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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
with Public Annex A**

**Joint Defence Submissions
on Impact of Delayed Prosecution Disclosure and Shift in Case
on the Scheduled Start Date for Trial**

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

Silas Chekera

Legal Representatives of the Victims

Wilfred Nderitu

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 files these supplemental written submissions as requested by the Trial Chamber at the recent Status Conference, in addition to the oral submissions made severally by counsel for Mr. Ruto and counsel for Mr. Sang.¹
2. On 9 July 2012, the Trial Chamber issued its order on the schedule for trial² and gave notice of the date by which the prosecution was to have completed disclosure of all incriminatory material.³ By the same date, 9 January 2013, the prosecution was ordered to file the Pre-Trial Brief setting out its case and the relevant evidence.⁴
3. In July 2012, the Chamber was of the view that three months between the “full disclosure of the prosecution case” and the commencement of trial would “afford the defence sufficient time to carry out all necessary preparations”.⁵ At that time, neither the defence nor the Chamber knew the full extent of the prosecution case or the number of witnesses. The only known quantity was the six witnesses⁶ relied on by the prosecution for purposes of the confirmation. The prosecution subsequently indicated that it intended to call 43 witnesses of fact and 3 expert witnesses. It recently withdrew five of those factual witnesses, subject to seeking to ‘re-add’ them if circumstances permit. In any event, the number of witnesses is higher than the defence, and possibly the Chamber, had anticipated.
4. Despite having been provided by the Chamber with six months notice within which to disclose material, the prosecution has abused both the letter and the spirit of the Chamber’s order, to the prejudice of the accused. The Prosecutor made little effort to disclose a significant volume of materials prior to 9th January, despite having the bulk of those materials in its possession prior to the confirmation of charges hearing in September 2011. Both the Chamber and the defence reasonably

¹ ICC-01/09-01/11-T-19-ENG ET WT 14-02-2013, pp. 9-23.

² *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-440, Decision on the schedule leading up to trial, 9 July 2012

³ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-440, Decision on the schedule leading up to trial, 9 July 2012 (“Scheduling Order”).

⁴ Scheduling Order, para. 14.

⁵ Scheduling Order, para. 15.

⁶ Scheduling Order, para. 8.

⁷ Confirmation witnesses 1, 2, 4, 5, 6 and 8.

assumed that the prosecution would, in good faith, disclose material relating to witnesses from July onward and not regard the 9th of January as the date on which disclosure took place. Yet that did not happen, largely because, as the Trial Chamber has noted, the prosecution failed to ensure witness security and protection measures in a timely manner.

5. Even so, come the 9th of January, and still continuing, the prosecution has failed to disclose significant relevant material. The prosecution has constantly requested the extension of various deadlines for disclosure after or on the day of the deadline, which forced a delay in the disclosure, even if the Trial Chamber ultimately rejected the request.⁷ The history of that disclosure makes it reasonable to conclude that the prosecution chose a policy of not disclosing witness material until the 9th of January. Requests even to confirm the prosecution's continued reliance on the confirmation witnesses was denied by the prosecution.⁸ The prosecution then failed to disclose by 9th January in respect of a substantial number of witnesses, a problem that arose through its failure to address witness protection and security issues in a diligent manner.
6. By January 9th, the identities of 19 witnesses remained undisclosed.⁹ Six witnesses have only been disclosed this month. Even now, full disclosure has yet to be effected. Disclosure is still to be effected in respect of five witnesses. Following the status conference, the prosecution disclosed the identities of three additional witnesses, along with over 750 pages of disclosure; these witnesses are expected to testify for a total of 40 hours.¹⁰ Up until now, the defence awaits the disclosure of identity and all unredacted materials relating to five more witnesses, which

⁷ See, *inter alia*, ICC-01/09-01/11-536-Conf-Red, Confidential Redacted version of Prosecution's urgent application for extension of time limit pursuant to Regulation 35 to disclose incriminatory material regarding P-24, 9 January 2013; ICC-01/09-01/11-537-Conf-Red, 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-01/09-01/11-563-Conf-Red, Prosecution's urgent request for additional time to add P-0024 to the list of witnesses based on exceptional circumstances, 24 January 2013 ; ICC-01/09-01/11-599-Conf-Red+Anx1, Confidential redacted version with Confidential Annexes 1-38 of Prosecution's application for the authorisation to maintain certain redactions, 13 February 2013.

⁸ ICC-01/09-01/11-481, 26 November 2012.

⁹ See ICC-01/09-01/11-540-Conf-AnxA-Red, Witness list, 9 January 2012.

