

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 5 August 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***

Public redacted version

Decision on Defence request for disclosure relating to Defence witnesses

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

Mr Joseph Kipchumba Kigen-Katwa

Silas Chekera

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

Mr Patrick Craig

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 regard to Rule 77 of the Rules of Procedure and Evidence (the 'Rules') and Regulation 24(5) of the Regulations of the Court, issues this Decision on Defence request for disclosure relating to Defence witnesses.

I. Procedural history and submissions

1. On 4 July 2013, the defence team for Mr Ruto ('Defence') filed its request for disclosure relating to a defence witness ('First Request').¹
2. On 8 July 2013, the Defence filed its second request for disclosure relating to a defence witness ('Second Request').²
3. The Defence informs the Chamber of its intention to call [REDACTED] as a witness for the Defence in the First Request³ and [REDACTED] as a Defence witness in the Second Request⁴ (both requests together 'Defence Requests'). The Defence submits that it learned from [REDACTED] that both had been interviewed by the Office of the Prosecutor ('Prosecution') earlier in the year of 2013 and in the end of the year of 2012 respectively.⁵ It requests that the Prosecution provide the Defence with statements given by these persons and all other documents related to them which are in the possession of the Prosecution.⁶ In the event that such material has been previously disclosed to the Defence in a redacted or summary form, the Defence requests the Prosecution to be ordered to

¹ Defence Request for Disclosure relating to [REDACTED], ICC-01/09-01/11-799-Conf with two confidential annexes.

² Defence Request for Disclosure relating to [REDACTED], ICC-01/09-01/11-805-Conf, with two confidential annexes.

³ ICC-01/09-01/11-799-Conf, para. 1.

⁴ ICC-01/09-01/11-805-Conf, para. 1.

⁵ ICC-01/09-01/11-805-Conf, para. 3

⁶ ICC-01/09-01/11-799-Conf, para. 13 and ICC-01/09-01/11-805-Conf, para. 13.

provide full and unredacted versions of such statements and material.⁷ Further, with regard to [REDACTED], the Defence requests the Chamber to order the Prosecution to comply with the protocol on contact with opposing parties' witnesses (the 'Protocol')⁸ 'in totality'.⁹ In respect of [REDACTED], the Defence additionally requests the Chamber to vary paragraph 5 of the Protocol, prohibiting the Prosecution from contacting him and order that any contact with the witness deemed necessary by the Trial Chamber is made via the Victims and Witnesses Unit.¹⁰

4. On 16 July 2013, the Prosecution filed its response to the Defence Requests ('Response'),¹¹ in which it states that it has no objection to disclosing the information sought in the Defence Requests to the Defence.¹²
5. On 22 July 2013, the Defence filed a request for leave to reply to the Prosecution's Response ('Leave to Reply Request'),¹³ in which it asserts that the Prosecution made a 'series of extremely serious but unfounded accusations' concerning the integrity of the Defence and Mr Ruto.¹⁴ The Defence is of the view that these allegations necessitate a reply in order for the Chamber to have the Defence's point of view on the matter.¹⁵ Further, it seeks leave to make additional submissions on the Prosecution's disclosure regime.¹⁶

⁷ ICC-01/09-01/11-799-Conf, para. 13 and ICC-01/09-01/11-805-Conf, para. 13.

⁸ Annex of Decision on the protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call, ICC-01/09-01/11-449-Anx.

⁹ ICC-01/09-01/11-799-Conf, para. 13.

¹⁰ ICC-01/09-01/11-805-Conf, para. 14.

¹¹ Prosecution's response to Defence's requests regarding P-0564 and P-0470, ICC-01/09-01/816-Conf-Exp, Prosecution only, with three confidential *ex parte*, Prosecution only, annexes. A confidential redacted version was filed on 16 July 2013 and notified on 18 July 2013.

¹² ICC-01/09-01/11-816-Conf-Red, para. 9.

¹³ Defence Application for Leave to Reply to "Prosecution's response to Defence's requests regarding P-0564 and P-0470", ICC-01-09/01/11-823-Conf.

¹⁴ ICC-01/09-01/11-823-Conf, para. 1.

¹⁵ ICC-01/09-01/11-823-Conf, paras 2, 9.

¹⁶ ICC-01/09-01/11-823-Conf, paras 2, 11.

