

**Cour
Pénale
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**International
Criminal
Court**

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

Date: 30 August 2013

TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding Judge
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

**Prosecution response to "Defence Application for Reconsideration of the 2
January 2013 'Decision on witness preparation'"**

Source: Office of the Prosecutor

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

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Introduction

1. The Prosecution opposes the Ruto Defence's application to reconsider Trial Chamber V's Decision on witness preparation ("Application").¹ The Defence is attempting to circumvent the Chamber's denial of its application for leave to appeal the same Decision, and for that reason alone it should be dismissed. The Defence also fails to establish that the necessary circumstances exist which justify the exceptional remedy of reconsideration of the Decision, namely that it is manifestly unsound and its consequences are manifestly unsatisfactory. For this reason too it should be dismissed.
2. Through this application, the Defence again seeks to exert control over the manner in which the Prosecution prepares its case. The Defence does no more than re-hash, in a different guise, the same arguments it presented in its recent attempt to dictate which eight witnesses should first be called by the Prosecution² - which was summarily dismissed by this Chamber³ - and its recent application for disclosure relating to intermediaries.⁴ Once again, the Defence predicates an application on purported evidence of an alleged conspiracy to falsely implicate the Accused, which the Prosecution has not been allowed to see, evaluate or investigate. The Chamber should not grant relief prejudicial to the Prosecution and its witnesses without it having had the opportunity to respond to the underlying evidence.

Confidentiality

3. The Prosecution submits this filing as confidential, as the Application is filed with the same classification and contains information relating to Prosecution witnesses.

¹ ICC-01/09-01/11-878-Conf.

² ICC-01/09-01/11-818-Conf-Red.

³ ICC-01/09-01/11-T-24-CONF-ENG, p. 54.

⁴ ICC-01/09-01/11-855-Conf.

Statement of facts

4. On 2 January 2013, Trial Chamber V issued its "Decision on witness preparation" ("Decision")⁵ and accompanying Witness Preparation Protocol ("Protocol").⁶
5. On 9 January, the Defence for both William Samoei RUTO and Joshua Arap SANG jointly filed their "Request for leave to appeal the Decision" on witness preparation.⁷ The Prosecution filed its response on 14 January.⁸
6. On 11 February, Trial Chamber V rejected the request for leave to appeal in its entirety.⁹
7. On 26 August, the Ruto Defence filed its Application.¹⁰

Submissions

8. In the context of adversarial proceedings, each party has a right to prepare and present its case in the manner it deems most appropriate,¹¹ so long as it does so within the constraints of the instruments governing those proceedings. One such instrument in the case at hand is the Protocol issued by Trial Chamber V following extensive submissions from both parties to the proceedings.¹²
9. Should either party consider a decision of the Pre-Trial or Trial Chamber of this Court to be fundamentally flawed, the proper recourse envisioned by the statutory framework is to seek leave to appeal the decision. In the case at hand, the Defence pursued this remedy, but was unsuccessful and its

⁵ ICC-01/09-01/11-524.

⁶ ICC-01/09-01/11-524-Anx.

⁷ ICC-01/09-01/11-539.

⁸ ICC-01/09-01/11-549.

⁹ ICC-01/09-01/11-596.

¹⁰ ICC-01/09-01/11-878-Conf.

¹¹ ICC-01/09-01/11-T-24-CONF-ENG, p. 54.

¹² ICC-01/09-01/11-446 and ICC-01/09-01/11-452.

application for leave to appeal was dismissed. The current Application attempts to circumvent that rejection. For this reason alone, the Application ought to be rejected.

The Request for Reconsideration of the Chamber's Decision

10. The Defence seeks an order from the Chamber prohibiting the Prosecution from "conducting the activities set out in paragraphs 18, 19, 20, 21, 23 and 26 of the Protocol with respect to witnesses P-0015, P-0016, P-0019, P-0024, P-0025, P-0028, P-0032 and P-0336"¹³ or in the alternative, require the Prosecution to complete its preparation sessions with those witnesses prior to the first of these taking the stand.¹⁴ The Defence also wants the Prosecution to cease any preparation and interviews with these eight witnesses pending the Chamber's decision on the Application.¹⁵ The Application provides no arguable basis for the remedy sought: a request for reconsideration is an exceptional remedy which is available only in narrowly confined circumstances. The Defence has failed to establish these circumstances.