¹⁰ According to the Pre-Trial Materials contained in ICC-01/09-01/11-540-Conf-AnxB, filed on 9 January 2013, the prosecution anticipates that each of the following witnesses will take the indicated hours on the stand for direct examination: P-15 (16 hours), P-397 (8 hours), and P-516 (16 hours).

constitute more than 64 hours¹¹ of the approximately 370 hours¹² that the prosecution has projected is required for questioning of all of its fact witnesses. Consequently, approximately one third of the prosecution's case was either disclosed this week or remains unknown to the defence, seven weeks prior to the scheduled start of trial. It has placed the defence in an impossible situation.

7. At this point the defence has received 1,558 incriminating documents adding up to over 15,000 pages; 494 Rule 77 documents adding up to 4,145 pages; and 136 pexo documents adding up to 939 pages.
8. An unknown volume of disclosure is yet to come. It is to be noted that disclosure in this case is highly focused. Unlike the extensive disclosure at the ICTR/ICTY the defence is not receiving large sets of transcripts or materials, which have built up over the years, and which is largely irrelevant to the specific case or only considered as background. Each item of disclosure must be read and analyzed.
9. The piecemeal and haphazard fashion of prosecution disclosure, which still continues to trickle in well after the 9 January deadline, has caused substantial prejudice to the defence in its ability to perform its task. Evidence review is but part of the functions of a defence lacking the extensive facilities of the prosecution. It must investigate, in the light of disclosure, both the evidence and the witnesses, respond to the constant prosecution motions on disclosure, take instructions and seek its own witnesses. Timely disclosure is essential for a defence to be able to perform effectively. The failure of the prosecution to have done presents a substantial burden on any defence.

II. SUBMISSIONS ON DELAYED DISCLOSURE

¹¹ According to the Pre-Trial Materials contained in ICC-01/09-01/11-540-Conf-AnxB, filed on 9 January 2013, the prosecution anticipates that each of the following witnesses will take the indicated hours on the stand for direct examination: P-24 (redacted ... the defence estimates 16 hours), P-495 (16 hours), P-524 (16 hours), P-534 (16 hours), and P-536 (16 hours).

¹² Note that the defence has adjusted this number downward from the estimate of 413 hours given in the Pre-Trial Materials at para. 3, to account for the fact that the prosecution has withdrawn five witnesses, who were projected to testify for 44 hours total: P-111 (6 hours), P-144 (4 hours), P-450 (16 hours), P-471 (4 hours), and P-481 (4 hours).

10. The defence case is that the evidence directly incriminating William Ruto and Joshua Sang in a plan to murder, displace and persecute non-Kalenjin in the Rift Valley is based on lies, motivated by various personal, political and financial considerations. The credibility of those prosecution witnesses is central to the case and to defence preparations. As such, the identity of those witnesses, as well as their complete and detailed allegations must be known to the defence in order to prepare for trial effectively.

11. Of course, when the identity of a witness is undisclosed consequent redactions permeate that witness's evidence. The names of places, people met, acquaintances etc that form part of that witness's account, and would form a basis for investigation, are redacted. Even when disclosed, significant parts of the material contain category B2 and/or B3 redactions.¹³ For ease of reference, attached as Annex A to this filing is a complete table indicating the date of all of the packages of Incriminating, Rule 77 and Pexo disclosures made during the trial phase, along with the number of documents and total number of pages they contained. Even where some of these documents may have been disclosed previously with R01 redactions, and later with R02 or R03 redactions, the reality is that the materials have to be reviewed completely after each re-disclosure in order to take note of which redactions had been lifted and to transfer that new information into investigators notes, analysis, etc. This is an unavoidable and time-consuming process.

12. The effect of redactions on the time spent preparing a case cannot be overstated. As the B1, B2 and B3 redactions are lifted, in a trickle, all of that evidence must be revisited and investigators re-instructed. Consider witness P-28 as an example – his evidence totals over 2,200 pages. Though his identity has been disclosed, B2 and B3 redactions still exist throughout his statements. Having trawled through this extensive evidence the defence will need to read it again in the light of the lifting of the substantial redactions.

¹³ According to the Redactions Protocol, category B1 redactions are for identifying and contact information of prosecution witnesses, category B2 redactions are for identifying and contact information of family members of witnesses, and category B3 redactions are for identifying and contact information of other persons at risk as a result of the activities of the court and their family members.

