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No.: ICC-01/09-01/11
Date: 19 September 2014

TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding Judge
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
"Prosecution's supplementary request to its eighth Application pursuant to
Regulation 35(2) of the Regulations of the Court",
ICC-01/09-01/11-1510-Conf, 11 September 2014

With Confidential *EX PARTE*, Annexes A-J only available to the Prosecution and
VWU and Confidential Annex K

Source: The Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Introduction

1. On 22 August 2014, the Office of the Prosecutor (“Prosecution” or “OTP”) filed an application to amend its List of Evidence and be permitted to rely upon 57 new items relating to witnesses P-0604 and P-0495 (“Application”),¹ followed by an Addendum to this Application which sought to include a further 23 additional items to the List of Evidence (“Addendum”).² On 3 September 2014, Trial Chamber V(A) (“Chamber”) issued its Decision on the Prosecution’s Application for Addition of Documents to its List of Evidence (“Decision”)³ granting the Prosecution’s application (as amended).
2. The Prosecution hereby files this Supplementary Request to include 11 new items on its List of Evidence pursuant to Regulation 35(2) of the Regulations of the Court and Articles 64(6)(d) and 69(3) of the Rome Statute. These 11 items comprise of six items relating to witness P-0495,⁴ four items relating to witness P-0604⁵ and a related Report.⁶
3. These 11 items are audio recordings, which are the source of previously disclosed transcripts and translations, and a report relating to [REDACTED] (“Report”). The transcripts and translations of the audio recordings are already included in the Prosecution’s List of Evidence.⁷
4. In light of the Chamber’s ruling on 10 September 2014 [REDACTED]⁸ the Prosecution requests to add 10 audio conversations pertaining to P-0495 and P-

¹ ICC-01/09-01/11-1463-Conf-Corr+Corr-Anx.

² ICC-01/09-01/11-1474-Conf+Anx.

³ ICC-01/09-01/11-1485-Conf.

⁴ Annexes A-F.

⁵ Annexes G-J.

⁶ Annex K.

⁷ ICC-01/09-01/11-1486-Conf-Anx1.

⁸ [REDACTED].

0604 to its List of Evidence. The Prosecution also seeks to include a Report [REDACTED]⁹ [REDACTED].

5. The Prosecution intends to rely upon the content of the audio recordings for the same purposes identified in its Application and its Addendum to the Application¹⁰ and incorporates by reference the legal arguments advanced therein in its support, as further clarified in its “Reply to the Defence Response”.¹¹
6. The Prosecution submits that adding these items to the Prosecution’s List of Evidence will result in little or no prejudice to the Defence, as all transcripts and translations have previously disclosed. Six of the recordings are in English. The remaining four, which are in [REDACTED] have all been translated. The Prosecution is in the process of applying redactions to the all the audio recordings on an urgent basis and will provide the Defence with courtesy copies by 12 September 2014 and formally disclose them on 15 September 2014. The Chamber will be notified of the disclosure in the usual manner. A courtesy copy of the Report was provided to the Defence on 4 September 2014 and will be formally disclosed on 12 September 2014.

Confidentiality

7. The Prosecution filed this Request as confidential as it contains information relating to witnesses P-0495 and P-0604 which could lead to their identification in the public domain. Annexes A-J are classified as confidential, *ex parte*, only available to the Prosecution and VWU as they contain unredacted versions of the audio recordings in question. Annex K is classified as confidential as it

⁹ [REDACTED].

¹⁰ ICC-01/09-01/11-1474-Conf-Exp and ICC-01/09-01/11-1474-Conf-Red.

¹¹ ICC-01/09-01/11-1463-Conf-Corr, paras 23-33, 35-38 and ICC-01/09-01/11-1471-Conf+Anxs respectively.

contains [REDACTED] which must not be disseminated to the public. A public version of this Supplementary Request will be filed.

Statement of facts

8. On 3 September 2014, the Chamber rendered its Decision, permitting the Prosecution to add, *inter alia*, transcripts and translations of audio recordings pertaining to P-0604 and P-0495 to its List of Evidence. The Prosecution filed an update version of its List of Evidence on 4 September 2014.¹²
9. On 10 September 2014, the Prosecution was prohibited from showing witness P-0604 [REDACTED].¹³

Submissions

Variation of the time and authorisation to disclose further evidence

10. The Prosecution incorporates by reference its submissions on variation of time and authorisation to disclose further evidence in its Application.¹⁴
11. The Prosecution did not anticipate having to disclose audio recordings of materials which it had already disclosed in transcribed and/or translated format, on the basis of past practice in this case and others.¹⁵ The Prosecution was of the understanding that “when audio recordings have been transcribed and such transcripts have subsequently been disclosed to the Defence, in principle, the audio recordings need not be disclosed as both the tape and the

¹² ICC-01/09-01/11-1486-Conf and ICC-01/09-01/11-1486-Conf-Anx.

