

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 3 September 2014

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TRIAL CHAMBER V(A)

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

SITUATION IN THE REPUBLIC OF KENYA

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

Public redacted version of

**Decision on the Prosecution's Application for Addition of Documents
to Its List of Evidence**

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Anton Steynberg

Counsel for William Samoei Ruto

Mr Karim Khan
Mr David Hooper
Ms Shyamala Alagendra

Counsel for Joshua Arap Sang

Mr Joseph Kipchumba Kigen-Katwa
Ms Caroline Buisman

Legal Representatives of Victims

Mr Wilfred Nderitu

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

The Office of Public Counsel for Victims

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

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(2) and 67(1) of the Rome Statute (the ‘Statute’), Rules 76 and 84 of the Rules of Procedure and Evidence (the ‘Rules’), and Regulations 24(5) and 35 of the Regulations of the Court (the ‘Regulations’), renders the following Decision on the Prosecution’s Application for Addition of Documents to Its List of Evidence.

I. PROCEDURAL HISTORY

1. 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 list of evidence by 9 January 2013.¹
2. On 9 January 2013, the Office of the Prosecutor (the ‘Prosecution’) filed its list of evidence (the ‘List of Evidence’).²
3. On 29 April 2014, the Chamber issued its ‘Decision on Prosecutor’s Application for Witness Summonses and Resulting Request for State Party Cooperation’, wherein it ordered, *inter alia*, a summons to be issued for Witness 495 to appear as a witness in this case.³ On 19 June 2014, the Chamber ordered a summons to be issued for Witness 604.⁴
4. On 22 August 2014, the Prosecution submitted the ‘Prosecution’s eighth application pursuant to Regulation 35(2) of the Regulations of the Court’ (‘the Application’).⁵ Therein, the Prosecution seeks: (i) variance of the Chamber’s deadline to submit

¹ ICC-01/09-01/11-440, para. 13.

² 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. For the most recent List of Evidence, see Annex 1 to Prosecution’s submission of its further updated List of Evidence, 24 October 2013, ICC-01/09-01/11-1065-Conf-Anx1-Red.

³ ICC-01/09-01/11-1274-Corr2.

⁴ Decision on Prosecutor’s Second Supplementary Request to Summon a Witness, ICC-01/09-01/11-1377-Conf.

⁵ ICC-01/09-01/11-1463-Conf, with annexes. On 22 August 2014, a corrigendum was filed as ‘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’, ICC-01/09-01/11-1463-Conf-Corr.

documents to the List of Evidence; (ii) authorisation pursuant to Articles 64(6)(d) and 69(3) of the Statute to introduce 57 further items on the list, and (iii) the shortening of the time limit for responses.

5. On 22 August 2014, the Chamber shortened the time limit for responses to the Application to noon Wednesday, 27 August 2014.⁶
6. On 26 August 2014, the defence team for Mr Ruto (the 'Ruto Defence') filed its response to the Application (the 'Ruto Response'),⁷ in which it opposes the Application in part. The Ruto Defence does not object to the Prosecution being permitted to add the 57 documents to its List of Evidence for the sole purpose of confronting a witness who recanted his previous statement and is declared hostile by the Chamber after hearing full argument, but it opposes the Prosecution's request to use the documents for any other purpose.⁸
7. On 27 August 2014, the defence team for Mr Sang (the 'Sang Defence') filed its response to the Application (the 'Sang Response')⁹ after the noon deadline. In the original Sang Response, the Sang Defence requests the Chamber to reject the Application.¹⁰ This position was subsequently reconsidered during oral submissions on 2 September 2014 where the Sang Defence submitted that it does not oppose the use of the additional materials, provided the use of the materials is limited by the Chamber to challenging witnesses who are found to be hostile.¹¹

⁶ Email from Trial Chamber V(A) Communications sent at 14:37.

⁷ Defence response to 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-Conf, ICC-01/09-01/11-1466-Conf.

⁸ Ruto Response, ICC-01/09-01/11-1466-Conf, para. 21.

⁹ Sang Defence Response to Prosecution's Eighth Application pursuant to Regulation 35(2) of the Regulations of the Court, ICC-01/09-01/11-1467-Conf.

¹⁰ Sang Response, ICC-01/09-01/11-1467-Conf, para. 22.

¹¹ Transcript of proceedings, 2 September 2014 ('Transcript'), ICC-01/09-01/11-T-127-CONF-ENG, page 34, lines 20-23.

