

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/11
Date: 21 February 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***

Public

Decision on Prosecution's application to disclose one additional document

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 Silas Chekera

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

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*, pursuant to Article 64 of the Rome Statute (“Statute”), Rule 77 of the Rules of Procedure and Evidence (“Rules”) and Regulations 23 *bis*, 34, 35 and 54(l) of the Regulations of the Court (“Regulations”), issues this Decision on Prosecution’s application to disclose one additional document (“Decision”).

I. Procedural History and Submissions

1. On 9 July 2012, the Chamber issued its Decision leading up to trial,¹ in which it set *inter alia* the date for the completion of all disclosure by the Office of the Prosecutor (“Prosecution”) as 9 January 2013, including all Rule 77 material for inspection to the defence teams for Mr Ruto and Mr Sang (together the “Defence”).
2. On 9 January 2013, the Prosecution filed its final brief,² annexing *inter alia* the list of evidence (“LOE”)³ on which the Prosecution intends to rely upon at trial.
3. On 25 January 2013, the Prosecution filed an application requesting the authorisation to disclose one additional document after the 9 January 2013 disclosure deadline (“Application”).⁴ The Prosecution argues that the Defence will not be prejudiced by the disclosure of the document referred to as KEN-OTP-0088-0922 due to the small size of the document, its nature and the

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

² Prosecution’s provision of material pursuant to Decision ICC-01/09-01/11-450, ICC-01/09-01/11-440 with four confidential *ex parte* Prosecution and Victims and Witnesses Unit (“VWU”) only annexes. Confidential redacted versions of the four annexes were filed on the same day, Annexes A and B were notified on 9 January 2013, Annexes C and D were notified on 10 January 2013.

³ ICC-01/09-01/11-540-Conf-Exp-AnxC.

⁴ Prosecution’s application for an extension to the deadline set by Decision ICC-01/09-01/11-440 to disclose one additional incriminatory document, ICC-01/09-01/11-570-Conf, with Annex 1 and 2 filed confidential *ex parte* Prosecution and VWU only and Annex 3 filed confidential.

relatively short delay after the disclosure deadline.⁵ In its Application the Prosecution submits that, if the request is granted, it will file an updated version of the LOE, which includes the additional document. Further, the Prosecution informs the Chamber that it intends to remove several documents from this updated LOE which it does not intend to rely on for purpose of the trial and to correct some clerical errors.⁶

4. On 11 February 2013, the Defence filed a response to the Application ("Response")⁷ in which it informed the Chamber that it does not object to the disclosure of the additional document.
5. In respect of the Prosecution's notification of the withdrawal of several documents from the LOE, the Defence notes that 22 of the items designated for removal have not been disclosed yet to the Defence. For three other items the Defence indicates that they have not been disclosed under the indicated ERN but under a different ERN.⁸ The Defence informs the Chamber that it had requested, *inter partes* via email, the Prosecution to disclose these items but has not received a response from the Prosecution.⁹ It requests the Chamber to order the Prosecution to disclose these items to the Defence in accordance with Rule 77 of the Rules, even if they are withdrawn, arguing that they are material to the preparation of the Defence.¹⁰
6. It further requests that the confidential version of the updated LOE include the pseudonyms of witnesses, the ERNs and descriptions of the documents that

⁵ ICC-01/09-01/11-570-Conf, para. 7.

⁶ ICC-01/09-01/11-570-Conf, para. 2.

⁷ Joint Defence Response to Application for an extension of the deadline set by Decision ICC-01/09-01/11-440 to disclose one additional incriminatory document, ICC-01/09-01/11-595-Conf

⁸ ICC-01/09-01/11-595-Conf-AnxA.

⁹ ICC-01/09-01/11-595-Conf, para. 9.

¹⁰ ICC-01/09-01/11-595-Conf, para. 9.

were still redacted in the original LOE on 9 January 2013, but which have been subsequently disclosed to the Defence.¹¹

7. Finally, the Defence requests that the Application and the Response (except the confidential annexes) be reclassified as public.¹²

II. Analysis and Conclusions of the Chamber

8. The Chamber notes that contrary to Regulation 23 (1)(d) of the Regulations the Prosecution failed to provide a legal basis for its Application. As the Application pertains to the addition of a new item of evidence to the LOE after the expiration of the relevant deadline, the applicable provision is Regulation 35 of the Regulations. The Prosecution submits that the delay was caused because it “inadvertently failed” to disclose it within the time limit.¹³ Therefore, the Chamber concludes that the conditions of Regulation 35(2) of the Regulations are not fulfilled, since oversight does not constitute an “exceptional circumstance” outside of the Prosecution’s control that could justify why it did not ask for an extension of time limit before it lapsed.
9. However, the Chamber notes that the Defence does not object to the additional disclosure and submits that it is not unduly prejudiced by the limited, late disclosure. Further, the document does not contain incriminating information, but merely background information which is available in the public domain. Therefore, pursuant to its powers under Article 64(3)(c) of the Statute and Regulation 54(l) of the Regulations the Chamber authorises, on an exceptional basis, the Prosecution to disclose KEN-OTP-0088-0922 to the Defence.

¹¹ ICC-01/09-01/11-595-Conf. para. 6.

¹² ICC-01/09-01/11-595-Conf. para. 11.

¹³ ICC-01/09-01/11-570-Conf. para. 7.

10. With regard to the Defence's request to order the Prosecution to provide the Defence with copies of the items it intends to remove from the LOE and which are not yet disclosed to the Defence the Chamber considers this to be a new request. The Chamber notes that it is not the practice of this Chamber to permit new requests in responses but will exceptionally allow it considering the specific circumstances. It therefore orders the Prosecution to respond to the Defence's request no later than 26 February 2013.

11. Further, the Chamber orders that the Application and the Response, except the annexes, be reclassified as public. The information redacted by the Prosecution in the public redacted version of its Application pertains to a publicly available document which does not contain any information specific to the case. Therefore, the Chamber does not consider that the filings refer to information which is confidential in nature.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

AUTHORISES the Prosecution to disclose document KEN-OTP-0088-0922 to the Defence no later than 22 February 2013;

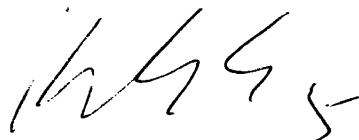
ORDERS the Prosecution to include in the confidential redacted version of the updated LOE all pseudonyms, ERNs and description of the documents that were still redacted from the Defence in the original LOE but which have been subsequently disclosed to the Defence;

ORDERS the Prosecution to respond to the Defence's request indicated in paragraph 9 of this Decision no later than 26 February 2013;

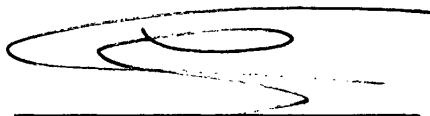
GRANTS the Defence's request to reclassify the Application and Response as public;
and

ORDERS the Registry to reclassify the Application and Response, except for the annexes to both filings, as public.

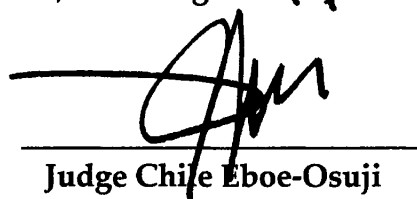
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding



Judge Christine Van den Wyngaert



Judge Chile Eboe-Osuji

Dated this 21 February 2013

At The Hague, The Netherlands