

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/09-02/11

Date: 23 October 2013

**TRIAL CHAMBER V(B)**

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

**SITUATION IN THE REPUBLIC OF KENYA**

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

**Public**

**Decision on Prosecution request to add P-548 and P-66 to its witness list**

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

Mr Benjamin Gumpert

**Counsel for Uhuru Muigai Kenyatta**

Mr Steven Kay

Ms Gillian Higgins

**Legal Representatives for 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

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

**States Representatives**

*Amicus Curiae*

**REGISTRY**

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**Registrar**

Mr Herman von Hebel

**Deputy Registrar**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Others**

**Trial Chamber V(B)** ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Uhuru Muigai Kenyatta*, having regard to Articles 64, 67 and 68 of the Rome Statute ('Statute'), Rules 76 and 84 of the Rules of Procedure and Evidence ('Rules') and Regulation 35 of the Regulations of the Court ('Regulations') issues the following Decision on Prosecution request to add P-548 and P-66 to its witness list.

#### **I. Procedural history and submissions**

1. On 13 September 2013, the Office of the Prosecutor ('Prosecution') filed the 'Prosecution's request to add two witnesses to its witness list' ('Request').<sup>1</sup>
2. On 30 September 2013, the Legal Representative for Victims ('LRV') responded to the Request ('LRV Response').<sup>2</sup>
3. Also on 30 September 2013, the defence team for Mr Kenyatta ('Defence') responded to the Request ('Defence Response').<sup>3</sup>
4. In the Request, the Prosecution requests to add P-548, a Mungiki insider, and P-66, a sexual and gender based violence witness.<sup>4</sup> The Prosecution submits that it came into contact with P-548 near the 9 January 2013 deadline to disclose its witness list, and that the collection of P-548's statement took place shortly afterwards.<sup>5</sup> The Prosecution submits that it had previous contact with P-66, but approached this person again as a replacement witness following the withdrawal of Witness 426.<sup>6</sup> The Prosecution argues that there is good cause to add these persons to its witness list at this stage because it would not prejudice the accused and would assist the

<sup>1</sup> ICC-01/09-02/11-805-Red2 (with four annexes; public redacted version notified 17 September 2013).

<sup>2</sup> ICC-01/09-02/11-815.

<sup>3</sup> ICC-01/09-02/11-816-Conf.

<sup>4</sup> Request, ICC-01/09-02/11-805-Red2, para. 1.

<sup>5</sup> Request, ICC-01/09-02/11-805-Red2, paras 1, 13-14.

<sup>6</sup> Request, ICC-01/09-02/11-805-Red2, paras 1, 17.

Chamber in determining the truth in this case.<sup>7</sup> In particular, the Prosecution submits that: (i) the evidence of both persons is relevant to the Prosecution's case,<sup>8</sup> (ii) the Defence would have ample time to prepare cross-examination since they would be called later in the Prosecution's case<sup>9</sup> and (iii) the anticipated evidence corroborates, in part, the evidence of witnesses already on the witness list and concerns matters already known to the Defence.<sup>10</sup>

5. In the LRV Response, the LRV argues that the Request impacts on the right of the victims to know the truth and that it is 'manifestly in the interest of justice' for this evidence to be heard.<sup>11</sup> The LRV submits that the Request should be granted.<sup>12</sup>
6. In the Defence Response, the Defence sets out the law it considers to be applicable to the Request, relying in part on a decision rendered by Trial Chamber II.<sup>13</sup>
7. As regards P-548, the Defence notes that the Prosecution concedes that this person was contacted before the 9 January 2013 disclosure deadline and that the Prosecution inadequately justifies the delayed filing of the Request.<sup>14</sup> The Defence argues that the proposed evidence of P-548 is far ranging and, if admitted, would require 'sustained Defence investigations prior to the start of trial'.<sup>15</sup> The Defence submits that a proper investigation into a Mungiki insider witness such as P-548 would require a further four months of preparation time before the start of trial.<sup>16</sup>

<sup>7</sup> Request, ICC-01/09-02/11-805-Red2, paras 2, 13.

