

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 17 October 2013

TRIAL CHAMBER V(A)

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

SITUATION IN THE REPUBLIC OF KENYA

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

Public

**Decision Regarding Prosecution Application for Addition of 104 Documents to
the List of Evidence**

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

The Office of the Prosecutor

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Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
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States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V(A) (the 'Chamber')¹ of the International Criminal Court (the 'Court'), in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, having regard to Articles 64(2), 64(7) and 67(1) of the Rome Statute (the 'Statute') and Regulation 23 *bis* of the Regulations of the Court (the 'Regulations'), issues this Decision Regarding Prosecution Application for Addition of 104 Documents to the List of Evidence.

I. Procedural history and submissions

1. On 7 July 2012, the Chamber directed the Office of the Prosecutor (the 'Prosecution') to file its list of evidence to be relied upon at trial by 9 January 2013.²
2. On 9 January 2013, the Prosecution filed its list of evidence.³
3. The Chamber granted additions or substitutions to the list of evidence on 17 April 2013,⁴ 3 June 2013,⁵ and 5 September 2013.⁶
4. On 9 September 2013, the Prosecution filed the 'Prosecution application pursuant to Regulation 35(2) for addition of documents to the list of evidence' (the 'Application').⁷

¹ Where 'Chamber' is used in this decision it refers to both Trial Chamber V in its composition as until 21 May 2013 and to Trial Chamber V(A) as composed by the Presidency's Decision constituting Trial Chamber V(a) and Trial Chamber V(b) and referring to them the cases of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* and *The Prosecutor v. Uhuru Muigai Kenyatta*, 21 May 2013, ICC-01/09-01/11-745.

² Decision on the schedule leading up to trial, 9 July 2012, ICC-01/09-01/11-440.

³ Annex C of the Prosecution's provision of materials pursuant to Decision ICC-01/09-01/11-440, 9 January 2013, ICC-01/09-01/11-540-Conf-AnxC-Red.

⁴ Decision on Prosecution request to substitute two documents on the list of evidence, 17 April 2013, ICC-01/09-01/11-686.

⁵ Decision on prosecution requests to add witnesses and evidence and defence requests to reschedule the trial start date, 3 June 2013, ICC-01/09-01/11-762.

⁶ Decision on the Prosecution's Requests to Add New Witnesses to its List of Witnesses, 3 September 2013, ICC-01/09-01/11-899-Red (notified on 5 September 2013).

⁷ ICC-01/09-01/11-915-Conf (with two confidential annexes and one confidential *ex parte* annex).

5. On 18 September 2013,⁸ the defence teams for Mr Ruto and Mr Sang (the 'Ruto Defence' and 'Sang Defence', respectively) responded to the Application (the 'Ruto Defence Response' and 'Sang Defence Response', respectively).⁹
6. On 25 September 2013, following a request,¹⁰ the Chamber granted the Prosecution leave to reply to the Sang Defence Response.¹¹
7. On 30 September 2013, the Prosecution replied to the Sang Defence Response (the 'Reply').¹²
8. In the Application, the Prosecution sets out a six item list of what it seeks to add to its list of evidence:
 - i. the *curricula vitae* and reports of proposed expert Witnesses 464, 488 and 542 (including the translation of the report of Witness 464 and maps connected to Witness 488's report);
 - ii. documents relating to Witness 15;
 - iii. a four page statement of Witness 16;
 - iv. the transcript of a handwritten statement of Witness 19, which is already included in the list of evidence;
 - v. a six-page statement of Witness 524; and
 - vi. 53 transcripts and translations of audio and video materials which are already on the list of evidence.¹³

⁸ Pursuant to the Chamber's direction, responses were due by this date. See email from TC V(A) Communications, 10 September 2013, 17:40.

⁹ Defence response to the Prosecution's application pursuant to Regulation 35(2) for addition of documents to the list of evidence, 18 September 2013, ICC-01/09-01/11-944-Conf; Sang Defence Response to Prosecution Application pursuant to Regulation 35(2) for Addition of Documents to the List of Evidence; 18 September 2013, ICC-01/09-01/11-949-Conf.

¹⁰ Prosecution's Request for Leave to Reply to the "Sang Defence Response to Prosecution Application pursuant to Regulation 35(2) for Addition of Documents to the List of Evidence", 23 September 2013, ICC-01/09-01/11-978-Conf.

