Cour
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International
Criminal
Court

Original: **English**

No.: **ICC-01/09-01/11**
Date: **26 November 2012**

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

Prosecution's Response to Joint Defence Request for an Indication of Prosecution's Continued Reliance on Confirmation Witnesses

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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Background

1. On 11 June 2012, the Trial Chamber (the "Chamber") held an initial status conference in accordance with Rule 132(1) of the Rules in order to set the date of the trial. The Chamber indicated at the status conference that it would issue an order on the schedule for trial, including the relevant disclosure deadlines. During the course of the status conference, the Chamber heard submissions from the parties on a number of issues related to the upcoming trial, including the schedule for disclosure and the amount of time required by the Defence to prepare for trial.[1]

2. On 9 July 2012, the Chamber issued a decision on the schedule leading up to trial (the "Decision").[2] The Decision ordered the Prosecution to provide to the Defence a list of the witnesses it intends to rely on at trial ("list of trial witnesses") by 9 January 2013.[3] In the interim, the Decision also ordered the Prosecution to file by 16 October 2012 a provisional list of trial witnesses on an *ex parte* basis available only to the Chamber and Victims and Witnesses Unit ("VWU").[4]

3. The Defence did not seek leave to appeal the Decision.

4. On 9 November 2012, four months after the Decision, the Defence for both Accused ("Defence") requested that the Chamber order the Prosecution to provide confirmation to the Defence on whether or not it will include the witnesses relied on during confirmation hearing ("confirmation witnesses") on its list of trial witnesses (the "Request").[5]

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[1] ICC-01/09-01/11-T-15-ENG.
[2] Decision on the schedule leading up to trial, ICC-01/09-01/11-440.
[3] The Decision, para. 13.
[4] The Decision, para. 11.
[5] ICC-01/09-01/11-471.

Submissions

5. The Prosecution opposes the Request on the basis that it is unjustified and unsupported by the framework of the Rome Statute.

6. First, issues related to the upcoming trial including the schedule for disclosure and the amount of time required by the Defence to prepare for trial were subject to submissions by the parties during the initial status conference. After considering the parties' submissions, the Chamber decided the underlying issues, including setting the time in which the Defence should be provided with the Prosecution final list of trial witnesses. While the Chamber required the provision of a tentative list of witnesses to it and the VWU, it clearly excluded the Defence from receiving this provisional list, and ordered that the Defence only be provided with the final list by 9 January 2013.

7. Now, the Defence seeks to shorten the deadline previously ordered by the Chamber for the submission of the Prosecution's final list of trial witnesses. By doing so, the Defence is requesting the Chamber to reconsider its decision after failing to exercise its right to appeal within the time frame allocated by the Rules. It has also failed to support its Request with a show of a material change in circumstances since the time the Decision was issued.

8. While the Prosecution agrees that Chambers have discretion to reconsider their decisions, the circumstances in which reconsideration will follow ordinarily will be exceptional and rare – in the Prosecution's view, when the decision is manifestly unsound and its consequences are manifestly unsatisfactory,[6] or

[6] Trial Chamber I accepted the possibility of reconsidering decisions in exceptional circumstances. See ICC-01/04-01/06-2705, paras.13-19. Other Chambers, like Pre-Trial Chamber II in the Uganda Situation, conclude that there is no express statutory authority to reconsider rulings (see, e.g., ICC-02/04-01/05-60, para.18). The Prosecution notes that the Appeals Chamber has affirmed the ability of

when new or previously unavailable information or analysis requires that the Chamber reconsider its previous ruling. Based on the Defence Request and the record of this case, none of these exceptional circumstances is present here.

9. There is no merit in the allegation asserted by the Defence that it is unable to prepare for the start of trial in an efficient, effective and meaningful manner without knowing, months before the trial is due to begin, whether the Prosecution will rely again on witnesses whose evidence was previously presented at confirmation.[7] To the contrary, it would seem that there is even less need for substantial advance notice regarding witnesses for whom the Defence already has previously prepared. Prior to the confirmation hearing, the Prosecution provided the Defence with disclosure related to the witnesses in question,[8] thereby enabling it to conduct its investigation accordingly, and the Defence addressed their evidence during its presentation at the confirmation hearing.

10. Additionally, as a practical matter the Prosecution is not prepared to make that final decision. It has proceeded according to the timetable previously set by the Chamber, with the legitimate assumption that it can make its final determination after it finally evaluates the pool of witnesses and assesses how, within the entirety of the available evidence, to most efficiently and effectively present its case. Confirmation from the Prosecution at this stage that all those witnesses will be called at trial, with the option to withdraw these witnesses as the trial comes closer, would therefore be provisional, uncertain, and ultimately of no value to the Defence.

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this Court to exercise inherent judicial powers, as in its authority to issue a permanent stay of proceedings even though no article or rule allows it (ICC-01/04-01/06-772 OA4, paras.36-39).

[7] Defence request para. 1.

[8] As stated by the Defence. See Defence request para. 2

11. Finally, the Prosecution submits that security imperatives justify that this sort of information should not be confirmed until the date set by the Chamber. [9]

Conclusion

12. The Prosecution accordingly submits that the Defence Request be denied.

Fatou Bensouda,
Prosecutor

Dated this 26th day of November 2012
At The Hague, The Netherlands

[9] Circumstances specific to this case heighten the fear of witnesses to be called to take the witness stand and be subject to potential acts of retaliation to their persons or members of their families. See e.g., Public redacted version of the 5 November 2012 "Prosecution's application for delayed disclosure of the identities of certain witnesses and authorisation of redactions pursuant to Decision ICC-01/09-01/11-459", 7 November 2012, ICC-01/09-01/11-468-Red.