<sup>8</sup> Request, ICC-01/09-02/11-805-Red2, paras 2, 22, 24, 26.

<sup>9</sup> Request, ICC-01/09-02/11-805-Red2, paras 2, 31.

<sup>10</sup> Request, ICC-01/09-02/11-805-Red2, paras 2, 23, 29-30.

<sup>11</sup> LRV Response, ICC-01/09-02/11-815, paras 10, 15.

<sup>12</sup> LRV Response, ICC-01/09-02/11-815, para. 17.

<sup>13</sup> Defence Response, ICC-01/09-02/11-816-Conf, paras 9-21, *citing* Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecution's Application to Add P-317 to the Prosecution Witness List (ICC-01/04-01/07-1537), 3 November 2009, ICC-01/04-01/07-1590.

<sup>14</sup> Defence Response, ICC-01/09-02/11-816-Conf, paras 25-28.

<sup>15</sup> Defence Response, ICC-01/09-02/11-816-Conf, para. 32.

<sup>16</sup> Defence Response, ICC-01/09-02/11-816-Conf, para. 34.

8. As regards P-66, the Defence responds that the redacted Request it received does not enable it to understand why Witness 426 is no longer willing to testify and why a replacement witness is deemed necessary at this stage of the proceedings.<sup>17</sup> The Defence emphasises that adding P-66 is prejudicial to the Defence due to the start date of the trial and the additional investigation which would be required.<sup>18</sup> The Defence responds that this prejudice is not mitigated by the fact that the evidence of P-66 is intended to replace the evidence of Witness 426.<sup>19</sup>
9. The Defence requests the Chamber to deny the relief sought in the Request.<sup>20</sup> In the alternative, if the Chamber authorises the addition of P-548 and P-66, the Defence requests that the Prosecution be ordered to postpone the calling of all Mungiki witnesses until such time as the Defence has been afforded adequate time to investigate the allegations made by Witness 548.<sup>21</sup> The Defence additionally requests the Chamber to order the immediate disclosure of the identities of both witnesses and all materials pertaining to them currently in the possession of the Prosecution.<sup>22</sup>

## II. Analysis and conclusions

10. The Chamber considers that, in principle, it will allow for the addition of evidence beyond the relevant deadlines for submitting such material when the terms of Regulation 35(2) of the Regulations are met.<sup>23</sup> However, the last sentence of Regulation 35(2) of the Regulations only applies in exceptional circumstances, such as an incapacitating illness making counsel temporarily unable to complete his/her

<sup>17</sup> Defence Response, ICC-01/09-02/11-816-Conf, para. 41.

<sup>18</sup> Defence Response, ICC-01/09-02/11-816-Conf, para. 42.

<sup>19</sup> Defence Response, ICC-01/09-02/11-816-Conf, para. 42.

<sup>20</sup> Defence Response, ICC-01/09-02/11-816-Conf, para. 43.

<sup>21</sup> Defence Response, ICC-01/09-02/11-816-Conf, para. 44.

<sup>22</sup> Defence Response, ICC-01/09-02/11-816-Conf, para. 45.

<sup>23</sup> Regulation 35(2) of the Regulations provides that: '[t]he Chamber may extend or reduce a time limit if good cause is shown and, where appropriate, after having given the participants an opportunity to be heard. After the lapse of a time limit, an extension of time may only be granted if the participant seeking the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control.'

work,<sup>24</sup> and the Chamber considers that this provision will generally not be satisfied when requesting to add evidence many months after the expiration of a deadline set in accordance with Rule 84 of the Rules.<sup>25</sup>

