

**Cour
Pénale
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**International
Criminal
Court**

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Date: **7 May 2013**

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TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding Judge
Judge Judge Robert Fremr
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

**Public redacted version of "Prosecution's third request pursuant to Regulation
35 of the Regulations of the Court", 7 May 2013, ICC-01/09-01/11-724-Conf**

Source: The Office of the Prosecutor

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

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For Joshua Arap Sang:

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Other

Introduction

1. Pursuant to Regulation 35 and/or Articles 64(6)(d) and 69(3) of the Rome Statute (Statute), the Prosecution hereby seeks the Chamber's authorisation to add one witness to its List of Witnesses, namely [REDACTED], the former Team Leader. Through *inter partes* communications with the Defence of William Samoei Ruto (RUTO's Defence) and Joshua Arap Sang (SANG's Defence), the Prosecution understands that the Defence is agreeable to this addition. The Prosecution submits that adding this witness will not unduly prejudice the Defence's preparation as the scope of his anticipated testimony should be limited to general matters regarding the OTP's investigation in regards to the Kenya 1 case.

Statement of Facts

2. On 9 July 2012, the Chamber issued its decision on the schedule leading up to trial (Decision), whereby it set the date of 10 April 2013 for the commencement of trial. In the same Decision, the Chamber also instructed the Prosecution to complete its disclosure by 9 January 2013 with certain exceptions,¹ including withholding the identity of certain witnesses, whose delayed disclosure was authorized by the Chamber.
3. On 8 March 2013, the Chamber set a new date for the commencement of trial for 28 May 2013,² which has now been vacated.³
4. On 12 April, the Prosecution filed an application pursuant to Regulation 35(2) of the Regulations of the Court. (First Application).⁴ A decision on the First Application is pending.

¹ ICC-01/09-01/11-440.

² ICC-01/09-01/11-642.

³ ICC-01/09-01/11-722.

⁴ ICC-01/09-01/11-680-Conf-Exp.

5. On 16 April, RUTO's Defence indicated to the Prosecution, by way of e-mail, that it was in the interest of justice for the Prosecution to call the lead investigator as part of its case in chief and that it would not object to him being added to the list of (Prosecution) witnesses.
6. On 26 April, the Prosecution indicated to the RUTO's Defence, by way of e-mail, that it would seek leave of the Court to call an OTP investigator to testify in its case in chief.
7. On 3 May, the Prosecution filed its second application pursuant to Regulation 35(2)⁵ (Second Application) which is also awaiting determination by the Chamber.
8. On 6 May, the Prosecution proposed to SANG's Defence, by way of email, that it would seek leave of the Court to call an OTP investigator to give evidence at trial. SANG's Defence replied on the same day, stating it would welcome the addition of an investigator to the Prosecution's list of witnesses.

Submissions

9. The Prosecution incorporates by reference the legal and factual grounds presented in support of its First Application.⁶ The Prosecution submits that the variation of time limit to disclose to the Defence witnesses it intends to call at trial is justified. Both Defence teams do not oppose calling this witness at trial, and the resulting testimony could aid the Chamber in fulfilling its mandate. As such, including Mr. [REDACTED] on the list of witnesses will not cause undue prejudice to the Defence or the fairness of the proceedings.

⁵ ICC-01/09-01/11-720-Conf-Exp.

⁶ ICC-01/09-01/11-680-Conf-Exp, paras. 7-8, 24.

10. The Prosecution seeks to call Mr. [REDACTED] in order to assist the Chamber in understanding the general conduct of the investigations in the Kenya 1 case. The Prosecution is of the view that the scope of the investigator's testimony should be carefully considered by the Chamber in order to avoid questions that would delve into irrelevant matters that are immaterial to the case. Essentially, as per the *Abu Garda* case, the Prosecution seeks that the Chamber limit questions to those bearing on objective facts and that judgments or evaluations of a discretionary nature, as well as questions merely aimed at challenging the investigative methods followed by the OTP, be disallowed.⁷

11. In practical terms, the Prosecution seeks that the Chamber limit the questioning of the OTP investigator by all the parties and participants to the proceedings to the following topics:

- how the investigation was conducted and a description of any difficulties encountered by investigators;
- the manner in which statements were taken from Prosecution witnesses;
- methods used to investigate exonerating circumstances and the manner in which evidence was reviewed in order to identify exculpatory material;
- any other information which the Chamber would consider useful in order for the Chamber to be properly informed when hearing the evidence of the witnesses, but which remains within the limits detailed in para. 7 above.

⁷ ICC-02/05-02/09-186.

12. Last, in accordance with the practice in the *Katanga and Ngudjolo* trial, the Prosecution requests that the questioning of the lead investigator should not extend to addressing the situation of particular witnesses.⁸

13. The Prosecution reserves the right to call its witnesses in the order it sees fit and will provide the Chamber and Defence with proper notice of when in the presentation of its evidence it intends to call Mr. [REDACTED].⁹

Relief Requested

14. For the foregoing reasons, the Prosecution requests that the Chamber authorise the inclusion of an OTP investigator on its list of witnesses, and that the questions put to the witness not exceed the scope of the topics listed in paragraph 11 above.



Fatou Bensouda,
Prosecutor

Dated this 7th day of May, 2013
At The Hague, The Netherlands

⁸ ICC-01/04-01/07-1603.

⁹ On 25 April 2013, the Prosecution submitted to VWU, as required, a list of the first ten witnesses it intends to call at trial. This list did not contain Mr. Freimann.