



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
With Confidential Annex A**

**Public Redacted Version of Sang Defence Response to Prosecution's
Ninth Application pursuant to Regulation 35(2)
of the Regulations of the Court (ICC-01/09-01/11-1518-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 its '*Ninth Application pursuant to Regulation 35(2) of the Regulations of the Court*',¹ wherein it seeks to add an additional 45 items to its List of Evidence ("LOE") in relation to alleged interference concerning witnesses P-516 and P-524. 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 these materials in the context of its Article 70 investigation and so it intends to lead P-516 and P-524 on this evidence, or alternatively, confront them with it during their investigation.² The stated purpose of the additional materials is to "(a) to prove that P-0516 and P-0524 were improperly interfered with and as such either recanted their prior statements and/or withdrew their cooperation with the Prosecution; (b) to prove that their 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."³
2. In previous applications of this nature, the Prosecution has sought⁴ (and has been granted) permission to add 91 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.⁵
3. Despite the Chamber's determination as to the relevance of the recently-added materials, which is similar to the relevance of the materials currently under consideration, the Defence for Joshua arap Sang ("Defence") objects to the addition of these 45 materials, as the Prosecution has not shown that it was – in

¹ 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").

² Ninth Application, para. 2.

³ Ninth Application, para. 3.

⁴ 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").

⁵ ICC-01/09-01/11-1485, 3 September 2014 ("Decision"); ICC-01/09-01/11-T-137-Conf, 16 September 2014 ("Oral Decision").

the terms of Regulation 35(2) – unable to file the application within the time limit for disclosure (which was 9 January 2013) for reasons outside of its control.

4. Due to the belated filing of the Prosecution's Ninth Application, and in accordance with the Trial Chamber's instructions,⁶ 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.

II. APPLICABLE LAW

5. 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.
6. 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".⁷
7. However, the Prosecution files its application to belatedly add 45 incriminatory materials to the List of Evidence pursuant to:

⁶ Via email to the parties on 12 September 2014.

⁷ 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).

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

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

8. The Prosecution now seeks to admit a screening note for P-516, seven audio recordings relating to P-516 and their corresponding transcripts, and 12 Investigator Reports.⁸ With respect to P-524, the Prosecution seeks to admit a statement taken in the context of Article 70 investigations, a screening note, 12 Investigator Reports, three letters relating to his withdrawal, and an affidavit.⁹
9. Given the Chamber's previous Decisions, the Defence is constrained from arguing that these materials should not be admitted due to lack of relevance to the extent that the materials have a "contextual or circumstantial bearing ... especially where the context or circumstances include the possibility that the witnesses may have recanted the statements previously given to the Prosecution" and that "some aspects of the Article 70 allegations are potentially relevant in the present case".¹⁰ However, and as detailed below, the Defence submits that not all of these materials are relevant for the accepted purposes.

⁸ Ninth Application, para. 34.

⁹ Ninth Application, para. 38.

¹⁰ Decision, paras. 30, 36-37.

10. Furthermore, the Prosecution seeks an extension of time to add materials after the expiration of the Chamber's disclosure deadline. Therefore, 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". Indeed, the Prosecution admits that five of the documents were available prior to that deadline,¹¹ but that it chose not to disclose them. A changing prosecutorial policy does not provide reason for the Court to grant the Prosecution an exception to the rule.
11. Additionally, the Prosecution suggests that there would be no prejudice to the Defence if these documents were admitted only a few weeks prior to testimony, because it claims that most of these materials were disclosed previously.¹² In reality, 22 items were disclosed for the first time in the last week of August and the first weeks of September 2014.¹³ Furthermore, seven items (audios relating to P-516) have yet to be disclosed at all.¹⁴ The Defence submits that it is clearly not in a position to investigate the allegations contained in the new material while most members of the team are present in Court at the ICC and while its resources are focused on the day-to-day requirements of trial. These documents should be excluded on this basis.

Objections to Specific Documents

12. The Prosecution seeks to admit the Screening Note of its initial contact with P-516,¹⁵ which was conducted on [REDACTED]. Clearly this material was available prior to the original disclosure date and should have been included at that time. Furthermore, there is nothing in the Screening Note relating to Article 70 investigations, which might make it relevant to the present application.

¹¹ Ninth Application, para. 2.

¹² Ninth Application, para. 5.

¹³ ICC-01/09-01/11-1511-AnxA-Conf.

¹⁴ ICC-01/09-01/11-1511-AnxC-Conf-Exp.

¹⁵ KEN-OTP-0090-1082_R02.

13. With respect to an Investigator's Report relating to P-516,¹⁶ which was "filed" on 6 June 2013, it is not clear when the Prosecution actually received the information from P-516, as all of the incidents described by the witness therein took place prior to 2011. Therefore, the Prosecution should not now be able to add it to its LOE.
14. The Investigator's Report of [REDACTED],¹⁷ wherein P-516 says [REDACTED] was obviously in the Prosecution's possession and could have been added to the LOE within the original deadline.
15. The transcript of a phone call between the Prosecution and P-516 on [REDACTED]¹⁸ should not be added to the LOE, as there is nothing contained therein which comes from the witness with respect to Article 70 investigations. Therefore, it is not relevant for its intended purpose. Rather, the Prosecution interviewer [REDACTED]. [REDACTED]. [REDACTED].¹⁹ The Defence fails to see how the Prosecution's [REDACTED] are relevant to the question of Article 70. The Prosecution cannot seek to add materials originated by itself to confirm its own version of events. Likewise, there is nothing useful or relevant in the third transcript in this series, dated 17 March 2014, in which the Prosecution and the witness simply discuss travel logistics.²⁰ At this late stage, the Prosecution should not be allowed to flood the List of Evidence with documents which are not directly relevant to the Main Case or the Article 70 investigations (as defined by the Chamber).
16. The Screening Note of P-524 was taken on [REDACTED];²¹ it could have been included in the original LOE.
17. Also, in respect to the narrative regarding the Prosecution's interactions with P-524, the Defence notes that it has provided the Court a selective account. The Prosecution omits to state that [REDACTED],²² that information was not

¹⁶ KEN-OTP-0104-0678.

¹⁷ KEN-OTP-0129-0324.

¹⁸ KEN-OTP-0138-0075_R01.

¹⁹ KEN-OTP-0138-0081.

²⁰ KEN-OTP-0138-0089.

²¹ KEN-OTP-0095-0765_R03.

²² Ninth Application, paras. 27-28.

conveyed to the Defence until [REDACTED].²³ During the last few days, the Prosecution has in fact been in contact with P-524 and has conveyed that the [REDACTED].

IV. CONCLUSION

18. The documents identified above should not be added to the Prosecution's List of Evidence for upcoming witnesses P-516 and P-524, as they are either irrelevant for the stated purpose, prejudicial due to their late disclosure, or could have been included on the original list.



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

²³ Email exchange between the Prosecution and the Sang defence team [Confidential Annex A].