11. When the terms of this regulation are not met, the Chamber may still grant the proposed addition if it can be permitted in line with the Chamber's obligation under Article 64(2) of the Statute to ensure that 'a trial is fair and expeditious and is conducted with full respect for the rights of the accused [...]'. This is consistent with Trial Chamber V(A)'s jurisprudence and the Trial Chamber II decision relied upon by the Defence, which allowed for a witness to be added despite Regulation 35(2) of the Regulations not being satisfied.<sup>26</sup> The Chamber considers that such decisions require a case-by-case assessment which balances the justifications for adding new evidence against the potential prejudice which may be caused to the other party. In particular, the Chamber must remain mindful of the impact on the right of the accused to have adequate time and facilities for the preparation of the defence, as set out in Article 67(1)(b) of the Statute.<sup>27</sup> The Chamber may consider many factors, including: (i) the length of time that has elapsed since the deadline, (ii) whether the new witnesses bring to light a previously unknown fact which has a significant bearing upon the case, (iii) whether good cause exists for not seeking to add the

<sup>24</sup> Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Reasons for the "Decision of the Appeals Chamber on the request of counsel to Mr. Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the Court of 7 February 2007" issued on the 16 February 2007, 21 February 2007, ICC-01/04-01/06-834, paras 9-11.

<sup>25</sup> Rule 84 of the Rules also allows for the Chamber to make 'any necessary orders for the disclosure of documents or information not previously disclosed and for the production of additional evidence. To avoid delay and to ensure that the trial commences on the set date, any such orders shall include strict time limits which shall be kept under review by the Trial Chamber'.

<sup>26</sup> ICC-01/04-01/07-1590, paras 12, 15-16, 19. See also Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Prosecution's Request to Add Witnesses to its List of Witnesses, 3 September 2013, ICC-01/09-01/11-899-Red (redacted version notified 5 September 2013); Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on prosecution requests to add witnesses and evidence and defence requests to reschedule the trial start date, 3 June 2013, ICC-01/09-01/11-762.

<sup>27</sup> As regards this right, Article 64(3)(c) of the Statute stipulates that the Trial Chamber shall provide for disclosure 'sufficiently in advance of the commencement of the trial to enable adequate preparation for trial'. Rule 76 of the Rules requires the Prosecution to provide the Defence with the names of witnesses whom the Prosecution intends to call to testify and copies of any prior statements made by those witnesses 'sufficiently in advance to enable the adequate preparation of the defence'.

witnesses at an earlier stage of the proceedings, (iv) whether the other party can be given adequate time to investigate the proposed new witnesses, bearing in mind the need to conduct the trial fairly and expeditiously and (v) whether it would be in the interests of justice to grant the request.

12. Turning to the Request, the Chamber notes that the Prosecution's deadline for submitting its witness list was 9 January 2013.<sup>28</sup> The Chamber does not consider that the Prosecution's explanation for why it has sought to add these witnesses qualifies as 'reasons outside of [its] control' within the meaning of Regulation 35(2) of the Regulations. Accordingly, the Chamber will conduct the case-by-case assessment identified above in order to determine whether it is fair to add P-548 and P-66 to the Prosecution's witness list.
13. As regards P-548, the Chamber notes that the Prosecution did contact this person before the 9 January 2013 disclosure deadline,<sup>29</sup> but failed to seek an extension of this deadline in order to interview P-548 and decide whether to add this person to its witness list. However, the Chamber is persuaded from P-548's witness statements<sup>30</sup> and the Prosecution's submissions<sup>31</sup> that much of the proposed evidence of P-548 is not duplicative with the evidence of other proposed witnesses, brings to light previously unknown facts which have a significant bearing on the case and would be of relevance in determining the questions at issue in this case.
14. As to the potential prejudice to the Defence, the Chamber is not persuaded by the Defence's submissions that four months before the commencement of trial is required in order to investigate the proposed evidence of P-548. In particular, the Chamber notes the Prosecution's undertaking that P-548 would be called later in

<sup>28</sup> Decision on the schedule leading up to trial, 9 July 2012, ICC-01/09-02/11-451, para. 18.

