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

Date: **28 August 2015**

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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 redacted version of

**Decision on the Ruto Defence's Request for Admission of Documentary
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
Mr Essa Faal

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

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V(A) (the ‘Chamber’) of the International Criminal Court in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, pursuant to Articles 64(2), 64(9)(a), 67(1)(e), 69(4) of the Rome Statute (the ‘Statute’) and Rule 63(2) of the Rules of Procedure and Evidence (the ‘Rules’), renders the following ‘Decision on the Ruto Defence’s Request for Admission of Documentary Evidence’.

1. On 27 May 2015, a *voir dire* was held within the course of the hearing to establish the circumstances of [REDACTED] (‘the Witness’) security concerns purportedly preventing him from testifying. The Presiding Judge directed that the defence may request the admission into the trial record of certain documents referred to during the *voir dire*.¹
2. On 29 May 2015, the defence team for Mr Ruto (the ‘Ruto Defence’) submitted a request² for the admission of: (i) an investigator’s note;³ (ii) documents recording [REDACTED];⁴ and (iii) emails from [REDACTED] to the VWU, which are already in the trial record, but lack evidential status (‘Request’).⁵
3. On 5 June 2015, the defence team for Mr Sang (the ‘Sang Defence’, together with the Ruto Defence, the ‘Defence’) submitted that it does not oppose the request and aligned itself with the observations made by the Ruto Defence.⁶
4. On the same day, the Office of the Prosecutor (the ‘Prosecution’)⁷ and the Common Legal Representative for the Victims⁸ (the ‘LRV’) submitted their

¹ Transcript of Hearing, 27 May 2015, ICC-01/09-01/11-T-200-CONF-ENG ET, page 66, line 23 to page 67, line 11.

² Ruto Defence request for materials related to the *voir dire* concerning [REDACTED] to be accepted into evidence and assigned evidence (EVD) numbers, ICC-01/09-01/11-1892-Conf, with one annex ICC-01/09-01/11-1892-Conf-Anx.

³ KEN-OTP-0103-3187.

⁴ Annex A to the Defence’s Request, ICC-01/09-01/11-1892-Conf-Anx.

⁵ Annex A to Registry’s second updated report on the prospects of [REDACTED] testimony commencing on the 28 April 2015, ICC-01/09-01/11-1865-Conf-AnxA-Red.

⁶ Sang Defence Response to Ruto Defence request for materials related to the *voir dire* concerning [REDACTED] to be accepted into evidence and assigned evidence (EVD) numbers (the ‘Sang Defence Response’), ICC-01/09-01/11-1900-Conf.

⁷ Prosecution’s response to the Ruto Defence request for materials related to the *voir dire* concerning [REDACTED] to be accepted into evidence and assigned evidence (EVD) numbers (‘Prosecution’s Response’), ICC-01/09-01/11-1898-Conf.

responses, both objecting to the admission of these materials as evidence in the case.

5. During a status conference held on 5 June 2015, the Prosecution inquired on the relevance of the Request, seeing as the Witness had since been withdrawn. However, the Ruto Defence reiterated its assertion of relevance and maintained the Request.⁹
6. The Defence submits that the Request is not moot given that allegations made by [REDACTED] concerning threats to his and his family's security are part of the record.¹⁰ The Sang Defence further submits that it should be given an 'opportunity to demonstrate the falsity of these allegations through the documents sought to be admitted'.¹¹
7. The Chamber notes the Ruto Defence claims that the items are proof that the Witness had 'perjured himself'.¹² The Chamber further notes that the Ruto Defence's written submission provides no substantiation as to the relevance of the requested items. It was not until discussing whether it wished to maintain its relief sought following the withdrawal of the witness that it argued that the items are 'relevant to [the] understanding of [the Defence's Claim that] a network of key Prosecution witnesses [are] in it for asylum not for the truth'.¹³
8. The Prosecution and the LRV both submit that the materials are irrelevant to the merits of the case, because they were presented in the context of the *voir*

⁸ Common Legal Representative for Victims' Response to the "Ruto Defence Request for Materials Related to the *voir dire* Concerning [REDACTED] to be Accepted into Evidence and Assigned Evidence (EVD) Numbers" ('LRV's Response'), ICC-01/09-01/11-1901-Conf.

⁹ Transcript of Status Conference on 5 June 2015, ICC-01/09-01/11-T-206-CONF-ENG ET, page 9, line 17 to page 10, line 10.

¹⁰ Sang Defence Response, ICC-01/09-01/11-1900-Conf, para. 4.

¹¹ Sang Defence Response, ICC-01/09-01/11-1900-Conf, para. 4.

¹² Transcript of Hearing 27 May 2015, ICC-01/09-01/11-T-200-CONF-ENG ET, page 66 lines 16-17; Status Conference 5 June 2014, ICC-01/09-01/11-T-206-CONF-ENG ET, page 9, line 23 to page 10, line 1.

¹³ Status Conference 5 June 2014, ICC-01/09-01/11-T-206-CONF-ENG ET, page 10, lines 15-17.

dire related to the Witness's security concerns.¹⁴ The Prosecution submits that admitting these documents as evidence would serve no legitimate purpose and would violate the principle of isolating evidence presented in the context of a *voir dire* from evidence on the merits of the case.¹⁵

9. The Chamber recalls, in particular, when making general admissibility assessments, the document sought for admission must be *prima facie* relevant. It must relate to a material issue or fact that is to be properly considered by the Chamber in the sense of making it more or less probable, that is, tending to prove or disprove the material issue or fact in question.¹⁶
10. The Chamber emphasises that the purpose of the *voir dire* was to enable counsel and the Chamber to explore (through questions to the Witness) the circumstances surrounding the Witness's refusal to testify on grounds of his claim of security concerns. In the outcome of the *voir dire* the Chamber considered that the Witness should be compelled to testify despite his claims of security concerns. And the Chamber ruled accordingly. But in light of the Witness's continued refusal to testify, despite the Chamber's granting of a Prosecution unopposed application to levy an administrative fine for the refusal, the Prosecutor withdrew the Witness, given the Chamber's rejection of the Prosecution's application for further administrative fines. In these circumstances, the Chamber considers that the post-*voir dire* withdrawal of the Witness by the Prosecution — being the party that called the Witness for purposes of discharging its burden of proof in the case — renders the requested materials irrelevant to the case of the Prosecution. It is for this reason that the Chamber must reject the Request for the admission of the materials. This decision is without prejudice to the right of the Defence to

¹⁴ Prosecution's Response, ICC-01/09-01/11-1898-Conf, para. 3; LRV's Response, ICC-01/09-01/11-1901-Conf, paras 2-3.

¹⁵ Prosecution's Response, ICC-01/09-01/11-1898-Conf, para. 3.

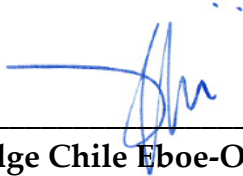
¹⁶ Decision on the Prosecution's Request for Admission of Documentary Evidence, 10 June 2014, ICC-01/09-01/11-1353, paras 15-17.

revisit the question of the admissibility of these materials, should a further cause arise in the future to consider them as relevant.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request.

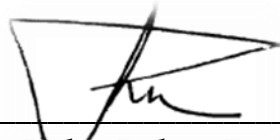
Done in both English and French, the English version being authoritative.



Judge Chile Eboe-Osuji
(Presiding)



Judge Olga Herrera Carbuca



Judge Robert Fremr

Dated this 28 August 2015

At The Hague, The Netherlands