

**Cour  
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Internationale**



**International  
Criminal  
Court**

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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***

**Lesser public redacted version of  
Decision on the Prosecution's Eleventh Application for Addition of Documents  
to Its List of Evidence and for Disclosure**

**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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Mr James Stewart  
Mr Anton Steynberg

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**Unrepresented Victims**

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**States Representatives**

*Amicus Curiae*

**REGISTRY**

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**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’) and Rules 76, 77 and 84 of the Rules of Procedure and Evidence (the ‘Rules’) renders the following Decision on the Prosecution’s Eleventh Application for Addition of Documents to Its List of Evidence and for Disclosure.

## 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 Office of the Prosecutor (the ‘Prosecution’) to submit its witness list and list of evidence by 9 January 2013.<sup>1</sup>
2. On 9 January 2013, the Prosecution filed its list of evidence (the ‘List of Evidence’).<sup>2</sup>
3. On 17 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*, summonses to be issued for several witnesses to testify in this case.<sup>3</sup>
4. On 20 May 2014, the Chamber issued its ‘Decision on the Second Prosecution Application for Delayed Disclosure of Material related to Witness 397’ (the ‘Decision on Delayed Disclosure’),<sup>4</sup> in which it authorised the Prosecution to withhold material relating to Witness 397 from disclosure.

<sup>1</sup> Decision on the schedule leading up to trial, ICC-01/09-01/11-440, para. 13.

<sup>2</sup> 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, 30 September 2014, ICC-01/09-01/11-1568-Conf-Anx1.

<sup>3</sup> ICC-01/09-01/11-1274-Corr2, filed on 24 April 2014. On 9 October 2014, the Appeals Chamber upheld the Trial Chamber’s Decision. See: Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation", ICC-01/09-01/11-1598 OA7 OA8.

<sup>4</sup> ICC-01/09-01/11-1311-Conf-Exp.

5. On 3 September 2014, the Chamber issued its 'Decision on the Prosecution's Application for Addition of Documents', in which it granted the Prosecution's application to add 80 items, relating to Witness 604 and Witness 495, to its List of Evidence (the '3 September Decision').<sup>5</sup>
6. On 16 September 2014, the Chamber granted a supplementary Prosecution application to add 11 items, relating to Witness 604 and Witness 495, to its List of Evidence.<sup>6</sup>
7. On 19 September 2014, the Chamber granted another Prosecution application to add 45 items to its List of Evidence related to Witness 516 and Witness 524.<sup>7</sup> In the same decision, the Chamber also instructed the Prosecution to submit any application for the further addition of items to its List of Evidence it considered necessary for any other upcoming witnesses no later than 15 October 2014.<sup>8</sup>
8. In the interim, on 26 September 2014, the Chamber granted an additional Prosecution application to add 38 items to its List of Evidence related to Witness 637.<sup>9</sup>
9. On 15 October 2014, the Prosecution filed an application to add 539 further items to its List of Evidence ('Application').<sup>10</sup>

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<sup>5</sup> ICC-01/09-01/11-1485-Conf. See: 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, 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; Addendum to Prosecution's Corrected version of "Prosecution's eighth application pursuant to Regulation 35(2) of the Regulations of the Court", 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.

<sup>6</sup> ICC-01/09-01/11-T-137-CONF-ENG ET, page 14, line 1 to page 18, line 4. See: Prosecution's supplementary request to its eighth Application pursuant to Regulation 35(2) of the Regulations of the Court, 11 September 2014, ICC-01/09-01/11-1510-Conf.

<sup>7</sup> Decision on the Prosecution's Ninth Application for Addition of Documents to Its List of Evidence, ICC-01/09-01/11-1527-Conf.

<sup>8</sup> ICC-01/09-01/11-1527-Conf, page 11.

<sup>9</sup> Decision on the Prosecution's Tenth Application for Addition of Documents to Its List of Evidence, ICC-01/09-01/11-1549-Conf.

10. On 16 October 2014, the Chamber shortened the time limit for responses to the Application to 16:00 on 24 October 2014.<sup>11</sup>
11. On 23 October 2014, the defence team for Mr Ruto (the 'Ruto Defence'), filed its response to the Application ('Ruto Defence Response').<sup>12</sup>
12. On 24 October 2014, the defence team for Mr Sang (the 'Sang Defence') (together with the Ruto Defence: the 'Defence') filed its response to the Application ('Sang Defence Response').<sup>13</sup>
13. On 28 October 2014, the Prosecution filed a request for authorisation to disclose material related to Witness 397, subject to delayed disclosure ('Request for Authorisation for Disclosure').<sup>14</sup> In the request, the Prosecution submits that circumstances now permit the disclosure of the material.<sup>15</sup>

## II. SUBMISSIONS

### *The Prosecution*

14. The Prosecution seeks to include 539 items on its List of Evidence which relate to several upcoming witnesses: Witness 15, Witness 16, Witness 336, Witness 397 and Witness 524, for whom summonses have been issued, as well as Witness 19 and Witness 28, who have not been summonsed, but [REDACTED].<sup>16</sup> The Prosecution submits that all these witnesses have 'at one time or another withdrawn their

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<sup>10</sup> Prosecution's eleventh application pursuant to Regulation 35(2) of the Regulations of the Court, ICC-01/09-01/11-1606-Conf, para. 1.