13. The prosecution submitted at the Status Conference that the difficulties faced by the defence through its failure to disclose material in a timely manner could be mitigated by the provision of summaries and by deferring the testimony of the undisclosed witnesses until the end of the prosecution's case. The defence dispute the utility of the summaries provided so far in this case as has been previously pointed out in its submissions. Deferring a witness's testimony fails to take into account the importance for the defence to know in detail the prosecution's case as a whole at the outset and the inevitable interplay between witnesses. The latter may prove to be a significant aspect of the case.

14. In addition to the late and to the pending disclosure, the defence also require further material that should have been provided. This includes screening notes made when first meeting a witness. This resulted in time-consuming exchanges with the prosecution and the late disclosure of screening notes from witnesses P-19,¹⁴ P-25,¹⁵ P-28,¹⁶ and P-516,¹⁷ which contain potentially exculpatory material in relation to their respective testimony. It is unclear why these screening notes were not disclosed initially; the prosecution had, as a matter of course, disclosed Rule 77 or Pexo excerpts or summaries of screening notes from other witnesses in this case.¹⁸ In the *Katanga* case, screening notes were provided in a complete but redacted format,¹⁹ ie, not in a segmented or excerpted or summarized format as the defence has received in this case. There are other screening notes that the defence has since noticed should have been provided – such as those of P-189 and P-376 - that make reference to previous conversations (i.e screening notes) and the defence are concerned as to the prosecution's ineffective review for disclosure that their non-disclosure reflects.

15. There are several other items included on the prosecution's List of Evidence, but which have yet to be disclosed. This includes twenty-five items, which the

¹⁴ KEN-OTP-0093-0427, disclosed on 18 February 2013.

¹⁵ KEN-OTP-0093-0429, disclosed on 18 February 2013.

¹⁶ KEN-OTP-0093-0219, disclosed on 11 February 2013.

¹⁷ KEN-OTP-0090-1087, disclosed on 18 February 2013.

¹⁸ Summaries of Pexo Material in screening notes (KEN-OTP-0052-2217, KEN-OTP-0088-0476, KEN-OTP-0088-0481, and KEN-OTP-0091-0942) and Summaries of R77 Material in screening notes (KEN-OTP-0088-0483, KEN-OTP-0088-0485, KEN-OTP-0088-0487, and KEN-OTP-0088-0489).

¹⁹ See, for instance, ICC-01/04-01/07-1844, Prosecution's Urgent Request to Disclose a Redacted Version of a Screening Note of P-296, 5 February 2010 and the Trial Chamber oral decisions ICC-01/04-01/07-T-97-Red-ENG WT 08-02-2010, pp. 5-7, and ICC-01/04-01/07-T-102-Red-ENG WT 15-02-2010, pp. 2-7.

prosecution has subsequently sought to withdraw from its List of Evidence.²⁰ The defence has requested these items from the prosecution pursuant to Rule 77, but to no avail. Furthermore, the prosecution has not disclosed items on its List of Evidence that are associated with witnesses P-336²¹ and P-356²², despite having disclosed the identity of those witnesses to the defence on 11 February 2013. On 19 February, the prosecution responded that some of the documents were duplicates, some had been disclosed under different ERNs (without notice to the defence), that there was a clerical error with respect to one document, and that for the others, “review of the remaining items shows that these items do not contain information disclosable to the defence”.²³ The defence needs time to pursue this further.

16. Furthermore, the prosecution has not disclosed items on its List of Evidence that are associated with witnesses P-336²⁴ and P-356²⁵, despite having disclosed the identity of those witnesses to the defence on 11 February 2013. On 20 February, the prosecution responded to a defence query, saying that the withheld materials would reveal the identity of another witness and therefore could not yet be disclosed. This delays the defence’s ability to analyze the statements of P-336 and P-356.
17. The defence has also requested any audio recordings or transcripts made in respect of any of the witnesses and which have not as yet been served.
18. On the 14th of February, being the very final date for such service, the defence was served the three expert reports.²⁶ These require scrutiny and consideration as to

²⁰ KEN-OTP-0080-0063, KEN-OTP-0003-0015, KEN-OTP-0026-4598, KEN-OTP-0026-5051, KEN-OTP-0027-0251, KEN-OTP-0027-0252, KEN-OTP-0027-0253, KEN-OTP-0027-0254, KEN-OTP-0027-0257, KEN-OTP-0027-0258, KEN-OTP-0027-0264, KEN-OTP-0027-0265, KEN-OTP-0027-0266, KEN-OTP-0027-0267, KEN-OTP-0027-0272, KEN-OTP-0027-0274, KEN-OTP-0027-0275, KEN-OTP-0028-0095, KEN-OTP-0066-1726, KEN-OTP-0065-0105, KEN-OTP-0041-0182, KEN-OTP-0033-0037, KEN-OTP-0066-1747, KEN-OTP-0065-0108, and KEN-OTP-0088-0686.

