

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 25 April 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**

**Public Redacted Version of "Second Defence Request to Vacate the Trial  
Commencement Date", submitted on 22 April 2013**

**Source:** Defence for Mr. William Samoei Ruto

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

**The Office of the Prosecutor**  
Fatou Bensouda, Prosecutor  
Cynthia Tai, Trial Lawyer

**Counsel for William Ruto**  
Karim AA Khan QC, David Hooper QC  
Kioko Kilukumi, Shyamala Alagenda

**Counsel for Joshua Sang**  
Joseph Kipchumba Kigen-Katwa  
Silas Chekera

**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 the 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**  
Didier Daniel Preira

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Section** **Other**

## I. Introduction

1. The Defence of Mr. William Samoei Ruto ("Ruto Defence") respectfully requests the Trial Chamber ("Chamber") vacate the scheduled 28 May 2013 commencement date of trial. The Defence, as the Chamber has recognised, has been operating under a "significant burden"<sup>1</sup> due to the Office of the Prosecutor's ("OTP") failure to provide timely and effective disclosure. The OTP's continued dilatory disclosure to the Defence as well as its general approach to the prosecution of this case has rendered the 28 May 2013 date absolutely unviable if the fair trial rights of Mr. Ruto are to be guaranteed. For the reasons submitted herein, the Defence requests<sup>2</sup> that the Chamber set a new trial date for no earlier than November 2013 so as to provide Mr. Ruto and his defence team adequate time to conduct the investigations necessary to properly prepare for his trial.<sup>3</sup>
  
2. In its 8 March 2013 "Decision concerning the start date of trial" ("Trial Date Decision"),<sup>4</sup> the Chamber determined that the prejudice to the Defence arising from delayed OTP disclosure<sup>5</sup> and the expanded temporal focus of the OTP case<sup>6</sup> necessitated the Chamber postponing the original trial commencement date of 10 April 2013 to 28 May so that the Defence could "continue its investigations and prepare for trial".<sup>7</sup> The Chamber considered that this postponement "should give the Defence adequate additional time".<sup>8</sup>

---

<sup>1</sup> Decision concerning the start date of trial, ICC-01/09-01/11-642, 8 March 2013, para. 13.

<sup>2</sup> This request is submitted confidentially as it refers to and discusses filings that have been classified as confidential.

<sup>3</sup> The Defence note that the Prosecution has itself previously proposed August 2012 as an appropriate commencement date for trial (Prosecution's response to the "Joint Defence Submissions on Impact of Delayed Prosecution Disclosure and Shift in Case on the Scheduled Start Date for Trial" (ICC-01/09-01/11-613-Corr), 25 February 2013, ICC-01/09-01/11-622, para. 14).

<sup>4</sup> ICC-01/09-01/11-642.

<sup>5</sup> *Ibid.*, paras. 13-16.

<sup>6</sup> *Ibid.*, para. 17.

<sup>7</sup> *Ibid.*, para. 18.

<sup>8</sup> *Ibid.*

3. While the Defence respectfully submits that this postponement of trial by seven weeks is insufficient in light of the substantial difficulties facing the Defence and in view of the nature and context of the case, the OTP's actions since the Trial Date Decision have rendered the 28 May 2013 trial date, on its face, unsustainable. In particular the OTP:
- i. Delayed the disclosure of the identity of one OTP witness until 17 April<sup>9</sup> and have yet to disclose the identity of another witness.<sup>10</sup>
  - ii. Maintained heavy redactions in the footnotes of the Pre-Trial Brief;
  - iii. Applied to [REDACTED];<sup>11</sup>
  - iv. Applied to [REDACTED];<sup>12</sup>
  - v. Delayed until the first week of April the disclosure of audio records of the interviews of four OTP witnesses;<sup>13</sup>
  - vi. Began disclosure only on 16 April of the screening notes [REDACTED];<sup>14</sup>
  - vii. Maintained category B2 and B3 redactions to the statements and transcripts of all of its fact witnesses;<sup>15</sup> and
  - viii. Submitted to the Chamber [REDACTED].<sup>16</sup>
4. The Defence accordingly submits this request to update the Chamber on the above-mentioned issues for the purposes of the Chamber's determination on whether the 28 May 2013 trial date remains viable in view of Mr. Ruto's Article

---

<sup>9</sup> Witness P-0524.

