

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 3 June 2013

TRIAL CHAMBER V(A)

Before: Judge, Chile Eboe-Osuji, Presiding
Judge Olga Herrera Carbuccion
Judge Robert Fremr

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
*THE PROSECUTOR v. WILLIAM SAMOEI RUTO and JOSHUA ARAP SANG***

Public

**Decision on prosecution requests to add witnesses and evidence and defence
requests to reschedule the trial start date**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Ms Cynthia Tai

Counsel for William Samoei Ruto

Mr Karim A.A. Khan
Mr David Hooper
Mr Kioko Kilukumi Musau
Ms Shyamala Alagendra

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

Mr Herman von Hebel

Deputy Registrar

Victims and Witnesses Unit

Mr Patrick Craig

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V(A)* (“Chamber”)¹ of the International Criminal Court (“Court”), in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, having regard to Articles 64 and 69 of the Rome Statute (“Statute”) and Rule 132 of the Rules of Procedure and Evidence, issues this Decision on prosecution requests to add witnesses and evidence and defence requests to reschedule the trial start date.

I. Procedural History

1. On 9 July 2012, the Chamber issued a “Decision on the schedule leading up to trial”, whereby it set 10 April 2013 as the date for the commencement of trial.²
2. On 8 March 2013, the Chamber vacated the 10 April 2013 start date in order to allow the Defence additional time to prepare for trial. The new date for the start of trial was set as 28 May 2013.³
3. On 12 April 2013, the Office of the Prosecutor (“Prosecution”) filed a request to add five witnesses to its witness list and add their evidence to its list of evidence (“Prosecution Request”).⁴
4. On 16 April 2013, the defence for Mr Ruto (“Ruto Defence”) requested, *inter alia*, an *ex parte*, Defence only, status conference to address defence investigation issues.⁵ The defence for Mr Sang (“Sang Defence”) joined the Ruto Defence’s

* Judge Herrera Carbuccion, who was appointed as Judge to Trial Chamber V(A) on 21 May 2013, and therefore was not present in the status conferences subject of this decision, and so as not to affect the expeditiousness of proceedings, hereby attests that she has familiarised herself with the record of the proceedings and the written and oral submissions made by the parties and participants.

¹ Where “Chamber” is used in this decision it refers both the Trial Chamber V in its composition as until 21 May 2013 and to Trial Chamber V(A) as composed by the Presidency’s decision of 21 May 2013 (see Decision constituting Trial Chamber V(a) and Trial Chamber V(b) and referring to them the cases of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* and *The Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-01/11-745; “Presidency’s Decision”).

² ICC-01/09-01/11-440.

³ Decision concerning the start date of trial, ICC-01/09-01/11-642.

⁴ Prosecution’s Request Pursuant to Regulation 35(2) of the Regulations of the Court, ICC-01/09-01/11-680-Conf-Exp. A confidential redacted version was filed on 15 April 2013, ICC-01/09-01/11-680-Conf-Red.

⁵ Defence Request for Status Conference, ICC-01/09-01/11-683-Conf, para. 2, 7-9. A public redacted version was filed on 25 April 2013, ICC-01/09-01/11-683-Red.

request for a status conference on 18 April 2013,⁶ indicating that it wished to discuss, *inter alia*, the feasibility of the 28 May 2013 date for the start of trial (“Sang Defence Request”).

5. On 22 April 2013 and on 24 April 2013, respectively, the Ruto Defence and the Sang Defence filed separately their responses to the Prosecution Request (“Ruto Defence Response”⁷ and “Sang Defence Response”⁸), in which both defence teams opposed the addition of the new witnesses to the Prosecution’s witness list.
6. Also on 22 April 2013, the Ruto Defence filed the “Second Defence Request to Vacate the Trial Commencement Date” (“Ruto Defence Request”), in which it requested that the trial date of 28 May 2013 be vacated in order to allow the Defence adequate time to prepare its case.⁹ On 24 April 2013, an *addendum* to the Ruto Defence Request was filed.¹⁰
7. On 1 May 2013, the Prosecution responded to the Ruto Defence Request,¹¹ in which it submits that the request should be denied. That same day, the Common Legal Representative for Victims (“Legal Representative”) also responded to the Ruto Defence Request.¹²
8. On 3 May 2013, the “Prosecution’s Second Request Pursuant to Regulation 35(2) of the Regulations” was filed.¹³

⁶ Sang Defence Request for Status Conference pursuant to Rule 132(2), ICC-01/09-01/11-687-Conf.

⁷ Defence Response to the Prosecution’s Request Pursuant to Regulation 35(2) of the Regulations of the Court, ICC-01/09-01/11-693-Conf.

⁸ Sang Defence Response to Prosecution’s Request Pursuant to Regulation 35(2) of the Regulations of the Court, ICC-01/09-01/11-702-Conf.

⁹ ICC-01/09-01/11-692-Conf. A public redacted version was filed on 25 April 2013, ICC-01/09-01/11-692-Red.

¹⁰ Addendum to Second Defence Request to Vacate the Trial Commencement Date, ICC-01/09-01/11-701-Conf.

¹¹ Prosecution’s Response to the Second Defence Request to Vacate the Trial Commencement Date, ICC-01/09-01/11-715-Conf.

¹² Response of the Common Legal Representative for Victims to the Second Defence Request to Vacate the Trial Commencement Date, ICC-01/09-01/11-714.

¹³ ICC-01/09-01/11-720-Conf-Exp. A confidential redacted version was filed on 8 May 2013, ICC-01/09-01/11-720-Conf-Red.

9. On 6 May 2013, the Chamber issued an order scheduling several status conferences. In the same order, the Chamber held that it would render a decision on the Defence requests related to the start date for trial only after having heard further submissions during the status conferences. On this basis and given the fact that a number of procedural issues relating to the conduct of proceedings had yet to be resolved, as well as the time needed for the Registry and the Victims and Witnesses Unit to make the necessary arrangement for the start of trial, the Chamber considered that 28 May 2013 could no longer be retained as the start date for the trial. Consequently, the Chamber, without prejudice to its decisions on the pending requests, vacated the trial date of 28 May 2013, indicating that a new trial date would be set in due course.¹⁴
10. On 7 May 2013, an *ex parte*, Prosecution only, status conference was held during which the Chamber heard further submissions from the Prosecution concerning the five witnesses that it seeks to add to its witness list.¹⁵
11. That same day, the "Prosecution's third request pursuant to Regulation 35 of the Regulations of the Court" was filed.¹⁶
12. On 13 May 2013, the Ruto Defence responded to the Third Prosecution Request.¹⁷
13. An *ex parte* status conference, Ruto Defence and Sang Defence (together "Defence") only, was held on 14 May 2013 during which the Ruto Defence made submissions concerning a number of investigatory challenges which, in its view, justified delaying the start of trial until November 2013.¹⁸

¹⁴ Order scheduling status conferences and provisionally vacating the trial date, ICC-01/09-01/11-722.

¹⁵ Transcript, ICC-01/01-01/11-T-20-CONF-EXP-ENG ET.

¹⁶ ICC-01/09-01/11-724-Conf.

¹⁷ Defence Response to Prosecution's third request pursuant to Regulation 35 of the Regulations of the Court, ICC-01/09-01/11-734-Conf

¹⁸ Transcript, ICC-01/01-01/11-T-21-CONF-EXP-ENG ET.

