

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/11
Date: 3 September 2013

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 redacted

**Decision on the Prosecution's Requests to Add New Witnesses to its List of
Witnesses**

Order 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 Anton Steynberg

Counsel for William Samoei Ruto

Mr Karim Khan

Mr David Hooper

Mr Essa Faal

Ms Shyamala Alagendra

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Legal Representatives of Victims

Mr Wilfred Nderitu

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

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States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

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Victims and Witnesses Unit

Mr Patrick Craig

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, 67 and 68 of the Rome Statute (the ‘Statute’) and Rules 76 and 84 of the Rules of Procedure and Evidence (the ‘Rules’), issues the following Decision on the Prosecution’s Requests to Add New Witnesses to its List of Witnesses.

I. Procedural Background and Submissions

1. On 2 August 2013, the Office of the Prosecutor (the ‘Prosecution’) filed, *ex parte*, Prosecution and the Victims and Witnesses Unit (‘VWU’) only, the ‘Prosecution’s fourth request pursuant to Regulation 35(2) of the Regulations of the Court’,¹ in which it sought authorisation to include two new witnesses on its list of witnesses and adduce their evidence at trial.² On 7 August 2013, the Chamber dismissed the aforementioned *ex parte* request without prejudice on the basis that the addition of witnesses might impact on the fair trial rights of the accused and the defence teams for the accused should thus be provided an opportunity to respond to the request, contrary to the manner of relief sought by the Prosecution.³

Filings and submissions related to the request to add P-604 to the Prosecution’s list of witness

2. On 13 August 2013, the Prosecution – in its own words – ‘re-filed’⁴ the ‘Prosecution’s fourth request pursuant to Regulation 35(2) of the Regulations of the Court’ (the ‘Fourth Request’) *ex parte*, Prosecution and VWU only, as well as a confidential redacted version of it.⁵ The request was accompanied by an *ex parte* annex, Prosecution

¹ ICC-01/09-01/11-837-Conf-Exp.

² ICC-01/09-01/11-837-Conf-Exp, paras 1 and 43(a).

³ Decision on the Prosecution’s Request to Add Two Witnesses to its List of Witnesses, ICC-01/09-01/11-843-Conf-Exp, para. 3.

⁴ ICC-01/09-01/11-852-Conf-Red, para. 10.

⁵ ICC-01/09-01/11-852-Conf-Exp and ICC-01/09-01/11-852-Conf-Red, respectively.

and VWU only, of which a confidential redacted version was filed on 22 August 2013.⁶ In the Fourth Request, the Prosecution only sought authorisation to add one new person to its witness list, but 'reserve[d] itself the right to make an additional application for the second witness once this is possible'.⁷ The Prosecution submits that the evidence of the proposed new witness, [REDACTED]. It further submits that the request to add P-604 to the witness list is filed after the 9 January 2013 disclosure deadline [REDACTED] and that this results from 'circumstances outside the Prosecution's control'.⁸ It argues that [REDACTED] is in the interests of justice as denying the request would send a wrong message to those who try to derail the Court's cases, and would deprive the Chamber of critical evidence for the establishment of the truth.⁹ In addition, the Prosecution submits that the addition of P-604 to the witness list will not cause 'irreparable prejudice' to the defence for Mr Ruto and Mr Sang (the 'Defence') as [REDACTED] the information that P-604 would provide is not 'novel'.¹⁰ In order to allow the Defence sufficient time to conduct investigations with respect to P-604, the Prosecution suggests that it will not include P-604 as one of the first 20 witnesses at trial.¹¹

3. In the requested relief, besides the request for authorisation to produce the evidence of P-604 by way of testimony at trial and to add his statements and annexes to the Prosecution's list of evidence, the Prosecution also requests the Chamber to issue its decision *ex parte*, Prosecution and VWU only, until security measures have been

⁶ Fourth Request, ICC-01/09-01/11-852-Conf-Red, para. 15.

⁷ Fourth Request, ICC-01/09-01/11-852-Conf-Red, para. 15.

⁸ Fourth Request, ICC-01/09-01/11-852-Conf-Red, para. 12.

⁹ Fourth Request, ICC-01/09-01/11-852-Conf-Red, paras 21-23.

¹⁰ Fourth Request, ICC-01/09-01/11-852-Conf-Red, para. 24.

