

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/11
Date: 13 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***

Public

**Decision on the joint defence request for an indication of prosecution's
continued reliance on confirmation witnesses**

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

Counsel for Joshua Arap Sang

Mr Joseph Kipchumba Kigen-Katwa

Mr Joel Kimutai Bosek

Legal Representatives of Victims

Mr Wilfred Nderitu

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V (“Chamber”) of the International Criminal Court in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, after considering Articles 64(3)(c) and 67(1)(b) of the Rome Statute (“Statute”) and Rules 76 and 77 of the Rules of Procedure and Evidence (“Rules”), renders the following Decision on the joint defence request for an indication of prosecution’s continued reliance on confirmation witnesses.

1. On 9 July 2012, the Chamber issued a decision on the schedule leading up to trial (“Schedule Decision”).¹ The Schedule Decision ordered the Office of the Prosecutor (“prosecution”) to provide the defence with, *inter alia*, a list of the witnesses it intends to rely on at trial by 9 January 2013.² The Schedule 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 the Registry’s Victims and Witnesses Unit.³
2. On 9 November 2012, the defence filed the “Joint Defence Request for an Indication of Prosecution’s Continued Reliance on Confirmation Witnesses” (“Request”).⁴ The defence requests the Chamber to order the prosecution to provide an “indication” of whether it intends to rely on confirmation Witnesses 1, 2, 4, 6 and 8 at trial.⁵ The Request reproduces the substance of *inter partes* correspondence on this issue, which suggests that, on 10 September 2012, the prosecution agreed to provide this information but subsequently, on 5 November 2012, changed its position.⁶ In the Request, the defence argues that it is “unable to prepare for the start of trial in an efficient, effective and meaningful manner without such an indication at this late stage”.⁷ While noting the disclosure deadlines in the Schedule Decision, the defence

¹ Decision on the schedule leading up to trial, 9 July 2012, ICC-01/09-01/11-440.

² Schedule Decision, para. 13.

³ Schedule Decision, para. 11.

⁴ ICC-01/09-01/11-471.

⁵ Request, para. 18.

⁶ Request, paras 6, 8.

⁷ Request, para. 1.

nevertheless submits that the relief it requests “barely qualifies as ‘disclosure’ at all”⁸ and that the “times ordered for disclosure are generally a minimum obligation and that the disclosing party should, where reasonable to do so, try to fulfil disclosure obligations in good faith and at the earliest reasonable opportunity”.⁹

3. On 26 November 2012, the prosecution filed the “Prosecution’s Response to Joint Defence Request for an Indication of Prosecution’s Continued Reliance on Confirmation Witnesses” (“Response”).¹⁰ The prosecution asserts that the Request is essentially a request to reconsider the deadlines in the Schedule Decision and notes that the defence failed to show any “material change in circumstances” since the Schedule Decision was issued.¹¹ The prosecution submits that the defence is able to adequately prepare for the start of the trial without the indication asked for, in particular because the defence already prepared for these witnesses at the confirmation stage of the proceedings.¹² The prosecution also submits that it “is not prepared to make” a final indication on which witnesses it is relying on and that 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”.¹³ The prosecution’s Response does not address the *inter partes* correspondence referenced in the Request.
4. The Chamber notes Article 64(3)(c) of the Statute, which states that the Trial Chamber shall “[...] provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to

⁸ Request, para. 11.

⁹ Request, para. 12.

¹⁰ ICC-01/09-01/11-481.

¹¹ Response, paras 7-8.

¹² Response, para. 9.

¹³ Response, para. 10.

enable adequate preparation for trial". This provision must be read in view of the rights of the accused¹⁴ and the prosecution's disclosure obligations.¹⁵

5. The Chamber considers that the Schedule Decision, which made express reference to Articles 64 and 67 of the Statute and Rules 76 and 77 of the Rules, created deadlines designed to allow the defence to adequately prepare for the trial.¹⁶ Pursuant to the Schedule Decision, the prosecution is entitled to consider and, as it sees fit, reconsider which witnesses it wishes to call before disclosing its witness list to the defence on 9 January 2013. The prosecution is not obligated to give any preliminary indication to the defence before that date, nor is the Chamber satisfied that the defence identifies any development since the Schedule Decision which justifies modifying the disclosure deadline. As such, the Chamber rejects the Request. It is a matter for the prosecution, having regard to the limited nature of the information sought by the defence and its apparent initial willingness to provide the requested information, whether to reconsider its current position.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

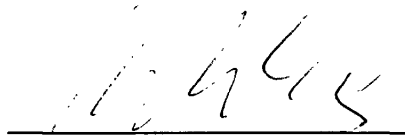
REJECTS the Request.

¹⁴ *See, in particular*, Article 67(1)(b) of the Statute (providing that "the accused shall be entitled [...] [t]o have adequate time and facilities for the preparation of the defence [...]").

¹⁵ *See, in particular*, Rules 76-77 of the Rules.

¹⁶ *See* Schedule Decision, p. 3, para. 7.

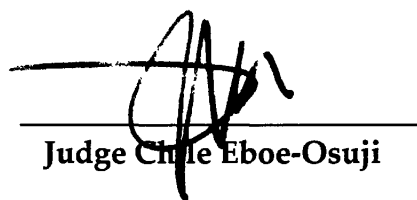
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding



Judge Christine Van den Wyngaert



Judge Chie Eboe-Osuji

Dated 13 December 2012

At The Hague, The Netherlands