14. On 14 and 15 May 2013, the Chamber held an *inter partes* status conference in order to address issues related to the aforementioned requests, among others.¹⁹
15. On 21 May 2013, the Ruto Defence filed its response to the Second Prosecution Request.²⁰ The Sang Defence also attempted to file its response within the prescribed time limit, but was not able to do so because, pursuant to the Presidency's Decision, the Chamber's composition (and name) had changed shortly before the filing deadline. As a result, the Sang Defence filed an updated version of its response after the 16.00 deadline.²¹ The Chamber takes into account the special circumstances and will consider the Sang Defence's response to the Second Prosecution Request and the Third Prosecution Request.
16. The outcome of the Chamber's decision on the Prosecution's requests to rely on five additional witnesses at trial, and add other additional evidence, will necessarily affect the time the Defence needs to adequately prepare for trial, and as such, the start date of trial. Therefore, the three Prosecution applications, as well as the Sang Defence Request and the Ruto Defence Request, will be dealt with herein.
17. The Chamber will first set out, and analyse, the parties' submissions on the three Prosecution requests. After deciding on these requests, the submissions by the parties and the Legal Representative on the trial date will be set out, followed by the Chamber's analysis and decision on this matter.

¹⁹ Transcript, ICC-01/01-01/11-T-22-CONF-ENG ET; Transcript, ICC-01/01-01/11-T-23-CONF-EXP-ENG ET.

²⁰ Defence Response to the "Prosecution's Second Request pursuant to Regulation 35(2) of the Regulations of the Court (ICC-01/09-01/11-720-Conf-Exp)", ICC-01/09-01/11-744-Conf.

²¹ Sang Defence Response to the Prosecution's Regulation 35(2) Applications (ICC-01/09-01/11-720-Conf-Red and ICC-01/09-01/11-724-Conf), ICC-01/09-01/11-746-Conf.

II. Prosecution Request

A. Submissions by the parties

i) Prosecution

18. The Prosecution submits that it has recently discovered three new witnesses, namely P-564, P-571 and P-572, whose evidence is said to be both “critical”²² for to the Prosecution’s case and offering “new and compelling evidence”²³ which “will ultimately aid the Chamber in its determination of the truth and serve the interests of justice”.²⁴ The Prosecution contends that the Chamber should allow the addition of this evidence as it fulfills the test set out by Trial Chamber II in *Katanga and Ngudjolo*,²⁵ according to which the new evidence must be “either more compelling than evidence already disclosed to the Defence, or [bring][...] to light previously unknown facts which have a significant bearing upon the case”.²⁶
19. The Prosecution alleges that the lateness in the discovery of these three persons as potential witnesses is not to be attributed to the Prosecution, but rather resulted from the “exceptional and precarious circumstances of the case”.²⁷ These circumstances are said to include “an atmosphere of intimidation in Kenya”, which has had “a chilling effect on current prosecution witnesses as well as anyone intending on cooperating with the Court”.²⁸
20. The Prosecution explains that as a result of security concerns two of its “most critical witnesses”, as well as another witness, have been unable to provide

²² ICC-01/09-01/11-680-Conf-Red, paras 1 and 11.

²³ Transcript, ICC-01/09-01/11-T-22-CONF-ENG ET, page 44, lines 19-23.

²⁴ ICC-01/09-01/11-680-Conf-Red, paras 1 and 11.

²⁵ ICC-01/09-01/11-680-Conf-Red, paras 24-25.

²⁶ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the disclosure of evidentiary material relating to the Prosecutor's site visit to Bogoro on 28, 29 and 31 March 2009 (ICC-01/04-01/07-1305, 1345, 1360, 1401, 1412 and 1456), 9 October 2009, ICC-01/04-01/07-1515-Corr, para. 37.

²⁷ ICC-01/09-01/11-680-Conf-Exp, para. 13, and further set out in paras 16-18.

²⁸ ICC-01/09-01/11-680-Conf-Red, para. 13.

assurances that they will testify at trial.²⁹ For this reason, the Prosecution has continued investigating “in the hope of finding new witnesses to replace” the aforementioned witnesses, in the event that this becomes necessary.³⁰

21. The Prosecution submits that its request to add the new witnesses (P-564, P-571 and P-572) could either be authorised under Regulation 35(2) of the Regulations or, alternatively, under Article 64(6)(d) of the Statute pursuant to the Chamber’s authority to order the production of evidence.³¹

22. In addition, the Prosecution requests permission to add “two other important witnesses”, namely P-111 and P-471, to its witness list.³² The Prosecution submits that this addition “will serve to establish the truth”, and that it “will not unduly prejudice the Defence”, because these witnesses were initially already on the Prosecution’s witness list³³ and the material related to these witnesses was previously disclosed to the Defence in January 2013 and November 2012, respectively, albeit in redacted form.³⁴ In addition, P-111’s and P-471’s evidence was relied on in the Pre-Trial Brief.³⁵ The Prosecution submits that the relevant evidence is thus “already known to the Defence”.³⁶

23. The Prosecution submits that given the personal circumstances of P-111 at the time that the deadline for disclosure of his identity was approaching, it had no alternative but to remove this witness from its list.³⁷ The Prosecution submits that circumstances have since changed and that P-111 is now in a position to testify

²⁹ ICC-01/09-01/11-680-Conf-Red, paras 14-15.

³⁰ ICC-01/09-01/11-680-Conf-Red, para. 15.

³¹ ICC-01/09-01/11-680-Conf-Red, paras 7-22.

³² ICC-01/09-01/11-680-Conf-Red, para. 1.

³³ P-111 and P-471 were withdrawn from the Prosecution’s witness list on 30 January 2013 and 21 January 2013, respectively. See ICC-01/09-01/11-680-Conf-Red, para. 5.

³⁴ ICC-01/09-01/11-680-Conf-Red, paras 30 and 33; see also ICC-01/09-01/11-T-22-CONF-ENG, page 45, lines 11-14.

³⁵ ICC-01/09-01/11-680-Conf-Red, para. 29.

³⁶ ICC-01/09-01/11-680-Conf-Red, para. 29.

³⁷ ICC-01/09-01/11-680-Conf-Red, para. 30.

before the Court, although additional submissions are made *ex parte* as to ongoing security concerns for this witness.³⁸

24. Similarly, the Prosecution submits that due to P-471's personal situation in the beginning of 2013, this person did want to testify.³⁹ However, the Prosecution informs the Chamber that P-471's personal circumstances have since changed and P-471 is now willing to testify.⁴⁰

25. With respect to the addition of all five witnesses to its witness list, the Prosecution contends that the Defence would not be unduly prejudiced in its preparation for trial as "[t]his evidence is intrinsically connected to the core allegations of the prosecution case, known to the Defence since the early stage of the proceedings".⁴¹ Moreover, the Prosecution submits that the majority of its evidence has already been disclosed to the Defence "many months ago".⁴² Further, it submits that the additional evidence relates "in substantial part [to] matters that are within the direct knowledge of the Accused, including their own actions".⁴³ In addition, in the view of the Prosecution any potential negative impact on the Defence preparations can be minimised by scheduling the testimony of the five requested witnesses at the end of the Prosecution's case.⁴⁴

ii) Ruto Defence

26. The Ruto Defence opposes the Prosecution Request.⁴⁵ The Ruto Defence submits that the Statute and the Court's jurisprudence make clear that the Prosecution must provide "proper and reasonable justification" for post-confirmation

³⁸ ICC-01/09-01/11-680-Conf-Red, para. 31.

³⁹ ICC-01/09-01/11-680-Conf-Red, para. 33.

⁴⁰ ICC-01/09-01/11-680-Conf-Red, para. 34.

⁴¹ ICC-01/09-01/11-680-Conf-Red, para. 37.

⁴² ICC-01/09-01/11-680-Conf-Red, para. 38.

⁴³ ICC-01/09-01/11-680-Conf-Red, para. 39.

⁴⁴ ICC-01/09-01/11-680-Conf-Red, para. 40.