<sup>10</sup> Witness P-0534.

<sup>11</sup> [REDACTED].

<sup>12</sup> [REDACTED].

<sup>13</sup> Witnesses [REDACTED].

<sup>14</sup> See [REDACTED].

<sup>15</sup> See [REDACTED].

<sup>16</sup> See [REDACTED].

67(1)(b) right to adequate time for the preparation of his defense. Additionally, in order to assist the Chamber in its evaluation of the Defence's request, the Defence also provides herein a detailed analysis of the impact of the manner of disclosure in this case on the Defence's ability to prepare for trial.<sup>17</sup>

5. As submitted in the "Defence request for Status Conference",<sup>18</sup> dated 16 April 2013, given the importance and complexity of these and other issues related to the viability of the 28 May trial date and the fair trial rights of Mr. Ruto, the Defence submits that it is necessary and conducive to the fair determination of this issue to supplement and expand upon these submissions at a status conference.
6. Mr. Ruto has sought to mitigate, to the extent possible, the "significant burden" imposed on him by the OTP's actions by supplementing his legal team.<sup>19</sup> Of course, adequate time for defense preparation cannot simply be addressed by the addition of facilities – in this case, personnel. As the Trial Chamber has properly and plainly declared, "it is important to ensure that the accused have adequate time for the preparation of the defence".<sup>20</sup>

## II. Defence update on OTP actions subsequent to Trial Date Decision

### *Issues (i) and (ii) – Continued anonymity of P-0534, Delayed disclosure of identity of P-0524 and Maintenance of heavy redactions to the Pre-Trial Brief*

7. In concluding that postponement of the trial start date to 28 May 2013 would be adequate for the purposes of defence preparation, the Chamber noted that it

<sup>17</sup> See paragraphs 35 to 43 below.

<sup>18</sup> ICC-01/09-01/11-683-Conf.

<sup>19</sup> See Registration in the record of the case a Power of Attorney executed in favour of Mr Karim A. A. Khan QC and his acceptance of the mandate, 10 April 2013, ICC-01/09-01/11-675. In addition, Ms. Shyamala Alagendra was appointed as Associate Counsel and Team Coordinator of Mr. Ruto's defence team effective 16 April 2013 (ref.: CSS/2013/210/us). The Trial Chamber will also note that additional personnel have joined the team including Ms Leigh Lawrie (Legal Assistant), Mr Andrew Muiruri (Case Manager), Ms Shalini Jayaraj (Trial Support Assistant) and Ms. Grace Sullivan (Trial Support Assistant). Mr Ruto is doing whatever is in his power to ensure he is given a fair trial but requires the additional time sought in the present application to ensure adequate time for the preparation of his defence so as to guarantee his Article 67 rights under the Statute.

<sup>20</sup> Trial Date Decision, para. 18.

had “issued decisions on the disclosure of the remaining 5 [anonymous] witnesses”.<sup>21</sup> Among other things, the Chamber had ordered the OTP to disclose to the Defence the identity of Witness P-0534 by 13 March 2013 or withdraw the witness from its list, and with respect to Witness P-0524, to update the Victims and Witnesses Unit on his situation by the same date.<sup>22</sup>

8. As has been the practice of the OTP throughout this case, [REDACTED].<sup>23</sup> [REDACTED].<sup>24</sup>
9. To date the identity of P-0534 has not been disclosed to the Defence. Accordingly, the Defence remains unable to review the witness’s un-redacted statements and then plan and conduct investigations into a witness whom the OTP submits is “[REDACTED]”.<sup>25</sup>
10. [REDACTED]<sup>26</sup> and Witness P-0534 [REDACTED], at this stage, less than six weeks from the scheduled commencement date of trial, insufficient time remains for the Defence to conduct proper investigations into the witness and his less-redacted evidence. In anticipation of the OTP’s well worn response to the issue of delayed disclosure – deferring the testimony of a witness, and as submitted in the joint Ruto Defence and Sang Defence request for vacating the original 10 April 2013 trial date (“First Defence Request”),<sup>27</sup> “[d]eferring a witness’s testimony fails to take into account the importance for the defence to know in detail the prosecution’s case as a whole at the outset and the inevitable interplay

