

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 6 March 2013

TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding Judge
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***

Confidential

Confidential redacted version of the "Decision on the request of the Prosecution for review of the Registrar's decision regarding Witness 24"

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

The Office of the Prosecutor
Ms Fatou Bensouda

Counsel for the Defence
For William Samoei Ruto :
Mr. David Hooper
Mr. Kioko Kilukumi Musau
For Joshua Arap Sang :
Mr. Joseph Kipchumba Kigen-Katwa
Mr. Silas Chekera

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia, Registrar

Defence Support Section

Victims and Witnesses Unit
Ms Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section Other**

Trial Chamber V ("Chamber") of the International Criminal Court ("Court"), in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* hereby delivers the following Decision on the request of the Office of the Prosecutor ("Prosecution") for review of the Registrar's decision regarding Witness 24.

Background

1. On 28 January 2013, the Chamber granted a further delay for the addition of Witness 24 to the list of witnesses for the Prosecution and the addition of related incriminating material to the list of evidence until the Chamber's final determination on the matter.¹ The Chamber granted the Prosecution three days to (a) disclose the identity of Witness 24; (b) withdraw the witness; or (c) submit the Registry's decision for review, to the extent that this decision has an impact on the witness's cooperation with the Court. In the event that the decision was submitted for review, the Defence was to be granted an opportunity to be heard, if necessary, on the timeline for disclosure.²
2. On 1 February 2013, the Prosecution submitted an urgent request for review ("Request for Review") of the Registrar's decision denying Witness 24's request for assistance [REDACTED] ("Registrar's Decision").³ The Prosecution also requested that the Chamber convene an *ex parte* hearing with representatives of the Registrar, including the Victims and Witnesses Unit (VWU), and the Prosecution regarding the matter.⁴

¹ Decision on the prosecution's urgent application for additional time to add P-24 to its witness list, ICC-01/09-01/11-571-Conf-Exp. A confidential redacted version of the decision is ICC-01/09-01/11-571-Conf-Red.

² ICC-01/09-01/11-571-Conf-Red, para. 8.

³ Prosecution's urgent request for review of the Registry's decision regarding P-0024, ICC-01/09-01/11-581-Conf-Exp. A confidential redacted version was filed on 4 February 2013, ICC-01/09-01/11-581-Conf-Red.

⁴ ICC-01/09-01/11-581-Conf-Red, para. 31.

3. On 6 February 2013, the Chamber held an *ex parte*, Prosecution and Registry only, status conference ("Status Conference") to discuss the matter.⁵ During the Status Conference the Chamber instructed the Registry to submit, by noon of the following day, a written report on Witness 24's financial situation.⁶ The Chamber allowed the Prosecution to make additional submissions after the receipt of the report.⁷
4. On 7 February 2013, the Registry submitted its report on Witness 24's financial situation.⁸ On 8 February 2013, the Prosecution filed its observations on the report.⁹
5. On 13 February 2013, the Registry filed its reply to the Prosecution's written observations.¹⁰ The reply was initially submitted by email. Upon the Chamber's instructions, on 20 February 2013, the Registry filed the reply, together with additional submissions,¹¹ which the Chamber neither requested, nor authorised. The Chamber will not consider these submissions.
6. On 22 February 2013, the Prosecution requested leave to reply to the additional submissions of the Registry filed on 20 February 2013 ("Prosecution Request for Leave to Reply").¹² In view of the Chamber's decision not to consider those additional submissions, the Prosecution's request is moot.

⁵ Order scheduling a status conference regarding Witness P-24, ICC-01/09-01/11-585-Conf.

⁶ Transcript of confidential, *ex parte* status conference on 6 February 2013, ICC-01/09-01/11-T-18-CONF-EXP-ENG, p. 22, lines 6-11.

⁷ ICC-01/09-01/11-T-18-CONF-EXP-ENG, p. 24, lines 19-23.

⁸ ICC-01/09-01/11-609-Conf-Exp-Anx1.

⁹ Prosecution's Additional Submissions in regards to P-0024, 8 February 2013, ICC-01/09-01/11-594-Conf-Exp.

¹⁰ ICC-01/09-01/11-609-Conf-Exp-Anx3. A redacted version was filed as ICC-01/09-01/11-609-Conf-Exp-Anx3-Red.

¹¹ ICC-01/09-01/11-609-Conf-Exp.

¹² Prosecution's request for leave to reply to the "Victims and Witnesses Unit's Report on Witness KEN-OTP-P-0024", ICC-01/09-01/11-618-Conf-Exp.