¹¹ Fourth Request, ICC-01/09-01/11-852-Conf-Red, paras 25-26.

implemented.¹² The latter request was redacted in the confidential redacted version of the Fourth Request.¹³

4. On 16 August 2013, the defence for Mr Ruto (the 'Ruto Defence') opposed the Fourth Request. It submitted that the Prosecution failed to provide information on the basis of which it can be properly assessed whether [REDACTED]. As such, the Chamber's 'ability to arrive at the truth' is not affected [REDACTED]. The Ruto Defence submits that the late addition of a new witness would result in 'serious prejudice' to the Defence as the new witness would need to be 'thoroughly and rigorously' investigated.¹⁴ It contends that the Defence is entitled to know the case against the accused and to have carried out the necessary investigations prior to the commencement of trial.¹⁵
5. In addition, the Ruto Defence submits that the Prosecution should have disclosed the information related to P-604 as it is material to the preparation of the Defence.¹⁶ It submits that incriminatory information is also subject to disclosure under Rule 77 of the Rules, and further that it is highly unlikely that the information provided by P-604 did not include any PEXO material.¹⁷ It therefore requests the Chamber to order the immediate disclosure pursuant to Rule 77 of the Rules of the statements and associated material of P-604, as well as the other person identified by the Prosecution [REDACTED].¹⁸

¹² Fourth Request, ICC-01/09-01/11-852-Conf-Exp, para. 27.

¹³ Fourth Request, ICC-01/09-01/11-852-Conf-Red, para. 27.

¹⁴ ICC-01/09-01/860-Conf, paras 16-19.

¹⁵ ICC-01/09-01/860-Conf, paras 17 and 21.

¹⁶ ICC-01/09-01/860-Conf, para. 22.

¹⁷ ICC-01/09-01/860-Conf, paras 23-24.

¹⁸ ICC-01/09-01/860-Conf, para. 28.

6. On 23 August 2013, the Prosecution filed a request for leave to reply to the Ruto Defence's response to the Fourth Request ('Leave to Reply Request'),¹⁹ arguing that the request by the Ruto Defence for the Chamber to order, pursuant to Rule 77 of the Rules, immediate disclosure of materials related to P-604 [REDACTED] constitutes a new issue on which the Chamber should receive submissions by the Prosecution before deciding on the request.²⁰
7. On that same day, the defence for Mr Sang (the 'Sang Defence') filed its response to the Fourth Request, opposing it.²¹ The Sang Defence submits that the Prosecution could have included P-604 in its witness list by 9 January 2013, [REDACTED].²² Furthermore, it submits that adding a new person to the witness list at this late stage would be contrary to the fair trial rights of the accused. The Sang Defence refers to the a decision by the Trial Chamber in *Bemba*, holding that in assessing potential prejudice to the defence, it can be considered 'whether the information was within the accused's own knowledge and whether the defendant would have adequate time and facilities to respond prior to the commencement of trial'.²³ The Sang Defence submits that [REDACTED] there would not be adequate time to investigate prior to the commencement of trial.²⁴
8. [REDACTED]

Filings and submissions related to the request to add P-613 to the Prosecution's list of witness

¹⁹ Prosecution's Request for Leave to Reply to "Defence response to the Prosecution's fourth request pursuant to Regulation 35(2) of the Regulations of the Court" (ICC-01/09-01/11-860-Conf), ICC-01/09-01/11-870-Conf.

²⁰ Leave to Reply Request, ICC-01/09-01/11-870-Conf, para. 8.

²¹ Sang Defence Response to Prosecution's fourth request pursuant to Regulation 35(2) of the Regulations of the Court, ICC-01/09-01/11-872-Conf.

²² ICC-01/09-01/11-872-Conf, para. 7.

²³ ICC-01/09-01/11-872-Conf, para. 8.

²⁴ ICC-01/09-01/11-872-Conf, para. 8.