---

<sup>21</sup> *Ibid.*

<sup>22</sup> Decision on the disclosure of the identities of Witnesses 495, 524, 534 and 536, 6 March 2013, ICC-01/09-01/11-638-Conf-Red.

<sup>23</sup> [REDACTED].

<sup>24</sup> [REDACTED].

<sup>25</sup> [REDACTED].

<sup>26</sup> Decision on the disclosure of the identities of Witnesses 495, 524, 534 and 536, 6 March 2013, ICC-01/09-01/11-638-Conf-Red.

<sup>27</sup> Joint Defence Submissions on Impact of Delayed Prosecution Disclosure and Shift in Case on the Scheduled Start Date for Trial, 20 February 2013, ICC-01/09-01/11-613. A corrigendum (ICC-01/09-01/11-613-Corr) was filed on 21 February 2013.

*between witnesses*".<sup>28</sup> This is especially so in circumstances where the Defence submits the case against Mr. Ruto is "based on lies, motivated by various personal, political and financial considerations" and accordingly "[t]he credibility of those prosecution witnesses is central to the case and to defence preparations".<sup>29</sup>

11. [REDACTED] the Defence is entitled, pursuant to Rule 77 of the Rules and potentially Article 67(2) of the Statute, to know the identity of the individual, and will still need to conduct investigations based on the identity and less redacted statements [REDACTED].
12. With respect to Witness P-0524, his identity and less redacted statements were finally disclosed to the Defence on 17 April 2013 – more than a month after the Trial Date Decision – along with a newly disclosed screening note.<sup>30</sup> As indicated above with respect to Witness P-0534, at this stage, six weeks prior to the commencement of trial, there is simply insufficient time for the Defence to conduct the necessary investigations into this witness and his less-redacted evidence prior to the commencement of trial.
13. Finally, to date, significant redactions remain to the footnotes in the OTP's Updated Pre-trial Brief,<sup>31</sup> submitted on 25 February 2013. The Defence wish to underscore that these redacted footnotes relate to critical allegations that the Defence **must** investigate prior to trial, relating as they do to direct allegations of alleged criminal conduct of Mr. Ruto. For the Defence not to investigate these would be tantamount to ineffective representation. Not to have adequate time to investigate these allegations would be to render nugatory the Article 67 guarantees that all accused are given adequate time to prepare a defence in

---

<sup>28</sup> *Ibid.*, para. 13.

<sup>29</sup> *Ibid.*, para. 10.

<sup>30</sup> See Prosecution's Communication of the Disclosure of Evidence, 18 April 2013, ICC-01/09-01/11-689.

<sup>31</sup> ICC-01/09-01/11-625-Conf-AnxB.

order to test and challenge the prosecution case and to be in a position to meaningfully confront accusers that the OTP intends to bring before the Court.

14. When these redactions are lifted, the Defence will need to undertake the time-consuming review of the underlying material for each pinpoint citation, incorporate this into its analysis of the case, and only then conduct the investigations it deems necessary based on this information. Again, at this stage of proceedings, insufficient time remains prior to the commencement of trial to properly undertake this task.

*Issues (iii) and (iv) – OTP Request* [REDACTED]

15. On 15 April 2013, six weeks from the scheduled trial commencement date, the OTP filed its “[REDACTED]”,<sup>32</sup> in which it requested [REDACTED].
16. Therefore, at this very late stage of proceedings, [REDACTED] insufficient time remains prior to the scheduled start date of trial to conduct effective investigations [REDACTED].
17. [REDACTED].<sup>33 34 35 36</sup>
18. Further, the Updated Pre-Trial Brief would need to be revised once again to appropriately incorporate [REDACTED].
19. Even if the Chamber denies the OTP’s request [REDACTED] Rule 77 and potentially Article 67(2) require [REDACTED].<sup>37</sup> At this stage, there is

---

<sup>32</sup> [REDACTED]

<sup>33</sup> *Ibid.*, para. 26.