⁴⁵ ICC-01/09-01/11-693-Conf, para. 2.

investigations.⁴⁶ According to the Ruto Defence, the Prosecution has not provided this justification.⁴⁷

27. The Ruto Defence accepts that if the Chamber were to find that the Prosecution's alleged "severe security concerns and/or problems regarding certain critical Prosecution witnesses" justified the continuance of investigations post-confirmation, the re-inclusion of P-111 and P-471 into the Prosecution's witness list would be justified;⁴⁸ as long as any resulting prejudice to the Defence is properly addressed.⁴⁹

28. As to the addition of P-564, P-571 and P-572, the Ruto Defence submits that for it to make submissions on the propriety of adding new witnesses at this late stage of the proceedings, it needs to be able to review the evidence of these new witnesses,⁵⁰ which – at this stage – it has not been able to do because it has not been provided with any information on these witnesses.⁵¹ As such, "the Defence is responding blind to the [Prosecution] Request".⁵² The Ruto Defence submits that in the event that the Prosecution Request is granted, given that the start of the trial is imminent, this would have "serious and prejudicial impact" on the Defence's readiness for trial,⁵³ and that this could not be mitigated solely by calling the three new witnesses at the end of the Prosecution case.⁵⁴

29. The Ruto Defence disputes the need to add P-564, P-571 and P-572. It suggests that the Prosecution seeks to add them to the witness list in case Witness 15 and others refuse to testify at trial along the lines of their previous statements.⁵⁵ The

⁴⁶ ICC-01/09-01/11-693-Conf, paras 4-6.

⁴⁷ ICC-01/09-01/11-693-Conf, paras 7-12.

⁴⁸ ICC-01/09-01/11-693-Conf, para. 7.

⁴⁹ ICC-01/09-01/11-693-Conf, paras 7 and 14.

⁵⁰ ICC-01/09-01/11-693-Conf, para. 8.

⁵¹ ICC-01/09-01/11-693-Conf, para. 14.

⁵² ICC-01/09-01/11-693-Conf, para. 13.

⁵³ ICC-01/09-01/11-693-Conf, para. 14.

⁵⁴ ICC-01/09-01/11-693-Conf, para. 14.

⁵⁵ ICC-01/09-01/11-693-Conf, para. 8.

Defence submits that the Prosecution Request is premature since no witnesses have been withdrawn from the Prosecution's list of witnesses and any need to replace evidence of witnesses is currently only speculation.⁵⁶

30. Furthermore, the Ruto Defence submits that the Prosecution's investigations prior to the confirmation of the charges against the accused were "wholly inadequate".⁵⁷ It submits that the majority of the witnesses that the Prosecution seeks to rely on at trial was interviewed post-confirmation and until very recently.⁵⁸ The Ruto Defence argues that if the Prosecution "has not done what they ought to and should have done", it should be open about this, rather than making allegations of witness intimidation.⁵⁹

31. In addition, the Ruto Defence contends that the Prosecution's admission that it found "new" and "more compelling" evidence during the course of its post-confirmation investigations contradicts the Prosecution's justification that its request results from security concerns.⁶⁰

iii) Sang Defence

32. The Sang Defence opposes the addition of the five witnesses and asks the Chamber to reject the Prosecution Request. It adopts the submissions made in the Ruto Defence Response.⁶¹ In addition, it submits that the Prosecution Request "appears to be a brazen attempt to circumvent the finality of orders made by the Trial Chamber", because the Prosecution was ordered to disclose all incriminatory evidence and its witness list to the Defence by 9 January 2013.⁶² The Sang Defence

⁵⁶ ICC-01/09-01/11-693-Conf, para. 8.

⁵⁷ ICC-01/09-01/11-693-Conf, para. 9.

⁵⁸ ICC-01/09-01/11-693-Conf, paras 9-10.

⁵⁹ ICC-01/09-01/11-693-Conf, paras 9-10.

⁶⁰ ICC-01/09-01/11-693-Conf, para. 11.

⁶¹ ICC-01/09-01/11-702-Conf, para. 2.

⁶² ICC-01/09-01/11-702-Conf, para. 3.

argues that the Prosecution is now improperly attempting to “belatedly bolster its case” with new witnesses and new material.⁶³

33. During the 14 May 2013 status conference, the Sang Defence focused on the request to add P-564, P-571 and P-572. It argued that the Prosecution seeks to add these persons as witnesses in order to replace Witness 15 and another witness whose identity is currently unknown to the Defence. In the event that Witness 15 and this other witness are able to testify, in the view of the Sang Defence, there would be no need for these three additional witnesses.⁶⁴ As to the security concerns cited by the Prosecution, the Sang Defence holds that these do not apply in case of Witness 15 because the fact that this witness has changed his mind about testifying “has nothing to do with security”.⁶⁵ In any event, the Sang Defence asks the Chamber to take the veracity of the security concerns alleged by the prosecution into account when deciding on the Prosecution Request.⁶⁶

34. The Sang Defence requests that if the Chamber grants the Prosecution Request, the Defence be given “reasonable time within which to respond to the contents of the additional evidence”.⁶⁷

B. Analysis by the Chamber

35. As to the adding of P-571 and P-572, the Chamber notes that recently no witnesses have been withdrawn from the Prosecution’s witness list.⁶⁸ Although the Prosecution submitted that these witnesses are “critical” for the Prosecution’s

⁶³ ICC-01/09-01/11-702-Conf, para. 3.

⁶⁴ Transcript, ICC-01/09-01/11-T-22-CONF-ENG ET, page 27, lines 16-21.

⁶⁵ Transcript, ICC-01/09-01/11-T-22-CONF-ENG ET, page 27, lines 1-6.

⁶⁶ Transcript, ICC-01/09-01/11-T-22-CONF-ENG ET, page 28, lines 9-18.

⁶⁷ Transcript, ICC-01/09-01/11-T-22-CONF-ENG ET, page 29, lines 15-20.

⁶⁸ Prosecution’s provision of materials pursuant to Decision ICC-01/09-01/11-440, 9 January 2013, ICC-01/09-01/11-540-AnxA-Conf-Red; and Prosecution’s provision of updated Pre-Trial Brief, 25 February 2013, ICC-01/09-01/11-625, para. 2.

case”,⁶⁹ it has not provided any information on the basis of which the Chamber could conclude that this might indeed be the case. The Chamber considers that the explanation of P-571 and P-572 (and P-564)’s evidence, as set out in the Prosecution Request and during the 7 May status conference, does not – at this stage – support the Prosecution’s claim.

36. Without prejudice to any decision at a later stage on additional witnesses, the Chamber considers it premature to add, at this stage, extra witnesses that may or may not be called upon to replace evidence that – based on the current state of the Prosecution case and its list of witnesses – will be given by other witnesses. Adding P-571 and P-572 as witnesses now, when ultimately their testimony may not need to be replaced, would unduly burden the Defence in its preparation for trial.

37. As to P-564, the Chamber notes that the Prosecution during the 7 May 2013 status conference stated that the adding of P-564 was not requested for the purposes of replacing another witness, but at the same time described the evidence that would be given by P-564 as corroborating and it mentioned that this would be “an additional witness” testifying about certain acts and conduct of the accused.⁷⁰ In addition, the Chamber notes that the Prosecution appears unsure whether recent events that allegedly took place will affect its bid to add P-564 to its witness list.⁷¹ Under these circumstances, the Chamber considers that permitting the Prosecution to add P-564 to the witness list is not opportune.

38. The Chamber therefore denies the Prosecution leave to add P-564, P-571 and P-572 to its witness list. In the event that one or more of the witnesses on the witness list have to be withdrawn, the Prosecution is free to make a renewed application for

⁶⁹ See para. 18 above.

⁷⁰ Transcript, ICC-01/09-01/11-T-20-CONF-EXP-ENG ET, page 6, lines 15-21.

⁷¹ Transcript, ICC-01/09-01/11-T-20-CONF-EXP-ENG ET, page 7, line 17 to page 8, line 16.

the addition of new witnesses. The Chamber will then, taking into consideration the circumstances at that moment, decide on such an application. For now, the Prosecution's request is considered premature and therefore rejected.