9. On 22 August 2013, the 'Prosecution's fifth request pursuant to Regulation 35(2) of the Regulations of the Court' (the 'Fifth Request') was filed.²⁵ This request pertains to the addition of P-613 to the Prosecution's witness list. [REDACTED] The Fifth Request relies on the same reasoning as the Fourth Request in respect of why the Chamber should grant the request.
10. The Ruto Defence opposes the Fifth Request in its response filed on 27 August 2013.²⁶ The Ruto Defence observes that the statement by P-613 disclosed to it, is heavily redacted, leaving the core of P-613's evidence 'hidden from the Defence'.²⁷ It therefore argues that the Prosecution has failed to substantiate [REDACTED].²⁸ As to possible prejudice to the Defence, the Ruto Defence submits that the Fifth Request has to be considered alongside the pending Fourth Request.²⁹ In addition to the submissions made in response to the Fourth Request, it submits that if the Chamber were to grant the Fifth Request, the Defence should be given an opportunity to review the proffered evidence within the context of the current evidence. It argues that since the 'key, incriminatory aspects' are redacted in the redacted versions of the statements of P-604 and P-613, the investigative work could only really start once full disclosure is effectuated for both witnesses.³⁰ [REDACTED]
11. The Ruto Defence requests that the Fifth Request be rejected. As subsidiary relief, it requests that if the Chamber grants the Fourth Request and/or Fifth Request, it would adjourn the trial for three months from the date of the disclosure of the unredacted statements of P-604 and P-613, in order to be able to adequately prepare for trial.³¹

²⁵ ICC-01/09-01/11-866-Conf-Exp and ICC-01/09-01/11-866-Conf-Red.

²⁶ Defense response to the Prosecution's fifth request pursuant to Regulation 35(2) of the Regulations of the Court, ICC-01/09-01/11-884-Conf.

²⁷ ICC-01/09-01/11-884-Conf, para. 6.

²⁸ ICC-01/09-01/11-884-Conf, para. 7.

²⁹ ICC-01/09-01/11-884-Conf, para. 11.

³⁰ ICC-01/09-01/11-884-Conf, paras 6 and 12.

³¹ ICC-01/09-01/11-884-Conf, paras 16-17.

12. On 28 August 2013, the Sang Defence responded to the Fifth Request.³² It opposes the Fifth Request and in addition to the submissions made in response to the Fourth Request, it submits that the circumstances at the current time, very close to the commencement of trial, 'are not ripe for the addition of new witnesses [...] and fresh incriminatory material'.³³ It contends that if the Fifth Request is granted, it 'will have to deflect its attention to analysing and investigating [REDACTED] whilst it is currently preparing its opening statement and cross-examination of the first witnesses'.³⁴ The Sang Defence further submits that the potential prejudice to the Defence militates against granting the Prosecution's request. Prejudice exists according to the Sang Defence as, based on the information deduced from the 'heavily redacted version' of P-613's statements, [REDACTED].³⁵ Additionally, it submits that the Prosecution has not tried to lessen the prejudice caused to the Defence by disclosing P-613's statement as soon as possible after the interview [REDACTED], which – according to the Sang Defence – the Prosecution was under a separate obligation to do pursuant to Rule 77 of the Rules.³⁶

II. Analysis by the Chamber

13. As [REDACTED] the arguments advanced to justify the addition of each to the Prosecution's list of witnesses are mostly the same for both these persons, the Chamber will analyse the requests jointly.

³² Sang Defence Response to the Prosecution's fifth request pursuant to Regulation 35(2) of the Regulations of the Court, ICC-01/09-01/11-887-Conf.

³³ ICC-01/09-01/11-887-Conf, para. 8.

³⁴ ICC-01/09-01/11-887-Conf, para. 8.

³⁵ ICC-01/09-01/11-887-Conf, para. 9.

³⁶ ICC-01/09-01/11-887-Conf, para. 10.

14. The Chamber recalls its without prejudice finding that the Defence should not be [REDACTED].³⁷
15. The Chamber considers that [REDACTED] as a result of circumstances outside the control of the Prosecution, so long as such additions do not cause undue prejudice to the Defence.
16. The Fourth and Fifth Requests result from [REDACTED],³⁸ the Chamber is satisfied that the circumstances [REDACTED], were outside the Prosecution's control.
17. [REDACTED] The Defence has submitted that the addition of P-604 and P-613 would result in significant prejudice to them. In determining whether to authorise the addition of new witnesses at this stage, the Chamber needs to consider, in particular, the impact on the right of the accused to have adequate time and facilities for the preparation of the defence, as set out in Article 67(1)(b) of the Statute. As regards this right, Article 64(3)(c) of the Statute stipulates that the Trial Chamber shall provide for disclosure 'sufficiently in advance of the commencement of the trial to enable adequate preparation for trial'. Rule 76 of the Rules requires the Prosecution to provide the Defence with the names of witnesses whom the Prosecution intends to call to testify and copies of any prior statements made by those witnesses 'sufficiently in advance to enable the adequate preparation of the defence'.
18. Relying on a previous decision by the Chamber on the start date of trial, the Ruto Defence submits that it should be given three months additional preparation time from the date of full disclosure of materials related to P-604 and P-613.³⁹ However, the Chamber recalls that a number of factors warranted the earlier decision to grant the Defence approximately three months extra time to prepare, and not merely the