11. While the Prosecution agrees that, in principle, Chambers of the Court have discretion to reconsider their decisions, under the Court's existing case-law such reconsideration will only occur where the decision in question is "manifestly unsound and its consequences are manifestly unsatisfactory".¹⁶ The Defence has failed to advance either sound argument or evidence to show that the Chamber's Decision is manifestly unsound or the consequences unsatisfactory, either presently or at the time that it was issued. For this reason, too, the Application should be rejected.

¹³ Application, para. 33.

¹⁴ Application, para. 34.

¹⁵ Application, para. 36.

¹⁶ Trial Chamber I accepted the possibility of reconsidering decisions in exceptional circumstances. See ICC-01/04-01/06-2705, paras.13-19. Other Chambers, like Pre-Trial Chamber II in the Uganda Situation, conclude that there is no express statutory authority to reconsider rulings (see e.g., ICC-02/04-01/05-60, para.18).

12. Once again, the Defence claims that the eight witnesses for which it demands a departure from the Protocol are part of a scheme organised to fabricate evidence and relies once again on Annex H to filing ICC-01/09-01/11-855-Conf. This annex still remains *ex parte* and unavailable to the Prosecution, thereby preventing the Prosecution from addressing the substance of these allegations in its response.
13. From what the Prosecution has been able to glean, the Defence has a theory that the eight Prosecution witnesses are engaged in fabricating evidence and are part of a scheme purportedly to “cook” evidence against RUTO¹⁷ – an allegation that the Prosecution rejects. Yet, it is for this reason that the Defence seeks a reconsideration of the Chamber’s Decision – a step that would effectively hamper the Prosecution’s trial preparation process, less than two weeks prior to the commencement of trial. While the Defence is certainly entitled to postulate any manner of theory, theories alone cannot render the Chamber’s Decision manifestly unsound or manifestly unsatisfactory.
14. Further, this theory does not demonstrate any flaws or shortcomings in the system envisioned by the Trial Chamber warranting a modification. Trial Chamber V, in its Decision, deemed the Protocol to be a proper and efficient system for preparing witnesses before they give their evidence so as to ensure that the witness gives relevant, accurate and structured testimony. Such preparation also helps ensure the well-being of the witness and enables the calling party to assess and clarify the witness’s evidence in order to facilitate the focused, efficient and effective questioning of the witness during the proceedings.¹⁸
15. The Defence suggests that the Prosecution has had adequate opportunity to meet the eight witnesses in question and has drawn up charts detailing the

¹⁷ Application, para. 13; ICC-01/09-01/11-818, para. 2.

¹⁸ ICC-01/09-01/11-524-Anx, para. 1.

contact between these witnesses and the Prosecution.¹⁹ The Defence therefore argues that this negates the necessity of the witness preparation session. Firstly, it is not for the Defence to second-guess what may have transpired during any contact made between the Prosecution and its witnesses, as that contact may have been made for a range of reasons. Secondly, the Defence misses the point when it comes to the purpose of the witness preparation process. It is not simply an opportunity to speak with a witness on any matter. Rather, it is a mechanism which the Trial Chamber deemed as necessary prior to a witness giving testimony “to enhance the efficiency, fairness and expeditiousness of the present trial”²⁰ and for the protection of the well-being of witnesses. In short, it has a specific purpose and must be conducted in a careful, structured manner in accordance with the Protocol. The Prosecution has not contacted any of its witnesses to date for the purpose of preparing them for trial in the manner envisioned by the Protocol.

