

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 3 January 2013

TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding
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***

Confidential

**Order regarding second and third prosecution applications for delayed
disclosure of witness identities**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor
Ms Fatou Bensouda

Counsel for William Samoei Ruto
Mr Kioko Kilukumi Musau
Mr David Hooper

Legal Representatives of Victims

Counsel for Joshua Arap Sang
Mr Joseph Kipchumba Kigen-Katwa
Mr Joel Kimutai Bosek
Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Deputy Registrar

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V ("Chamber") of the International Criminal Court ("Court"), in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, having considered Articles 64, 67, 68(1) and 68(5) of the Rome Statute, Rules 76, 77, 81 and 84 of the Rules of Procedure and Evidence of the Court and Regulations 24, 33, and 34 of the Regulations of the Court, renders the following Order regarding the second and third prosecution applications for delayed disclosure of witness identities ("Order").

1. On 17 December 2012, the Office of the Prosecutor ("Prosecution") filed a second application requesting the delayed disclosure of a further seven witnesses ("Second Application").¹ The Second Application and its seven annexes were filed on a confidential *ex parte*, Prosecution and Victims and Witnesses Unit ("VWU") only basis. On 20 December 2012, a confidential redacted version of the Second Application, with four of seven annexes was filed.²
2. On 27 December 2012, the Prosecution filed a third application requesting delayed disclosure of a further five witnesses ("Third Application").³ The Third Application and its five annexes were filed on a confidential *ex parte*, Prosecution and VWU only basis. Confidential redacted versions of the Third Application and four of its five annexes were filed on 28 December 2012.⁴
3. The defence for Mr Ruto and for Mr Sang (together "Defence") filed a joint response to both Applications on 3 January 2013, requesting the Chamber to

¹ Second application for delayed disclosure of witness identities and application for variation of the 5 November 2012 deadline with respect to Witnesses 15, 16 and 32, ICC-01/09-01/11-515-Conf-Exp.

² Confidential redaction version with Confidential Annexes 4-7 of Second application for delayed disclosure of witness identities and application for variation of the 5 November 2012 deadline with respect to Witnesses 15, 16 and 32, 20 December 2012, ICC-01/09-01/11-515-Conf-Red. A public redacted version was filed the same day, ICC-01/09-01/11-515-Red2.

³ Third application for delayed disclosure of witness identities, ICC-01/09-01/11-521-Conf-Exp. A corrigendum to Annex 5 was filed on 3 January 2012, ICC-01/09-01/11-521-Conf-Exp-Anx5-Corr.

⁴ Confidential Redacted Version of Third application for delayed disclosure of witness identities, ICC-01/09-01/11-521-Conf-Red and Annexes 1, 2, 4, and 5 thereto.

dismiss them as untimely⁵ or alternatively, to deny the relief sought in the Applications.⁶

4. The Chamber notes with concern that due to the deficiencies in the Second and Third Applications (as discussed in greater detail below), in combination with the late filing of these Applications, it will not be possible for the Chamber to issue a ruling on the merits of the Second and Third Applications prior to the disclosure deadline of 9 January 2013.
5. The Chamber will consider the consequences of the late filing of the Second and Third Applications, including any prejudice caused to the Defence thereby in its future substantive decision on the Second and Third Applications. Pending such decision, however, the Chamber deems it necessary to temporarily authorise the Prosecution to withhold the identities of the witnesses in question in order to safeguard the security interests of those witnesses who may be put at risk should disclosure occur on 9 January 2013. This temporary authorisation should not be seen as prejudging in any way the Chamber's future decision on the Second and Third Applications.
6. The Chamber requires additional information from the Prosecution in order to adequately assess the merits of the Second and Third Applications. Specifically:
 - a) The Chamber notes that the Prosecution's submissions as to security incidents experienced by the witnesses and / or subjective security concerns expressed by the witnesses are again⁷ not supported by references to any substantiating material. The Chamber requires the Prosecution to provide references to the relevant portions of the witnesses' statements or

⁵ Joint Defence Response to Prosecution's Second and Third Applications for Delayed Disclosure of Witness Identities and Variation of the 5 November 2012 Deadline, 3 January 2013, ICC-01/09-01/11-526-Conf, para. 30.

⁶ ICC-01/09-01/11-526-Conf, paras 31 – 32.

⁷ The Chamber previously had to request such supporting material in respect of the Prosecution's first application for delayed disclosure. See Order requesting additional information on witness security, 28 November 2012, ICC-01/09-01/11-485-Conf, para. 2.

transcripts so that the Chamber may independently assess the witnesses' security situation. Where the witnesses' statements or transcripts do not contain the supporting information, other materials such as internal Prosecution security assessments may be provided.

- b) In the Second Application, the Prosecution states that the proposed delays to the disclosure of the identities of the seven witnesses "will ensure sufficient time to put in place appropriate protective measures [..]"⁸ However, the Second Application (including its annexes) does not provide the Chamber with details of any other protective measures it has, or will, seek to implement for the witnesses. The Chamber requires the Prosecution to provide this information and to clarify whether, in its view, the witnesses' identities may be disclosed as soon as any such additional protective measures can be put in place.
- c) In the Third Application, the Prosecution provides details of other protective measures sought or envisaged for the witnesses in question. However, it is unclear⁹ whether the Prosecution proposes to disclose the witnesses' identities as soon as these other protective measures are in place. The Chamber requests the Prosecution to inform it whether this is the case or whether it seeks, in any event, to delay disclosure until the timeframes identified for each witness in the Third Application, namely 30 days before trial for two witnesses and 45 days before testimony for three witnesses

7. This information referred to above should be provided in an *ex parte*, Prosecution and Registry only, filing by no later than **11 January 2013**. A confidential redacted version should be filed on the same day.

⁸ ICC-01/09-01/11-515-Conf-Red, para 35.

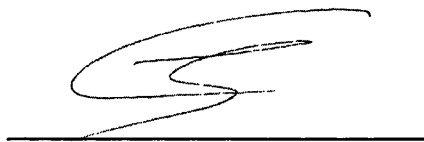
⁹ The Prosecution again states that the proposed delays to disclosure "will ensure sufficient time to put in place appropriate protective measures [..].ICC-01/09-01/11-521-Conf-Red, para 47.

8. The Chamber similarly requires information from the Victims and Witnesses Unit ("VWU") on the security situation and current protection status of any of the witnesses referred to in the Second and Third Applications who have been formally referred to the VWU or been the subject of consultations between the VWU and the Prosecution. The Chamber requests the VWU to provide this information by no later than **11 January 2013**.

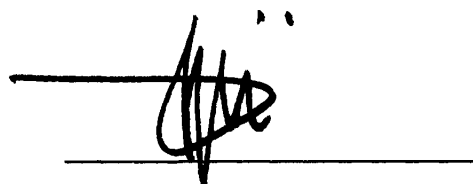
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding Judge



Judge Christine Van den Wyngaert



Judge Chile Eboe-Osuji

Dated 3 January 2013

At The Hague, The Netherlands