<sup>11</sup> Email from Legal Officer of Trial Chamber V(A) to the parties, at 11:20.

<sup>12</sup> Ruto Defence response to the "Prosecution's eleventh application pursuant to Regulation 35(2) of the Regulations of the Court", ICC-01/09-01/11-1615-Conf.

<sup>13</sup> Sang Defence Response to the "Prosecution's eleventh application pursuant to Regulation 35(2) of the Regulations of the Court", ICC-01/09-01/11-1617-Conf.

<sup>14</sup> Prosecution's Sixth Provision of Updated Information Concerning Witness P-0397 and Request for Authorisation to Disclose Material Subject to Delayed Disclosure, ICC-01/09-01/11-1620-Conf-Exp with confidential *ex parte* Annex A.

<sup>15</sup> ICC-01/09-01/11-1620-Conf-Exp, para. 19.

<sup>16</sup> Application, ICC-01/09-01/11-1606-Conf, para. 2.

cooperation with the Prosecution and thus it cannot be ruled out that, once before the Court, these witnesses will provide testimony that is adverse to the Prosecution'.<sup>17</sup> The Prosecution thus requires these items to confront the witnesses with such evidence should they prove hostile.<sup>18</sup> The Prosecution also states it intends to use some of the material 'to demonstrate the existence of a wider scheme of witness interference'.<sup>19</sup>

15. The Prosecution submits that the Application is filed after the 9 January 2013 deadline 'because the relevant events concerning the proposed additional evidence and/or the Prosecution's awareness of the witnesses' withdrawal and potential hostility took place well after the 9 January 2013 deadline'.<sup>20</sup> Although it acknowledges that some items originated before the 9 January 2013 deadline, the Prosecution submits it was not aware of the need to add them to the List of Evidence until recently.<sup>21</sup> The Prosecution states that it seeks to add audio material in light of the Chamber's oral ruling on 10 September 2014.<sup>22</sup>
16. The Prosecution submits that it did not foresee the need to use the screening notes and investigator reports, 'until it became aware of the full extent of the witness interference scheme'.<sup>23</sup> Furthermore, the Prosecution argues that, in light of the affidavits received from some of these witnesses, and other information or evidence of alleged witness interference, it has shown good cause for the Chamber to exercise

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<sup>17</sup> Application, ICC-01/09-01/11-1606-Conf, paras 3, 18, 19, 21-23, 27-28, 35, 37-39, 46.

<sup>18</sup> Application, ICC-01/09-01/11-1606-Conf, paras 3, 54-55, 58, 61, 69.

<sup>19</sup> Application, ICC-01/09-01/11-1606-Conf, paras 52, 54, 57, 62, 68 and 75.

<sup>20</sup> Application, ICC-01/09-01/11-1606-Conf, para. 48.

<sup>21</sup> Application, ICC-01/09-01/11-1606-Conf, para. 48.

<sup>22</sup> Application, ICC-01/09-01/11-1606-Conf, paras 4, 49 and 80. The Prosecution refers to the Chamber's oral ruling at T-133-Conf-Eng ET, page 18, lines 5-14.

<sup>23</sup> Application, ICC-01/09-01/11-1606-Conf, para. 49.

its discretion to vary the 9 January 2013 deadline and allow the addition of these items to the List of Evidence.<sup>24</sup>

17. The Prosecution states that the addition of these items will not cause unfair prejudice to the Accused, as the 'bulk of the material' was previously disclosed pursuant to Rule 77 of the Rules or Article 67(2) of the Statute. It further submits that any 'prejudice to the Defence is outweighed by the cogency of the information contained in these items', which is essential 'to ensure that the Chamber has before it necessary evidence for the determination of the truth'.<sup>25</sup> It is further submitted that the Defence teams have been on notice of the Prosecution's intention to rely on these sorts of items since 22 August 2014, when the first application of this kind was filed. The Prosecution also notes that the Chamber intentionally imposed the deadline of 15 October 2014 for the Prosecution to seek the inclusion of this material.<sup>26</sup> Although some audio material has not yet been disclosed, the Prosecution reiterates that this material is being disclosed on a rolling-basis as a result of the Chamber's recent oral ruling and will be done well in advance of the '24-hour rule required by the Chamber with respect to P-0516'.<sup>27</sup> The Prosecution also states that the items 'do not bring new facts to the matters charged', but 'provide information with respect to interference that the Prosecution contends the witnesses have been exposed to'.<sup>28</sup>
18. With regard to the relevance of the items, the Prosecution refers to the Chamber's 3 September Decision and subsequent decisions that have authorised the addition of

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<sup>24</sup> Application, ICC-01/09-01/11-1606-Conf, para. 50.