²¹ KEN-OTP-0082-0258, KEN-OTP-0082-0260, KEN-OTP-0082-0262, KEN-OTP-0082-0265, KEN-OTP-0082-0267, and KEN-OTP-0082-0268.

²² KEN-OTP-0073-0245, KEN-OTP-0073-0212, and KEN-OTP-0073-0313.

²³ Email from Cynthia Tai to Logan Hambrick, dated 19 February 2013, re: Rule 77 Request for Disclosure of Materials to be withdrawn from List of Evidence.

²⁴ KEN-OTP-0082-0258, KEN-OTP-0082-0260, KEN-OTP-0082-0262, KEN-OTP-0082-0265, KEN-OTP-0082-0267, and KEN-OTP-0082-0268.

²⁵ KEN-OTP-0073-0245, KEN-OTP-0073-0212, and KEN-OTP-0073-0313.

²⁶ See, for KEN-OTP-P-0488: KEN-OTP-0092-0882, KEN-OTP-0092-0917, KEN-OTP-0092-0931, KEN-OTP-0092-0957, KEN-OTP-0092-0958, KEN-OTP-0092-1169, KEN-OTP-0092-1380, KEN-OTP-0092-1401, KEN-

whether it is necessary to instruct additional experts. The Chamber is aware that the report of Mr. Maupeu was served in French and will take time to translate.²⁷ The prosecution has said they will try to disclose the English translation by 28 February 2013 (ie, two weeks late).²⁸

III. SUBMISSIONS ON SHIFTS IN FOCUS OF THE CASE

19. During the status conference on 14 February, counsel for both Mr. Ruto and for Mr. Sang highlighted the difficulties presented to the defence because of the shifting or expanding nature of the prosecution's case, post-confirmation.²⁹ The changing nature of the case has become clear through reference to the prosecution's pre-trial brief, the summaries of anticipated witness testimony, and through the disclosed materials themselves.
20. The expansion of the case that will require the most time and resources from the defence is the prosecution's increased focus on events that took place in 2005 during the referendum, and which make express reference to the alleged whereabouts of or statements made by the accused.³⁰ At the confirmation stage, little was said about the referendum, the time period of 2005 or the vote on the constitution.³¹ Now, it appears that the prosecution intends to lead evidence from no fewer than fifteen witnesses about specific acts and conduct of the accused with respect to the 2005 referendum.³² The majority of these witnesses were not part of

OTP-0092-1402, KEN-OTP-0092-1457, KEN-OTP-0092-1512, KEN-OTP-0092-1513, KEN-OTP-0092-1514, KEN-OTP-0092-1515, KEN-OTP-0092-1516, KEN-OTP-0092-1517, KEN-OTP-0092-1518, KEN-OTP-0092-1519, KEN-OTP-0092-1520, KEN-OTP-0092-1521, KEN-OTP-0092-1522, KEN-OTP-0092-1523, KEN-OTP-0092-1524; for KEN-OTP-P-0464: KEN-OTP-0093-0871; for KEN-OTP-P-0542: KEN-OTP-0093-0431.

²⁷ See ICC-01/09-01/11-606, Joint Defence Request for an Order for the Prosecution to Serve Expert Report of Mr. Maupeu in a Language that Mr. Ruto and Mr. Sang Fully Understand and Speak, 19 February 2012.

²⁸ ICC-01/09-01/11-608, Prosecution's Response to "Joint Defence Request for an Order for the Prosecution to Serve Expert Report of Mr Maupeu in a Language that Mr Ruto and Mr Sang Fully Understand and Speak, 20 February 2012.

²⁹ ICC-01/09-01/11-T-19-ENG 14-02-2013, 13-14 and 16-19.

³⁰ See, for instance, the prosecution's Pre-Trial Brief (ICC-01/09-01/11-540-Conf-AnxD), paras. 12-18 ("Politics, Land and the Rift Valley"), 21, 99, and 143.

³¹ There was no mention of the 2005 referendum period in the prosecution's post-confirmation brief (ICC-01/09-01/11-345, 30 September 2011). Indeed, in the confirmation decision itself (ICC-01/09-01/11-373, 23 January 2012), the only reference to events in 2005 was an allegation made by Witness 4 (now P-19) about Henry Kosgey's attendance at an ODM rally. Neither of these documents could be said to have put the defence on notice that the prosecution intended to focus on the 2005 period at trial.

