, in good faith, believe it was necessary to disclose the audios, due to past

⁷ Supplementary Application, paras 17-19.

⁸ Supplementary Application, paras 11-13.

practice.⁹ Yet the Prosecution's prior approach to such disclosure has not followed a clear or consistent policy, and the Prosecution was on notice from previous decisions of this Court that the disclosure may have been necessary. The Defence submits that the Prosecution, especially where the content of the audios deals with contentious issues going directly to the witnesses' credibility, should have known that it was necessary to effect the disclosure in a timely manner.

Audios of Conversations with Prosecution Witnesses

10. The first category of audios includes audios of [REDACTED]¹⁰ and [REDACTED].¹¹ The Prosecution intended to rely on the transcript and translation of these audios during its examination of witness P-604 and P-495. The Defence cannot understand how the Prosecution could not see the need to disclose the audios alongside the transcripts and translations for this intended purpose. While there is no "best evidence" rule at the ICC, it still stands to reason that where the audios, which serve the basis of a transcript are available, the audios should be used in tandem with the translation.
11. Of course, the practice of the Defence has conformed to this practice in its cross-examinations of Prosecution witnesses, when it seeks to use a KASS FM program. The Defence provides the audio of the radio program, the transcription and the translation. Making all of these available to the Chamber reinforces the integrity and reliability of the translations. One can imagine the Prosecution's objection, should the Defence ever seek to introduce a transcription and translation of a KASS FM program without providing the audio as well. Of course, the same standard should apply to both parties and in these circumstances, the Prosecution should have foreseen the need to disclose the audios in a timely manner.
12. The Defence further notes that audios of [REDACTED] are distinguishable from audio recordings made by the Prosecution of interviews of Prosecution witnesses

⁹ Supplementary Application, para. 12.

¹⁰ Supplementary Application, para 17: **KEN-OTP-0136-0012** [REDACTED]; **KEN-OTP-0136-0011** [REDACTED]; **KEN-OTP-0136-0060** [REDACTED]; and **KEN-OTP-0136-0014** [REDACTED].

¹¹ **KEN-OTP-0114-0471** [REDACTED]; **KEN-OTP-0114-0472** [REDACTED]; and **KEN-OTP-0115-0248** [REDACTED].

under Rule 112. Even though the Chamber has ruled that Rule 112 audios are not always subject to disclosure, this does not exclude the possibility that they may be subject to disclosure where the Prosecution intends to put them to a witness on the stand. In such circumstances, the disclosure is clearly necessary for the preparation of the Defence, and as a matter of fairness to the witness.

13. Since the Prosecution has already completed its examination of witness P-604, the Defence submits that it is now too late to add these audios to its List of Evidence for use with him. To do so will require the Prosecution to re-open its examination and unduly prolong the witness's evidence before the Chamber. With respect to the imminent beginning of P-495's evidence, the Defence submits that it is prejudicial to add new materials at this late stage.

Audios of [REDACTED]

14. The second category of audios includes audios of interviews conducted [REDACTED],¹² disclosed on 16 May 2014. Contrary to its arguments, the Prosecution had ample notice that the audios underlying these interviews with P-495 should have been disclosed. Indeed, this Trial Chamber has quoted the Appeals Chamber's ruling in *Banda and Jerbo*, which states that "the audio or video-record of the questioning of a person in accordance with rule 112 of the Rules of Procedure and Evidence and the transcript thereof are records of statements that are potentially subject to disclosure pursuant to rule 76 of the Rules of Procedure and Evidence where the Prosecutor intends to call the person to testify as a witness".¹³ Furthermore, the Chamber determined that while the Prosecution is not obligated to disclose all audio recordings of its witness interviews, "such audio recordings may be subject to disclosure pursuant to, *inter alia*, Rule 77 of the Rules if they are deemed material to the preparation of the Defence".¹⁴ In this instance, where the Prosecution seeks to use the transcripts

¹² Supplementary Application, para 17: **KEN-OTP-0114-0468, KEN-OTP-0114-0469, KEN-OTP-0114-0470** [REDACTED].

¹³ ICC-01/09-01/11-890-Conf, Urgent Decision on the Defence Application for Disclosure of Materials related to Witness 15, 28 August 2013, para 17, citing *Prosecutor v. Banda and Jerbo*, ICC-02/05-03/09-295, 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, para 17.

¹⁴ ICC-01/09-01/11-890-Conf, para 17.

and translations of the audios at trial to impeach the credibility of its own witness, the audios themselves are clearly material to the preparation of the Defence.

15. By way of explanation, the Defence submits that as a result of and as a corollary to this reasoning, the disclosure obligation on the Prosecution is higher or greater when it seeks to rely on the contents of audios of such interviews to impugn its own witness. Where the transcript is to be used at trial to impeach a witness (rather than to be simply disclosed to provide notice to the Defence as to the content of the interview), the Defence submits that the disclosure and use at trial of the audio is necessary as a matter of fairness to the witness and is generally in the interests of justice. When a witness's credibility is at stake, it is important for the witness, the parties and the Chamber to hear and analyse whether the transcription and translation is an accurate reflection of the interview. This should have been a foreseeable requirement for the Prosecution.
16. At a functional level, the Defence recalls that the Prosecution has previously disclosed audios for interviews conducted with three witnesses [REDACTED].¹⁵ When the Defence initially requested disclosure of such, the Prosecution raised only a practical objection (the time it would take to redact the audios), rather than a legal or principled objection.¹⁶ It further stated that "If, however, the Defence has a need for particular tapes of interviews or particular portions of those interviews, provision of these can be arranged."¹⁷ As the Chamber has stated, the lack of resources in the Prosecution's office is not a reason for it to not discharge its obligations.¹⁸
17. Consequently, the Defence argues that the Prosecution cannot in good faith claim that it did not believe it was under no obligation to disclose the [REDACTED]

¹⁵ Supplementary Application, para. 13. See also ICC-01/09-01/11-793-Conf, Sang Defence Application for Disclosure of All Audio Recordings of Prosecution Interviews with Witness 15, 1 July 2013, paras. 5-8 and ICC-01/09-01/11-793-Conf-AnxB; ICC-01/09-01/11-890-Conf, Urgent Decision on the Defence Application for Disclosure of Materials related to Witness 15, 28 August 2013, para. 20.

¹⁶ ICC-01/09-01/11-793-Conf, para 7.

¹⁷ ICC-01/09-01/11-793-Conf, para 7 and ICC-01/09-01/11-793-Conf-AnxA; ICC-01/09-01/11-890-Conf, 28 para 20.

¹⁸ ICC-01/09-01/11-T-133-Conf, Transcript, 10 September 2014, p. 18, lns 5-9 [REDACTED].

audios in question. The Prosecution should not be able to cure this mistake on the eve of witness P-495's testimony before the Chamber.

IV. CONCLUSION

18. The Prosecution has not met the requirements of Regulation 35(2), as it was not unable to disclose the audios at the time of its previous Regulation 35(2) applications. Rather, the Prosecution chose not to make the disclosure. For this and the foregoing reasons, the Defence prays that the Trial Chamber reject the addition of the 11 materials and not allow them to be included on the List of Evidence or be used at trial. The Prosecution should have foreseen the need to disclose, and in fact effected the disclosure of the audios, sufficiently in advance of the testimony of witnesses P-604 and P-495.



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On behalf of Mr. Joshua arap Sang
Dated this 12th Day of December 2014
In Nairobi, Kenya