³⁷ ICC-01/09-01/11-762, para. 36.

³⁸ [REDACTED].

³⁹ ICC-01/09-01/11-884-Conf, paras 16-17, referring to the ICC-01/09-01/11-762, para. 92.

addition of two new witnesses to the Prosecution's witness list.⁴⁰ From the time that has elapsed between the confirmation of charges until the commencement of trial, and the time for preparation requested by the Defence on earlier occasions, it is clear that three months cannot be considered the standard time that should be automatically granted to enable investigations with respect to (two) additional witnesses. The Chamber therefore considers the Ruto Defence's reliance on the Chamber's previous ruling, in which it granted the Defence a substantial amount of extra time for its general preparations for trial, misplaced.

19. Furthermore, the expression 'sufficiently in advance' appearing in both Article 64(3)(c) of the Statute and Rule 76 of the Rules is an expression of no fixed meaning. Its aim is to avoid prejudice to the Defence, which is always an issue that is relative in light of the particular circumstances in which the matter is to be considered. In the circumstances of the present matter, the Chamber considers that [REDACTED] would not require a considerable amount of additional investigations on the part of the Defence regarding the subject matter of their anticipated testimonies. The Chamber additionally notes that a degree of further investigation would likely have been required by the Defence in any case [REDACTED]. However, the Chamber is mindful that besides the investigations related to the substance of the anticipated substantive evidence, the Defence will wish to investigate the persons themselves in order to evaluate their credibility. The Chamber considers that such investigations do not necessarily need to take place prior to the commencement of trial. [REDACTED] Furthermore, if the Prosecution calls P-604 and P-613 towards the end of the prosecution case, the proceedings will leave sufficient time to carry out such investigations, thus sufficiently counterbalancing the resulting prejudice to the rights of the accused.

⁴⁰ ICC-01/09-01/11-762, para. 90-94.

20. In light of the above, the Chamber considers that the addition of persons to the Prosecution's witness list [REDACTED] is justified and that their addition at this late stage does not cause undue prejudice to the Defence. The Chamber will therefore grant the request to add P-604 and P-613 to the Prosecution's list of witnesses for trial, and will direct the Prosecution to call these persons among its last witnesses.

Disclosure of the identities of P-604 and P-613

21. The Chamber now turns to the request for delayed disclosure that the Prosecution implicitly made when requesting to add persons to the witness list whose identity could not immediately be disclosed to the Defence.

22. After having been prompted by the Chamber to do so,⁴¹ the Prosecution submitted that it would be in a position to disclose the identity of P-604 to the Defence on 11 September 2013. It arrived at this date by counting the approximate number of days [REDACTED].

23. With respect to P-613, the Prosecution submits in the Fifth Request that it expects to be in a position to disclose this person's identity to the Defence by 11 September 2013;⁴² redacting the reasons for disclosure by this date from the Defence. However, from the reasons provided, it is unclear, however, how the Prosecution arrived at the aforementioned date. The Prosecution has not provided sufficient information in its Fifth Request as to why disclosure by this specific date would be possible, but not at another, earlier date.

⁴¹ See para. 8 above.

⁴² Fifth Request, ICC-01/09-01/11-866-Conf-Red, para. 5.