16. The Prosecution also notes that Trial Chamber V specifically rejected the Defence’s previous attempt to argue that witness preparation should be carried out during the investigation stage, finding that “the purpose and nature of witness preparation conducted by counsel shortly before the testimony of a witness differs in important respects from those activities that are properly undertaken during an investigation. [...W]itness preparation, by its nature, is appropriately conducted shortly before a witness is due to testify.”²¹

17. The Prosecution submits that even if there were any merit in the Defence’s theory regarding the eight witnesses, it is difficult to envisage how curtailing the Prosecution’s application of the Protocol would alleviate any concern that the witnesses in question would “tip off” each other. Indeed, if there

¹⁹ Annexes A-H of the Application.

²⁰ Decision, para. 35.

²¹ *Ibid.*, paras. 40 – 41.

were any truth to this theory of collaboration, then the first of the eight witnesses to be cross-examined by the Defence would still be in a position to inform the remaining seven of the areas of Defence cross-examination as soon as possible. Therefore, whether the remaining seven were to take part in witness preparation or not would be irrelevant as the first witness could already have told them what they would be cross-examined about. This would render the relief requested by the Defence completely unnecessary.

18. Finally, the Prosecution is well aware of its obligation during the witness preparation process to explain the topics that may be covered by cross-examination in *neutral and general terms* only. Even assuming that the Prosecution were able to accurately gauge what questions the Defence intended to put to a specific witness, it may not convey specific Defence questions to the witness, nor the responses of other witnesses to such questions. It also may not coach the witness on how to answer Defence lines of questioning. The existence of a video recording of each preparation session provides additional safeguards that these lines will not be crossed.

Prejudice to the Prosecution

19. The Prosecution submits that granting the Defence request would be highly prejudicial to the Prosecution. It would almost completely deprive the Prosecution of the benefits of witness preparation. It would essentially restrict the Prosecution to admonishing the witness to tell the truth and allowing the witness to review his or her prior statement, a routine task that was previously conducted by the VWU. To restrict the manner in which the Prosecution can speak to its witnesses and prepare them to give focused, accurate and efficient testimony at trial at this late stage would severely hinder the manner in which the Prosecution is able to present its case.

Prejudice to the Witnesses

20. Granting the Application would also place these witnesses at a disadvantage vis-à-vis other witnesses in the case before they had even commenced their testimony, by depriving them of all the benefits of proper preparation which the Chamber has already recognised.²²

21. The Prosecution also notes, with concern, that the Defence's attempt to prevent the Prosecution from explaining to the witness, even in general and neutral terms, the topics on which he or she may be cross-examined, appears to be an attempt to preserve its ability to repeatedly ambush successive witnesses in cross-examination. This, it is submitted, is inconsistent with the notion of a fair trial as it is envisaged in the Statute, which is predicated on the principles of, *inter alia*, adequate notice and disclosure to prevent the use of such ambush tactics.

Ex Parte Annex

22. The Prosecution reiterates its recent submissions with respect to the *ex parte* Annex H to filing ICC-01/09-01/11-855-Conf and the Defence allegations that the evidence of the eight witnesses is fabricated.²³ The Defence has refused to disclose any of this material to the Prosecution on the basis that it is not obliged to do so under the Statute. The Defence ought not to be permitted to rely on evidence which is entirely withheld from the Prosecution, and to which it cannot thus respond, as the basis for substantive relief.

23. The Prosecution restates its submission that it would not go to trial on evidence which it knows to be false. If the Defence is confident of the truth of these allegations, a more efficient way of addressing the issue would be to furnish the Prosecution with the relevant information to enable it consider whether there is need for investigations to be conducted under article 70. The

²² Decision, para. 37.

²³ ICC-01/09-01/11-885-Conf, para. 20 and ICC-01/09-01/11-849-Conf-Red paras. 20 and 22.

fact that the Defence chooses to continually use this “evidence” of alleged fabrication pertaining to the eight witnesses as the bases for frivolous applications and requests, leads the Prosecution to conclude that the Defence is simply attempting to stall proceedings and hinder the Prosecution’s ability to prepare for the upcoming trial.

Relief sought

24. The Prosecution submits that the Defence Application ought to be dismissed.



Fatou Bensouda, Prosecutor

Dated this 30th day of August 2013

At The Hague, the Netherlands