<sup>34</sup> *Ibid.*, para. 27.

<sup>35</sup> *Ibid.*, para. 28.

<sup>36</sup> See [REDACTED].

<sup>37</sup> Trial Chamber IV of the Court has held that Rule 77 and Article 67(2) constitute “ ‘mandatory disclosure obligations’ on the prosecution. Items that are potentially exculpatory or material to the defence must be disclosed in a form such that they may be effectively used in the investigation and preparation of the defence of the accused.’ This requires that items are disclosed in their original form. . . . Accordingly, . . . in principle, the



insufficient time prior to the scheduled commencement date of trial for the Defence to undertake such activities [REDACTED] and in view of the immense task with which the Defence is already faced due to the dilatory disclosure practices of the OTP.<sup>38</sup>

*Issues (v) and (vi) – Audio Records of OTP Rule 111 Interviews and Screening Notes related to OTP Witnesses*

20. Paragraph 16 of the Trial Date Decision states that with “regards [to] other disclosure-related issues raised by the Defence, the Chamber takes note of the OTP’s declaration that most of these issues are being resolved *inter partes*”. The Defence understands this to mean the Chamber did not take into account these “other disclosure-related issues” for the purposes of determining the appropriateness of the 28 May 2013 trial date. Indeed, the Chamber could not have properly taken into account these issues given, as the Chamber indicates, the OTP declined to provide submissions on these matters.
21. Among these ‘other’ issues are the Defence’s request for the provision of “audio recordings or transcripts made in respect of any of the witnesses and which have not as yet been served”<sup>39</sup> on the Defence. [REDACTED].<sup>40</sup>
22. The OTP has now confirmed that previously un-disclosed audio recordings of Rule 111 interviews do exist with respect to four of its witnesses – [REDACTED]. The OTP disclosed these audio recordings on 2 April<sup>41</sup> and 8 April 2013.<sup>42</sup> The review of the audio records and comparison with the signed statements of each witness is of course a time-consuming process which the

---

material in question should be disclosed in its entirety and original form” (*Prosecutor v. Abdallah Banda and Saleh Jerbo*, Public Redacted Decision on the prosecution’s request for non-disclosure or redactions of material relating to Witnesses 304,305,306 and 312, 28 February 2012, ICC- 02/05-03/09-265-Red, para. 20 (internal citations omitted)).

<sup>38</sup> [REDACTED].

<sup>39</sup> First Defence Request, para. 17.

<sup>40</sup> See [REDACTED].

<sup>41</sup> INCRIM Package 39 – relating to the interviews of [REDACTED].

<sup>42</sup> INCRIM Package 40 – relating to the interviews of [REDACTED].

Defence is undertaking in addition to its myriad other investigatory and trial preparation tasks.

23. Additionally, at the 14 February 2013 status conference,<sup>43</sup> and as reiterated in the First Defence Request,<sup>44</sup> the Defence requested the OTP, pursuant to Rule 77 and Article 67(2), to provide it with the original and un-redacted screening notes in the OTP's possession related to OTP witnesses. After *inter partes* discussions proved unfruitful [REDACTED].<sup>45</sup> [REDACTED].<sup>46</sup>
24. In the "[REDACTED]",<sup>47</sup> submitted on 11 April 2013, the OTP agreed to "[REDACTED]".<sup>48</sup> The OTP additionally submitted that it would [REDACTED].<sup>49 50</sup>
25. The OTP also informed that: [REDACTED].<sup>51 52 53</sup>
26. [REDACTED].<sup>54</sup> It is unacceptable that this PEXO information continues to be withheld from the Defence. [REDACTED] the OTP submits that it cannot provide the Defence with [REDACTED] at which time a further update will be provided to the Chamber.<sup>55</sup> Further, the OTP improperly submits that [REDACTED].<sup>56</sup>

---

<sup>43</sup> ICC-01/09-01/11-T-19-ENG ET, p. 11, lines 11-20.

