

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/11
Date: 17 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

**Confidential redacted version of 'Decision on renewed prosecution request for
delayed disclosure of the identity of Witness P-471'**

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

Legal Representatives of Victims

Counsel for Joshua Arap Sang
Mr Joseph Kipchumba Kigen-Katwa
Mr Joel Kimutai Bosek
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
Ms Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V ("Chamber") of the International Criminal Court ("Court"), in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, having considered Articles 64, 67, 68(1) and 68(5) of the Rome Statute, Rule 76 of the Rules of Procedure and Evidence of the Court and Regulation 34 of the Regulations of the Court, renders the following Decision regarding renewed request for delayed disclosure of the identity of Witness P-471.

1. On 17 December 2012, the Office of the Prosecutor ("Prosecution") filed its first application requesting the delayed disclosure of the identities of nine witnesses ("First Application"), including Witness P-471.¹ The Prosecution thereafter filed two further applications for delayed disclosure of the identities of 12 additional witnesses.²
2. The defence teams for both accused ("Defence") opposed these delayed disclosure requests in their entirety.³
3. On 4 January 2013, the Chamber issued a decision on the Prosecution's First Application ("Decision"), authorising the Prosecution to temporarily withhold from disclosure to the defence the identities of four witnesses beyond 9 January 2013, pending implementation of protective measures, and rejecting the

¹ ICC-01/09-01/11-468-Conf-Exp, notified on 6 November 2012. A public redacted version of the application was filed on 7 November 2012, without any annexes. ICC-01/09-01/11-468-Conf-Red. The confidential redacted versions of the annexes were filed on 4 December 2012. A confidential redacted version of the First Application has not been filed.

² Second application for delayed disclosure of witness identities and application for variation of the 5 November 2012 deadline with respect to Witnesses 15, 16 and 32, ICC-01/09-01/11-515-Conf-Exp. A confidential redacted version was filed on 20 December 2012, ICC-01/09-01/11-515-Conf-Red. Third application for delayed disclosure of witness identities, ICC-01/09-01/11-521-Conf-Exp. A confidential redacted version was filed on 28 December 2012, ICC-01/09-01/11-521-Conf-Red.

³ Joint Defence Response to 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", ICC-01/09-01/11-507-Conf. Joint Defence Response to Prosecution's Second and Third Applications for Delayed Disclosure of Witness Identities and Variation of the 5 November 2012 Deadline, 3 January 2013, ICC-01/09-01/11-526-Conf.

Prosecution's request to delay the disclosure of the identity of the remaining four witnesses, including Witness P-471, beyond 9 January 2013.⁴ The relevant findings of the Chamber with regard to this witness were as follows:

78. The OTP Security Profile notes that the witness [REDACTED]⁵ and [REDACTED].⁶ [REDACTED].⁷

79. The OTP Security Profile for this witness states that [REDACTED].⁸ The Chamber has not been able to identify any statements to this effect in the witness's statement annexed to the First Application. The [REDACTED] provided by the Prosecution records that the witness [REDACTED] but provides no detail other than [REDACTED].⁹

80. At the Status Conference, the Prosecution stated [REDACTED].¹⁰ However, the VWU Report records that, as of 7 December 2012, the witness had not yet been referred to the VWU.¹¹ The Prosecution has not provided any supplementary information to the Chamber about this witness subsequent to the filing of the VWU Report. The latest information available to the Chamber, therefore, is that the witness has not been the subject of a security assessment by the VWU nor have any protective measures been recommended.

81. In the absence of an assessment by the VWU or other materials to substantiate the Prosecution's submissions, the Chamber cannot find that disclosure to the accused of the witness's security would present an objectively justifiable risk to his safety. Furthermore, the Chamber cannot be satisfied that the delayed disclosure is the least restrictive measure possible, given that the Prosecution [REDACTED].¹² The Chamber reminds the Prosecution that, as the party calling the witness, it bears the pivotal responsibility for taking all necessary steps to ensure the witness's security. This includes making appropriate requests to the Chamber and the VWU in the most timely and most efficient manner. The Prosecution's failure to do so does not justify the non-disclosure of a witness's identity past 9 January 2013. Accordingly, the Chamber rejects the Prosecution's request with respect to P-471 and directs the Prosecution to take all necessary steps to ensure the witness's security upon disclosure of his identity. This is without prejudice to the Prosecution's freedom to renew its request in relation to this aspect of the decision within five days of this decision, if it is able to supply the information indicated above as missing.

⁴ ICC-01/09-01/11-531-Conf-Exp.

⁵ ICC-01/09-01/11-468-Conf-Exp-Anx 9, at Annex 9A, para. 1.

⁶ ICC-01/09-01/11-468-Conf-Exp-Anx 9, at Annex 9A, para. 5.

⁷ ICC-01/09-01/11-468-Conf-Exp-Anx 9, at Annex 9A, para. 7.

⁸ ICC-01/09-01/11-468-Conf-Exp-Anx 9, at Annex 9A, para. 6.