24. Given the possibility that the Fourth and Fifth Request may be granted, the Prosecution thus intends to disclose the identity of both new witnesses to the Defence on 11 September 2013: one day after the commencement of the trial. The Chamber recalls that it has previously rejected the Defence's argument, made in relation to an application by the Prosecution for delayed disclosure, that delaying the disclosure of witness identities beyond the commencement of trial is in all circumstances prohibited by the statutory framework of the Court and by the jurisprudence of the Appeals Chamber.⁴³ However, the Chamber notes that the Statute and the Rules emphasise disclosure prior to the commencement of trial and that the Appeals Chamber held that disclosure should 'in principle take place prior to the commencement of trial',⁴⁴ as well as that the Chamber has considered disclosure after the commencement of trial to be an 'exceptional step'.⁴⁵
25. The Chamber has been provided with only a limited basis to determine whether the alleged risk to the safety of P-604 and P-613 is objective. However, the Chamber is mindful of the obligations placed on the Court with respect to the safety and security of witnesses and notes in relation to P-604, in particular, that an assessment by the VWU is pending. Nonetheless, on the basis of the information before it, the Chamber is not convinced that exceptional reasons exist that would militate in favour of authorising disclosure beyond the commencement of trial on 10 September 2013.

⁴³ [REDACTED].

⁴⁴ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled "Decision on the Modalities of Victim Participation at Trial", 16 July 2010, ICC-01/04-01/07-2288 ('*Katanga Appeal Judgment*'), paras 43 and 45. See also Rule 81(4) of the Rules, which provides for the possibility of non-disclosure of the identities of witnesses as a measure to protect their safety. This Rule refers to such non-disclosure 'prior to the commencement of the trial'.

⁴⁵ Confidential redacted version of 'Decision on first prosecution application for delayed disclosure of witness identities', 4 January 2013, ICC-01/09-01/11-531-Conf-Red, para. 29.

26. For the foregoing reasons, the Chamber considers that disclosure of the identities of P-604 and P-613 should take place as soon as possible, and in any case prior to the commencement of trial, i.e. no later than on 9 September 2013.

Ex parte relief

27. As to the Prosecution's request for partial *ex parte* relief in the Fourth Request, the Chamber rejects the request to file the current decision *ex parte*, Prosecution and VWU only. It would be inappropriate not to notify the Defence of a decision on a pending request that the Defence is aware of, and has responded to, and can thus reasonably expect to learn about the Chamber's ruling at the same time as the Prosecution. Moreover, the Chamber considers that the Defence is entitled to be informed of the Chamber's decision on an important matter such as the addition of new witnesses to the Prosecution's list of witnesses close to the commencement of trial.

28. Besides the relief that was redacted from the Defence, the Fourth and Fifth Request include redactions to sections that contain information that forms the basis for the Chamber's conclusion that any prejudice to the Defence can be sufficiently mitigated. In order to fully appreciate the Chamber's decision to grant the requests, the Defence shall be given access to the unredacted versions of the Fourth and Fifth Request. The Chamber orders the Prosecution to notify the *ex parte* versions of its requests to the Defence at the same moment that it discloses the identities of P-604 and P-613. If the Prosecution wishes to retain any redactions to filings ICC-01/09-01/11-852-Conf-Exp and ICC-01/09-01/11-866-Conf-Exp, it shall file a separate request, explaining the reasons for such redactions.

Leave to Reply Request

29. With the addition of P-604 and P-613 to the Prosecution's list of witnesses, the Prosecution will have to disclose the materials related to these persons to the Defence. The Ruto Defence's request to be provided with these materials is therefore moot and so is the Leave to Reply Request.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the Fourth Request in part;

GRANTS the Fifth Request;

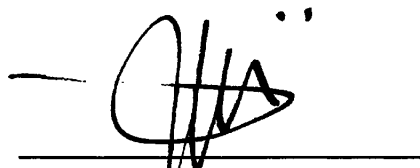
ORDERS the Prosecution to disclose the identities of P-604 and P-613 as soon as possible, and no later than 12.00 (noon) on 9 September 2013;

DIRECTS the Prosecution to call P-604 and P-613 among the last witnesses of the prosecution case;

ORDERS the Prosecution to notify to the Defence the *ex parte* versions of the Fourth Request and the Fifth Request, once the identities of P-604 and P-613 can be disclosed to the Defence, but in any case by 12.00 (noon) on 9 September 2013; and

REJECTS all other requests.

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



Judge Chile Eboe-Osuji
(Presiding Judge)

Judge Olga Herrera Carbuccion

Judge Robert Fremr

Dated 3 September 2013
At The Hague, The Netherlands