



Original: English

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

Date: 4 December 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***

URGENT

Public

**Joint Defence Request
for Extension of Time to Respond to Delayed Disclosure Application**

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:

The Office of the Prosecutor

Fatou Bensouda, Prosecutor

Cynthia Tai, Trial Lawyer

Counsel for William Ruto

David Hooper QC

Kioko Kilukumi Musau

Counsel for Joshua Sang

Joseph Kipchumba Kigen-Katwa

Joel Kimutai Bosek, Philemon K.B. Koech

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Silvana Arbia

Counsel Support Section

Deputy Registrar

Didier Daniel Preira

Victims and Witnesses Unit

Detention Section

**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 a reasonable extension of time, until Tuesday, 11 December 2012 (instead of Friday 7 December 2012) to file its response to the prosecution’s Delayed Disclosure Application.¹ As required by Regulation 35(2) of the Regulations of the Court, the defence has “good cause” to request an extension of the time limit for its response, on the basis that the prosecution has only today given effective disclosure of Witness Materials required formulate the response.
2. The defence submit that ensuring that the defence has one full week to prepare and file its response, from the date of the effective disclosure of the redacted Witness Materials annexes to the prosecution’s Delayed Disclosure Application is limited in nature and justified in the circumstances.

II. PROCEDURAL HISTORY AND SUBMISSIONS

3. 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”.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 One witness has subsequently been dropped.⁵
4. The prosecution did not serve the defence with the annexes to the Delayed Disclosure Application, which contained the witness statements and transcripts (“Witness Materials”) with the proposed redactions.

¹ *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 (“Delayed Disclosure Application”).

² Ibid.

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-Red, Prosecution’s update regarding Prosecution submission ICC-01/09-01/11-468-Conf-Exp, 23 November 2012.

5. On 26 November 2012, the Trial Chamber *proprio motu* ordered the prosecution to disclose the Witness Materials to the defence forthwith, and no later than 30 November 2012.⁶
6. At 20.00 hours on 30 November 2012, the prosecution served 315 items to the defence⁷ -- a mixture of incriminating material, potentially exculpatory material, and Rule 77 material. The prosecution did not indicate that these were the Witness Materials that had been ordered disclosed by the Trial Chamber in relation to the Delayed Disclosure Application. Nor did the prosecution indicate which Witness Materials were related to which witness pseudonym as assigned in the Delayed Disclosure Application. As such, the defence was unable to assess the relevance and significance of the materials.
7. The Trial Chamber will be aware of the correspondence between the parties, which followed this disclosure on the 30th. It will recall that first thing on Monday morning, the defence sought to clarify whether the Witness Materials had been served by way of a filing or whether they had been part of the disclosures made after the close of business on Friday night. The prosecution responded late in the day, to the effect that the Witness Materials had been part of Friday's disclosure. The prosecution still did not provide any indication as to how the materials were relevant to the witnesses for whom the prosecution was requesting delayed disclosure of their identities.
8. Finally, after the defence made a specific follow up request for such, the prosecution provided the defence with a chart listing the ERN numbers of the disclosed Witness Materials and the corresponding witness pseudonym. The prosecution also indicated via email that it will issue the missing metadata relating to the disclosed Witness Materials tomorrow, ie the 5th of December.
9. The defence's ability to respond fully to the prosecution's Delayed Disclosure Application has been repeatedly frustrated by the way in which the prosecution

⁶ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-482, Order Regarding Redactions, 26 November 2012 ("Order").

⁷ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-494, Prosecution's Communication of the Disclosure of Evidence in accordance with ICC-01/09-01/11-482, 3 December 2012.

has disclosed the Witness Materials. In its Order, the Trial Chamber acknowledged that the defence should have access to the Witness Materials, so that it can “submit more meaningful observations on the Delayed Disclosure Application and the scope of the proposed redactions”.⁸ Only now is the defence in a position to begin assessing the scope of the proposed redactions and analyzing how they affect the prosecution’s request for delayed disclosure of the identity of eight witnesses.

10. It is imperative that the defence have adequate time to address the issues raised in the Delayed Disclosure Application, as the ultimate effect of the prosecution’s request, if granted, will significantly impact the amount of time the defence has to investigate the witnesses and the allegations that underpin the case against the accused.

III. RELIEF REQUESTED

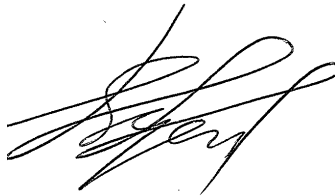
11. The defence submit that it has shown good cause for the extension and that it is both limited in nature and justified in the circumstances. Consequently, the defence requests the Trial Chamber to grant an extension of time for the defence to file its response to the Delayed Disclosure Application until Tuesday, 11 December 2012. This is one week from the date on which the defence received effective disclosure of the Witness Materials; this is the same amount of time the Trial Chamber, through its *proprio motu* Order, intended for the defence to have to respond following the disclosure of the Witness Materials.⁹

⁸ Order, para. 8.

⁹ See Order, where the Trial Chamber *proprio motu* gave the defence a one week extension of time, so that the defence could properly assess the Witness Materials before filing its response.



David Hooper, QC
On behalf of William Samoei Ruto
Dated this 4th day of December 2012
In London



Joseph Kipchumba Kigen-Katwa
On behalf of Joshua Arap Sang
Dated this 4th day of December 2012
In Nairobi