8. On 27 August 2014, the Prosecution filed the 'Prosecution's request for leave to reply to the "Defence Response to 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"' (the 'Request for Leave').¹² In this request the Prosecution sought leave to address: (i) the Ruto Defence's alleged mischaracterisation of the Prosecution's second and third grounds for the Application and (ii) the Ruto Defence's allegation that the majority of items were only disclosed in the past two weeks.¹³
9. On 27 August 2014, satisfied that the Request for Leave had established good cause in citing new and distinct issues, which would be of assistance in examining the Application, the Chamber granted the Prosecution leave to reply to the Ruto Response pursuant to Regulation 24(5) of the Regulations.
10. On 28 August 2014, the Prosecution filed 'Prosecution's Reply to the "Defence Response to 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"' (the 'Prosecution Reply'),¹⁴ in which it requested the Chamber to consider the Prosecution's additional submissions contained therein when determining the Application.¹⁵
11. On 29 August 2014, the Prosecution filed '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' (the

¹² Prosecution's request for leave to reply to the "Defence Response to 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"', 27 August 2014, ICC-01/09-01/11-1468-Conf.

¹³ Request for Leave, ICC-01/09-01/11-1468-Conf, paras 6-7.

¹⁴ ICC-01/09-01/11-1471-Conf, with annexes.

¹⁵ Prosecution Reply, ICC-01/09-01/11-1471-Conf, para. 19.

'Addendum'), seeking the addition of a further 23 documents to the List of Evidence.¹⁶

12. On 2 September 2014, the Chamber heard oral submissions from the parties.¹⁷

II. SUBMISSIONS

Prosecution's submissions

13. The Prosecution seeks to tender 80 items which relate to the testimony of Witness 604 and Witness 495, for whom summonses to appear at the September 2014 trial session have been issued. The items include evidence such as screening notes, photographs, statements, annexes thereto and associated documents, transcripts of interviews, reports relating to Witness 604 and Witness 495 [REDACTED] in the context of an Article 70 investigation in 2013-14.¹⁸
14. The Prosecution submits that both witnesses — and some other Prosecution witnesses — have been unlawfully interfered with and, as a result, have ceased cooperation with the Prosecution.¹⁹ The Application notes that on 14 September 2013, Witness 495 advised the Prosecution that he had been approached to withdraw as a Prosecution witness and induced in turn to approach another witness, thus confessing to his role in the alleged witness interference scheme.²⁰ The Prosecution submits that after he absconded from his accommodation that same night, the Prosecution has been in contact with Witness 495 regarding security issues but has not met with the witness and he has given no indication of renewed cooperation.²¹ The Prosecution further submits that while Witness 604 met with the

¹⁶ ICC-01/09-01/11-1474-Conf-Exp, with an annex. A confidential redacted version was filed as ICC-01/09-01/11-1474-Conf-Red.

¹⁷ Transcript, above n11.

¹⁸ Application, ICC-01/09-01/11-1463-Conf-Corr, para. 1; Addendum, ICC-01/09-01/11-1474-Conf-Red, para. 2.

¹⁹ Application, ICC-01/09-01/11-1463-Conf-Corr, para. 3.

²⁰ Application, ICC-01/09-01/11-1463-Conf-Corr, para. 20.

²¹ Application, ICC-01/09-01/11-1463-Conf-Corr, para. 20.

Prosecution on 4 August 2014 and reiterated his willingness to testify at proceedings,²² on 11 August 2014 the Prosecution received an affidavit purportedly from Witness 604 in which he withdrew his cooperation.²³

15. The Prosecution seeks to lead the witnesses on the 80 items of evidence, or alternatively, to confront them with it during examination.²⁴ The Prosecution submits that the additional evidence will be used firstly, to prove that Witness 604 and Witness 495 were improperly interfered with; secondly, to prove that the interference was part of a wider witness interference scheme; and thirdly, to assist the Chamber with its overall assessment of evidence in determining matters related to alleged witness corruption.²⁵ During oral submissions the Prosecution noted that it is not its application at this time to have the evidence admitted to establish consciousness of guilt on the part of the Accused.²⁶
16. The Prosecution submits that the evidence did not exist when the Prosecution originally filed its List of Evidence and thus could not have been included therein. Further, it was not certain until 11 August 2014 that Witness 604 would potentially be adverse to the Prosecution case, thus necessitating the request to rely on the additional documents.²⁷ Similarly, the Prosecution submits that until recently, it could not disclose the identities of the targets of the Article 70 investigation and therefore was not in a position to file the present request.²⁸ The Prosecution submits that the addition of the 80 documents is not prejudicial to Mr Ruto and Mr Sang, as the bulk of the materials have previously been disclosed to their defence teams (the

²² Application, ICC-01/09-01/11-1463-Conf-Corr, para. 16.