39. With respect to the request to add P-111 and P-471 to the Prosecution's witness list, the Chamber considers that the aforementioned prejudice to the Defence does not arise. Both P-111 and P-471 were on the Prosecution's initial witness list and pursuant to the Chamber's orders their (redacted) statements were disclosed to the Defence before the 9 January 2013 deadline for disclosure; on 2 January 2013 and 30 November 2012, respectively.⁷² These witnesses formed part of the original Prosecution case and are, as such, mentioned in the Pre-Trial Brief.⁷³

40. P-111 and P-471 were withdrawn from the Prosecution's witness list because the Prosecution at the time, due to security concerns related to personal circumstances of a temporary nature, could not comply with the Chamber's order to disclose the identity of these persons. When withdrawing P-111 from its witness list on 30 January 2013, the Prosecution already announced that in case of a delay in the trial or a change in the personal circumstances of P-111, it would request "late inclusion" of this person on its witness list.⁷⁴ Now that these circumstances have changed, the Chamber is persuaded that there has been a change in circumstances that warrants the granting of the Prosecution's request to add these witnesses back on to its witness list. The Chamber considers that no prejudice to the accused arises so long as the Defence will be given more time to prepare for trial than was originally contemplated when initially setting the date for the commencement of trial.

⁷² ICC-01/09-01/11-527 and ICC-01/09-01/11-494-Red.

⁷³ See the Pre-Trial Brief filed on 9 January 2013 (ICC-01/09-01/11-540-Conf-Exp-AnxD) at paras 180, 181, 196, 211, 242 and 256 for P-111 and at paras 48, 51, 59, 65, 76, 98, 105, 114, 124, 134, 182, 220, 240, 241, 255, 256, 260, 393 and 394 for P-471.

⁷⁴ ICC-01/09-01/11-577-Conf-Exp, para. 8.

41. The Chamber considers it important, however, that disclosure related to P-111 and P-471 will take place as soon as possible. No further delays in disclosure, save for extra-ordinary circumstances, will be accepted by the Chamber. If the Prosecution is not in a position to disclose the identity of these witnesses and statements in compliance with the Redaction Protocol by 10 June 2013, it will have to withdraw these witnesses.

III. Second Prosecution Request

42. The Chamber now turns to the Second Prosecution Request, which pertains to a request for authorization of disclosure of the statements arising out of the re-interviews of four witnesses (Witnesses 189, 287, 336, and 495) as incriminating material, as well as the disclosure of interactive maps, and the addition of these items to the Prosecution's List of Evidence ("LoE").⁷⁵

A. *Submissions by the parties*

i) *Prosecution*

43. The Prosecution explains that it has re-interviewed four witnesses in order to clarify "specific issues of a limited scope".⁷⁶ It submits that the resulting witness statements are "very brief and concise",⁷⁷ and that they will assist the Chamber and the Defence teams in understanding specific elements of prior disclosed evidence.⁷⁸

44. The Prosecution sets out that during an interview in March 2013 with P-564, whose addition to the witness list forms part of the Prosecution Request, it received information that contradicted evidence previously provided by one of

⁷⁵ ICC-01/09-01/11-720-Conf-Red, para. 22.

⁷⁶ ICC-01/09-01/11-720-Conf-Red, para. 2.

⁷⁷ ICC-01/09-01/11-720-Conf-Red, para. 2.

⁷⁸ ICC-01/09-01/11-720-Conf-Red, para. 12.

the Prosecution witnesses. The Prosecution therefore, “in order to ascertain the truth about this limited point”, re-interviewed three witnesses.⁷⁹ The Prosecution seeks to add the statements of two of these interviews to the LoE.⁸⁰ It holds that since the reason to conduct these re-interviews arose out of information received after 9 January 2013, it was unable to conduct the interviews in question and disclose the resulting statements prior to the 9 January 2013 disclosure deadline.⁸¹

45. The Prosecution submits that it re-interviewed another witness that had been contacted several times regarding a video that the witness was attempting to obtain, “in order to provide some clarity on this issue”. During this interview, the witness made “useful comments” on video footage that was collected from a different source.⁸² The Prosecution stresses that it could not have interviewed the concerning witness sooner than 4 April 2013. In addition, it submits that the information in the re-interview statement will assist the Chamber as it clarifies audio-visual material that appears on the LoE.⁸³

46. As to the last re-interview statement, the Prosecution submits that re-interviewing the witness concerned in March 2013 was done to ascertain the truth about information provided by another witness during an interview in late December 2012, namely whether these two witnesses knew each other.⁸⁴ The Prosecution states that it first came into possession of the information that the witnesses knew each other on 15 February 2013 and that it conducted the re-interview as soon as practicable. It submits that it could not conduct the re-interview within the time limit imposed by the Chamber, because it only received the information that

⁷⁹ ICC-01/09-01/11-720-Conf-Red, para. 13.

⁸⁰ ICC-01/09-01/11-720-Conf-Red, para. 14.

⁸¹ ICC-01/09-01/11-720-Conf-Red, para. 14.

⁸² ICC-01/09-01/11-720-Conf-Red, para. 15.

⁸³ ICC-01/09-01/11-720-Conf-Red, para. 16.

⁸⁴ ICC-01/09-01/11-720-Conf-Red, para. 17.

formed the basis to conduct the re-interview after the 9 January 2013 disclosure deadline.⁸⁵

47. The Prosecution submits that these circumstances demonstrate good cause and reasons outside the Prosecution's control, which – in the view of the Prosecution – are required for the Chamber to “retroactively extend the 9 January disclosure time limit”.⁸⁶

48. Further, the Prosecution submits that it was only in March 2013 able to obtain interactive maps of the locations where the alleged attacks occurred.⁸⁷ The maps concern the greater Eldoret region, Kiambaa, Turbo, Kapsabet, and Nandi Hills.⁸⁸ According to the Prosecution, such maps that accurately show these locations both before and after the post-election violence will be “extremely useful” to the Chamber and to all parties and participants.⁸⁹ It highlights that it seeks inclusion of the maps in the case record so that all parties and participants may be able to use them to present their argument and views. The Prosecution submits that the late disclosure of the maps thus does not result in any unfair prejudice to the Defence.⁹⁰

ii) Ruto Defence

49. The Ruto Defence opposes the Second Prosecution Request.⁹¹ It submits that there is no justification for the addition of the re-interview statements and the interactive maps to the LoE.⁹² It repeats its objections to the Prosecution Request⁹³ and contends that any security concern justifications put forward by the

⁸⁵ ICC-01/09-01/11-720-Conf-Red, para. 18.

⁸⁶ ICC-01/09-01/11-720-Conf-Red, para. 11.

⁸⁷ ICC-01/09-01/11-720-Conf-Red, para. 20.

⁸⁸ ICC-01/09-01/11-720-Conf-Red, para. 20.

⁸⁹ ICC-01/09-01/11-720-Conf-Red, paras 3 and 12.

⁹⁰ ICC-01/09-01/11-720-Conf-Red, para. 21.

⁹¹ ICC-01/09-01/11-744-Conf, para. 1.

⁹² ICC-01/09-01/11-744-Conf, para. 3.

⁹³ ICC-01/09-01/11-744-Conf, para. 3.