<sup>25</sup> Application, ICC-01/09-01/11-1606-Conf, paras 5 and 77.

<sup>26</sup> Application, ICC-01/09-01/11-1606-Conf, para. 78.

<sup>27</sup> Application, ICC-01/09-01/11-1606-Conf, para. 80. The Prosecution refers to the Chamber's oral ruling at T-133-Conf-Eng ET, page 18, lines 5-14. The Prosecution also refers to the Chamber's Decision ICC-01/09-01/11-1527-Conf, para. 24.

<sup>28</sup> Application, ICC-01/09-01/11-1606-Conf, para. 81.

similar items to the List of Evidence.<sup>29</sup> The Prosecution further submits that the items 'are relevant (a) to the issue of the witnesses' credibility and the reason for their withdrawal of cooperation and/or recantation; (b) for the purposes of cross-examination if the witnesses are adverse; (c) for corroboratory purposes with respect to *other* witnesses which the Prosecution alleges have been interfered with through a wider witness interference scheme; and (d) for the Chamber's overall assessment of the evidence and the determination of conflicting versions relating to alleged witness tampering'.<sup>30</sup> The Prosecution also notes that the evidence 'will be relevant to the Chamber's determination of a contemplated Prosecution request to admit prior statements of one or more of these witnesses'.<sup>31</sup> Lastly, the Prosecution submits that the Application is for the sole inclusion of evidence on the List of Evidence, 'with a determination on admissibility to follow at the appropriate time'.<sup>32</sup>

### *Ruto Defence Response*

19. The Ruto Defence submits that, in spite of the Chamber's recent decisions permitting the Prosecution to add items to its List of Evidence, the 'sheer number of the items, combined with the timing of the application, will result in a real prejudice to the Ruto Defence, and thus, warrant a rejection in total' of the Application.<sup>33</sup> The Ruto Defence notes that if the Application is granted, this would result in an increase of 47.25% of the items in the List of Evidence after 1 September 2014.<sup>34</sup>

20. The Ruto Defence acknowledges that the addition of items to the List of Evidence is sometimes necessary, but that the addition of 539 items is unprecedented and

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<sup>29</sup> Application, ICC-01/09-01/11-1606-Conf, para. 51.

<sup>30</sup> Application, ICC-01/09-01/11-1606-Conf, para. 52.

<sup>31</sup> Application, ICC-01/09-01/11-1606-Conf, para. 52.

<sup>32</sup> Application, ICC-01/09-01/11-1606-Conf, paras 51 and 79.

<sup>33</sup> Ruto Defence Response, ICC-01/09-01/11-1615-Conf, para. 3.

<sup>34</sup> Ruto Defence Response, ICC-01/09-01/11-1615-Conf, footnote 4.



comes at an advanced stage of the proceedings.<sup>35</sup> The Ruto Defence states that it has finite resources and that these should be focused on a fixed target, 'rather than a case which is constantly evolving'.<sup>36</sup> Additionally, it submits that the time available to investigate the items is 'incredibly short', as the next session commences on 17 November 2014, and involves 'four of the seven witnesses' subject of the Application.<sup>37</sup>

21. The Ruto Defence contends that the Prosecution's submission that the Defence has been on notice since 22 August 2014 'is no answer to the Defence's concerns'.<sup>38</sup> The Ruto Defence submits that this bare notice is no substitute for being directed to the actual items which are to be relied upon by the Prosecution as incriminatory evidence, particularly when the items are still subject to redactions.<sup>39</sup>

22. The Ruto Defence further submits that, as observed by this Chamber, prior disclosure of items pursuant to Rule 77 of the Rules or as potentially exculpatory does not amount to notice of the Prosecution's intention to rely on those items as incriminatory material. Thus, 'it cannot be reasonably anticipated that full investigations and trial preparations have been properly conducted in respect of all 539 items by the Ruto Defence simply by virtue of the fact of disclosure'.<sup>40</sup>

23. The Ruto Defence argues that even if items added to the List of Evidence are not admitted, it still needs to properly and thoroughly investigate the items if the Prosecution intends to use them to prove Mr Ruto's guilt. The Ruto Defence submits it 'must be ready to meet and challenge these items at the point when the

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<sup>35</sup> Ruto Defence Response, ICC-01/09-01/11-1615-Conf, para. 4.

