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No.: ICC-01/09-01/11  
Date: 25 February 2013

**TRIAL CHAMBER V**

**Before:** Judge Kuniko Ozaki, Presiding Judge  
Judge Christine Van den Wyngaert  
Judge Chile Eboe-Osuji

**SITUATION IN THE REPUBLIC OF KENYA**

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

**Public  
with Public Annex A**

**Prosecution's response to the "Joint Defence Submissions on Impact of Delayed  
Prosecution Disclosure and Shift in Case on the Scheduled Start Date for Trial"  
(ICC-01/09-01/11-613-Corr)**

**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. In accordance with the Trial Chamber's oral order issued during the 14 February 2013 status conference,<sup>1</sup> and in addition to its oral submissions at the time,<sup>2</sup> the Prosecution hereby submits its response to the "Joint Defence Submissions on Impact of Delayed Prosecution Disclosure and Shift in Case on the Scheduled Start Date for Trial".<sup>3</sup>
2. The Prosecution has carried out its disclosure in accordance with the deadlines set by the Chamber, and has taken all reasonable steps to ensure that the Defence receive timely disclosure, notwithstanding the unprecedented level of witness tampering in this case and the associated witness security challenges. Contrary to the Defence's assertions, the scope of the Prosecution case remains unchanged.
3. The Prosecution is ready to proceed as scheduled. At the same time, the Prosecution recognizes that a variety of logistical constraints make a trial on 10 April 2013 unlikely. Therefore, the Prosecution does not object to a reasonable adjournment, but recommends that the Trial Chamber set a new date now to provide more certainty for the parties and victims.

## Submissions

4. Many of the matters raised in the Request can be resolved through *inter partes* communication, and therefore the Prosecution will not seek to address each and every allegation or factual inaccuracy in the Request.<sup>4</sup> Instead, the Prosecution will limit its submissions to the two substantive arguments advanced in the Request.

### *Prosecution's Disclosure of evidence*

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<sup>1</sup> ICC-01/09-01/11-T-19-ENG ET WT 14-02-2013, p.24, 1.4-5.

<sup>2</sup> ICC-01/09-01/11-T-19-ENG ET WT 14-02-2013, p.24-27.

<sup>3</sup> ICC-01/09-01/11-613-Corr.

<sup>4</sup> Most of the disclosure issues raised by the Defence were communicated to the Prosecution via email and are already being resolved *inter partes*.

5. The Prosecution has effected disclosure of evidence in a continuous flow during all phases of the proceedings through 34 disclosures, as shown in Annex A to this filing. Further, the Prosecution has complied with the “Decision on the schedule leading up to trial”<sup>5</sup> and the “Decision on the protocol establishing a redaction regime”.<sup>6</sup> On 9 January 2013, all remaining incriminatory material was disclosed as ordered by the Chamber, with the exception of the identity of certain witnesses, along with the redactions necessary to protect their identities.
6. The delayed disclosure of this limited number of witness identities was allowed by the Chamber for the purpose of protecting their security and well-being.<sup>7</sup> The same applies to requests for redactions to protect family members of witnesses and other persons at risk on account of the activities of the Court.
7. The Prosecution submits that it has sought at all times to provide the Defence with appropriate remedies, approved or ordered by the Chamber,<sup>8</sup> to mitigate potential prejudice arising from authorised delay of full disclosure. As per the Chamber’s Decisions, each request for delayed disclosure of identities of witnesses was accompanied by the disclosure of the witnesses’ statements and associated material in the proposed redacted form, enabling the Defence to know the content of the evidence and prepare its case accordingly.<sup>9</sup> Moreover, the Prosecution’s case, including the evidence provided by the protected witnesses, is included in both the Pre-Trial Brief and the Document Containing the Charges, which have provided the Defence with notice of the Prosecution’s case.<sup>10</sup> Further, in some instances, summaries of the redacted information were provided to the Defence, in addition to (and not instead of) the redacted statement.<sup>11</sup> Lastly, the Prosecution proposes to call the concerned witnesses towards the end of its case

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<sup>5</sup> ICC-01/09-01/11-440.

<sup>6</sup> ICC-01/09-01/11-458.

<sup>7</sup> ICC-01/09-01/11-458, ICC-01/09-01/11-531, ICC-01/09-01/11-564, ICC-01/09-01/11-578, ICC-01/09-01/11-582, ICC-01/09-01/11-589.

<sup>8</sup> ICC-01/09-01/11-458, ICC-01/09-01/11-482, ICC-01/09-01/11-564.

<sup>9</sup> ICC-01/09-01/11-490, ICC-01/09-01/11-494-RED, ICC-01/09-01/11-517-RED.

<sup>10</sup> See ICC-02/11-01/11-403, para.18.