6. On 25 July 2013, the Prosecution filed its response to the Leave to Reply Request, opposing the Leave to Reply Request and requesting that it be dismissed.¹⁷ The Prosecution asserts that it made no allegations which impugn the integrity of the Defence and describes these allegations in return as speculation and conjecture.¹⁸ In respect of the requested submissions on the Prosecution's disclosure regime, it asserts that it is not a new and distinct issue and should therefore be rejected.¹⁹

II. Analysis by the Chamber

A. Leave to Reply Request

7. Firstly, the Chamber notes that the Defence seeks to make additional submissions on two issues, which do not to assist the Chamber in deciding on the merits of the Defence Requests.
8. The Chamber considers that observations on the Prosecution's disclosure regime are not necessary to decide on the specific disclosure requests, especially keeping in mind that the Defence has filed both requests without contacting the Prosecution *inter partes* first.
9. Further, with regard to the request for leave to reply to allegations made by the Prosecution which the Defence considers to be unsubstantiated and the subsequent submission by the Prosecution that this allegation itself is mere speculation, the Chamber stresses that the parties are to refrain from any speculation and allegations that are not related to a specific request in their filings. The Chamber will not entertain any submissions on such matter.
10. Therefore, the Chamber considers that it would not benefit from further submissions and accordingly rejects the Leave to Reply Request.

¹⁷ Prosecution's response to "Defence Application for leave to Reply to 'Prosecution's response to Defence's requests regarding P-0564 and P-0470'", ICC-01/09-01/11-828-Conf, para. 1.

¹⁸ ICC-01/09-01/11-828-Conf, para 1.

¹⁹ ICC-01/09-01/11-828-Conf, para 9.

B. Defence Requests

11. Turning to the Defence Requests, the Chamber considers that the previous statements and any other material related to the two Defence witnesses are material to the preparation of the Defence. Accordingly, the material is subject to disclosure under Rule 77 of the Rules.
12. It further notes that the Prosecution states in its Response that it 'has no objection to disclosing these statements and related information [...] under Rule 77.'²⁰ The Chamber considers this to be an acceptance by the Prosecution that the indicated material falls under Rule 77 of the Rules. The Prosecution therefore should have proceeded to disclose the material on its own account and not merely indicating that it does not object to the disclosure. However, only when responding to the Leave to Reply Request, the Prosecution informed the Chamber that it had 'undertaken to disclose the relevant material requested'.²¹ In view of this undertaking and provided the actual disclosure is effected, the Chamber considers the Defence Requests with regard to the disclosure of statements and any other material to be moot.
13. In order to avoid such disclosure delays in the future, the Chamber emphasises that the Prosecution is to disclose material it considers to be disclosable under Rule 77 of the Rules, or any other statutory provision, without delay. Further, the Chamber reminds the Prosecution that, in order to apply redactions to disclosable material, it apply the protocol establishing a redaction regime and, if necessary, seek authorisation from the Chamber.²²
14. In respect of the Defence's submission to order the Prosecution to comply with the Protocol when contacting [REDACTED], the Chamber notes that the Defence did

²⁰ ICC-01/09-01/11-816-Conf-Red, para. 9.

²¹ ICC-01/09-01/11-8228-Conf, para. 10.

²² Annex to Decision on the protocol establishing a redaction regime, ICC-01/09-01/11-458-Anx-Corr.

not allege any conduct of the Prosecution which would lead the Chamber to believe that the Prosecution is not minded to fully apply the Protocol. In the same vein, the Defence did not present any information which justifies the variation of paragraph 5 of the Protocol in the case of [REDACTED]. The prior attempts by the Prosecution to contact [REDACTED], irrespective of whether [REDACTED] wished to speak to the Prosecution, occurred at a time when the Protocol did not apply since [REDACTED] was not a Defence witness at that time and the Prosecution was not informed of the Defence's intention to call [REDACTED] as a witness.²³ Therefore, the Chamber does not consider it necessary to make any additional orders to the Prosecution with regard to contacting these two persons.

15. Accordingly, the Chamber rejects the requested relief concerning the Protocol in the Defence Requests.

²³ ICC-01/09-01/11-449-Anx, para.1.

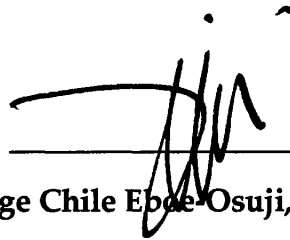
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Leave to Reply Request;

DISMISSES, in light of the Prosecution undertaking to make the requested disclosure, the request to order the Prosecution to disclose statements and any other material concerning [REDACTED] as moot; and

REJECTS the remainder of the Defence Requests.

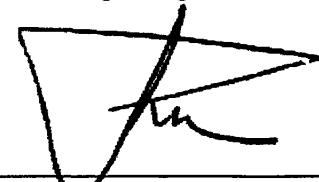
Done in both English and French, the English version being authoritative.



Judge Chile Eboe-Osuji, Presiding Judge



Judge Olga Herrera Carbuccion



Judge Robert Fremr

Dated 5 August 2013

At The Hague, The Netherlands