<sup>36</sup> Ruto Defence Response, ICC-01/09-01/11-1615-Conf, para. 4.

<sup>37</sup> Ruto Defence Response, ICC-01/09-01/11-1615-Conf, para. 4.

<sup>38</sup> Ruto Defence Response, ICC-01/09-01/11-1615-Conf, para. 5.

<sup>39</sup> Ruto Defence Response, ICC-01/09-01/11-1615-Conf, para. 5.

<sup>40</sup> Ruto Defence Response, ICC-01/09-01/11-1615-Conf, para. 6. The Ruto Defence refers to the Chamber's Decision ICC-01/09-01/11-1485-Conf, para. 31.

Prosecution seeks their admission'.<sup>41</sup> The Ruto Defence states that it will 'simply be unable to analyse and review the items added to the List of Evidence in the manner it would and should be entitled to expect'.<sup>42</sup>

24. The Ruto Defence submits that 65 items related to Witness 397 have not yet been disclosed to the Defence and, thus, the Defence 'cannot offer meaningful submissions in this response'.<sup>43</sup> The Ruto Defence also argues that the application to lift the non-disclosure order pertaining to Witness 397 should have been made at a much earlier date.<sup>44</sup> The Ruto Defence states that it 'cannot agree to the admission of items it has never seen and about which it knows nothing' and, thus, requests that this aspect of the Application 'be delayed until such time as the Prosecution effects full and proper disclosure'.<sup>45</sup>

### *Sang Defence Response*

25. The Sang Defence submits that it does not object to the addition of the items of evidence in terms of whether the Prosecution has satisfied the requirements of Regulation 35(2) of the Regulations.<sup>46</sup> However, it submits that compared to previous applications by the Prosecution, with respect to the Application, the prejudice to the Defence is much greater because 539 items are being added at once, with limited time remaining prior to the examination of the relevant witnesses.<sup>47</sup>

26. The Sang Defence also contends that it is prejudiced because the bulk of the material does not relate to the substance of the charges against the Accused. Instead, they relate to potential Article 70 charges and 'the Defence has not

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<sup>41</sup> Ruto Defence Response, ICC-01/09-01/11-1615-Conf, para. 7.

<sup>42</sup> Ruto Defence Response, ICC-01/09-01/11-1615-Conf, para. 8.

<sup>43</sup> Ruto Defence Response, ICC-01/09-01/11-1615-Conf, para. 9.

<sup>44</sup> Ruto Defence Response, ICC-01/09-01/11-1615-Conf, para. 9.

<sup>45</sup> Ruto Defence Response, ICC-01/09-01/11-1615-Conf, para. 10.

<sup>46</sup> Sang Defence Response, ICC-01/09-01/11-1617-Conf, para. 5.

<sup>47</sup> Sang Defence Response, ICC-01/09-01/11-1617-Conf, para. 6.

previously had occasion to investigate these peripheral allegations'.<sup>48</sup> The Sang Defence also submits that 'these Article 70-related materials are not germane to the question of whether or not the initial accounts provided by the witnesses to the Prosecution are truthful, accurate or reliable'.<sup>49</sup>

### III. ANALYSIS

27. The Chamber notes that the Prosecution seeks to add 539 items to the List of Evidence related to the following witnesses:

- (a) **Witenss [REDACTED]** is scheduled to be the first witness heard in the next court session that will start on 17 November 2014. The Prosecution seeks to add 117 items.<sup>50</sup>
- (b) **Witenss [REDACTED]** is scheduled to be the second witness to testify in the next court session. The Prosecution seeks to add a total of 87 items.<sup>51</sup>
- (c) **Witenss [REDACTED]** is the third witness due to testify in the next session. The Prosecution seeks to add only one item, which is an e-mail communication dated 11 October 2014.<sup>52</sup>

<sup>48</sup> Sang Defence Response, ICC-01/09-01/11-1617-Conf, para. 7.

<sup>49</sup> Sang Defence Response, ICC-01/09-01/11-1617-Conf, para. 8.