¹³ [REDACTED].

¹⁴ Application, paras. 23-26.

¹⁵ ICC-01/04-01/10-378, para.24, ICC-02/05-03/09-295, para.23.

transcript contain the same record of the words used by the witness.”¹⁶ Following this reasoning, the Prosecution was of the view that, if the audio-recording was not required to be disclosed, then it would also not need to be placed on its List of Evidence, since this is contingent on prior disclosure.

12. However, in light of the Chamber’s ruling on 10 September 2014 [REDACTED]¹⁷ the Prosecution now seeks to include the said audio recordings on its List of Evidence. The Prosecution did not previously seek to include the audio recordings until now as it did not, in good faith, believe that it was necessary to do so.

13. [REDACTED]¹⁸ the Prosecution to date has only disclosed the audio of transcribed or translated material where it has been specifically ordered to¹⁹ on good cause shown, or where the Defence have provided to the OTP a *prima facie* basis as to why it considered the audio recordings relevant to its preparation.²⁰ [REDACTED]²¹ [REDACTED] has not previously been considered to be a sufficient foundation to motivate disclosure of audio recordings.

14. With respect to the Report, the Prosecution seeks to include this on its List of Evidence also in response to the Chamber’s ruling that [REDACTED]²² The Report was only finalised on 4 September 2014, [REDACTED]. As such, it would have been impossible to include in its 9 January 2013 List of Evidence, nor the Prosecution’s subsequent Application.

¹⁶ ICC-01/09-01/11-890, para.17.

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ [REDACTED].

²⁰ [REDACTED].

²¹ [REDACTED].

²² [REDACTED].

Relevance of additional items

15. The Prosecution incorporates by reference its submissions in its Application with respect to the relevance of the transcripts of the interview with P-0495 and the [REDACTED] featuring P-0495²³ and the submissions in its Addendum with respect to relevance of the transcripts and translations of the four audio-recordings pertaining to witness P-0604.²⁴ This reasoning applies *mutatis mutandis* to the audio recordings.

16. With respect to the Report, the Prosecution refers to the Chamber's ruling of 10 September 2014 to establish relevance. [REDACTED].²⁵ [REDACTED].

Addition of items to the List of Evidence is not unfairly prejudicial to the Accused

17. The Prosecution submits that the addition of the 11 items at the subject of this Request is not prejudicial to the Accused, as the transcripts and translations of the items in question have been disclosed to the Defence with sufficient notice. The six items pertaining to witness P-0495 are audio recordings [REDACTED]²⁶ and the audio recording of the Prosecution's interview conducted with P-0495 pursuant to Article 55(2) of the Statute.²⁷ Transcripts and translations of [REDACTED] were disclosed to the Defence on 6 June 2014,²⁸ 23 July 2014²⁹ and 15 August 2014,³⁰ and the transcripts of the Prosecution's interview with P-0495 were first disclosed on 16 May 2014.³¹ In respect of the four audio recordings [REDACTED], the transcripts and translations thereof were

²³ Application, paras. 27-28 and 34-38.

²⁴ Addendum, paras. 13-16.

²⁵ [REDACTED].

²⁶ [REDACTED]

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ [REDACTED]

³⁰ [REDACTED]

³¹ [REDACTED].

disclosed to the Defence in draft form on 22 August 2014 and in final format on 29 August 2014.³² In its Decision, the Chamber did not deem this disclosure to be unfairly prejudicial to the Accused.

18. With respect to the Report, the Prosecution disclosed³³ an earlier version [REDACTED] on 28 August 2014.³⁴ This was updated with additional data received [REDACTED] on 12 August 2014 and sent to the Defence on 4 September 2014. Formal disclosure of the Report will be affected on 12 September 2014.³⁵

19. The Prosecution submits that any prejudice to the Defence is limited, as there is nothing in the content of the audio recordings that is not reflected in the transcripts and translations thereof. In addition, and as pleaded in the Application and the Addendum, the content of the audio recordings – as with their corresponding transcripts and translations – do not bring new facts to the matters charged in the Prosecution’s Document Containing the Charges, but provide information with respect to interference P-0604 and P-0495 have been exposed to.

³² [REDACTED].

³³ A courtesy copy was earlier sent to the Defence on 22 August 2014.

³⁴ [REDACTED].

³⁵ [REDACTED].

Relief requested

20. For the foregoing reasons, the Prosecution requests leave to supplement its filings ICC-01/09-01/11-1463-Conf-Exp and ICC-01/09-01/11-1474-Conf-Exp by the addition of the 11 items listed in Annexes A-K hereto.

A handwritten signature in blue ink, appearing to read 'Fatou Bensouda', is written over a horizontal line. The signature is stylized and cursive.

Fatou Bensouda, Prosecutor

Dated this 19th day of September 2014
At The Hague, The Netherlands