



Original: English

No.: ICC-01/09-01/11

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 Tenth
Application pursuant to Regulation 35(2) of
the Regulations of the Court
(ICC-01/09-01/11-1548-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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1. On 22 September 2014, the Prosecution filed its '*Tenth Application pursuant to Regulation 35(2) of the Regulations of the Court*',¹ wherein it seeks to add an additional 38 items to its List of Evidence ("LOE") in relation to alleged interference concerning witnesses [REDACTED]. The Prosecution applies pursuant to Regulation 35(2) of the Regulations of the Court, and Articles 64(6)(d) and 69(3) of the Rome Statute. The Prosecution states that it has collected most of these materials in the context of its Article 70 investigations throughout the course of 2013 and 2014; the balance are audio files of his 2012 interview with the Prosecution and a screening note. But for the audio files and the screening note, the materials did not exist at the time the Prosecution filed its List of Evidence.²
2. The Prosecution intends to lead [REDACTED] on this additional evidence, or alternatively, confront them with it during his testimony.³ The stated purpose of the additional materials is to "(a) to prove that [REDACTED] was improperly interfered with and as such recanted his prior statements and withdrew his cooperation with the Prosecution; (b) to prove that this 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
3. In previous applications of this nature, the Prosecution has sought⁵ (and has been granted) permission to add 136 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.⁶

¹ ICC-01/09-01/11-1532-Conf, Prosecution's tenth application pursuant to Regulation 35(2) of the Regulations of the Court, 22 September 2014 ("Tenth Application").

² Tenth Application, para. 2.

³ Tenth Application, para. 2.

⁴ Tenth Application, para. 3.

⁵ 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"); 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; and ICC-01/09-01/11-1510-Conf, 12 September 2014 ("Supplementary Application"); ICC-01/09-01/11-1511-Conf, Prosecution's ninth application pursuant to Regulation 35(2) of the Regulations of the Court, 12 September 2014 ("Ninth Application").

⁶ ICC-01/09-01/11-1485, 3 September 2014 ("Initial Decision"); ICC-01/09-01/11-T-137-Conf, 16 September 2014 ("Oral Decision"); ICC-01/09-01/11-1527-Conf, 19 September 2014 ("Decision on Ninth Application").

4. In light of the Chamber's analysis in previous decisions on related applications,⁷ the Defence does not object to the addition of these materials to be added to the List of Evidence in relation to witness [REDACTED]. The Defence notes that the Chamber is satisfied that the Prosecution has only recently concluded that it may require these documents in its examination of such witnesses and that the prejudice to the Defence is minimized by the nature and size of the items added, as well as the timing of their original disclosure. The Defence further notes that it will have the ability to argue against the material's relevance to the Article 70 investigations (or lack thereof), during any discussion as to use or admissibility of the materials.
5. Due to the belated filing of the Prosecution's Tenth Application, and in accordance with the Trial Chamber's instructions,⁸ the Defence files this response on an expedited basis. The Defence also files 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.



Joseph Kipchumba Kigen-Katwa
On behalf of Mr. Joshua arap Sang
Dated this 12th Day of December 2014
In Nairobi, Kenya

⁷ For example, Decision on Ninth Application, paras 17-21.

⁸ Via email to the parties on 23 September 2014.