Prosecution, in fact, result from “investigative failings”.⁹⁴ Further, it complains about the Prosecution’s use of redactions and the lack of legal basis provided for them.⁹⁵

50. The Ruto Defence argues that since the re-interviews of Witnesses 336 and 495 were triggered by the interview of P-564, a person who in the view of the Ruto Defence should not have been interviewed this long after the confirmation decision, adding the re-interviews to the LoE should not be permitted.⁹⁶ Similarly, in suggesting that Witness 287 was re-interviewed in order to strengthen the credibility of Witness 536, a witness who was first interviewed in late December 2012, it contends that the re-interview of Witness 287 should thus not be added to the LoE.⁹⁷

51. As to the re-interview of Witness 189, the Ruto Defence submits that the re-interview could have been conducted before the 9 January 2013 deadline and that the Defence should not be burdened because of the Prosecution’s failure to do so.⁹⁸

52. With respect to the request to add interactive maps to the LoE, the Ruto Defence submits that it does not believe the Prosecution’s submission that it was unable to obtain the said maps at an earlier date.⁹⁹ Further, it does not consider the maps to be useful as they appear to be “simply the names of case specific locations in certain areas”.¹⁰⁰ For these reasons, the Ruto Defence submits that there is no basis to add the maps to the LoE.¹⁰¹

⁹⁴ ICC-01/09-01/11-744-Conf, para. 4.

⁹⁵ ICC-01/09-01/11-744-Conf, paras 4, 6 and 8.

⁹⁶ ICC-01/09-01/11-744-Conf, para. 5.

⁹⁷ ICC-01/09-01/11-744-Conf, para. 9.

⁹⁸ ICC-01/09-01/11-744-Conf, para. 7.

⁹⁹ ICC-01/09-01/11-744-Conf, para. 10.

¹⁰⁰ ICC-01/09-01/11-744-Conf, para. 11.

¹⁰¹ ICC-01/09-01/11-744-Conf, para. 12.

iii) Sang Defence

53. The Sang Defence opposes the addition of the re-interview statements of Witnesses 189, 287, 336, and 495 and the interactive maps to the LoE “at this late stage”, because the Prosecution has not persuasively explained why it did not respect the 9 January 2013 disclosure deadline in relation to these materials.¹⁰² It specifically addresses the request to add the re-interview statements of Witnesses 189 and 287. It submits that the Prosecution misrepresents the dates that these Witnesses were first interviewed.¹⁰³ By referring to the witness statements already on the LoE, the Sang Defence stresses the Prosecution was on notice of the need to conduct a re-interview well before the moment alleged in the Second Prosecution Request. The Sang Defence argues that the Prosecution therefore should have been able to conduct the re-interviews prior to the 9 January 2013 deadline and as a result, the statements of the interviews conducted after this disclosure deadline should not be added to the LoE.¹⁰⁴

54. As to the interactive maps, the Sang Defence contends that the Prosecution should have informed the Chamber prior to the 9 January 2013 disclosure deadline that it was experiencing difficulties in obtaining such maps and apply for an extension. The Sang Defence submits that as a result of the failure to do so at that stage, the request to add the maps to the LoE should be rejected.¹⁰⁵

B. Analysis by the Chamber

55. At the outset, the Chamber recognises that the Sang Defence correctly highlighted that the Prosecution provided inaccurate information to the Chamber about the

¹⁰² ICC-01/09-01/11-746-Conf, para. 3.

¹⁰³ ICC-01/09-01/11-746-Conf, paras 5-11.

¹⁰⁴ ICC-01/09-01/11-746-Conf, paras 8 and 11.

¹⁰⁵ ICC-01/09-01/11-746-Conf, para. 12.

dates of its first interviews with two of the witnesses to which the Second Prosecution Request relates.¹⁰⁶ The Chamber regrets that the Prosecution provided the Chamber with incorrect submissions on this point and urges it to be diligent in the future.

56. The Ruto Defence has challenged the re-interview statement of Witnesses 336 and 495 on the basis of the source of the Prosecution's information that triggered the re-interviews.¹⁰⁷ However, the source of the information triggering the need to conduct re-interviews is not the criterion on the basis of which the justification for admitting the resulting re-interview statements is assessed. What matters is whether the Prosecution received information that required clarification.
57. Contrary to the Defence's submissions,¹⁰⁸ the Chamber considers that the addition of re-interview statements does not particularly burden the Defence. Rather, the re-interview statements put the Defence on notice of issues that may arise during the testimony of the witnesses concerned. The Chamber considers that disclosure of the statements to the Defence sufficiently in advance of the start of trial for it to have adequate time to prepare, is in the interests of justice and that a variation of the disclosure deadline initially set for 9 January 2013 is therefore appropriate.
58. Therefore, the Chamber permits the addition of the re-interview statements to the LoE. As no request for redactions to the statements is before the Chamber, this authorisation is given in the understanding that the statements will be disclosed forthwith and be in compliance with the Redactions Protocol.¹⁰⁹
59. As to the interactive maps, the Chamber considers that detailed maps may be beneficial for its understanding of the evidence. The Defence questions the utility

¹⁰⁶ See para. 53 above.

¹⁰⁷ See para. 50 above.

¹⁰⁸ See para. 51 above.

¹⁰⁹ Decision on the protocol establishing a redaction regime, 27 September 2013, ICC-01/09-01/11-458-AnxA-Corr.

of the maps,¹¹⁰ but the Chamber considers that the maps may assist the Chamber, as well as the parties and participants in the proceedings, in appreciating the geographical location of relevant places discussed during the presentation of evidence. However, as with all other evidence, the Defence needs to be in a position to test it and challenge its credibility. The Ruto Defence objected to the identity of the entity that produced the maps being withheld without the mentioning of any reason by the Prosecution.¹¹¹ Indeed, the Chamber considers that – in the absence of justification for non-disclosure provided by the Prosecution – the name of the entity should be disclosed to the Defence. The Chamber notes that the actual maps themselves do not appear to contain any information identifying their origin and/or which entity produced them. For the aforementioned reasons, the Chamber concludes that the maps as such may be admitted to the LoE. As to the confidential redacted version of the Second Prosecution Request, if the Prosecution wishes to retain the redactions to the name of the entity that produced the maps, it is required to request such redactions; or else, it is to file a lesser redacted version of the Second Prosecution Request, without redactions to paragraph 20, by 10 June 2013.

60. The Chamber grants the Second Prosecution Request. Disclosure of the new statements of Witnesses 336, 495, 189, and 287, and of the interactive maps is to take place forthwith.

IV. Third Prosecution Request

61. The Third Prosecution Request pertains to the request to add a Prosecution investigator to the Prosecution's witness list.

¹¹⁰ See paras 52 above.

¹¹¹ ICC-01/09-01/11-744-Conf, para. 12.

A. Submissions by the parties

i) Prosecution

62. The Prosecution sets out that on 16 April 2013 the Ruto Defence indicated to the Prosecution by email that it considered it “in the interest of justice for the Prosecution to call the lead investigator as part of its case in chief”.¹¹² On 26 April and 3 May 2013, respectively, the Prosecution notified the Ruto Defence and the Sang Defence by email that it would seek leave from the Chamber to add a Prosecution investigator to its witness list. The Sang Defence responded favourably to this email.¹¹³

63. The Prosecution seeks authorisation from the Chamber to add Mr Freimann, the former Prosecution team leader, as an additional witness to its witness list. It submits that the resulting variation of the time limit for disclosure to the Defence of the witnesses that the Prosecution intends to call at trial is justified since the Defence does not oppose calling Mr Freimann at trial, and because Mr Freimann’s testimony would assist the Chamber in understanding the general conduct of the investigations in the Kenya I case, and as such, “aid the Chamber in fulfilling its mandate”.¹¹⁴ Therefore, it submits, including this person in the witness list will not cause undue prejudice to the Defence nor affect the fairness of the proceedings.¹¹⁵

64. The Prosecution submits that because Mr Freimann’s testimony is intended to assist the Chamber at the start of the case in understanding how the Prosecution’s investigations were conducted and how statements were taken from witnesses,¹¹⁶ the scope of the said testimony should not involve irrelevant matters that are

¹¹² ICC-01/-09-01/11-724-Conf, para. 5.