Submissions

7. During the Status Conference, the Prosecution pointed out that Witness 24 [REDACTED].¹³ The Prosecution criticised the VWU's assessment of the witness's situation and the conclusion that he is living a normal life.¹⁴ It was submitted that a correct assessment should be made¹⁵ on the basis of the long-term situation,¹⁶ not of a snapshot of the witness at a particular moment.¹⁷
8. The Prosecution submitted that the witness is not exploiting an opportunity¹⁸ and that he rather wants to continue co-operating with the Court.¹⁹ The Prosecution explained in this connection that the witness had contacted the VWU in May 2012²⁰ and the Prosecution on 13 September 2012 in order to voice his troublesome situation.²¹
9. The Prosecution stated that because of the current problem the witness is considering [REDACTED],²² [REDACTED].²³ Further, the Prosecution asserted that the witness's inclusion in the ICCPP indicates that he is still at risk.²⁴
10. In its additional submissions the Prosecution submits that, even if the witness were to maintain his present schedule and working hours,

¹³ ICC-01/09-01/11-T-18-CONF-EXP-ENG, p. 15, lines 20-22.

¹⁴ ICC-01/09-01/11-T-18-CONF-EXP-ENG, p. 19, lines 22-23.

¹⁵ ICC-01/09-01/11-T-18-CONF-EXP-ENG, p. 16, line 25 and p. 17 lines 1, 4-6.

¹⁶ ICC-01/09-01/11-T-18-CONF-EXP-ENG, p. 17, line 9.

¹⁷ ICC-01/09-01/11-T-18-CONF-EXP-ENG, p. 20, lines 4-5.

¹⁸ ICC-01/09-01/11-T-18-CONF-EXP-ENG, p. 18, lines 9-10 and p. 20, line 9.

¹⁹ ICC-01/09-01/11-T-18-CONF-EXP-ENG, p. 20, lines 8-9.

²⁰ ICC-01/09-01/11-T-18-CONF-EXP-ENG, p. 21, lines 11-15.

²¹ ICC-01/09-01/11-T-18-CONF-EXP-ENG, p. 20, lines 24-25 and p. 21, line 1.

²² ICC-01/09-01/11-T-18-CONF-EXP-ENG, p. 18, lines 11-12 and p. 25, lines 15-21.

²³ ICC-01/09-01/11-T-18-CONF-EXP-ENG, p. 18 lines 23-25 and p. 19, lines 1-4.

²⁴ ICC-01/09-01/11-T-18-CONF-EXP-ENG, p. 18, lines 15-17.

[REDACTED].²⁵ The Prosecution observes that in the Registry's report there is no budgeted money for clothing and for unexpected medical expenses.²⁶ The Prosecution submits that the witness's earnings [REDACTED].²⁷ In the submission of the Prosecution the witness's request for financial support is borne out of a need to maintain a normal, sustainable and endurable life [REDACTED].²⁸ The Prosecution requests the Chamber to direct the VWU to reassess Witness 24's exact needs in [REDACTED] and to provide financial support necessary for the witness [REDACTED] while maintaining a sustainable lifestyle.²⁹

11. At the Status Conference the Registry's representative submitted that the witness is living "relatively well".³⁰ The Registry stated that when making its decision it took into account the timing of the witness's request- at the time of disclosure of evidence, which, in the view of the Registry, is indicative of the witness's desire to materially benefit from his involvement with the Court.³¹ The Registry pointed out that the protection programme should not be used by witnesses to raise their social level.³² According to the Registry, although there are no internal guidelines for these kinds of cases, it takes into account [REDACTED].³³

12. The Registry submitted that Witness 24 [REDACTED]. [REDACTED].³⁴ Although [REDACTED]. The Registry had no information [REDACTED] that the witness experienced any difficulties.³⁵ The witness has

²⁵ ICC-01/09-01/11-594-Conf-Exp, para. 5.

²⁶ ICC-01/09-01/11-594-Conf-Exp, para. 6.

²⁷ ICC-01/09-01/11-594-Conf-Exp, para. 8.

²⁸ ICC-01/09-01/11-594-Conf-Exp, para. 8.

²⁹ ICC-01/09-01/11-594-Conf-Exp, para. 10.

³⁰ ICC-01/09-01/11-T-18-CONF-EXP-ENG, p. 4, lines 13-17.

³¹ ICC-01/09-01/11-T-18-CONF-EXP-ENG, p. 5, lines 12-22.

³² ICC-01/09-01/11-T-18-CONF-EXP-ENG, p. 5, line 25 and p. 6, lines 1-3.

³³ ICC-01/09-01/11-T-18-CONF-EXP-ENG, p. 7, lines 9-24.

³⁴ ICC-01/09-01/11-T-18-CONF-EXP-ENG, p. 10, lines 11-23.

³⁵ ICC-01/09-01/11-T-18-CONF-EXP-ENG, p. 12, lines 10-17.