<sup>50</sup> Application, ICC-01/09-01/11-1606-Conf, para. 66 and Annex I. The Prosecution seeks leave to add the following items related to the witness to its List of Evidence: (a) one screening note (dated 2012, five pages long); (b) six written statements and their annexes, as well as transcripts of interviews conducted with the witness in the context of Article 70 investigations (dated 2013, total of 81 pages), as well as their corresponding recordings (total of eight audio files); (c) nine audio files of conversations with the witness, and corresponding transcripts and translations (17 items, total of 247 pages); (d) three administrative documents of Prosecution's dealings with the witness (namely two signed waivers of rights and one written consent dated 2014); (e) 27 investigator reports, [REDACTED] (dated 2012-2014, total of 76 pages); and (f) two recanting affidavits (dated 2013, total of 12 pages).

<sup>51</sup> The Prosecution seeks leave to add the following items related to the witness to its List of Evidence: (a) one screening note and one transcript of a screening (dated 2010, total of 19 pages); (b) three transcripts of conversations between the Prosecution and the witness (dated 2010, total of 61 pages); (c) 11 administrative documents related to Prosecution's dealings with the witness (these items include handwritten notes, signed waivers of rights, and acknowledgements of receipt, dated 2010-2012, total of 12 pages); (d) 18 investigator reports (dated 2011-2014, total of 35 pages); (e) 53 audio recordings (dated 2009-2011). Application, ICC-01/09-01/11-1606-Conf, Annex N, pages 46-57.

<sup>52</sup> Application, ICC-01/09-01/11-1606-Conf, para. 76.

(d) **Witenss [REDACTED]** is the fourth witness scheduled to testify in the next court session. The Prosecution seeks to add 123 items.<sup>53</sup>

(e) **Witenss [REDACTED]** is not yet scheduled to testify. The Prosecution seeks to add 99 items.<sup>54</sup>

(f) **Witenss [REDACTED]** is also not yet scheduled to testify. The Prosecution seeks to add 36 items.<sup>55</sup>

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<sup>53</sup> The Prosecution requests leave to add the following items related to [REDACTED]: (a) one screening note (two pages long, dated 2010); (b) 32 transcribed statements, a witness statement and a one-page handwritten note (total of 730 pages, all items dated 2014); (c) 40 audio recordings of interviews with Prosecution investigators (dated 2010-2014); (d) seven annexes to statements, namely handwritten notes and sketches (total of 18 pages); (e) a [REDACTED], two handwritten letters, a typed letter and an e-mail apparently from the witness (total of 18 pages, dated 2011-2013); (f) 20 investigator notes or reports (total of 37 pages, dated 2010-2014); (g) four ICC administrative documents (total of four pages, dated 2010-2013); (h) two identity documents (total of two pages); (i) one video, its transcript and translation of an interview with the witness and [REDACTED]; (j) one copy of a newspaper article (two pages long); (k) two affidavits purportedly from the witness (total of 20 pages, dated 2013); (l) one non-ICC statement of the witness (3 pages long, dated 2010); and (m) two court documents and their translations (total of 29 pages, dated 2012 and 2013). Application, ICC-01/09-01/11-1606-Conf, para. 56. The Prosecution notes that some of these items are identical to those requested already in relation to [REDACTED]. See Application, ICC-01/09-01/11-1606-Conf, footnotes 76 and 93. There is however a mistake in the evidence reference number ('ERN') of one of the items listed in footnote 76, which is KEN-OTP-0134-0187 and not 0178 as stated in the Application. The Chamber notes that some of these items are of extremely poor quality and that the pages referred to in Annex C do not always correspond to the ERNs of the exhibits. Application, ICC-01/09-01/11-1606-Conf, footnotes 89, 91, 92, 94, 95.

<sup>54</sup> The Prosecution requests leave to add the following items related to [REDACTED]: (a) two e-mails, one letter and one affidavit (four items, total of nine pages) dated February 2013; (b) two audio recordings, one transcript of the recording and its translation (45 pages each), as well as four annexes (each one page long) resulting from an interview of Prosecution investigators with the witness in February 2013; (c) one e-mail, two letters and three affidavits dated March 2013 (six items, total of eight pages); (d) Investigator Report dated March 2015 (three pages long); (e) one non-ICC statement, two letters and two audio recordings related to an alleged press release of Mr Paul Gicheru (the written items have a total of six pages); (f) one video, its transcript and translation of an interview with the witness and [REDACTED] (the written items have a total of five pages); (g) affidavits and letters allegedly related to the national proceedings regarding Walter Barasa (seven items, total of 30 pages); (h) three prior statements and two transcripts of prior statements that the witness allegedly provided to other organisations (five items, total of 37 pages) (the Prosecution notes that these items already are on the List of Evidence); (i) two audio recordings and corresponding transcripts of the witness's screening (the written items have a total of 40 pages); (j) four audio recordings and corresponding transcripts of the Prosecution's security discussions with the witness (the written items have a total of 73 pages); (k) seven waivers of rights connected to the Prosecution's interviews with the witness (total of seven pages); (l) two investigator reports (total of five pages); (m) one photocopy of a newspaper article and a printout of an internet page (total of five pages); and (n) 39 audio recordings of the Prosecution's interviews with the witness in 2010 and 2011. Application, ICC-01/09-01/11-1606-Conf, para. 53.