<sup>29</sup> Request, ICC-01/09-02/11-805-Red2, para. 13.

<sup>30</sup> Annex B of the Request, ICC-01/09-02/11-805-Conf-AnxB.

<sup>31</sup> Request, ICC-01/09-02/11-805-Red2, paras 22-24.

the Prosecution's case. Mindful however of the potential linkage between the proposed evidence of P-548 and that of other Mungiki insider witnesses, the Chamber is prepared to grant the Defence's alternative request to 'postpone the calling of all Mungiki witnesses until such time as the Defence has been afforded adequate time to investigate the allegations made by Witness 548'.<sup>32</sup> The Chamber considers 'adequate' time in the present circumstances to mean that the Prosecution would delay calling any Mungiki witnesses at the beginning of its evidence presentation. Accordingly, in addition to the Prosecution's undertaking with respect to P-548, the Prosecution is also directed not call any of its Mungiki witnesses until at least the end of January 2014. If the Prosecution considers that the security situation for any of its Mungiki witnesses requires a variation of this direction, it is directed to seize the Chamber with an application to this effect.

15. Accordingly, the Chamber grants the Prosecution's request with respect to P-548. The Prosecution is directed to disclose the identity of Witness 548 and all related disclosable information to the Defence forthwith.
16. As regards P-66, the Chamber notes that, although the Prosecution does not explain the reasons for Witness 426's withdrawal in the Request, the Defence was previously notified as to why this witness withdrew on 16 July 2013.<sup>33</sup> The Chamber is satisfied that Witness 426's withdrawal means that P-66's proposed evidence brings to light otherwise unknown facts which have a significant bearing upon the case. Further, given the overlap P-66's proposed evidence has with that of former Witness 426,<sup>34</sup> the Chamber considers that the Defence has previously had an opportunity to prepare for similar evidence in this case. Finally, as with P-548, the Prosecution has undertaken not to call this witness until later in its case. The

<sup>32</sup> Defence Response, ICC-01/09-02/11-816-Conf, para. 44.

<sup>33</sup> ICC-01/09-02/11-773-Conf-Red2.

<sup>34</sup> Compare Request, ICC-01/09-02/11-805-Red2, para. 66 with Annex B of Prosecution's provision of materials pursuant to Decision ICC-01/09-02/11-451, 9 January 2013, ICC-01/09-02/11-596-Conf-AnxB, page 21.



Chamber therefore considers that no undue prejudice would result in adding P-66 to the Prosecution's witness list and, given these considerations, the Defence would have an adequate amount of time to conduct investigations related to P-66's proposed evidence before the trial is scheduled to commence on 12 November 2013.

17. Accordingly, the Chamber grants the Prosecution's request with respect to P-66. The Prosecution is directed to disclose the identity of Witness 66 and all related disclosable information to the Defence forthwith.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

**GRANTS** the relief sought in the Request;

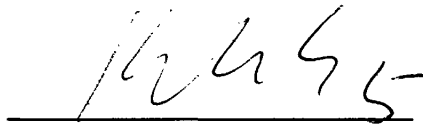
**GRANTS** the alternative request sought in the Defence Response;

**ORDERS** the Prosecution to disclose the identities of Witnesses 548 and 66 and all disclosable information relating to them forthwith;

**DIRECTS** the Prosecution to call Witnesses 548 and 66 among the last witnesses of the Prosecution case; and

**DIRECTS** the Prosecution to call its Mungiki insider witnesses in accordance with paragraph 14 of the present decision.

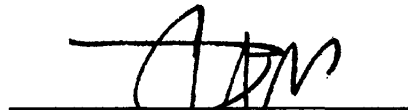
Done in both English and French, the English version being authoritative.



**Judge Kuniko Ozaki, Presiding**



**Judge Robert Fremr**



**Judge Chile Eboe-Osuji**

Dated 23 October 2013

At The Hague, The Netherlands