[REDACTED] and he [REDACTED]. [REDACTED].³⁶ The Registry submitted that [REDACTED].³⁷

13. The Registry submitted that its decision regarding Witness 24 was also motivated by the need to make the witness "stand on [his] feet and to become self-sufficient".³⁸ The Registry stated that it prefers to encourage witnesses to make a living for themselves.³⁹ [REDACTED] for which the witness requested funding costs [REDACTED].⁴⁰

14. The Registry stated that the witness currently has [REDACTED].⁴¹

15. In the report prepared upon instructions from the Chamber, the Registry added that the witness [REDACTED].⁴² The report details the sources of income of Witness 24 [REDACTED].⁴³ The report provides that the witness received [REDACTED].⁴⁴ According to the report, the witness [REDACTED].⁴⁵ The report refers to a publically available resource which would [REDACTED] to the witness at [REDACTED] per month. The Registry, however, notes that it should be taken into consideration that the witness receives [REDACTED].⁴⁶ The Registry submits in the report that [REDACTED] Witness 24 [REDACTED] per month.⁴⁷

16. In its reply to the Prosecution's submissions, the Registry contends that as a matter of principle, financial assistance to witnesses should be moderate, as the main aim of granting admission to a protection programme is to

³⁶ ICC-01/09-01/11-T-18-CONF-EXP-ENG, p. 11, lines 2-13.

³⁷ ICC-01/09-01/11-T-18-CONF-EXP-ENG, p. 11, lines 19-22.

³⁸ ICC-01/09-01/11-T-18-CONF-EXP-ENG, p. 11, lines 23-25 and p. 12, lines 1-5.

³⁹ ICC-01/09-01/11-T-18-CONF-EXP-ENG, p. 11, lines 20-25.

⁴⁰ ICC-01/09-01/11-T-18-CONF-EXP-ENG, p. 13, lines 18-20.

⁴¹ ICC-01/09-01/11-T-18-CONF-EXP-ENG, p. 14, lines 21-25 and p. 15, lines 1-2.

⁴² ICC-01/09-01/11-609-Conf-Exp-Anx1, p. 3.

⁴³ ICC-01/09-01/11-609-Conf-Exp-Anx1, pp. 4-6.

⁴⁴ ICC-01/09-01/11-609-Conf-Exp-Anx1, p. 7.

⁴⁵ ICC-01/09-01/11-609-Conf-Exp-Anx1, p. 7.

⁴⁶ ICC-01/09-01/11-609-Conf-Exp-Anx1, p. 8.

⁴⁷ ICC-01/09-01/11-609-Conf-Exp-Anx1, p. 8.

save a witness's life.⁴⁸ The Registry also refers to the overall cost of [REDACTED], arguing that it would constitute a significant burden for the Registry, in light of its budget, and concluding that this would not be financially sustainable.⁴⁹

Relevant Provisions and Jurisprudence

17. The Appeals Chamber ruled that "[i]n cases of disagreement between the assessment of the [...] VWU [...] and the Prosecutor, the ultimate arbiter of whether the serious measure of relocation should be undertaken is the Chamber".⁵⁰ While the disagreement in the present case is not about whether the witness should be relocated, [REDACTED] and the Chamber is of the view that it is competent to review the Registrar's Decision, consistent with its obligation to "take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses" under Article 68(1) of the Statute.⁵¹

18. The Chamber is, however, mindful of the language of Article 43(6) of the Statute, entrusting the VWU with the task of providing, *inter alia*, protective measures and other appropriate assistance for witnesses. The task is thus to be carried out by the VWU in the first place. Indeed, the VWU staff has the skills and knowledge necessary to provide protection. This is recognised in the last sentence of Article 43(6) of the Statute, which requires the VWU to include staff with expertise in trauma. Therefore, without prejudice to the Chamber's powers under Article 68(1), the

⁴⁸ ICC-01/09-01/11-609-Conf-Exp-Anx3-Red, p. 3.

⁴⁹ ICC-01/09-01/11-609-Conf-Exp-Anx3-Red, p. 3.

⁵⁰ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the appeal of the Prosecutor against the "Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules" of Pre-Trial Chamber I, 26 November 2008, ICC-01/04-01/07-776, para. 2.

⁵¹ *Ibid.*, para. 95.

Registrar, acting through the VWU, is normally the entity to take decisions regarding protection and assistance for witnesses. The Chamber will generally not interfere with such decisions unless specifically requested to review them.

19. As regards the standard of review, considering the particular circumstances of the present case and the Chamber's responsibilities under Article 68(1) of the Statute, the Chamber's review of the Registrar's Decision will be based on the assessment of: (a) whether the Registrar made a manifestly unreasonable decision; and (b) whether the Registrar's Decision is affected by a material error of law or fact.⁵²

Analysis and Conclusion

20. The Prosecution's request for review of the Registrar's Decision is primarily based on the assertion that Witness 24 [REDACTED] and below the standard of living [REDACTED], which factors were not duly considered by the Registrar. The Prosecution also takes issue with the Registrar's proposition that the witness seeks to materially benefit from the Court's protection programme.

