

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 22 July 2013

**TRIAL CHAMBER V(A)**

**Before:** Judge, Chile Eboe-Osuji, Presiding  
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***

**Confidential ex parte available only to the Registry, Prosecution and the  
defence team of Mr Ruto**

**Order on the defence's request for VWU assistance to facilitate interview**

**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 Anton Steynberg

**Counsel for William Samoei Ruto**

Mr Karim Khan

Mr David Hooper

Mr Kioko Kilukumi Musau

Ms Shyamala Alagendra

**Counsel for Joshua Arap Sang**

**Legal Representatives of Victims**

**Legal Representatives of 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**

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**Registrar**

Mr Herman von Hebel

**Deputy Registrar**

**Victims and Witnesses Unit**

Mr Patrick Craig

**Detention Section**

**Victims Participation and Reparations  
Section**

**Others**

**Trial Chamber V(A)** ( the 'Chamber') of the International Criminal Court (the 'Court' or 'ICC'), in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, having regard to Articles 43(6) and 64(6)(f) of the Rome Statute (the 'Statute'), issues this Order on the defence's request for VWU assistance to facilitate interview.

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

1. On 17 June 2013, the defence team for Mr Ruto ('Defence') requested the Chamber to order the Victims and Witnesses Unit ('VWU') to facilitate an interview with Witness 111 ('Request').<sup>1</sup>
2. The Defence informs the Chamber that on 10 June 2013, the Office of the Prosecutor ('Prosecution') inadvertently disclosed the identity of former trial Witness 111.<sup>2</sup> The Defence states that immediately upon discovering that the Prosecution had made this inadvertent mistake, it contacted the Prosecution to: i) advise that the name of Witness 111 had been disclosed to the Defence; ii) request that the Prosecution contact and inform Witness 111 that the Defence would like to meet with him and interview him; and iii) request that the Prosecution audio-record its contact with Witness 111 regarding the Defence request, and retain a copy. The Defence further requested that the Prosecution liaise with the VWU to convey the Defence request to Witness 111 and, therefore, copied the head of VWU on this email.<sup>3</sup>
3. On that same day the Prosecution replied, confirming that the name of Witness 111 is confidential and its disclosure was inadvertent.<sup>4</sup> The Defence thereafter replied to the Prosecution, stating that they would comply with all orders of the

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<sup>1</sup> Defence Request for VWU Assistance to facilitate Witness Interview, ICC-01/09-01/11-776-Conf-Exp, available only to the Registry, Prosecution and the Ruto Defence, with Confidential *ex parte* Annexes A to C.

<sup>2</sup> Request, ICC-01/09-01/11-776-Conf-Exp, para. 7.

<sup>3</sup> Request, ICC-01/09-01/11-776-Conf-Exp, para. 8 and Annex A.

<sup>4</sup> Request, ICC-01/09-01/11-776-Conf-Exp, para. 9 and Annex B.

Court and the Code of Conduct. The Defence further asked that their request be addressed by close of business on 12 June 2013. However, at the time of filing of the Request, the Prosecution had not yet responded to the Defence.<sup>5</sup>

1. The Defence submits that since Witness 111 is not a trial witness, the 'Decision on the protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call' ('Witness Protocol')<sup>6</sup> does not apply. However, in order to be prudent and avoid ambiguity, the Defence seeks the Chamber's authorisation for VWU's assistance in facilitating contact between the Defence and Witness 111.<sup>7</sup> The Defence further contends that the Prosecution has failed, neglected and/or refused to cooperate with the Defence in this regard and therefore an order from the Chamber is necessary.<sup>8</sup>
2. On 19 June 2013,<sup>9</sup> the Prosecution responded to the Request ('Response').<sup>10</sup> The Prosecution submits that in the last months it has received more than 70 *inter partes* requests from both Defence teams and it has sought to resolve these requests expeditiously and without the involvement of the Chamber.<sup>11</sup> The Prosecution states that it was in the process of providing a response to the Defence.<sup>12</sup> The Prosecution submits that on 14 June 2013, the Prosecution spoke to Witness 111 and relayed the Defence's request for an interview but that he declined to be interviewed by the Defence. The Prosecution therefore states that this could have been dealt with *inter partes*, if the Defence would have allowed

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<sup>5</sup> Request, ICC-01/09-01/11-776-Conf-Exp, para. 10 and Annex C.

<sup>6</sup> 24 August 2012, ICC-01/09-01/11-449 and Annex.

<sup>7</sup> Request, ICC-01/09-01/11-776-Conf-Exp, para. 11.