²³ Application, ICC-01/09-01/11-1463-Conf-Corr, para. 17.

²⁴ Application, ICC-01/09-01/11-1463-Conf-Corr, para. 2; Addendum, ICC-01/09-01/11-1474-Conf-Red, para. 3.

²⁵ Application, ICC-01/09-01/11-1463-Conf-Corr, para. 3.

²⁶ Transcript, page 17, lines 10-14.

²⁷ Application, ICC-01/09-01/11-1463-Conf-Corr, para. 25.

²⁸ Application, ICC-01/09-01/11-1463-Conf-Corr, para. 26.

'Defence')²⁹ and the documents have been disclosed with sufficient notice prior to Witness 604 and Witness 495's scheduled appearance at trial.³⁰

Legal Representative's submissions

17. The Legal Representative for Victims supports the Application.³¹

Ruto Defence submissions

18. The Ruto Defence does not object to addition of documents for the sole purpose of confronting a hostile witness, but it opposes any attempt to divert attention from the central issue of the case and allegations of post-election violence in Kenya.³² In particular, the Ruto Defence submits that use of the 80 documents to establish evidence of a 'wider witness interference scheme' runs counter to Prosecution undertakings that it would not use such complaints as evidence of consciousness of guilt.³³ The Ruto Defence contends that the Application may be 'a gateway application' for future applications in respect of the remaining summonsed witnesses.³⁴

19. The Ruto Defence submits that allegations of a 'wider witness interference scheme' have no place in the main case for four reasons. Firstly, it is an unacceptable '*volte face* in the Prosecution's position' to refrain from using complaints of witness interference as evidence of consciousness of guilt.³⁵ Secondly, allegations of a wider scheme of witness tampering and corruption are largely irrelevant to the charges in the present case and detract from the primary focus of the case.³⁶ Thirdly, the Prosecution's allegations regarding Mr Ruto's involvement in witness interference

²⁹ Application, ICC-01/09-01/11-1463-Conf-Corr, para. 4; Addendum, ICC-01/09-01/11-1474-Conf-Red, para. 18.

³⁰ Application, ICC-01/09-01/11-1463-Conf-Corr, para. 39; Transcript, page 16, lines 1-2.

³¹ Transcript, page 18, line 12- page 20, line 24.

³² Ruto Response, ICC-01/09-01/11-1466-Conf, para. 2.

³³ Ruto Response, ICC-01/09-01/11-1466-Conf, para. 2.

³⁴ Ruto Response, ICC-01/09-01/11-1466-Conf, para. 2.

³⁵ Ruto Response, ICC-01/09-01/11-1466-Conf, para. 10.

³⁶ Ruto Response, ICC-01/09-01/11-1466-Conf, para. 12.

have resulted in the Ruto Defence diverting limited resources to investigate a second 'shadow case'.³⁷ Fourthly, allegations that Mr Ruto's associates are involved in a witness interference scheme are untested and only at the investigation phase. As such, the appropriate process and forum is through the confirmation process and consideration by a Pre-Trial Chamber.³⁸

20. The Ruto Defence also raises concerns regarding the timing of the Application, the Addendum and, more broadly, the manner and timing of disclosures in general.³⁹ Both Witness 604 and Witness 495 are the subject of summonses and the Ruto Defence submits that the Prosecution must have had reasonable doubt whether these witnesses would cooperate and therefore should have filed the Application earlier.⁴⁰ Contrary to the Prosecution's submission that the majority of the documents have already been disclosed and therefore should not unfairly prejudice the Accused, the Defence notes that the 'bulk of the materials' were only disclosed for the first time in the past two weeks.⁴¹
21. During oral submissions, the Ruto Defence reemphasised its concern that the additional documents will be used to establish consciousness of guilt of the Accused, despite former undertakings by the Prosecution not to do so.⁴² Further, using the evidence which the Defence has not investigated and is not able to challenge is, in the Ruto Defence submission, grossly prejudicial.⁴³

Sang Defence submissions

22. The Sang Defence submits that it does not oppose the use of the additional 80 items, provided the use of them is limited by the Chamber to challenging witnesses who

³⁷ Ruto Response, ICC-01/09-01/11-1466-Conf, para. 14.

³⁸ Ruto Response, ICC-01/09-01/11-1466-Conf, paras 3 and 15.