¹¹³ ICC-01/-09-01/11-724-Conf, paras 6 and 8.

¹¹⁴ ICC-01/-09-01/11-724-Conf, paras 1 and 9-10.

¹¹⁵ ICC-01/-09-01/11-724-Conf, para. 9.

¹¹⁶ Transcript, ICC-01/09-01/11-T-22-CONF-ENG ET, page 42, lines 1-5.

immaterial to the case.¹¹⁷ It stresses that “fishing expeditions” should be avoided¹¹⁸ and that limiting the scope of the questioning is “in the interests of judicial economy”.¹¹⁹ It therefore requests the Chamber to limit the questions to Mr Freimann to “those bearing on objective facts” and that questions “aimed at challenging the investigative methods” of the Prosecution be disallowed.¹²⁰ In addition, it holds that the questions should not address the situation of particular witnesses.¹²¹ It submits that questions by all parties and participants should be limited to how the investigation was conducted, which difficulties were encountered by investigators, how witness statements were taken, and how exonerating evidence was collected and reviewed.¹²²

ii) *Ruto Defence*

65. The Ruto Defence, which initially asked the Prosecution to add the Prosecution’s lead investigator to the witness list,¹²³ supports the request for calling Mr Freimann as a witness. However, it opposed the requested restrictions on questioning.¹²⁴

66. The Ruto Defence notes that all questioning of witnesses must always be probative and relevant to the concerning issue, which is laid down in the Statute, the Rules and the Code of Professional Conduct for counsel.¹²⁵ The Ruto Defence does not see any justification why Mr Freimann would be afforded a “special status” that would “effectively [...] shield” this Prosecution staff member from

¹¹⁷ ICC-01/-09-01/11-724-Conf, para. 10, referring to *The Prosecutor v. Bahar Idriss Abu Garda*, Decision on witness to be called by the Defence at the confirmation hearing, 19 October 2009, ICC-02/05-02/09-186.

¹¹⁸ Transcript, ICC-01/09-01/11-T-22-CONF-ENG ET, page 41, lines 18-20.

¹¹⁹ Transcript, ICC-01/09-01/11-T-22-CONF-ENG ET, page 42, lines 18-20.

¹²⁰ ICC-01/-09-01/11-724-Conf, para. 10.

¹²¹ ICC-01/-09-01/11-724-Conf, para. 12, referring to *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Décision sur la requête de la Défense de Mathieu Ngudjolo en vue de reporter la date d'ouverture des débats au fond (règle 132-1 du Règlement de procédure et de preuve), 5 November 2009, ICC-01/04-01/07-1603.

¹²² ICC-01/-09-01/11-724-Conf, para. 11.

¹²³ ICC-01/09-01/11-734-Conf, para. 2.

¹²⁴ ICC-01/09-01/11-734-Conf, para. 3.

¹²⁵ ICC-01/09-01/11-734-Conf, para. 4.

“necessary questioning”¹²⁶ and to curtail the Defence’s right to cross-examine.¹²⁷ It does not understand why Mr Freimann’s position as a witness should be different from other witnesses.¹²⁸

67. The Ruto Defence argues that the decisions in *Abu Gharda* and *Katanga and Ngudjolo*, on which the Prosecution relies,¹²⁹ do not support the Prosecution’s request.¹³⁰

68. The Ruto Defence submits that it is for the Chamber to control the proceedings and that the Chamber can order the Defence to stop pursuing a certain line of questioning,¹³¹ but that the Chamber cannot make such a determination at this stage of the proceedings.¹³²

69. With respect to the order in which the Prosecution witnesses be called, the Ruto Defence requests the Chamber that the Prosecution be ordered to call Mr Freimann as its first witness in order to prevent that he “tailor[s] his evidence according to what transpires in the cross-examination of other prosecution witnesses”.¹³³ In addition, it requests the Chamber to order the Prosecution to take a statement from Mr Freimann on the topics to which the Prosecution proposes his testimony be limited, so as to assist the Defence in preparing properly in advance to Mr Freimann’s testimony.¹³⁴

¹²⁶ ICC-01/09-01/11-734-Conf, paras 2 and 12.

¹²⁷ ICC-01/09-01/11-734-Conf, para. 16.

¹²⁸ ICC-01/09-01/11-734-Conf, paras 5 and 15.

¹²⁹ See footnotes 117 and 121 above.

¹³⁰ ICC-01/09-01/11-734-Conf, paras 6-11.

¹³¹ ICC-01/09-01/11-734-Conf, para. 13.

¹³² ICC-01/09-01/11-734-Conf, para. 16.

¹³³ ICC-01/09-01/11-734-Conf, paras 19-20.

¹³⁴ ICC-01/09-01/11-734-Conf, para. 21.

iii) *Sang Defence*

70. The Sang Defence welcomes the calling of Mr Freimann as a witness.¹³⁵ It does object to the conditions that the Prosecution seeks to have put in place for Mr Freimann's testimony. The Sang Defence submits that placing restrictions on the questioning would affect "the integrity of these proceedings"¹³⁶ and frustrate the Chamber's ability to seek the truth.¹³⁷ Limiting the Defence's ability to ask questions would defeat the purposes of Article 54 of the Statute, and will prejudice the Defence by affecting its options to put forward arguments on the investigations.¹³⁸

71. The Sang Defence stresses that the Chamber will be able to determine what question may be asked and which may not be asked during the actual testimony.¹³⁹

B. *Analysis by the Chamber*

72. The Chamber commends the parties for having agreed, through *inter partes* discussion, on seeking permission to add a Prosecution investigator to the Prosecution's witness list. However, the fact that the parties agree does not affect the need for the Chamber to carefully assess the request to add a new witness to the witness list. At this stage, no specific issues as to the Prosecution's method of investigating have arisen, as the evidentiary stage of the trial has not yet commenced and no witnesses have been heard and no related witness statements have been admitted into evidence.¹⁴⁰

¹³⁵ Transcript, ICC-01/09-01/11-T-22-CONF-ENG ET, page 31, lines 14-16; ICC-01/09-01/11-746-Conf, para. 13.

¹³⁶ Transcript, ICC-01/09-01/11-T-22-CONF-ENG ET, page 31, line 21 to page 32, line 3.

¹³⁷ ICC-01/09-01/11-746-Conf, para. 13.

¹³⁸ Transcript, ICC-01/09-01/11-T-22-CONF-ENG ET, page 30, lines 13-17.

¹³⁹ Transcript, ICC-01/09-01/11-T-22-CONF-ENG ET, page 32, lines 11-12; ICC-01/09-01/11-746-Conf, para. 13.

¹⁴⁰ See arguments made at Transcript, ICC-01/09-01/11-T-22-CONF-ENG ET, page 41, line 25 to page 42, line 3.

73. The Prosecution has cited judicial economy and efficiency as arguments to call Mr Freimann at the beginning of trial, but the Chamber considers it more efficient to call a witness on the Prosecution's investigations when actual issues concerning these investigations would have arisen. At this stage of the proceedings, the Chamber therefore rejects the Third Prosecution Request.

V. Defence requests

74. The Chamber will now consider the Defence's requests. Initially, the Defence requested to vacate the trial date in order for it to be given extra time to prepare for trial. The Chamber has already vacated the 28 May 2013 trial date¹⁴¹ and will therefore consider the Defence requests as requests for extra time. It will first set out the submissions by the parties and the Legal Representative, followed by the Chamber's analysis.

A. Submissions by the parties

i) Ruto Defence

75. The Ruto Defence raises a number of issues that it suggests justify delaying the start of trial until November 2013.¹⁴² The first of these is the continued non-disclosure of the identity of Witness P-534. The Ruto Defence submits that it is unable to conduct investigations regarding P-534, a witness the Prosecution has described as "key" to its case.¹⁴³ In this connection, the Defence points to the "significant redactions remain[ing]" in the Prosecution's Pre-Trial Brief.¹⁴⁴ The

¹⁴¹ ICC-01/09-01/11-722.

