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

Date: 28 November 2012

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***

Public

**Joint Defence Request
for the Prosecutor to Comply Meaningfully
with the Chamber's Order Regarding Redactions**

Source: Defence for Mr. William Samoei Ruto
Defence for Mr. Joshua Arap Sang

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Legal Representatives of the Victims

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Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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**The Office of Public Counsel for the
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States' Representatives

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**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The defence for Mr. William Samoei Ruto and the defence for Mr. Joshua Arap Sang (the “defence”) hereby request the Trial Chamber to require the prosecution to comply meaningfully with its order regarding redactions (“Order”).¹

II. PROCEDURAL HISTORY AND SUBMISSIONS

2. On 8 November 2012, the defence were notified of the redacted version of the “prosecution’s application for delayed disclosure of the identities of certain witnesses and authorisation of redactions pursuant to Decision ICC-01/09-01/11-458” (“Delayed Disclosure Application”).² In that application, the prosecution requested delayed disclosure of the identity of nine witnesses, listed by pseudonym.³ The prosecution sought delayed disclosure of the identity of seven of those witnesses until 30 days before commencement of trial; delayed disclosure of the identity of the other two witnesses until 30 days before the witnesses’ anticipated testimony.⁴
3. On 23 November 2012, the prosecution filed a confidential *ex parte* update to its Delayed Disclosure Application, wherein it stated that it no longer sought delayed disclosure of one witness’s identity because it no longer expected that witness to testify at trial.⁵
4. On 26 November 2012, the Trial Chamber *proprio motu* ordered the prosecution to provide a redacted version of the Delayed Disclosure Update to the defence.⁶ The Chamber noted that the Delayed Disclosure Update is “of relevance to the defence, in particular for the purposes of preparing its response to the Delayed Disclosure Application”.

¹ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-482, Order regarding redactions, 26 November 2012.

² *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-468, 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-01/09-01/11-458”, 7 November 2012.

³ Delayed Disclosure Application, para. 2.

⁴ Delayed Disclosure Application, para. 3.

⁵ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-480-Conf-Exp, Prosecution’s update regarding Prosecution submission ICC-01/09-01/11-468-Conf-Exp, 23 November 2012 (“Delayed Disclosure Update”).

⁶ Order, para. 9.

5. On 27 November 2012, the prosecution did provide a redacted version of the Delayed Disclosure Update to the defence.⁷ The prosecution indicated that it no longer intends to call one witness to testify at trial, “due to witness management issues and concerns about [his] on-going willingness to testify”.⁸
6. However, the Redacted Version remains so redacted that it does not achieve the purpose for which the Trial Chamber ordered its filing. In the Redacted Version of the Delayed Disclosure Update, the prosecution has not even indicated the pseudonym of the witness for whom it no longer seeks delayed disclosure of identity. As such, the defence does not know which category of delayed disclosure the prosecution was seeking for that witness; ie whether the prosecution sought to delay disclosure until 30 days before trial or until 30 days before the witness’s anticipated testimony. In the absence of this information, the defence is unable to assess its full relevance or significance to the prosecution’s initial Delayed Disclosure Application to which the defence must now respond by 7 December 2012.
7. Of course, the Redacted Version of the Delayed Disclosure Update must also be viewed in light of the defence’s earlier request to the prosecution to indicate whether the prosecution continues to rely on its confirmation witnesses for purposes of the trial.⁹ Understandably, the defence would find it helpful to its preparations and investigations if the prosecution could indicate whether the witness who has been dropped was Witness 1, 2, 4, 6 or 8 (as referred to during the confirmation of charges hearing).

III. RELIEF REQUESTED

8. Consequently, the defence requests the Trial Chamber to require the prosecution to comply meaningfully with its Order and to indicate forthwith to the defence the pseudonym and the confirmation witness number of the witness that it no longer intends to call to testify.

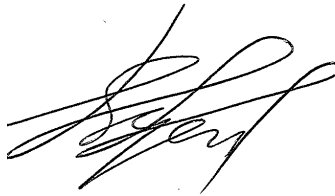
⁷ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-480-Red, Public Redacted Version of the 23 November 2012 “Prosecution’s update regarding Prosecution submission ICC-01/09-01-468-Conf-Exp” (ICC-01/09-01/11-480-Conf-Exp), 27 November 2012 (“Redacted Version”).

⁸ Redacted Version, para. 4.

⁹ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-471, Urgent Joint Defence Request for an Indication of Prosecution’s Continued Reliance on Confirmation Witnesses, 9 November 2012.



David Hooper, QC
On behalf of William Samoei Ruto
Dated this 28th day of November 2012
In Nairobi



Joseph Kipchumba Kigen-Katwa
On behalf of Joshua Arap Sang
Dated this 28th day of November 2012
In Nairobi