



Original: **English**

No.: **ICC-01/09-01/11**

Date: **22 June 2016**

TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding Judge
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

Public redacted version of "Prosecution's request for variation of time to disclose witness identities", 6 September 2013, ICC-01/09-01/11-914-Conf

Source: Office of the Prosecutor

Document 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
Mr Anton Steynberg

Counsel for the Defence

For William Samoei Ruto:

Mr Karim Khan
Mr David Hooper
Ms Shyamala Alagendra

For Joshua Arap Sang:

Mr Joseph Kipchumba Kigen-Katwa
Ms Caroline Buisman

Legal Representatives of the Victims

Mr Wilfred Nderitu

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(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

Counsel Support Section

Deputy Registrar

Mr Didier Preira

Victims and Witnesses Unit

Mr Patrick Craig

Detention Section

**Victims Participation and Reparations
Section**

Others

Introduction

1. Pursuant to Regulation 35(2) of the Regulations of the Court, the Prosecution seeks to vary the time limit set down by Trial Chamber V(A) ("Chamber") to disclose the identities of P-0604 and P-0613 until such a time that the Defence challenge regarding their inclusion on the Prosecution's list of witnesses has been resolved. In addition, the Prosecution requests that the *ex parte* classification of the Fourth and Fifth Requests remain in place until the identities of P-0604 and P-0613 are disclosed to the Defence.
2. The Prosecution submits that if this Chamber were to allow the Defence application for leave to appeal, and in turn the Appeals Chamber were to reverse the Decision on the "Prosecution's Requests to Add New Witnesses to its List of Witnesses" ("Decision"),¹ the result would be that P-0604 and P-0613's identity would have been disclosed unnecessarily. Given the history of witness interference and intimidation in this case, this may have security implications for the witnesses and their families which could result in the Court incurring costly on-going protection obligations which could be avoided if the requested relief is granted.
3. [REDACTED].
4. The Prosecution submits these reasons show good cause for the disclosure deadline of noon on 9 September 2013 be varied until such a time as the appeal is resolved, if the Trial Chamber is minded to grant leave to appeal on this matter.

¹ ICC-01/09-01/11-899-Conf.

Statement of facts

5. On 13 August and 22 August 2013 respectively, the Prosecution filed its Fourth² and Fifth³ Requests pursuant to Regulation 35 of the Regulations of the Court.
6. On 3 September 2013, the Chamber issued its Decision on the Prosecution's Requests to Add New Witnesses to its List of Witnesses ("Decision"),⁴ where it ordered, *inter alia*, that the Prosecution disclose the identities of P-0604 and P-0613 by no later than noon on 9 September 2013 and that it notify the *ex parte* versions of the Fourth and Fifth Requests to the Defence by the same time limit.
7. On 4 September 2013, the Defence for William Samoei RUTO ("Defence") filed an application for leave to appeal the Decision.⁵

Confidentiality

8. The Prosecution submits this filing as confidential as it contains information relating to witnesses P-0604 and P-0613 which should not be revealed to the general public.

Submissions

Good cause to vary the time limit for disclosure of P-0604 and P-0613

9. Pursuant to Regulation 35(2) of the Regulations of the Court, this Chamber has the power to extend a time limit if good cause is shown. The Prosecution submits that there is good cause for a variation the noon, 9 September 2013 deadline for the disclosure of P-0604 and P-0613 in light of the Defence's application for leave to appeal the Decision.

² ICC-01/09-01/11-852-Conf-Exp and ICC-01/09-01/11-852-Conf-Red.

³ ICC-01/09-01/11-866-Conf-Exp and ICC-01/09-01/11-866-Conf-Red.

⁴ Decision.

⁵ ICC-01/09-01/11-905-Conf.

10. The Prosecution is ready to disclose the identities of P-0604 and P-0613 by 9 September, as ordered. However, the Prosecution submits that for security reasons, their identities should not be disclosed until the issues on appeal are resolved and it is certain that they can be added to the Prosecution's list of witnesses. As it stands, the Defence is seeking leave to appeal the inclusion of witnesses P-0604 and P-0613 on the Prosecution's list of witnesses. If the Defence request for leave is granted and a subsequent appeal, allowed, then the outcome could be that P-0604 and P-0613 would *not* be permitted to provide evidence at trial. If this were the case, and the Prosecution had already disclosed their identities, then P-0604 and P-0613 and their families would be subjected to unnecessary risk. [REDACTED].

11. The Prosecution has notified the Chamber on many occasions of reports of interference with Prosecution witnesses in this case.⁶ Despite the fact that the Prosecution has attempted to maintain the confidentiality of the identities of its trial witnesses, it appears that this information has fallen into the hands of third parties. Prosecution witnesses have repeatedly been targeted by members of their communities and beyond because of their cooperation with the Prosecution. Many have reported that they have been ostracised due to their witness status, and voiced their fears to the Prosecution on many occasions.

12. The Prosecution seeks to minimise any risk of intimidation or interference to witnesses, and would be loath to place both P-0604 and P-0613 in the same vulnerable position unnecessarily.

13. [REDACTED].

14. Should the Chamber refuse the Defence application for leave to appeal, or were the Appeals Chamber to dismiss the appeal, as the case may be, the

⁶ See for example ICC-01/09-01/11-647-Conf-Exp, ICC-01/09-01/11-665-Conf-Exp, ICC-01/09-01/11-736-Conf-Exp, ICC-01/09-01/11-721-Conf-Exp.

Prosecution will be in a position to disclose the identities of these witnesses on short notice.

15. The Prosecution further requests that the *ex parte* classification of the Fourth and Fifth Requests remain in place until the identities of P-0604 and P-0613 are disclosed. The *ex parte* Requests contain information which would lead to the identification of P-0604 and P-0613 which, if disclosed, would defeat the purpose of this request.⁷

Limited prejudice to the rights of the Accused

16. The Prosecution submits that there will be little to no prejudice caused to the Defence if the time limit for the disclosure of P-0604 and P-0613 were varied. The Chamber, in its Decision, ordered the Prosecution to call P-0604 and P-0613 “among the last witnesses of the prosecution case,”⁸ in order to counterbalance any prejudice to the rights of the Accused. As such, the Defence will still have a substantial amount of time to investigate witnesses P-0604 and P-0613 once the issues underlying the application for leave to appeal are resolved, either before the Trial or the Appeals Chamber. Given the present sitting schedule, the availability of court rooms and the current seven month estimation for the Prosecution’s case, it seems unlikely that they would testify before mid-2014. Further, as this Chamber considered, “replacement of the evidence of [REDACTED] with that of P-604 and P-613, would not require a considerable amount of additional investigations on the part of the Defence regarding the subject matter of their anticipated testimonies.”⁹

Relief requested

17. The Prosecution requests the variation of the time limit to disclose the identities of P-0604 and P-0613 until the Defence application for leave to

⁷ The Prosecution simultaneously filed confidential redacted versions of both the Fourth and Fifth Requests on 13 and 22 August 2013 respectively.

⁸ Decision, p. 17.

⁹ Decision, para. 19.

appeal, and any subsequent interlocutory appeal that may be permitted, have been resolved. The Prosecution further requests that the *ex parte* classification of the Fourth and Fifth Requests remain in place until the identities of P-0604 and P-0613 are disclosed.



Fatou Bensouda, Prosecutor

Dated this 22nd day of June 2016

At The Hague, the Netherlands