

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/11
Date: 10 January 2013

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***

Confidential

**Decision on the prosecution's urgent application for extension of time limit
pursuant to Regulation 35 to disclose incriminatory material regarding P-376**

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

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**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*, pursuant to Regulation 35 of the Regulations of the Court ("Regulations"), renders the following Decision on the prosecution's urgent application for extension of time limit pursuant to Regulation 35 to disclose incriminatory material regarding P-376.

1. On 9 July 2012, the Chamber instructed the Office of the Prosecutor ("prosecution") to provide its list of witnesses and evidence as well as to complete its disclosure to the Defence of all incriminatory material that it intended to rely on at trial by 9 January 2013.¹
2. On 5 November 2012, the prosecution filed an application requesting the delayed disclosure of the identities of nine witnesses, including witness P-376.²
3. On 4 January 2013, the Chamber issued its decision on this application which, in relevant part, rejected the prosecution's request to delay the disclosure of the identity of witness P-376 beyond 9 January 2013.³ The Chamber directed the prosecution to "take all necessary steps to ensure the witness's security upon disclosure of his identity."⁴
4. On 9 January 2013, the prosecution filed, confidential *ex parte*, its "Prosecution's urgent application for extension of time limit pursuant to Regulation 35 to disclose

¹ ICC-01/09-01/11-440.

² 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, 5 November 2012, ICC-01/09-01/11-468-Conf-Exp (notified on 6 November 2012; public redacted version notified on 8 November 2012).

³ Decision on first prosecution application for delayed disclosure of witness identities, 4 January 2013, ICC-01/09-01/11-531-Conf-Exp (confidential redacted version notified the same day).

⁴ ICC-01/09-01/11-531-Conf-Exp, para. 59.

incriminatory material regarding P-376";⁵ a confidential redacted version was filed the same day ("Application").⁶

5. In the Application, the prosecution informs the Chamber that: (i) upon receipt of the Chamber's decision of 4 January 2013, the prosecution immediately attempted to contact witness P-376 to implement the appropriate security measures,⁷ (ii) the prosecution made numerous attempts to contact witness P-376 between 4 and 8 January, without success,⁸ (iii) the prosecution made contact with witness P-376 for the first time on 9 January and was only at that point able to commence discussing the necessary steps to ensure the witness's security.⁹ The prosecution indicates that it requires two weeks in order to implement the necessary security measures,¹⁰ and on this basis urgently requests the Chamber to authorise a delay of an additional two weeks in order for it to communicate P-376's incriminatory material and his identity to the defence and to add his name to the list of witnesses and list of evidence.¹¹
6. Regulation 35(2) of the Regulations provides that "The Chamber may extend or reduce a time limit if good cause is shown and, where appropriate, after having given the participants an opportunity to be heard."
7. This decision is issued on a confidential basis as it refers to confidential and sensitive materials with respect to witness security. Considering the extreme urgency of the Application, the Chamber has decided, pursuant to Regulation 35(2) of the Regulations, that it is not appropriate in the present case to give the defence

⁵ ICC-01/09-01/11-537-Conf-Exp.

⁶ Confidential Redacted version of Prosecution's urgent application for extension of time limit pursuant to Regulation 35 to disclose incriminatory material regarding P-376, 9 January 2013, ICC-01/09-01/11-537-Conf-Red.

⁷ Application, ICC-01/09-01/11-537-Conf-Red, para. 5.

⁸ Application, ICC-01/09-01/11-537-Conf-Red, para. 9, footnote 5.

⁹ Application, ICC-01/09-01/11-537-Conf-Red, paras 9-11.

¹⁰ Application, ICC-01/09-01/11-537-Conf-Red, para. 11.

¹¹ Application, ICC-01/09-01/11-537-Conf-Red, para. 13.

the opportunity to be heard on the Application prior to issuing its ruling.¹² The Chamber emphasises the exceptional nature of this decision, and urges the prosecution in the future to make such requests sufficiently before the Chamber's deadlines in order for the defence to be given an adequate opportunity to respond.

8. The Chamber considers that the reasons advanced in the Application justify a variation of time limit pursuant to Regulation 35(2) of the Regulations until 23 January 2013. In particular, good cause is shown for granting this limited extension because of: (i) the difficulty the prosecution experienced in contacting witness P-376 and (ii) the prosecution's diligent efforts to contact witness P-376 following the Chamber's directions in its decision of 4 January 2013. Moreover, the length of the extension requested is limited and will not cause undue prejudice to the Defence.

¹² The Chamber also notes that it sent an email at 16:52pm on 9 January 2013 indicating its intended ruling on the Application in order to prevent the defence from spending its resources to file a response to an Application which the Chamber had already resolved to grant.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the relief requested in the Application.

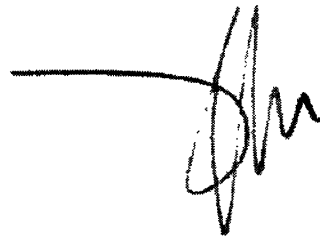
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding Judge



Judge Christine Van den Wyngaert



Judge Chile Eboe-Osuji

Dated 10 January 2013

At The Hague, The Netherlands