¹¹ Decision Regarding Prosecution Request for Leave to Reply to Sang Defence Response to Application for Addition of 104 Documents to the List of Evidence, 25 September 2013, ICC-01/09-01/11-989.

¹² Prosecution's Reply to the "Sang Defence Response to Prosecution Application pursuant to Regulation 35 (2) for Addition of Documents to the List of Evidence", 30 September 2013, ICC-01/09-01/11-1002-Conf.

9. These proposed additions are reflected in highlighted text in Annexes 2 and 3 of the Application.¹⁴
10. The Prosecution submits that it makes its application for the sake of completeness of the list of evidence.¹⁵ The Prosecution notes that, with the exception of seven transcripts/translations and one map connected to Witness 488's testimony, all the documents covered by the Application came into the Prosecution's possession after 9 January 2013.¹⁶ The Prosecution emphasises that all documents were disclosed 'far in advance' of the set date for the start of the trial¹⁷ and notes that the latest disclosure of any document covered by the Application was made on 25 July 2013.¹⁸ Accordingly, the Prosecution requests the addition of the documents listed above to the list of evidence.¹⁹
11. The Ruto Defence defers to the Trial Chamber's discretion as to whether to grant the relief sought in the Application.²⁰ However, the Ruto Defence also submits that this Application is 'yet another unjustified last minute request' from the Prosecution.²¹ The Ruto Defence also argues that the Prosecution misrepresents its compliance with disclosure deadlines as regards the documents sought to be added to the list of evidence.²²

¹³ Application, ICC-01/09-01/11-915-Conf, para. 1.

¹⁴ Annex 2 of the Application, ICC-01/09-01/11-915-Conf-Exp-Anx2; Annex 3 of the Application, ICC-01/09-01/11-915-Conf-Anx3.

¹⁵ Application, ICC-01/09-01/11-915-Conf, para. 4.

¹⁶ Application, ICC-01/09-01/11-915-Conf, para. 5.

¹⁷ Application, ICC-01/09-01/11-915-Conf, para. 6.

¹⁸ See Application, ICC-01/09-01/11-915-Conf, para. 5, notes 9-16. The Prosecution notes that one finalised transcript remains to be disclosed, but the relevant draft transcript was disclosed on 16 July 2013. Annex 1 of the Application, ICC-01/09-01/11-915-Conf-Anx1, page 3.

¹⁹ Application, ICC-01/09-01/11-915-Conf, para. 7.

²⁰ Ruto Defence Response, ICC-01/09-01/11-944-Conf, para. 8.

²¹ Ruto Defence Response, ICC-01/09-01/11-944-Conf, para. 8.

²² Ruto Defence Response, ICC-01/09-01/11-944-Conf, para. 7.

12. The Sang Defence does not object to adding the first four items on the Prosecution's list to the list of evidence.²³ The Sang Defence also does not object to the fifth item on the list, albeit with a clarification that the statement in question does not reveal any improper conduct on the part of Mr Sang.²⁴
13. With respect to the sixth item on the Prosecution's list, the Sang Defence objects to the inclusion of most transcripts and translations onto the list of evidence.²⁵ The Sang Defence references the Prosecution's request of 10 June 2013 for additional time to disclose translations and transcripts of six audio-visual materials which were on the list of evidence.²⁶ With respect to all other audio-visual materials on the list of evidence which had not been translated or transcribed at that time, the Prosecution indicated in this 10 June 2013 request that '[m]indful of the prior jurisprudence of this Court, the Prosecution has therefore reviewed its list of evidence and now decided that it will no longer rely on all of the A/V materials contained therein'.²⁷ The request for delayed disclosure of the six transcriptions/translations was granted by the Chamber on 9 July 2013, which considered that one factor which justified granting the request was the limited number of materials for which an extension was sought.²⁸
14. The Sang Defence submits that: (i) the Prosecution seems to now have 'backtracked on its undertaking, and indeed does not seek to remove items from its [list of evidence] that were not disclosed [with] proper transcripts and translations in time' and (ii) this 'backtrack' is prejudicial, as the Sang Defence has organised its review of disclosure on the basis of the Prosecution's assertions that

²³ Sang Defence Response, ICC-01/09-01/11-949-Conf, para. 3.