21. The Chamber accepts that [REDACTED] income of the witness [REDACTED]. However, the Chamber notes the Registry's argument that because Witness 24 [REDACTED], his income is not immediately comparable [REDACTED]. The Chamber accepts that the assistance which the witness [REDACTED] reduces his monthly expenses. However, the Chamber is unable to determine whether the financial value of the

⁵² See also *Prosecutor v. Thomas Lubanga Dyilo*, Decision on disclosure issues, responsibilities for protective measures and other procedural matters, 24 April 2008, ICC-01/04-01/06-1311-Anx2 (as annexed to filing ICC-01/04-01/06-1311 of 8 May 2008), para. 82. See also, albeit in the context of decisions regarding the composition of defence teams, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Urgent Requests by the Legal Representative of Victims for Review of Registrar's Decision of 3 April 2012 regarding Legal Aid, 23 April 2012, ICC-01/04-01/07-3277, para. 9.

assistance received by the witness [REDACTED] fully compensates for the lack of monetary income. The Chamber is thus not in a position to decide whether or not the witness [REDACTED]. Under these circumstances, it is not possible to hold that the Registry's Decision was manifestly unreasonable.

22. The Chamber also takes note of the Prosecution's observation that when reviewing various monthly expenses of the witness [REDACTED], the Registry did not take into account clothing and unexpected medical expenses. The Chamber agrees that the list of expenses provided by the Registry is limited to the most basic items needed for subsistence and does not include other expenses, such as clothing. However, the Registry also referred to savings which the witness is able to make and which could possibly cover such unexpected expenses.

23. As regards Witness 24's income [REDACTED]. However, this observation seems to be based on the assumption that it is the Court's obligation to guarantee witnesses [REDACTED]. This clearly cannot be the case, as there are many other variables that should also be taken into consideration when assessing one's standard of living [REDACTED]. The Chamber also appreciates the Registry's concern about the risks of overly generous financial aid to witnesses covered by the protection programme. For these reasons, the Chamber finds that the Prosecution has not demonstrated that the Registry erred by failing to consider the witness's standard of living [REDACTED] or by not giving sufficient weight to this factor.

24. The Prosecution also contests the proposition that the witness tries to materially benefit from the protection system by making his request for assistance at a time when his cooperation is of critical importance to the Prosecution. The Chamber notes that the Registry relies in this respect on

the timing of the witness's request for funding, which coincided with the expiry of time limits for the Prosecution's disclosure of evidence. Although the Chamber is not entirely persuaded that this conclusion has a solid basis, it does not consider the Registry's argument to amount to an error and certainly not to a material error warranting the reversal of the Registrar's Decision, especially in light of the other considerations on which that decision is primarily based.

25. Having regard to the above-listed criteria for review of the Registrar's decisions concerning protection and assistance for witnesses, the Chamber considers that the decision refusing to provide funding [REDACTED] is neither manifestly unreasonable, nor affected by a material error.

26. The Chamber, however, recalls its responsibility under Article 68(1) of the Statute to take appropriate measures to protect, *inter alia*, the physical well-being and dignity of witnesses, and notes that the living conditions of Witness 24 [REDACTED] are a cause for concern. The Chamber directs the Registry to consider measures, short of [REDACTED], that may improve the living conditions of the witness [REDACTED]. The Chamber acknowledges the expertise and experience of the Registry in such matters and only gives it a general direction to consider alternative means of improving the situation of Witness 24 [REDACTED] bearing in mind [REDACTED].

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY:

- **DECLARES MOOT** the Prosecution Request for Leave to Reply;
- **REJECTS** the Request for Review;

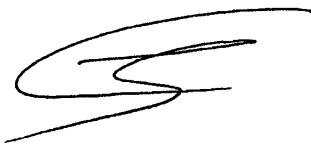
- **DIRECTS** the Registrar to consider means of improving the situation of Witness 24 [REDACTED], bearing in mind [REDACTED];
- **DIRECTS** the Registry to report to the Chamber and the Prosecution, by 18 March 2013, on the steps it has taken to implement the present decision; and
- **INSTRUCTS** the Prosecution to consult with Witness 24 as soon as possible in order to determine whether he is willing to continue cooperating with the Court and **ORDERS** the Prosecution to decide whether or not to add Witness 24 and related incriminating material to the Prosecution's list of witnesses no later than 12 March 2013.

Judge Eboe-Osuji will file a dissenting opinion.

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



Judge Kuniko Ozaki, Presiding Judge



Judge Christine Van den Wyngaert

Judge Chile Eboe-Osuji

Dated this 6 March 2013