<sup>44</sup> First Defence Request, para. 14.

<sup>45</sup> [REDACTED].

<sup>46</sup> *Ibid.*, para. 16.

<sup>47</sup> ICC-01/09-01/11-677-Conf.

<sup>48</sup> *Ibid.*, para. 8.

<sup>49</sup> *Ibid.*

<sup>50</sup> [REDACTED].

<sup>51</sup> ICC-01/09-01/11-677-Conf, para. 14.

<sup>52</sup> These are [REDACTED].

<sup>53</sup> ICC-01/09-01/11-677-Conf, para. 19.

<sup>54</sup> *Ibid.*, para. 17.

<sup>55</sup> *Ibid.*, paras. 20, 22.

<sup>56</sup> *Ibid.*, para. 19.

27. On 16 April 2013, more than three months after the 'final' disclosure deadline of 9 January 2013, the OTP provided the Defence with the first batch [REDACTED].<sup>57</sup>
28. Needless to say, the above narrative describes an OTP that remains unable to meet its basic disclosure obligations, to the severe detriment of the rights of Mr. Ruto and the Defence's ability to adequately prepare for trial. In the less than six weeks that remain prior to the scheduled commencement of trial, the Defence must review and take investigatory steps based on [REDACTED] screening notes [REDACTED]. Concurrently, the Defence will need to review and if necessary challenge the application of the redactions requested by the OTP to these materials and must await the conclusion of the OTP's [REDACTED] before further action – whether investigatory or legal – can be taken.
29. It is untenable and contrary to the Article 67(1)(b) rights of Mr. Ruto for a trial to proceed on the 28th of May under these circumstances. The Defence must be provided adequate time to review and effectively make use of the above-mentioned items in its investigations, as well as for any legal disputes arising out of this disclosure – such as the application of redactions – to be settled prior to the commencement of trial.

*Issue (vii) – OTP's maintenance of category B2 and B3 redactions*

30. On 13 February 2013, the OTP submitted an application<sup>58</sup> [REDACTED].<sup>59</sup>
31. On 7 March 2013, the Defence filed its response to the OTP's application.<sup>60</sup> The Defence need not repeat in full here its submissions. Suffice it to say that the Defence raised serious concerns [REDACTED].

---

<sup>57</sup> [REDACTED].

<sup>58</sup> [REDACTED].

<sup>59</sup> *Ibid.*, para. 1.

32. This matter is of course pending before the Trial Chamber and [REDACTED] will likely require the Defence [REDACTED]. [REDACTED].

(vii) [REDACTED]

33. In the "Defence Request for Status Conference",<sup>61</sup> the Defence [REDACTED].<sup>62</sup>

34. The confidential redacted versions of OTP [REDACTED] notified to the Defence on the date of the Trial Date Decision (13 March 2013)<sup>63</sup> and on 3 April 2013,<sup>64</sup> [REDACTED], underscore the necessity [REDACTED].

35. Of particular concern to the Defence is the OTP's submission that [REDACTED].<sup>65</sup> [REDACTED]. [REDACTED].

### III. Submissions on the Impact of Delayed Disclosure on Adequate Time for Defence Preparation

36. The Defence appreciates the Trial Chamber's recognition in the Trial Date Decision that "*[i]t is evident from the parties' submissions that of all incriminatory material disclosed after the confirmation hearing approximately 70% was disclosed only in January 2013 or even later*"<sup>66</sup> and the Chamber's "*accept[ing] the Defence position that the number of witnesses subject to delayed disclosure represents a significant proportion of the total number of witnesses the Prosecution intends to rely on at trial*".<sup>67</sup>

37. The Defence submits that it was perhaps culpable in not having fully brought to the Trial Chamber's attention in the First Defence Request the true magnitude of the negative impact of the OTP's extremely dilatory disclosure on the

---

<sup>60</sup> [REDACTED].