¹⁴² ICC-01/09-01/11-692-Red.

¹⁴³ ICC-01/09-01/11-692-Red, paras 7-11.

¹⁴⁴ ICC-01/09-01/11-692-Red, para. 13.

Defence also submits that it has not been given sufficient time to investigate the evidence of Witness P-524, whose identity was only disclosed on 17 April 2013.¹⁴⁵

76. The next issue raised by the Defence is the Prosecution's request to add five witnesses, submitted six weeks before the scheduled trial commencement date. The Defence contends that if the Chamber authorises the addition of even one of these witnesses, all of whose identities are unknown to the Defence, more time will be required in order to conduct effective investigations into the witnesses prior to trial.¹⁴⁶ The Defence submits that the Updated Pre-Trial Brief would need to be revised again to incorporate the evidence of any new witness.¹⁴⁷ It also submits that even were the Chamber to deny the request to add one or more of the five witnesses, Rule 77 of the Rules and potentially Article 67(2) of the Statute require that the identities and statements of the witnesses are disclosed to the Defence sufficiently in advance of trial in order to allow appropriate investigations.¹⁴⁸

77. The Ruto Defence also raises the related matter of the recent disclosure by the Prosecution of audio recorded interviews relating to four witnesses, as well as the Defence request to be provided with full, non-redacted screening notes for all Prosecution trial witnesses.¹⁴⁹ The Defence contests the continued non-disclosure of Rule 67(2) material related to Witness P-41, and it also requests the identities of ten non-trial witnesses for whom the Prosecution prepared screening notes.¹⁵⁰ It also submits that it will need to review and take any necessary investigative steps as a result of the information contained in the 28 screening notes of trial witnesses which were disclosed on 16 April 2013 (more than three months after the final

¹⁴⁵ ICC-01/09-01/11-692-Red, para. 12.

¹⁴⁶ ICC-01/09-01/11-692-Conf, paras 15-17.

¹⁴⁷ ICC-01/09-01/11-692-Conf, para. 18.

¹⁴⁸ ICC-01/09-01/11-692-Conf, para. 19.

¹⁴⁹ ICC-01/09-01/11-666-Conf-Exp.

¹⁵⁰ ICC-01/09-01/11-692-Conf, paras 23-27.

disclosure deadline of 9 January 2013) and the remainder of the still undisclosed screening notes and information.¹⁵¹ On this basis, and in particular given that the Prosecution will not disclose the identities of ten non-trial witnesses until after their security situations have been evaluated, the Defence submits that adequate time is critical for it to be able to review this information.¹⁵² The Ruto Defence made further submissions on the extent of non-disclosure and the need for adequate time to conduct investigations prior to trial in the course of the 14 May 2013 *inter partes* status conference convened to discuss issues related to the start date of trial.¹⁵³

78. The Defence also refers to the Prosecution's application for authorisation to maintain ongoing B.2 and B.3 redactions to the statements of 38 witnesses.¹⁵⁴ It submits that any redactions that the Chamber orders the Prosecution to lift will likely require additional Defence investigations and extra time for trial preparation.¹⁵⁵

79. Finally the Ruto Defence argues that trial cannot "fairly commence" without first resolving the allegations of witness interference by the accused and his associates.¹⁵⁶ In this regard, the Ruto Defence suggests that: (i) the Article 70 allegations are adjudicated before trial; (ii) the Article 70 allegations are treated as a peripheral collateral matter and are not allowed into the record of this case; or (iii) if the Prosecution intends to rely on Article 70-related evidence as consciousness of guilt, all relevant material must be disclosed to the Defence.¹⁵⁷

¹⁵¹ ICC-01/09-01/11-692-Conf, paras 27-28.

¹⁵² ICC-01/09-01/11-692-Conf, paras 28-29.

¹⁵³ Transcript, ICC-01/09-01/11-T-22-CONF-ENG ET, page 8, line 5 to page 23, line 16.

¹⁵⁴ ICC-01/09-01/11-692-Conf, para. 30.

¹⁵⁵ ICC-01/09-01/11-692-Conf, paras 31-32.

¹⁵⁶ ICC-01/09-01/11-692-Conf, paras 33-35.

¹⁵⁷ Transcript, ICC-01/09-01/11-T-23-CONF-ENG ET, page 34, line 10 to page 36, line 10.

80. The Ruto Defence also submits that three months after full disclosure is insufficient to prepare for trial, given the volume of material that has been disclosed and the timing of disclosure that has taken place to date.¹⁵⁸ The Defence provides the Chamber with specific information as regards the number of items disclosed post-Confirmation.¹⁵⁹ It submits that the credibility and motivations of the Prosecution's witnesses is central to the case, and that it is thus essential for the Defence to be able to investigate, prior to the commencement of trial, the interconnections between the Prosecution's witnesses.¹⁶⁰ The Ruto Defence made further submissions on the scope of necessary investigations during the course of the *ex parte*, Defence only, status conference held on 14 May 2013.¹⁶¹

81. On this basis, the Ruto Defence requests that the Trial Chamber set the new trial start date as no earlier than November 2013.¹⁶²

82. During the *inter partes* status conference on 14 May 2013, the Ruto Defence requested that the Prosecution be required to appoint a disclosure officer to certify that disclosure had been done.¹⁶³

ii) Sang Defence

83. During both the *ex parte* and the *inter partes* status conferences on 14 May 2013, the Sang Defence made submissions concerning the reasons it would need additional time to conduct investigations prior to trial, and in particular pointed to late prosecution disclosure as the main factor for this state of affairs.¹⁶⁴

¹⁵⁸ ICC-01/09-01/11-692-Red, paras 36-44.

¹⁵⁹ ICC-01/09-01/11-692-Red, paras 39-43; Addendum to Second Defence Request to Vacate the Trial Commencement Date, 24 April 2013, ICC-01/09-01/11-701-Conf.

¹⁶⁰ ICC-01/09-01/11-692-Red, para. 44.

¹⁶¹ Transcript, ICC-01/09-01/11-T-21-CONF-EXP-ENG ET.

¹⁶² ICC-01/09-01/11-692-Red, page 16.

¹⁶³ Transcript, ICC-01/09-01/11-T-22-CONF-ENG ET, page 14, lines 6-10.

¹⁶⁴ See, for example, Transcript, ICC-01/09-01/11-T-22-CONF-ENG ET, page 33, lines 8-18.

84. As regards Article 70 allegations, the Sang Defence made submissions on the prejudice arising out of the Prosecution's allegations of witness interference. According to the Sang Defence, the time and resources it must devote to investigating these allegations is substantial and detracts from its ability to focus on the case against the accused.¹⁶⁵ The Sang Defence also submits that *ex parte* or heavily redacted Prosecution submissions containing allegations of witness interference are inappropriate as the Defence is thus unable to properly respond.¹⁶⁶

iii) Prosecution

85. During the status conference, the Prosecution acknowledged that there were "oversights" with regard to disclosure in this case, but contended that the Defence has not justified its request to delay the start of trial until November 2013.¹⁶⁷ The Prosecution also submits that in view of the disclosure review ordered in *Kenyatta* case, it is currently conducting a further review of all material in its possession.¹⁶⁸ With regard to the Defence's request for screening notes, the Prosecution submits that it has provided the relevant information as requested.¹⁶⁹ The Prosecution also submitted that the identities of all of its witnesses – save for P-534 and the additional five witnesses it seeks to add – have been disclosed to the Defence.¹⁷⁰ Finally, as regards the Pre-Trial Brief, the Prosecution submits that there are only very few redactions remaining.¹⁷¹

¹⁶⁵ Transcript, ICC-01/09-01/11-T-23-CONF-ENG ET, page 36, line 13 to page 37, line 20.