<sup>8</sup> Request, ICC-01/09-01/11-776-Conf-Exp, para. 12.

<sup>9</sup> The deadline to respond was moved up to this date. See Email communication from Trial Chamber V-A Communications to the Prosecution and the VWU at 10:09 on 18 June 2013.

<sup>10</sup> Prosecution's Response to 'Defence Request for VWU Assistance to facilitate Witness Interview' (ICC-01/09-01-11-776-Conf-Exp), ICC-01/09-01/11-779-Conf-Exp.

<sup>11</sup> Response, ICC-01/09-01/11-779-Conf-Exp, para. 2.

<sup>12</sup> Response, ICC-01/09-01/11-779-Conf-Exp, para. 3.

more than three working days between its initial request and the Request submitted before the Chamber.<sup>13</sup>

3. On 25 June 2013, the VWU filed its observations ('VWU Observations').<sup>14</sup> The VWU states that, in principle, it is only involved in such matters when the witnesses are in the Court's Protection Program ('ICCPP') but that, considering the specific circumstances of the case, it is ready to facilitate the Request.<sup>15</sup>
4. On 26 June 2013, the Chamber sought clarification from the Defence on whether it still considered the present Request as outstanding, particularly in view of the Prosecution's contact with the witness and his refusal to be interviewed by the Defence.<sup>16</sup>
5. On 28 June 2013, the Defence responded that their filing remained live and that intervention of the Chamber was still required. The Defence further contends that – contrary to its request – the Prosecution did not record the telephone conversation it had with Witness 111 and that the Prosecution had treated Witness 111 differently to a witness subject of a similar previous request (Witness 256), who had been contacted through the VWU.<sup>17</sup>

## II. Analysis by the Chamber

6. The Chamber reiterates that matters such as the present one should preferably be dealt with *inter partes*, respectful of the rights of the accused and of a fair trial, but also of the safety, physical and psychological well-being of witnesses.

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<sup>13</sup> Response, ICC-01/09-01/11-779-Conf-Exp, para. 4.

<sup>14</sup> Victims and Witnesses Unit's Observations on the "Defence Request for VWU Assistance to facilitate Witness Interview" (ICC-01/09-01/11-776-Conf-Exp), ICC-01/09-01/11-785-Conf-Exp.

<sup>15</sup> VWU Observations, ICC-01/09-01/11-785-Conf-Exp.

<sup>16</sup> See Email communication from Trial Chamber V-A Communications to the Defence counsel at 18:28 on 26 June 2013.

<sup>17</sup> See E-mail communication from the Defence to Trial Chamber V-A Communications at 06:18 on 28 June 2013.

7. The Chamber observes that in the case at hand, as accepted by the Defence, the Witness Protocol does not apply to Witness 111, as he is not a trial witness nor is he a witness in the ICCPP.<sup>18</sup>
8. Accordingly, the Defence is not obliged to notify the Prosecution of its intention to interview Witness 111 and neither is the Prosecution under the obligation to contact Witness 111 to facilitate such contact.
9. Notwithstanding the above, the Chamber notes with regret that in spite of numerous communications between the Prosecution and the Defence in the instant case, the parties have not been able to agree on the manner in which the Defence contacts Witness 111. Meaningful efforts should be made to resolve issues before asking the Chamber to intervene. In view of that, and in light of the VWU's willingness to facilitate such contact, the Chamber hereby instructs the VWU, as neutral organ of the Court, to assist the Defence in this undertaking.

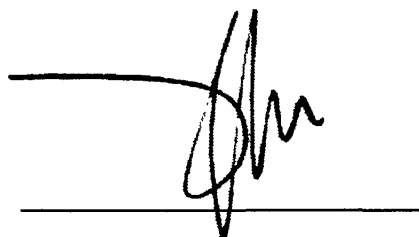
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<sup>18</sup> Decision of 24 August 2012, ICC-01/09-01/11-449 and Annex.

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

**INSTRUCTS** the VWU to assist the Defence in facilitating contact with Witness 111.

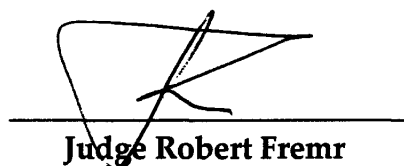
Done in both English and French, the English version being authoritative.

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**Judge Chile Eboe-Osuji, Presiding Judge**

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**Judge Olga Herrera Carbuca**

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**Judge Robert Fremr**

Dated 22 July 2013

At The Hague, The Netherlands