²⁴ Sang Defence Response, ICC-01/09-01/11-949-Conf, paras 9-10.

²⁵ Sang Defence Response, ICC-01/09-01/11-949-Conf, para. 11.

²⁶ Sang Defence Response, ICC-01/09-01/11-949-Conf, para. 12, *referencing* Prosecution's Update on Disclosure and Request for additional time to disclose certain materials (ICC-01/09-01/11-768-Conf), 10 June 2013, ICC-01/09-01/11-768-Red (public redacted version notified 12 July 2013).

²⁷ Sang Defence Response, ICC-01/09-01/11-949-Conf, para. 12, *referencing* ICC-01/09-01/11-768-Red, para. 8.

²⁸ Decision on request for additional time to disclose translations, 9 July 2013, ICC-01/09-01/11-807, para. 11.

these un-translated materials would not be used. The Sang Defence therefore requests that the Chamber only allow those materials from the sixth item on the Prosecution's list for which delayed disclosure was granted by the Chamber on 9 July 2013.²⁹

15. In its Reply, the Prosecution notes its 10 June 2013 submission highlighted by the Sang Defence³⁰ and clarifies that: (i) as of the time of that submission, it understood the disclosure deadline to be 10 June 2013,³¹ (ii) all of the transcriptions/translations at issue in the Application, other than the ones for which delayed disclosure was sought,³² were disclosed to the defence teams on or before 10 June 2013,³³ (iii) the Prosecution's 10 June 2013 'undertaking to remove' audio-visual materials from the list of evidence was made in regard to what it erroneously considered to be a 10 June 2013 disclosure deadline,³⁴ (iv) the Prosecution in fact removed over 50 audio-visual materials from the list of evidence following its 10 June 2013 submission³⁵ and, (v) conceding that it misunderstood the Chamber's instruction and that the final disclosure deadline was not 10 June 2013, it has filed the present Application seeking leave to add these materials to the list of evidence.³⁶ The Prosecution therefore replies that, as regards the transcriptions/translations which were not covered by the delayed

²⁹ Sang Defence Response, ICC-01/09-01/11-949-Conf, paras 13-14.

³⁰ *See supra*, para. 13.

³¹ Reply, ICC-01/09-01/11-1002-Conf, para. 10.

³² The Chamber's ruling in ICC-01/09-01/11-807 addressed six recordings, but the Reply refers to eight documents for which delayed disclosure was granted. This is because two of the Prosecution's recordings have two entries, one for the document transcription and one for the document translation. *See* Annex 1 of the Application, ICC-01/09-01/11-915-Conf-Anx1, page 3 lines 48-51.

³³ Reply, ICC-01/09-01/11-1002-Conf, para. 10.

³⁴ Reply, ICC-01/09-01/11-1002-Conf, paras 10-11.

³⁵ Reply, ICC-01/09-01/11-1002-Conf, para. 11, n. 14.

³⁶ Reply, ICC-01/09-01/11-1002-Conf, paras 10, 12, *referencing* ICC-01/09-01/11-807, para. 6 (9 July 2013 clarification by the Chamber that the final disclosure deadline was 9 January 2013).

disclosure decision of 9 July 2013, it is 'incorrect to state that the Prosecution had undertaken to remove them from the list of evidence'.³⁷

II. Analysis and conclusions

16. As a preliminary matter, the Chamber notes that, in the request for leave to file its Reply, the Prosecution indicated that three transcripts/translations in the Application were included in error and that it does not wish to add these documents to its list of evidence.³⁸ Accordingly, the Chamber's ruling only extends to the remaining 104 documents identified in the Application.

17. 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.³⁹ A bar table procedure has been adopted by this Chamber for tendering evidence without it being introduced by a witness,⁴⁰ and the Prosecution is not seeking recourse to this procedure at this time. Rather, the Prosecution's requested relief is solely to add items to its list of evidence; any admissibility discussion will come at a later time.

18. Turning to the relief sought in the Application, the Chamber notes that the Ruto Defence and Sang Defence do not expressly object to granting the relief sought with respect to the first five items listed in the Application. Moreover, the Chamber notes that all of the items proposed for addition to the list of evidence have been disclosed, at the latest, in July 2013. As such, the defence teams have

³⁷ Reply, ICC-01/09-01/11-1002-Conf, para. 12.