<sup>55</sup> The Prosecution requests leave to add the following items related to [REDACTED] to its List of Evidence: (a) one screening note (dated 2010, two pages long); (b) 14 audio recordings of the witness's interview (dated 2010); (c) seven investigator reports (dated 2010-2014, total of 10 pages); (d) two non-ICC written statements (dated 2008 and 2011, total of 14 pages); (e) five copies of newspapers and printouts of internet pages (dated 2010 and 2011, total of 31 pages); and (f) seven items resulting from a [REDACTED] (dated 2013 and 2014, total of 99 pages). The Prosecution notes that one of these items (KEN-D09-0007-0057) is identical to an item already requested in relation to

(g) **Witenss [REDACTED]** is not yet scheduled to testify. The Prosecution seeks leave to add 76 items to the List of Evidence.<sup>56</sup>

28. The Chamber notes that in the 3 September Decision it concluded that: (a) in view of the allegations of interference, the addition of such items has a contextual or circumstantial bearing, at least, as regards the evidence of witnesses who may have recanted statements previously given to the Prosecution;<sup>57</sup> (b) applications for the addition of items in the List of Evidence should be made as early as possible in order to enable the Defence to adequately prepare;<sup>58</sup> and (c) these applications may be made at a later stage if there are good reasons to do so (these may include when the Prosecution has received information about interference or recantation at a later stage in the proceedings, or when there are risks to ongoing Article 70 investigations if material is disclosed to the Defence at an earlier stage).<sup>59</sup>

29. In this regard, the Chamber notes that the Prosecution foresees, as with other prior witnesses, that the witnesses concerned in the Application may become adverse to the Prosecution, thus, seeks to add these items to demonstrate the causes of any eventual recantation (*inter alia*, alleged witness interference, intimidation and

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[REDACTED]. The Chamber also observes that the Prosecution states that this item is already on the List of Evidence. See Application, ICC-01/09-01/11-1606-Conf, para. 59, footnotes 78 and 101.

<sup>56</sup> The Prosecution requests leave to add the following items related to the witness to its List of Evidence: (a) one screening note (dated 2012, three pages long); (b) 29 investigator reports (dated 2012-2014, total of 62 pages); (c) three letters, including one affidavit (dated 2013, total of three pages); (d) an affidavit with corresponding letters (dated 2013, total of three pages); (e) a report on [REDACTED] (dated 2014, total of three pages); (f) a handwritten signed waiver (dated 2014, one page long); (g) bank records (dated 2013, seven pages long); (h) audio files of interviews with the witness and corresponding transcripts (dated 2014, written material is 281 pages long); (i) audio recordings of conversations with the witness and corresponding transcripts (dated 2014, written material is 62-pages long); (j) three written statements from relatives of the witness (dated 2014, total of 23-pages long); (k) two solemn declarations (dated 2014, total of six pages); (l) external correspondence, namely police reports (dated 2014, total of five pages); (m) CD covers and photographs of physical evidence the Prosecution may rely on. The Chamber notes that the CD covers are apparently of CDs containing transcripts and translations. However, there is one CD cover that does not have any indication as to what the contents might be. There are two other photographs that appear to state that a bag contains two telephone SIM cards (see footnote 142, referring to Annex K, pages 467-472). However, the Chamber cannot verify the contents of this material, as it is not available in E-court. Application, ICC-01/09-01/11-1606-Conf, para. 71.

<sup>57</sup> ICC-01/09-01/11-1485-Conf, para. 30.

<sup>58</sup> ICC-01/09-01/11-1485-Conf, para. 31.

<sup>59</sup> ICC-01/09-01/11-1485-Conf, para. 33.

influence).<sup>60</sup> Accordingly, regarding the items relevant to this Application, the Chamber adopts its prior reasoning that some aspects of the Article 70 allegations potentially have a circumstantial or contextual bearing in this case.

30. The Chamber also notes that in previous occasions it has determined that an application such as the present one is solely to add items to the Prosecution's List of Evidence and that any admissibility discussion, including regarding alleged relevance, will come at a later time.<sup>61</sup> Nevertheless, the Chamber is also mindful that the addition of items to the List of Evidence will necessitate additional efforts from the Defence, who still has to be prepared to discuss the eventual tendering and admission of these items in court. Accordingly, the Chamber will consider at the appropriate time the probative value and relevance of the added items in relation to the actual charges brought against the Accused in this case, weighed against any prejudice that could be caused to the Accused by the addition of these items at this advanced stage of the proceedings.

