



Original: English

No.: ICC-01/09-02/11
Date: 30 September 2013

TRIAL CHAMBER V(B)

Before: Judge Kuniko Ozaki, Presiding
Judge Robert Fremr
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

***IN THE CASE OF
THE PROSECUTOR V. UHURU MUIGAI KENYATTA***

Public document

**Victims' response to public redacted version of the Prosecution's request to add
two witnesses to its witness list**

Source: Common Legal Representative for Victims

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Ms Fatou Bensouda
Ms Adesola Adeboyejo

Counsel for the Defence

Mr Steven Kay
Ms Gillian Higgins

Legal Representatives of Victims

Mr Fergal Gaynor

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda
Ms Caroline Walter

**The Office of Public Counsel for the
Defence**

States Representative

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Deputy Registrar

Mr Didier Preira

Detention Section

Victims and Witnesses Unit

Mr Patrick Craig

**Victims Participation and Reparations
Section**

Ms Fiona McKay

Other

I. Introduction

1. On behalf of the victims of this case, the Common Legal Representative for Victims (“Legal Representative”) hereby responds to the “Public redacted version of the Prosecution’s request to add two witnesses to its witness list” (“Request”), in line with Regulation 24(2) of the Regulations of the Court (“Regulations”).¹
2. For the reasons set out below, the Legal Representative submits that the Request should be granted.

II. Procedural background

3. On 9 July 2012, the Chamber issued its “Decision on the schedule leading up to trial”. The Chamber set the trial date for 11 April 2013, and ordered the Prosecution to disclose “all incriminatory material (...) to be relied on at trial”, “provide its witness list” and “file its list of evidence to be relied on at trial” by 9 January 2013.²
4. On 9 January 2013, the Prosecution completed its disclosure of the incriminatory evidence to be relied upon at trial in its possession (except for certain information permitted to be withheld by the Chamber),³ and filed its list of evidence⁴ and list of witnesses to be relied on at trial.⁵

¹ ICC-01/09-02/11-805-Red2.

² ICC-01/09-02/11-451, paras 18-19, 25.

³ ICC-01/09-02/11-637.

⁴ ICC-01/09-02/11-596-Conf-AnxC.

⁵ ICC-01/09-02/11-596-Conf-AnxA.

5. On 16 July 2013, the Prosecution withdrew three witnesses from its witness list.⁶ The Prosecution also gave notice that it may file an application pursuant to Regulation 35 of the Regulations in the future, if suitable replacements for those witnesses could be located.⁷
6. On 13 September 2013, the Prosecution filed the Request, seeking the Chamber's authorisation to add Witness 548 and Witness 66 to its witness list.
7. On 17 September 2013, the Trial Chamber directed that any responses to the Request were to be filed by no later than 16.00 on 30 September 2013.⁸

III. Submissions

8. In deciding whether to authorise the addition of new witnesses during the trial, the Trial Chamber must consider the impact on the right of the accused to have adequate time and facilities for the preparation of the defence. This exercise is governed in particular by Articles 64(3)(c) and 67(b) of the Rome Statute, and Rule 76 of the Rules of Procedure and Evidence ("Rules").
9. In its "Decision on the Prosecution's Requests to Add New Witnesses to its List of Witnesses" of 3 September 2013 in *The Prosecutor v. William Samoei Ruto & Joshua Arap Sang*, Trial Chamber V(A) considered the expression "sufficiently in advance" in Article 64(3)(c) and Rule 76 of the Rules, and held that the amount of time needed for the accused to prepare the defence is not fixed, but relative to the particular circumstances in which the matter is to be considered.⁹ It granted a motion by the Prosecution to add two persons to the

⁶ ICC-01/09-02/11-773-Conf-Red2, paras 8-9.

⁷ ICC-01/09-02/11-773-Red, para. 11; see also ICC-01/09-02/11-596, paras 9-10.

⁸ Email to the parties and the Legal Representative from Trial Chamber V(B) dated 17 September 2013.

⁹ ICC-01/09-01/11-899-Red, para. 20.

Prosecution's witness list in that case, finding that the addition was justified and did not cause undue prejudice to the Defence.¹⁰

10. The Request directly impacts on the right of the victims to know the truth¹¹ about the horrific crimes committed against them in Naivasha and Nakuru in January 2008.
11. The Prosecution has submitted that witness 548's evidence will concern *inter alia* the nature of the preparatory meetings prior to the 24 January 2008 Nakuru attack; the provision of weapons; the specific targeting of senior and influential ODM members; instances of rape, forcible circumcision and murder in Nakuru; as well as information about other preparatory meetings between Mungiki leaders and senior PNU officials in January 2008.¹²
12. It is patently in the interest of justice for the Trial Chamber to hear this evidence, as it goes to the heart of the planning, preparation and execution of the 24 January 2008 attack on Nakuru.
13. Furthermore, the Prosecution has also submitted that Witness 548 can provide direct and relevant evidence with respect to the Prosecution's allegations of witness bribery and intimidation.¹³ It is also imperative for the Trial Chamber to hear this evidence. The present case appears to have been characterized by high levels of witness intimidation. In order to be properly able to assess the evidence of insider witnesses, in particular, at trial, the Trial Chamber must be

¹⁰ *Idem*.

¹¹ ICC-01/04-01/06-1119, Trial Chamber I, 18 January 2008, para. 98; ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, para. 32; ICC-01/04-503 OA4 OA5 OA6, Appeals Chamber, 30 June 2008, para. 97.

¹² Request, paras. 22-23.

¹³ Request, para. 24.

fully apprised of the context of intimidation to which some of those witnesses have been subjected.

14. The Prosecution has also submitted that Witness 66's evidence, which it says largely replaces that already provided to the Defence by Witness 426,¹⁴ relates to *inter alia* the rape and sexual violence which took place during the PEV; its ongoing effect on victims; the stigma which attaches to such victims; underreporting of rape and sexual violence; and the ongoing trauma of the victims.¹⁵

15. It is manifestly in the interest of justice for this evidence to be heard, as it will assist the bench in appreciating the extraordinary levels of psychological and physical suffering of the many women who were raped by Mungiki in Naivasha and Nakuru, and of the many men who were forcibly circumcised and castrated. That suffering continues to this day and will continue well after this trial is over. In recent meetings with victims in Kenya, the Legal Representative has listened to many accounts of *inter alia* gang rape by Mungiki in Nakuru and Naivasha; the challenges of raising children fathered by Mungiki rapists; the challenges of living with HIV contracted from Mungiki rapists; and the physical pain which continues to be experienced by victims of violent gang rape and those whose sexual organs were viciously and permanently damaged by the Mungiki. The devastating ongoing effect of rape and sexual violence on the victims of those crimes in Naivasha and Nakuru deserves the fullest possible consideration by the Trial Chamber.

16. The Legal Representative notes the Prosecution's submission that the evidence of the two witnesses is similar to, and partly corroborative of,

¹⁴ Request, para. 30.

¹⁵ Request, para. 26.

evidence already provided to the Defence and in support of detailed allegations already known to the Defence.¹⁶ It also appears that the two witnesses will testify not before March 2014 at the earliest,¹⁷ which allows the Defence sufficient time for preparation for cross-examination. In these circumstances, no unfair prejudice will arise as a result of granting the Request.

IV. Conclusion

17. For the foregoing reasons, the Legal Representative submits that the Request should be granted.

Respectfully submitted,



Fergal Gaynor
Common Legal Representative of Victims

Dated this 30th September 2013

At Nairobi, Kenya

¹⁶ Request, paras. 2, 23, 29 and 30.

¹⁷ Request, para. 32.