³⁹ Ruto Response, ICC-01/09-01/11-1466-Conf, para. 17; Transcript, page 26, lines 15-17.

⁴⁰ Ruto Response, ICC-01/09-01/11-1466-Conf, para. 4.

⁴¹ Ruto Response, ICC-01/09-01/11-1466-Conf, para. 19.

⁴² Transcript, page 24, lines 17-25.

⁴³ Transcript, page 31, lines 13-15.

have been found to be hostile.⁴⁴ While the Sang Defence does not object to the inclusion of the materials on the List of Evidence, it notes that third parties could be mentioned, affected or prejudiced if subsequent proceedings are conducted against them pursuant to Article 70.⁴⁵

23. In relation to the timeframes, the Sang Defence notes that: (i) the Application could have been made earlier; (ii) that the additional material does not have a significant bearing upon the present case and is not necessary to establish the guilt or innocence of the Accused in this case; and (iii) that the Prosecution has sought to add items well after the timeframes stipulated by the Chamber.⁴⁶
24. The Sang Defence notes that questions of witness interference must be considered by the Pre-Trial Chamber rather than by this Chamber.⁴⁷ Further, the Sang Defence requests the Chamber to limit the scope of the examination of witnesses pursuant to summonses to the main case, rather than allowing the Prosecution to later use the transcripts against individuals in Article 70 proceedings.⁴⁸

Prosecution Reply

25. The Prosecution Reply emphasises that the Prosecution does not seek to rely on the relevant evidence to establish consciousness of guilt on the part of Mr Ruto⁴⁹ nor

⁴⁴ Transcript, page 34, lines 20-23

⁴⁵ Transcript, page 35, lines 18-21.

⁴⁶ Sang Response, ICC-01/09-01/11-1467-Conf, para. 12, citing *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on Prosecution Requests ICC-01/04-01/07-1386 and ICC-01/04-01/07-1407 made pursuant to Regulation 35 of the Regulations, 23 October 2009, ICC-01/04-01/07-1552; and Decision on the disclosure of evidentiary material relating to the Prosecutor's site visit to Bogoro on 28, 29 and 31 March, 9 October 2009, ICC-01/04-01/07-1515-Corr, para. 29.

⁴⁷ Sang Response, ICC-01/09-01/11-1467-Conf, para. 20.

⁴⁸ Sang Response, ICC-01/09-01/11-1467-Conf, para. 21.

⁴⁹ Prosecution Reply, ICC-01/09-01/11-1471-Conf, para. 10.

has it sought to add the additional items to establish *mens rea* on the part of Mr Ruto.⁵⁰

26. As to the Defence assertions regarding the bulk of the materials being disclosed in the past two weeks, the Prosecution submits that this is a misleading and exaggerated assertion.⁵¹ In relation to the original Application, the Prosecution notes that the 57 items they seek to add comprise 280 pages in total. Of the 27 items disclosed for the first time in August 2014, the Prosecution notes this constitutes 45 pages in total (13 of which are one-page screen shots of telephones and eight of which are short Investigator's reports numbering 12 pages). Additionally, the Prosecution contends that the nature of the items disclosed is straightforward.⁵²
27. Further, the Prosecution submits that the identifying document, consent form and waiver are all administrative in nature and do not add any new information to that already available to the Defence and should not be characterised as unfairly burdening the Defence.⁵³ In addition, the Prosecution notes it was unable to disclose three items earlier than it did (including an affidavit and cover email received by the Prosecution two days before they were disclosed).⁵⁴
28. The Prosecution notes that there is a principle that the Chamber should have the ability to freely assess the evidence before it rather than seek to limit the use of evidence at the outset.⁵⁵ The Prosecution submits that if the evidence is only used for the limited purpose of considering the credibility of the Prosecution witness, the full picture of circumstances surrounding the relevant evidence is lost.⁵⁶ Further, as to the Defence argument that the materials only be used if a witness is declared

⁵⁰ Prosecution Reply, ICC-01/09-01/11-1471-Conf, para. 11.

⁵¹ Prosecution Reply, ICC-01/09-01/11-1471-Conf, para. 13.

⁵² Prosecution Reply, ICC-01/09-01/11-1471-Conf, para. 14.

⁵³ Prosecution Reply, ICC-01/09-01/11-1471-Conf, para. 16.

⁵⁴ Prosecution Reply, ICC-01/09-01/11-1471-Conf, para. 17.

⁵⁵ Transcript, page 41, lines 16-20.