<sup>61</sup> 16 April 2013, ICC-01/09-01/11-683-Conf.

<sup>62</sup> [REDACTED].

<sup>63</sup> [REDACTED].

<sup>64</sup> [REDACTED];

<sup>65</sup> [REDACTED].

<sup>66</sup> Trial Date Decision, para. 13 (internal citation omitted).

<sup>67</sup> *Ibid.*,

Defence's ability to conduct investigations, and therefore on Mr. Ruto's Article 67(1)(b) right to have adequate time for the preparation of his defence. Nonetheless, given that the Defence has been placed in this untenable position through no fault of its own,<sup>68</sup> and in light of the fundamental fair trial issue at stake, the Defence is compelled to re-emphasise to the Chamber, in the context of this second request for an adjournment, the necessity of "ensur[ing] that the accused [has] adequate time for the preparation of the defence".<sup>69</sup>

38. While the Defence, in the First Defence Request, utilized as a point of reference the Trial Chamber's proposed time period of 3 months from the point of 'full' OTP disclosure as the bare minimum period necessary for the adequate preparation of the defence,<sup>70</sup> the Defence of course also noted that the Chamber's estimate in this regard was reached in July 2012, when "neither the defence nor the Chamber knew the full extent of the prosecution case or the number of witnesses" the OTP intended to rely upon at trial.<sup>71</sup>
39. The 3 month estimate proposed by the Chamber, presumably based upon, as noted, the primary data point available to the Chamber at that time – the seven out of eight witnesses relied upon at confirmation that the OTP intended to rely upon for trial – surely cannot reflect the adequate time required to investigate not only these witnesses after 'full' disclosure has been effected, but an additional 31 fact witnesses and 3 expert witnesses. As noted above, the OTP [REDACTED].
40. Similarly, it is not simply that approximately 70% of the incriminatory material disclosed post-confirmation was disclosed in January 2013 or later, but the

---

<sup>68</sup> As the Trial Chamber acknowledged, "the need for delayed disclosure of many of these witnesses arose from delays on the part of the Prosecution in referring their security situation to the Victims and Witnesses Unit for assessment and implementation of protective measures as appropriate" (Trial Date Decision, para. 14).

<sup>69</sup> Trial Date Decision, para. 18.

<sup>70</sup> First Defence Request, para. 24.

<sup>71</sup> *Ibid.*, para. 3.

quantity of this material. Again, the Defence respectfully urges the Trial Chamber not to apply estimates based on the materials disclosed pre-confirmation for the purposes of determining adequate time for defence preparation at the trial stage.

41. By the Defence's count, 934 items were disclosed to the Defence prior to the confirmation of charges hearing, consisting of 607 incriminatory items (9,883 pages and 18 audio or video items), 51 PEXO items (707 pages and 37 audio or video items) and 276 Rule 77 items (2,322 pages and 6 audio or video items). Compare this with the number of items that have been disclosed, thus far, after the confirmation of charges hearing:<sup>72</sup> 1,384 incriminatory items consisting of 11,930 pages; 157 PEXO documents consisting of 976 pages; and 518 Rule 77 documents consisting of 4,393 pages. This is a total of 2,158 items – more than two times as many items than were disclosed at the confirmation stage, and a total of 17,299 pages of materials plus audio and video items.
42. 3 months time to process and conduct investigations based upon this amount of material, after 'full' or 'effective' disclosure, is, on any analysis, wholly insufficient. The Defence did not receive the first batch of post-confirmation disclosure until 30 October 2012 (more than one year after the confirmation hearing in this case concluded – from now on a time period the Defence shall refer to as the "wasted year"), and as has been noted, approximately 70% of the incriminatory material disclosed after the confirmation hearing was provided to the Defence only in January 2013 or later. This 70% figure also comports with the date of disclosure of the OTP's core post-confirmation evidence, with the statements or transcripts of 22<sup>73</sup> of the 31 'new' OTP witnesses (witnesses not relied upon at confirmation) having first been disclosed to the Defence in

<sup>72</sup> The Defence acknowledge that due to the Prosecution having re-disclosed some items at the trial stage that were previously disclosed at the confirmation stage, but with a new ERN number, this count is not exact.