31. In relation to the timing of the application, the Chamber accepts that it may only recently have become foreseeable to the Prosecution that the material in question would have a potential circumstantial or contextual bearing to this case from the perspective of purported Article 70 allegations as indicated in the earlier rulings.<sup>62</sup> The Chamber is thus satisfied that there are good reasons for applying for the addition of documents to the List of Evidence at this point in the proceedings. Nonetheless, the Chamber also notes that the Prosecution has significantly increased the number of items it now seeks to add to the List of Evidence in

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<sup>60</sup> Application, ICC-01/09-01/11-1606-Conf, paras 18, 21-23, 25-28, 30-35, 42-46, 58, 60-62, 64-65, 68-69, 72-74.

<sup>61</sup> ICC-01/09-01/11-1485-Conf, para. 38. See also: 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.

<sup>62</sup> Application, ICC-01/09-01/11-1606-Conf, paras 18, 22-23, 27-28, 35, 38-40, 44-45. See also: 3 September Decision, ICC-01/09-01/11-1485-Conf, para. 33.

comparison with the number of items it sought to add during the last session in September [it now seeks to add 539 items related (except for one item) to six witnesses, while in September it sought to add 174 items related to five witnesses].<sup>63</sup>

32. In this regard, the need must always be kept uppermost in the mind – as the Chamber has repeatedly stressed orally in the course of the trial – to avoid at every stage of this trial the possibility of eclipsing the actual charges before the Chamber with aspects of inquiries that are better conducted in an Article 70 trial. There is a critical need and value – and a place of its own – for an Article 70 trial, where the Prosecution investigations properly bear out such a trial in terms of the facts and the suspects implicated in the Article 70 violation. But, an Article 7 trial (on charges of crimes against humanity) must remain *firmly focussed* on its own particular needs. The concern here bears the emphasis, given that the indicated need to add these additional items to the List of Evidence was said to give this Chamber a ‘picture’ of the widespread scheme of witness interference – although not to urge an inference of consciousness of guilt against the Accused in this case – in a way that would explain why the witnesses concerned may have resiled from their statements to the Prosecution. In that connection, the Prosecution has now applied to add 539 further items to its List of Evidence at this stage of the trial. Together with the additional items that have been added to the Prosecution’s List of Evidence (at their application) since 3 September 2014, the total number of further items engaged in these applications come to 713 documents. The needs of efficiency in the trial of this case thus raise the question whether the Prosecution needs 713 additional items of evidence to give that ‘picture’. The Chamber merely raises the question. It is a question of focus.

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<sup>63</sup> The Chamber notes the submissions of the Ruto Defence, stating that 174 items were added to the List of Evidence after 1 September 2014, while the Prosecution now seeks to add 539 items to the List of Evidence. See: Ruto Defence Response, ICC-01/09-01/11-1615-Conf, footnote 4.

33. Regarding the potential prejudice that such applications may cause to the Defence, the Chamber has previously determined that the nature and size of the items to be added, and the timing of their original disclosure to the Defence, are relevant considerations.<sup>64</sup> In the circumstances, the Chamber considers that it would be prejudicial to the Defence, even if the items are repetitive,<sup>65</sup> to have 2895 pages of written evidence added to the List of Evidence at this stage of the proceedings, in addition to the audio or other electronic items that the Prosecution seeks to add.<sup>66</sup> Moreover, the Chamber notes that of the items included in this Application, a total of 118 items were only disclosed to the Defence for the first time in October 2014 (this number excludes the audio recordings).<sup>67</sup>
34. Accordingly, the Chamber limits its authorisation to add items to the List of Evidence to a total of 100 items. At this stage of the proceedings, and having examined four hostile witnesses in the last court session, the Prosecution now needs to focus its attention in the remaining witnesses, in order to optimise the use of court time and resources to conclude its case. Thus, the Chamber considers that 100 items should give the Prosecution ample leeway to examine its witnesses, even in the event they would become hostile, from the perspective of giving a ‘picture’ of the widespread scheme of witness interference that the Prosecution alleges.
35. As regards the specific items related to Witness 397, the Chamber notes that a significant number of these items are yet to be disclosed to the Defence.<sup>68</sup> As indicated earlier, the Chamber authorised the Prosecution to withhold material related to Witness 397 from disclosure.<sup>69</sup> However, having considered the

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<sup>64</sup> 3 September Decision, ICC-01/09-01/11-1485-Conf, paras 34-37.