⁵⁶ Transcript, page 43, lines 3-4.

hostile, the Prosecution submits that it would be more efficient to allow this evidence to be submitted in the ordinary course of examining witnesses rather than to separate it, require the witness to be recalled, or otherwise having to reintroduce the evidence at a later stage.⁵⁷

III. ANALYSIS

Preliminary matter

29. The Chamber notes that the Sang Defence filed its response to the Application almost four hours after the expiry of the time limit. The Sang Defence noted during oral submissions that this was an oversight. Given the time limit for written submissions was shortened at the request of the Prosecution in order to expedite the issuing of the decision and that the Prosecution subsequently sought and was granted leave to reply, the Chamber will exceptionally consider the Sang Response, despite the delay, noting that during oral submissions the Sang Defence advised that it had reconsidered its filing and now no longer opposes the use of the additional 80 materials, for the limited purpose of challenging witnesses found to be hostile.⁵⁸ But this specific indulgence must not be taken by the parties as a rational precedent for future practice.

Merits of the Application

30. The Chamber is satisfied that in view of the allegations of interference, the addition of the 80 documents have a contextual or circumstantial bearing, at least, as regards the evidence of Witnesses 605 and 495, especially where the context or circumstances include the possibility that the witnesses may have recanted the statements previously given to the Prosecution.

⁵⁷ Transcript, page 15, lines 4-8.

⁵⁸ Transcript, page 34, lines 20-23.

31. As regards the timing of the Application and the Addendum, the Chamber is of the view that such applications should be made as early as possible in order to enable the Defence to adequately prepare. While many of the 80 documents were disclosed earlier in the trial, the Defence was not on notice of the Prosecution's intention to rely on those documents until the filing of the Application and the Addendum. The Chamber will thus examine the timeliness of both disclosure and application for adding the documents to the List of Evidence.
32. The Chamber notes that at different points in time Witness 604 and Witness 495 ceased contact with the Prosecution. This led the Prosecution to seek summonses to appear.⁵⁹ The Chamber is, however, not persuaded by the Sang Defence's argument that the cessation of contact, without other indications of the witnesses' unwillingness to stand by their prior statement, put the Prosecution sufficiently on notice that it would need to use documents regarding the alleged interference with the two witnesses.
33. The Prosecution received information about Witness 604's recantation on 11 August 2014.⁶⁰ It thus appears that only at that time could the Prosecution form the view that there is a risk of the witness becoming adverse to its case. The Prosecution did not receive such direct indication in relation to Witness 495. The Prosecution submits that he may become adverse to its case in view of the evidence that he has been allegedly corrupted by persons involved in the alleged interference.⁶¹ The Chamber notes, however, that the Prosecution received that evidence as early as September 2013.⁶² The reason why it did not disclose that evidence until recently or

⁵⁹ Corrected and amended version of "Prosecution's request under article 64(6)(b) and article 93 to summon witnesses" (ICC-01/09-01/11-1120-Conf-Exp), 5 December 2013, ICC-01/09-01/11-1120-Red2-Corr, para. 61; Confidential redacted version of 'Prosecution's second supplementary request to summon a witness', 9 June 2014, ICC-01/09-01/11-1349-Conf-Red, para. 35.

⁶⁰ Application, ICC-01/09-01/11-1463-Conf-Corr, para. 17.

⁶¹ Application, ICC-01/09-01/11-1463-Conf-Corr, para. 35.

⁶² Application, ICC-01/09-01/11-1463-Conf-Corr, para. 20.

only disclosed it with critical information redacted, is because there was a risk that disclosure 'would have greatly impeded' the ongoing Article 70 investigation.⁶³ The Chamber is thus satisfied that there were good reasons for applying for addition of documents to the List of Evidence only recently.

34. As regards the disclosure, the Chamber is mindful that, while the bulk of the materials have previously been disclosed to the Defence,⁶⁴ there has been limited time for the Defence to consider the new materials prior to the commencement of the next trial session.⁶⁵ While a significant number of documents in Attachments A and B to the Application were disclosed in August 2014,⁶⁶ it appears that a good number of those documents had been previously disclosed to the Defence, albeit with more redactions.
35. In relation to those documents only disclosed for the first time in August, the Chamber notes that such timing affords limited opportunity for the Defence to appropriately investigate and consider the material, particularly where Witnesses 604 and 495 are scheduled to be the first and second witnesses to appear in the next trial session in less than a week's time. Nevertheless, the Chamber recognises that the nature of many of those new items - and their relatively small size - lends support to the argument that their late disclosure does not unduly prejudice the Accused.
36. The Chamber further notes that both the Ruto Defence and Sang Defence take issue with the intended use of the 80 documents. The objection relates primarily to what the Defence considers to be an impermissible introduction into the present case of

⁶³ Application, ICC-01/09-01/11-1463-Conf-Corr, para. 26. The redactions were authorised by the Chamber. See Decision on Prosecution's Request for Redaction, Non-disclosure and Delayed Disclosure of Documents Emanating from the Article 70 Investigation, 17 July 2014, ICC-01/09-01/11-1440-Conf, para. 30.