⁹ ICC-01/09-01/11-487-Conf-Exp-Anx A, page 6.

¹⁰ ICC-01/09-01/11-T-17-CONF-EXP-ENG ET, page 22, lines 16-19; page 24, lines 12-15.

¹¹ ICC-01/09-01/11-500-Conf-Exp, page 4, point 8.

¹² ICC-01/09-01/11-T-17-CONF-EXP-ENG ET, page 25, lines 17-21.

4. On 9 January 2013, the Prosecution renewed its request for delayed disclosure of the identity of Witness P-471 in a confidential *ex parte* filing.¹³ The confidential version notified to the defence contained heavy redactions to the section of the filing dealing with the renewed request.¹⁴
5. In the renewed request, the Prosecution points out that [REDACTED].¹⁵ Apart from this clarification, the Prosecution does not provide any of the information substantiating the witness's security concerns that was missing from the First Application.
6. Significantly, however, the Prosecution reports that [REDACTED].¹⁶
7. In response to the Chamber's request to advise it of the estimated date of implementation of protective measures, the Prosecution responds that it "is not in a position to advise the Chamber as to the estimated date of implementation of these protective measures, as they are in the remit of the VWU."¹⁷ The Prosecution asks for disclosure of the identity of Witness P-471 to be delayed "pending the full implementation of the VWU of the protective measures sought".¹⁸
8. On 10 January 2013, in response to an inquiry from the Chamber, the [REDACTED].
9. On 3 January 2013, [REDACTED].¹⁹
10. As of 10 January 2013, [REDACTED].²⁰
11. On 15 January 2013, the Defence filed its response to the Prosecution's renewed request regarding Witness P-471.²¹ The Defence submits that due to redactions

¹³ ICC-01/09-01/11-538-Conf-Exp, paras. 10 – 14.

¹⁴ ICC-01/09-01/11-538-Conf-Red, paras. 10 – 14.

¹⁵ ICC-01/09-01/11-538-Conf-Exp, para. 12. The Chamber notes that the fact that [REDACTED] was taken into account in its Decision. ICC-01/09-01/11-531-Conf-Exp, [REDACTED].

¹⁶ ICC-01/09-01/11-538-Conf-Exp, para. 11.

¹⁷ ICC-01/09-01/11-538-Conf-Red, para. 14.

¹⁸ ICC-01/09-01/11-538-Conf-Red, para. 15.

¹⁹ Email communication from the VWU to a Legal Officer of Trial Chamber V at 17:04 on 10 January 2013.

²⁰ Email communication from the VWU to a Legal Officer of Trial Chamber V at 17:04 on 10 January 2013.

applied to the request, it is unable to contribute any effective comment on the renewed request.²² The Defence only queries whether, to the extent the Prosecution seeks re-consideration of the Decision, it has demonstrated that there are exceptional circumstances justifying re-consideration.²³

12. The deadline for all Prosecution disclosure has already passed. Continued delay in implementing protective measures for this witness, based on the justification that the Prosecution "is not in a position to advise the Chamber as to the estimated date of implementation of ... protective measures" is wholly inadequate to satisfy the Prosecution's disclosure obligations.
13. The Chamber, however, considers [REDACTED] to be indicative of the existence of an objectively justifiable risk to the safety of Witness P-471 should his identity be disclosed [REDACTED]. The Chamber is of the view that the existence of this risk justifies a further delay in the disclosure of the witness's identity.
14. The Chamber is also of the view that further delay in the disclosure of the witness's identity may adversely affect the Defence's ability to prepare for trial. Therefore, the delay should not extend beyond the time necessary for [REDACTED] and, in any event, for more than 3 weeks.
15. For the foregoing reasons, the Prosecution has until 16:00 on Monday, 21 January 2013 to inform the Chamber whether Witness P-471 [REDACTED]. If so, [REDACTED] no later than 8 February 2013, after which date his identity must be disclosed to the Defence or the witness withdrawn.
16. Finally, the VWU is directed to file a formal and updated report on the security situation of Witness P-471 by 16:00 on 21 January 2013.

²¹ Joint Defence Response to Confidential Redacted version of Prosecution's Provision of Information to the Chamber pursuant to the 'Decision on first prosecution application for delayed disclosure of witness identities' – ICC-01/09-01/11-531-Conf-Exp, ICC-01/09-01/11-552-Conf.

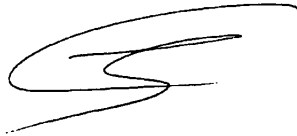
²² ICC-01/09-01/11-552-Conf, paras 3, 11.

²³ ICC-01/09-01/11-552-Conf, para. 10.

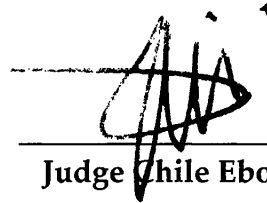
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding Judge



Judge Christine Van den Wyngaert



Judge Chile Eboe-Osuji

Dated 17 January 2013

At The Hague, The Netherlands