<sup>65</sup> The Chamber is aware that the volume of the material in question is significantly increased by a degree of duplication (*i.e.* audio recordings and their corresponding transcripts and translations).

<sup>66</sup> Application, ICC-01/09-01/11-1606-Conf, Annex N.

<sup>67</sup> Application, ICC-01/09-01/11-1606-Conf, Annex N.

<sup>68</sup> Application, ICC-01/09-01/11-1606-Conf, Annex N, pages 78-87.

<sup>69</sup> Decision on Delayed Disclosure, ICC-01/09-01/11-1311-Conf-Exp.



Prosecution's recent submissions regarding the witness,<sup>70</sup> the Chamber is satisfied that there is no longer sufficient justification for non-disclosure of this material. In light of the above, the Chamber considers that any relevant material that the Prosecution intends to rely on during the examination of Witness 397 must be disclosed to the Defence no later than 7 November 2014.

36. In relation to the single item related to Witness 524, the Chamber notes that although it had already ruled on the items related to this witness, exceptionally, this item may be added to the List of Evidence at this stage since its existence is subsequent to the Chamber's ruling on this matter.

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<sup>70</sup> Request for Authorisation for Disclosure, ICC-01/09-01/11-1620-Conf-Exp, paras 12-19; Annex A to the request, ICC-01/09-01/11-1620-Conf-Exp-AnxA.

**FOR THE FOREGOING REASONS THE CHAMBER HEREBY**

**PARTLY GRANTS** the relief sought in the Application;

**GRANTS** the relief sought in the Request for Authorisation for Disclosure and directs the Prosecution to effect disclosure no later than 7 November 2014;

**DIRECTS** the Prosecution to disclose all other undisclosed items, which are not contained in the Request for Authorisation for Disclosure but on the List of Evidence, no later than 7 November 2014;

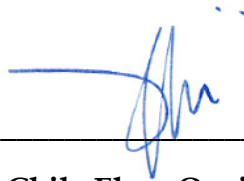
**DIRECTS** the Prosecution to update its List of Evidence for ease of reference and file it into the record of the case forthwith, indicating clearly the 100 items that have been added pursuant to this Decision, no later than 7 November 2014; and

**DIRECTS** the parties to file public redacted versions of their prior confidential submissions related to the addition of items to the List of Evidence no later than 12 December 2014.<sup>71</sup>

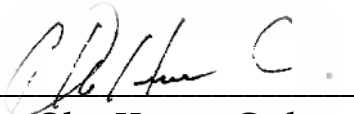
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<sup>71</sup> Sang Defence Response to Prosecution's Eleventh Application pursuant to Regulation 35(2) of the Regulations of the Court, 24 October 2014, ICC-01/09-01/11-1617-Conf; Ruto Defence response to the "Prosecution's eleventh application pursuant to Regulation 35(2) of the Regulations of the Court", 23 October 2014, ICC-01/09-01/11-1615-Conf; Sang Defence Response to Prosecution's Tenth Application pursuant to Regulation 35(2) of the Regulations of the Court, 25 September 2014, ICC-01/09-01/11-1548-Conf; Defence response to the "Prosecution's tenth application pursuant to Regulation 35(2) of the Regulations of the Court", 24 September 2014, ICC-01/09-01/11-1542-Conf; Prosecution's tenth application pursuant to Regulation 35(2) of the Regulations of the Court, 22 September 2014, ICC-01/09-01/11-1532-Conf; Sang Defence Response to Prosecution's Ninth Application pursuant to Regulation 35(2) of the Regulations of the Court, 17 September 2014, ICC-01/09-01/11-1518-Conf; Defence response to the "Prosecution's ninth application pursuant to Regulation 35(2) of the Regulations of the Court", 17 September 2014, ICC-01/09-01/11-1517-Conf; Defence Response to "Prosecution's Supplementary Request to its Eighth Application pursuant to Regulation 35(2) of the Regulations of the Court", 15 September 2014, ICC-01/09-01/11-1513-Conf; Sang Defence Response to Prosecution's Supplementary Request to its Eighth Application pursuant to Regulation 35(2) of the Regulations of the Court, 15 September 2014, ICC-01/09-01/11-1512-Conf; Prosecution's ninth application pursuant to Regulation 35(2) of the Regulations of the Court, 12 September 2014, ICC-01/09-01/11-1511-Conf; Prosecution's supplementary request to its eighth Application pursuant to Regulation 35(2) of the Regulations of the Court, 11 September 2014, ICC-01/09-01/11-1510-Conf.

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



**Judge Chile Eboe-Osuji, Presiding**



**Judge Olga Herrera Carbuccion**



**Judge Robert Fremr**

Dated 31 October 2014

At The Hague, The Netherlands