³⁸ ICC-01/09-01/11-978-Conf, para. 4, *referencing* Annex 1 of the Application, ICC-01/09-01/11-915-Conf-Anx1, items 43-45.

³⁹ *See generally* Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", 3 May 2011, ICC-01/05-01/08-1386, OA 5 OA 6.

⁴⁰ Decision on the Conduct of Trial Proceedings (General Directions), 9 August 2013, ICC-01/09-01/11-847-Corr, para. 27 (corrigendum notified 16 August 2013).

had an adequate amount of time to review these items. In the circumstances, the Chamber does not consider it unduly prejudicial to the accused to add these items to the list of evidence at this stage of proceedings.

19. With respect to the sixth item in the Application, (transcripts and translations of audio and video materials which are already on the list of evidence), the Chamber is mindful that: (i) these transcriptions/translations do not contain new evidence, but merely serve to clarify materials which were duly included on the list of evidence⁴¹ and (ii) any prejudice caused by the late addition to the list of evidence can be remedied by giving the defence teams additional time to prepare, if necessary. The Chamber is also satisfied that the Prosecution's Reply clarifies matters relating to its 10 June 2013 undertaking, although the Chamber considers that it is weakly explained why the present Application was not filed earlier and, in particular, not filed immediately after 9 July 2013. Ultimately, the Chamber considers it is appropriate to also grant the Prosecution's request with respect to the sixth item on the Prosecution's list.

20. For these reasons, the Chamber considers that the Prosecution may add the items described in the Application onto its list of evidence.

21. As a final matter, the Chamber notes that the Prosecution justifies its confidential classification for the Application solely because it relates to 'evidence which remain confidential at this stage of the proceedings'.⁴² The Chamber recalls the general principle of publicity in this Court's proceedings, which can be derived

⁴¹ See Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on prosecution's requests to add items to the evidence to be relied on at trial filed on 21 April and 8 May 2008, 4 June 2008, ICC-01/04-01/06-1377, para. 29 (noting this same point when granting an addition to the list of evidence for similar materials). See also ICC-01/09-01/11-890-Conf, para. 17 (noting that an audio recording and its corresponding transcript contain the same record of the words used by the witness, such that, in principle, audio recordings need not be disclosed when their transcriptions/translations have been disclosed).

⁴² Application, ICC-01/09-01/11-915-Conf, para. 3.

from Articles 67(1) and 64(7) of the Statute,⁴³ and sees no reason why public versions of the Application, the request for leave to file the Prosecution Reply, the Prosecution Reply, the Ruto Defence Response and the Sang Defence Response could not be filed in a manner which protects any information covered by the parties' proposed confidential classifications. Pursuant to Regulation 23 *bis* (3) of the Regulations, the parties are ordered to prepare and file public versions of these documents with any redactions they deem necessary.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the relief sought in the Application;

DIRECTS the Prosecution to update its list of evidence for ease of reference and file it into the record of the case within seven days of notification of the present decision;

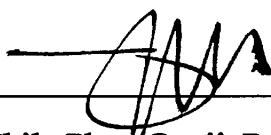
ORDERS the Prosecution to file, within seven days of notification of the present decision, a public version of the Application (ICC-01/09-01/11-915-Conf), request for leave to reply (ICC-01/09-01/11-978-Conf) and Reply (ICC-01/09-01/11-1002-Conf) with any redactions it deems necessary, excluding annexes;

ORDERS the Ruto Defence to file, within ten days of notification of the present decision, a public version of the Ruto Defence Response (ICC-01/09-01/11-944-Conf) with any redactions it deems necessary; and

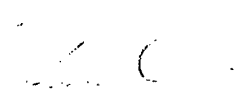
ORDERS the Sang Defence to file, within ten days of notification of the present decision, a public version of the Sang Defence Response (ICC-01/09-01/11-949-Conf) with any redactions it deems necessary.

⁴³ Article 67(1) of the Statute provides that "[i]n the determination of any charge, the accused shall be entitled to a public hearing [...]". Article 64(7) of the Statute provides that "The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence".


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



Judge Chile Eboe-Osuji, Presiding Judge



Judge Olga Herrera Carbuccia



Judge Robert Fremr

Dated 17 October 2013

At The Hague, The Netherlands