<sup>73</sup> These are witnesses P-32, P-128, P-185, P-189, P-247, P-287, P-323, P-326, P-378, P-405, P-409, P-410, P-438, P-442, P-452, P-469, P-475, P-487, P-508, P-516, P-535.

January 2013. Of the remaining 9 'new' witnesses, the statements or transcripts of three witnesses were disclosed in December 2012<sup>74</sup> and for six witnesses,<sup>75</sup> on 30 November 2012 – no sooner than 10 months after the issuance of the confirmation of charges decision.<sup>76</sup> Even now, and has been discussed at length above, 'full' disclosure has yet to be effected in this case.

43. Of equal importance is the date of disclosure of the identities of the 41 witnesses on the OTP's list of trial witnesses. As of 3 January 2013, six days prior to the 'final' deadline for OTP disclosure, the identity of exactly two witnesses – Witness P-0013<sup>77</sup> and P-0025 – had been disclosed to the Defence, and this, with respect to P-0025, only on 17 December 2012.<sup>78</sup> This is a point worth repeating: **Less than a week** prior to the expiration of the deadline set by the Chamber for 'final' disclosure, more than 20 months after Mr. Ruto's initial appearance before the Court, and more than 11 months after the issuance of the confirmation of charges decision, Mr. Ruto and his Defence knew the identity of **only** 2 out of the 41<sup>79</sup> witnesses scheduled to testify for the OTP in a case scheduled to go to trial in three months, and whose factual allegations stretch over three years and include innumerable individual alleged events and acts. The Defence submits that the Prosecution tactic of deliberately dilatory, delayed and insufficient disclosure cannot be rewarded with the huge dividend of a trial date that so significantly prejudices the Defence and avoids proper scrutiny and testing of OTP evidence, much of which the Defence submits is concocted.
44. In the view of counsel, who have appeared in other cases before this Court as well before the *ad hoc* and hybrid international tribunals and courts, such a

<sup>74</sup> These are witnesses P-495, P-524 and P-534.

<sup>75</sup> These are witnesses P-268, P-336, P-356, P-376, P-397 and P-423.

<sup>76</sup> That the Prosecution did not [REDACTED] cannot, of course, be used to limit in any manner the adequate time to be granted the defence once full or effective disclosure is provided.

<sup>77</sup> The identity of P-0013 was disclosed prior to the confirmation hearing.

<sup>78</sup> The identity of Witness P-0247 was disclosed on 4 January 2013.

<sup>79</sup> [REDACTED].

situation is unprecedented. Even if all the identities of the OTP's remaining 39 witnesses had been disclosed on 9 January 2013, which they were not, three months time would have been insufficient to conduct adequate investigations with respect to such a large number of witnesses. As the Defence has previously submitted, and as reiterated above, the credibility and motivations of the OTP's witnesses is central to this case, and therefore what might be considered adequate time to investigate a witness in a standard case is certainly not applicable in the context of this case, where it is crucial for the Defence to have investigated in full, prior to the commencement of trial, the interconnections between the OTP's witnesses.

45. Given the imminence of trial, the Defence request the Trial Chamber to give consideration to shortening the time limits for any responses to this filing pursuant to Regulation 35 of the Regulations of the Court.
46. The Defence respectfully notifies the Trial Chamber that it will supplement this filing in due course with an additional *ex parte* filing detailing important investigative challenges that necessitates the vacating of the May 2013 trial date in order to provide the Defence with adequate time to prepare an effective defence so as to preserve the fair trial rights of Mr. Ruto.

### **Relief Requested**

For the reasons submitted above, the Defence respectfully requests that the Trial Chamber vacate the trial commencement date of 28 May 2013 and set a new trial date no earlier than November 2013.



Respectfully submitted,



---

**Karim A.A. Khan QC**  
Lead Counsel for H.E. William Samoei Ruto  
Deputy President of the Republic of Kenya

Dated this 25th Day of April 2013  
At Nairobi, Kenya