³² Those witnesses include : Expert Henre Maupeu; P-0015; P-0019 (including Sang's broadcasts in 2005); P-0025; P-0028 (in great detail, including alleged meetings at locations including Ruto's home); P-0268 (including discussion of tension between Kalenjin and Kikuyus over land); P-0287 (tension and violence during 2005 in Rift Valley); P-0323 (targeting of Kikuyu in 2005 Referendum, incitement); P-0326 (creation of ODM following

the prosecution case during confirmation. Though these allegations fall far outside the temporal jurisdiction of the charges, to the extent that the prosecution intends to rely on the actions of the accused in 2005 to impute blame to them for the 2007-8 PEV, and putting aside any legal or jurisprudential bars to such an approach on the part of the prosecution, the defence must now investigate the circumstances surrounding the 2005 referendum, including ascertaining where the accused were and what they did or did not say during this time period. This requires, *inter alia*, taking instructions from the accused, going through public record archives to determine the participation of Mr. Ruto in various rallies, translating and listening to archived Kass FM broadcasts purportedly made by Mr. Sang, etc. The need to conduct these investigations is critical but has only become clear since January 2013.

21. The prosecution also intends to rely on evidence of Mr. Ruto's purported post-offence conduct to allegedly cover-up his involvement in the PEV. The defence has still not received disclosure relating to these allegations, which the prosecution deems evidence of Mr. Ruto's "consciousness of guilt", but they are entirely new allegations, made after and untested by the confirmation process. The first notice the defence had of this serious allegation was in the prosecution's pre-trial brief in January 2013.³³ The defence also draws the Chamber's attention to the confidential filing it made in relation to allegations of the accused and others' participation in planning meetings in 2009 in preparation for the then-scheduled 2012 elections.³⁴ Each of these allegations, which post-date the PEV, will require extensive investigative effort and concentration.
22. The other significant shift or expansion of the prosecution's case comes in regard to the number of alleged planning meetings attended by the Mr. Ruto and/or Mr. Sang. The confirmation decision evaluated the evidence pertaining to approximately ten such planning meetings (30 December 2006, 15 April 2007, 2 September 2007, 2 November 2007, two meetings at the beginning of December 2007, 14 December 2007, and three gatherings between 14 and 22 December

2005 Ref); P-0336 (plans to evict Kikuyu during 2005 Ref); P-0410; P-0442 (claiming there has been anti-Kikuyu rhetoric on Kass since 2005); P-0464 (occurrence of violence during elections and/or referenda between 92 and 2005); P-0469 (tension after 2005 Ref); and P-0524 (Sang support to No camp in 2005 Ref).

³³ ICC-01/09-01/11-540-Conf-AnxD, para. 135.

³⁴ ICC-01/09-01/11-588-Conf, 6 February 2013.

2007).³⁵ These meetings (with specified dates, places, and /or lists of people involved), which were acknowledged by the Pre-Trial Chamber, have been the focus of defence investigations until now. Suddenly, according to the pre-trial brief³⁶ and as emerges when reading through the disclosed statements, there is a proliferation of over 30 meeting dates and places, which the defence must investigate, going back as far as June 2006. This considerably increases (indeed triples) the defence's workload, in terms of finding alibi evidence and cross-checking the claims of the prosecution witnesses, etc.

23. The prosecution's change in focus with respect to the composition of the Network (ie, a Kalenjin organization), and changes with respect to alleged victims and locations of crimes also require additional time to evaluate and investigate.

IV. CONCLUSION AND RELIEF REQUESTED

24. For all the considerations above, and considering the extensive delays in disclosure of the prosecution case, the defence requests the Trial Chamber to vacate the 10 April 2013 date for the commencement of trial, in order to ensure effective defence preparation. It is reasonable, in a case as serious and as extensive as this, to provide the defence with – as a minimum – the three months following disclosure that the chamber believed necessary – which, given the state of disclosure, would provide a start date in June. This is not of the defence's making.

³⁵ Confirmation Decision, paras 187-196.

³⁶ ICC-01/09-01/11-540-Conf-AnxD, Section 3 (“Planning and preparation meetings and public ODM rallies”), paras. 53-85.



David Hooper, QC
On behalf of William Samoei Ruto
Dated this 20th day of February 2013
In London



Joseph Kipchumba Kigen-Katwa
On behalf of Joshua Arap Sang
Dated this 20th Day of February 2013
In Nairobi