

**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* Prosecution and Ruto Defence only

Decision on Ruto Defence request for formal caution

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 Anton Steynberg

Counsel for William Samoei Ruto

Mr Karim Khan
Mr David Hooper
Mr Kioko Kilukumi
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

Registrar

Mr Herman von Hebel

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V(A) (the 'Chamber') of the International Criminal Court (the 'Court'), in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, having considered Regulation 23bis(2) of the Regulations of the Court, renders its Decision on Ruto Defence request for formal caution.

1. On 23 May 2013, the defence team for Mr Ruto ('Ruto Defence') filed the 'Defence Request for VWU Assistance to facilitate Witness Interview and for Disclosure' ('Interview Request')¹, a confidential and *ex parte* filing, available only to the Registry and the Ruto Defence. On the same day, the Ruto Defence also filed a confidential *ex parte* redacted version of the Interview Request, available only to the Office of the Prosecutor ('Prosecution'), the Registry and the Ruto Defence.² The defence team for Mr Sang ('Sang Defence') was not notified of the Interview Request.
2. On 3 June 2013, the Prosecution responded to the Interview Request ('Interview Response'), filing two versions of its written response: a confidential *ex parte* version available only to the Prosecution and the Victims and Witnesses Unit³ and a confidential redacted version that was notified to the Prosecution, the Registry, the Legal Representative of the Victims, the Ruto Defence, and the Sang Defence.⁴ In the confidential redacted version of the filing, the Prosecution discussed in detail the *ex parte* Interview Request made by the Ruto Defence, including its inquiry into the identity of a witness and its request to interview the witness.⁵

¹ ICC-01/09-01/11-751-Conf-Exp.

² Redacted Version of the 'Defence Request for VWU Assistance to facilitate witness interview and for Disclosure', ICC 01/09/01-751-Conf-Exp-Red.

³ Prosecution's Observations on 'Defence Request for VWU Assistance to facilitate Witness interview and for Disclosure', ICC-01/09-01/11-761-Conf-Exp.

⁴ ICC-01/09-01/11-761-Conf-Red.

⁵ ICC-01/09-01/11-761-Conf-Red, paras 5-7.

3. On 5 June 2013, the Ruto Defence filed the 'Defence Notification of Breach of Confidentiality by the Prosecution and Request for Formal Caution' ('Request for Caution').⁶ The Ruto Defence submits that the Prosecution has breached its obligations of confidentiality by disclosing to the Sang Defence information that the Ruto Defence had 'deliberately and carefully classified' to protect both confidential information provided by the Prosecution and lines of defence investigation.⁷ The Ruto Defence further submits that the Interview Response has consequently alerted the Sang Defence to aspects of the Ruto Defence strategy, particularly that it was investigating a specific individual as a potential defence witness.⁸ In light of the breach of confidentiality, the Ruto Defence requests that a formal caution be issued to remind the Prosecution of its duties and obligations.⁹
4. On 10 June 2013, the Prosecution filed its response to the Ruto Defence Request for Caution.¹⁰ In its response, the Prosecution admits error in wrongly classifying its Interview Response. The Prosecution submits that this is the first instance in which the Ruto Defence or Sang Defence has made submissions without inclusion of the other defence team, and asserts that it is now aware of the 'shift in defence practices and will take particular care in the future'.¹¹ Having taken note of the error, the Prosecution further submits that the prejudice to the Ruto Defence resulting from this breach is minimal, as the witness in question had already been known to both teams.¹² The Prosecution affirms that it is aware of its obligations

⁶ ICC-01/09-01/11-764-Conf-Exp.

⁷ ICC-01/09-01/11-764-Conf-Exp, para. 15.

⁸ ICC-01/09-01/11-764-Conf-Exp, para. 9.

⁹ ICC-01/09-01/11-764-Conf-Exp, para. 17.

¹⁰ Prosecution's Response to Defence Notification of Breach of Confidentiality by the Prosecution and Request for Formal Caution, ICC-01/09-01/11-767-Conf-Exp.

¹¹ ICC-01/09-01/11-767-Conf-Exp, para. 2.

¹² ICC-01/09-01/11-767-Conf-Exp, para. 3.

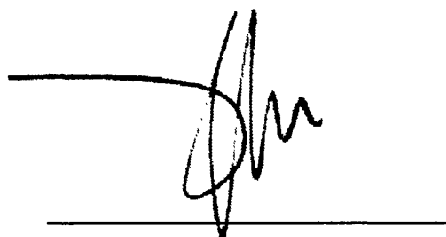
under all applicable rules and the protocol on the handling of confidential information, and submits that a formal caution is unnecessary in this case.¹³

5. As the Prosecution has indicated in its submission that it is aware of its duties and obligations, the Chamber does not find it necessary to issue an official caution to the Prosecution. As such, the Chamber is of the view that this issue is sufficiently addressed in the submissions of both parties, and that no additional action from the Chamber is required at this time.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request for Caution as moot.

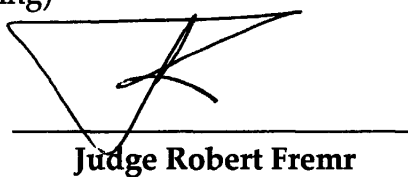
Done in both English and French, the English version being authoritative.



Judge Chile Eboe-Osuji
(Presiding)



Judge Olga Herrera Carbuccion



Judge Robert Fremr

Dated 22 July 2013

At The Hague, The Netherlands

¹³ ICC-01/09-01/11-767-Conf-Exp, para. 4.