<sup>11</sup> ICC-01/09-01/11-576, pursuant to ICC-01/09-01/11-564.

presentation during trial to provide the Defence with ample time to investigate those witnesses.<sup>12</sup>

8. The Prosecution complied with the 9 January 2013 deadline set by the Chamber to disclose the identity of witnesses not concerned by delayed disclosure applications. The Defence's assertion<sup>13</sup> that the Prosecution chose a "policy" of not disclosing witness material before that date is without merit. The majority of the witnesses disclosed on that date were interviewed within weeks before the deadline. In all cases, prior to disclosing a witness' identity, it was incumbent on the Prosecution to conduct risk assessments to ensure that disclosure of the identity would not jeopardize the safety and security of the witness. As of the 9 January deadline, all witnesses that were not the subject of an application for delayed disclosure were in fact disclosed.
9. To date, only five witnesses' identities remain undisclosed for reasons outside the Prosecution's control. One witness is the subject of a pending decision from the Chamber and the other four await implementation of security measures from the VWU. For all, redacted versions of their statements were duly disclosed to the Defence.<sup>14</sup>

*Alleged "shift" in the Prosecution's case*

10. The Prosecution strongly refutes the Defence's allegation that the scope of the Prosecution's case has shifted or expanded. In fact, the scope of the case remains the same as confirmed by the Pre-Trial Chamber and contained in the updated Document Containing the Charges.<sup>15</sup> Neither the crimes charged nor their temporal or territorial scope has changed. The Defence does not contest that events in 2005 were included during the confirmation stage. Instead, it argues that little was said, and now the Prosecution seeks to lead additional evidence

<sup>12</sup> See ICC-01/04-01/07-1553 p.18; ICC-01/05-01/08-626, para.28.

<sup>13</sup> ICC-01/09-01/11-613-Corr, para.5.

<sup>14</sup> P-24 (1 July 2011) ; P-495 and P-524 (17 December 2012) ; P-536 (2 January 2013) and P-534 (10 October 2012).

<sup>15</sup> ICC-01/09-01/11-533-AnxA-Corr.

from several witnesses who were not part of the Prosecution case during confirmation.<sup>16</sup>

11. Similarly, the Defence argues that the Prosecution wrongly contemplates introducing evidence of more planning meetings attended by the Accused than were shown during the confirmation.<sup>17</sup> But the key meetings remain the same as presented during the confirmation hearing. Further, the fact that additional evidence establishes the participation of the Accused in more meetings, to confirm and corroborate that they participated in planning the PEV, does not change the scope of the case. It simply adds evidence to support the allegation that the Accused participated in planning meetings – an allegation that was known to the Defence since the start of the case and was litigated and confirmed during the confirmation hearing.
  
12. It is self-evident that the Prosecution would offer more evidence at trial than at the confirmation stage, when it needed only surpass the “substantial grounds” threshold and was entitled to rely upon “summary evidence”.<sup>18</sup> Applying the rationale of the Defence would require the Prosecution to present all of its evidence at the confirmation stage, which is well beyond the requirements set forth in the Statute and the Rules. Further, it is uncontested that the Prosecution may continue its investigation beyond the confirmation hearing, which will ordinarily result in additional evidence.<sup>19</sup>
  
13. The Defence complains that the Prosecution is seeking to introduce evidence that is outside the timeframe of the alleged crimes. That claim is without merit. The Prosecution is not limited to evidence that pertains only to the time when the crimes actually occurred. Rather, under the Statute and the Rules, the Prosecution is permitted to offer any evidence that is *relevant* to the charges alleged, including evidence of preparation, intent or motive before the crimes

<sup>16</sup> ICC-01/09-01/11-613-Corr, para. 20.

<sup>17</sup> ICC-01/09-01/11-613-Corr, para. 22.

<sup>18</sup> Article 61(5) of the Statute.

<sup>19</sup> ICC-01/04-01/06-568 OA3, paras. 49-55.

occur. In this case, the evidence that ‘pre-dates the temporal scope of the charges’<sup>20</sup> is relevant to elements of the Prosecution case, including the contextual background, the planning and preparation for the commission of the crimes, the Accuseds’ influence and authority, and the violence associated with past elections and the Accuseds’ knowledge that crimes will occur in the ordinary course of events. Of course the Prosecution will, as always, try to be focused and streamlined in its presentation of the evidence and may not require each witness to testify about the full extent of his or her knowledge.

14. Finally, in these circumstances, and because it appears that the Court’s operational restraints may make an April start date untenable in any event,<sup>21</sup> the Prosecution does not object to a reasonable adjournment. The Defence has requested the Chamber to vacate the scheduled date for the commencement of trial and provide the Defence with three months as a minimum following disclosure.<sup>22</sup> The Prosecution suggests that if the 10 April 2013 trial date is to be vacated, it would be appropriate for the Chamber to fix a new date for the start of the trial. This would assist all parties and participants in their preparations and planning. It is also important for the Kenyan public, and particularly the victims of the 2007-2008 post-election violence, to be assured that the trial will, in fact, commence in the coming months. Assuming that the security issues pending before the VWU are resolved within the next month, the Prosecution suggests that a start date immediately after the Court’s summer recess may be appropriate, which will provide the Defence with several months for preparation after disclosure of the identities of protected witnesses pending the implementation of protective measures by the VWU.

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<sup>20</sup> ICC-01/09-01/11-591, para. 13.

<sup>21</sup> ICC-01/09-01/11-T-19-ENG ET, pages 29-30.

<sup>22</sup> ICC-01/09-01/11-613-Corr, para 24.



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Fatou Bensouda, Prosecutor

Dated this 25<sup>th</sup> day of February 2013

At The Hague, the Netherlands