⁶⁴ Application, ICC-01/09-01/11-1463-Conf-Corr, para. 4.

⁶⁵ Application, ICC-01/09-01/11-1463-Conf-Corr, para. 17.

⁶⁶ Prosecution's Communications of the Disclosure of Evidence, ICC-01/09-01/11-1464-Conf-AnxA; ICC-01/09-01/11-1460-Conf-AnxA; ICC-01/09-01/11-1457-Conf-AnxA.

matters that should more properly be examined in an Article 70 case concerning allegations of witness interference. The Chamber agrees that the present case should focus on the issues of guilt or innocence of Mr Ruto and Mr Sang and the crimes with which they are charged.

37. The Chamber recalls its previous ruling that '[a]ny possible charges brought pursuant to Article 70 would be part of a separate case, not brought before this Chamber. Consequently, these allegations will not affect the preparation time in the current case; unless the Prosecution at trial intends to rely on additional evidence that forms part of Article 70 allegations, in which case it must disclose this material, and apply to the Chamber to add it to the [List of Evidence].'⁶⁷ Consistent with this ruling, the Chamber allows for the possibility that some aspects of the Article 70 allegations are potentially relevant in the present case.
38. The Chamber notes that the Prosecution intends to prove, on the basis of the 80 documents, the existence of 'a wider witness interference scheme'.⁶⁸ While the Prosecution provided limited detail regarding this alleged scheme during oral submissions, it is not possible at this stage to determine whether it is appropriate for the Prosecution to lead evidence on all of those allegations. In addition, the Chamber recalls that 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.⁶⁹ The Prosecution's requested relief is solely to add items to its List of Evidence; any admissibility discussion will come at a later time. It is at that time when the Chamber will be able to determine whether the items sought for admission meet the criteria and, in particular, whether they are relevant.

⁶⁷ 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, para. 89.

⁶⁸ Application, ICC-01/09-01/11-1463-Conf-Corr, para. 3.

⁶⁹ Appeals Chamber, *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, paras 42-26.

39. The Chamber is not persuaded that the Prosecution should only be allowed to add the 80 documents for the purpose of confronting a witness after he has been declared hostile.⁷⁰ Because of the above-mentioned uncertainty as to the exact purpose of the Prosecution's use of the documents, the Chamber finds it more appropriate not to set such a limitation at this point. As indicated earlier, the present decision only deals with the issue whether the documents can be added to the List of Evidence.

FOR THE FOREGOING REASONS THE CHAMBER HEREBY

GRANTS the relief sought in the Application and Addendum;

DIRECTS the Prosecution to update its List of Evidence for ease of reference and file it into the record of the case forthwith;

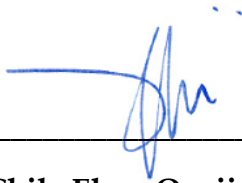
ORDERS the Prosecution to file, within seven days of notification of the present decision, a public version of the Application (ICC-01/09-01/11-1463-Conf-Corr), Request for Leave (ICC-01/09-01/11-1468-Conf), Reply (ICC-01/09-01/11-1471-Conf) and Addendum (ICC-01/09-01/11-1474-Conf-Exp) with any redactions 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-01/09-01/11-1466-Conf) with any redactions it deems necessary; and

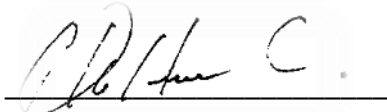
⁷⁰ Response, ICC-01/09-01/11-1466-Conf, paras 2, 6 ; Transcript, page 34, lines 20-23.

ORDERS the Sang Defence to file, within ten days of notification of the present decision, a public version of the Sang Defence Response (ICC-01/09-01/11-1467-Conf) with any redactions it deems necessary.

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



Judge Chile Eboe-Osuji, Presiding



Judge Olga Herrera Carbuccia



Judge Robert Fremr

Dated 3 September 2014

At The Hague, The Netherlands