¹⁶⁶ Transcript, ICC-01/09-01/11-T-23-CONF-ENG ET, page 37, line 21 to page 38, line 8.

¹⁶⁷ Transcript, ICC-01/09-01/11-T-22-CONF-ENG ET, page 38, line 5 to page 39, line 8.

¹⁶⁸ Transcript, ICC-01/09-01/11-T-22-CONF-ENG ET, page 39, lines 11-14.

¹⁶⁹ Transcript, ICC-01/09-01/11-T-22-CONF-ENG ET, page 39, lines 15-18.

¹⁷⁰ Transcript, ICC-01/09-01/11-T-22-CONF-ENG ET, page 39, lines 19-21.

¹⁷¹ Transcript, ICC-01/09-01/11-T-22-CONF-ENG ET, page 39, lines 22-25.

86. In sum, the Prosecution argues that the trial should begin “as soon as practicable” in light of the outstanding Prosecution request to add five witnesses, although it declined to suggest what date might be appropriate.¹⁷²

iv) Legal Representative

87. The Office of Public Counsel for Victims (OPCV), on behalf of the Common Legal Representative, made submissions during the 14 May 2013 status conference concerning the start date of trial. As an initial matter, the OPCV informed the Chamber that as a result of non-notification of important documents to the Legal Representative, the victims are unable to make detailed submissions on the relevant issues related to the start date of trial.¹⁷³ The OPCV recalled in this regard the Chamber’s reminder during the 13 May 2013 status conference¹⁷⁴ that the parties are to notify the Legal Representative and OPCV of any filings affecting the personal interests of the victims.¹⁷⁵

88. As regards the start date of trial, the OPCV submits that a further delay in the commencement of trial may adversely affect the effective participation of victims in the proceedings.¹⁷⁶ The OPCV also submits, however, that it recognizes the importance of the disclosure process and therefore believes that the Chamber must strike a balance between the rights of the Defence for adequate time and facilities to prepare for trial, and the obligation to ensure a fair and ex in setting the new trial start date.¹⁷⁷

¹⁷² Transcript, ICC-01/09-01/11-T-22-CONF-ENG ET, page 40, lines 4-25.

¹⁷³ Transcript, ICC-01/09-01/11-T-23-CONF-ENG ET, page 12, line 12 to page 17, line 2.

¹⁷⁴ Transcript, ICC-01/09-01/11-T-22-CONF-ENG ET, page 3, lines 17-22.

¹⁷⁵ Transcript, ICC-01/09-01/11-T-23-CONF-ENG ET, page 13, lines 14-19.

¹⁷⁶ Transcript, ICC-01/09-01/11-T-23-CONF-ENG ET, page 14, lines 1-12.

¹⁷⁷ Transcript, ICC-01/09-01/11-T-23-CONF-ENG ET, page 14, lines 15-25.

B. Analysis by the Chamber

89. As a preliminary matter, the Chamber indicates that the parties' submissions related to Article 70 will be dealt with as necessary in a separate decision. However, for purposes of the determination of a new date for the commencement of trial, the Chamber considers that no additional delay is necessary on the basis of Article 70 issues. Any possible charges brought pursuant to Article 70 would be part of a separate case, not brought before this Chamber. Consequently, these allegations will not affect the preparation time in the current case; unless the Prosecution at trial intends to rely on additional evidence that forms part of Article 70 allegations, in which case it must disclose this material, and apply to the Chamber to add it to the LoE.

90. On another preliminary note, the Chamber is deeply concerned by both the significant volume of late disclosure in this case and the fact that at this late date, additional evidence still remains to be disclosed to the Defence. The Chamber recalls its previous decision delaying the original trial date, in which it found that "the disclosure of a large amount of materials close to the scheduled commencement date of trial puts a significant burden on the Defence's preparation" and noted that "the Defence was in a position to start conducting its investigations relating to a significant part of the disclosed material only recently and for some of it the Defence is still unable to investigate".¹⁷⁸

91. The Chamber has, however, considered all of the submissions of the Defence teams in support of their request to delay the date for trial commencement until November 2013. The Chamber is not persuaded that an additional delay of such an extensive period (more than five months) is necessary in order to permit the

¹⁷⁸ ICC-01/09-01/11-642, paras 13 and 15.

Defence adequate time to carry out investigations and otherwise adequately prepare for trial.

92. Although the Defence has already been given additional time in order to conduct investigations arising out of material disclosed after January 2013, it is clear that further additional time is still required for the Defence to be able to effectively prepare for trial. The Chamber notes in this regard the very recent disclosure of screening notes and the fact that the identity of Witness 534 is still unknown to the Defence. Also of significance to the determination of a new trial date is the fact that in the present decision the Prosecution is authorised to add to its witness list two witnesses whose identities are not yet known to the Defence. Given these considerations, the Chamber concludes that it is appropriate to grant the Defence additional time to prepare for trial.

93. As discussed above, the Prosecution must disclose the identities of P-111 and P-471 by 10 June 2013. The Chamber considers that three months after the full disclosure of the evidence that the Prosecution intends to rely on at trial allows the Defence sufficient time to be ready for trial.¹⁷⁹

94. For these reasons, the Chamber is of the view that adjourning trial until 3 September 2013 will allow the Defence sufficient time to conduct the necessary investigations and to carry out its preparation.

¹⁷⁹ ICC-01/09-01/11-440, para. 7. Pursuant to the Chamber's decision of 2 May 2013, the disclosure of the identity of P-534 is delayed until 45 days before the witness's testimony, but no later than the commencement of trial (Confidential redacted version of the "Decision on the Prosecution's renewed request for delayed disclosure of identity of Witness 534", ICC-01/09-01/11-718-Conf-Red). The Chamber further notes that the disclosure of identities of non-trial witnesses mentioned in screening notes is to be completed by 60 days before trial (see Decision on Defence request to be provided with screening notes and Prosecution's corresponding requests for redactions, ICC-01/09-01/11-743-Conf, ICC-01/09-01/11-743-Conf).

FOR THE FOREGOING REASONS, the Chamber hereby:

GRANTS the Prosecution Request in part;

ALLOWS the Prosecution to add P-111 and P-471 to the Prosecution's list of witnesses;

ORDERS the Prosecution to disclose the identity of and materials for P-111 and P-471 to the Defence by 10 June 2013;

GRANTS the Second Prosecution Request;

ORDERS the Prosecution to disclose the unredacted versions of the Re-Interview Statements forthwith;

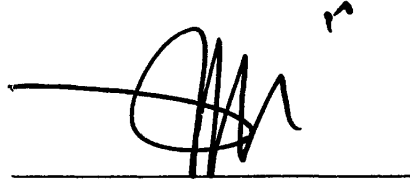
ORDERS the Prosecution to file a lesser redacted version of the Second Prosecution Request, as discussed in paragraph 59 above, by 10 June 2013;

REJECTS the Third Prosecution Request;

GRANTS the Ruto Defence Request and Sang Defence Request in part;

SETS the date for the start of trial for 10 September 2013;

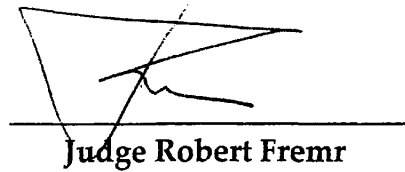
REJECTS all other requests.

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Judge Chile Eboe-Osuji, Presiding Judge

A handwritten signature in black ink, appearing to be 'Olga C.' with a horizontal line underneath.

Judge Olga Herrera Carbuccion

A handwritten signature in black ink, consisting of a large, stylized 'R' with a horizontal line underneath.

Judge Robert Fremr

Dated 3 June 2013

At The Hague, The Netherlands