

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/11
Date: 13 September 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

Order on the Common Legal Representative's Contact with Witness 536

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 Essa Faal
Ms Shyamala Alagendra

Counsel for Joshua Arap Sang

Mr Joseph Kipchumba Kigen-Katwa

Legal Representatives of Victims

Mr Wilfred Nderitu

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**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**

Ms Fiona McKay

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 Articles 64(2), 68(1) and (3) of the Rome Statute, issues the following Order on the Common Legal Representative's Contact with Witness 536:

I. BACKGROUND

1. On 3 January 2013, the Chamber issued the 'Decision on witness preparation',¹ in which it adopted a Witness Preparation Protocol.
2. On 5 September 2013, the Common Legal Representative (the 'Legal Representative') filed an application requesting to examine, *inter alia*, Witness 536 (the 'Application'), who is also a victim represented by the Legal Representative.² The Application contains a list of questions the Legal Representative anticipates he will ask.
3. On 9 September 2013, the Chamber held a status conference, at which the Legal Representative requested the Chamber to authorise the preparation of Witness 536 by him for the purpose of asking those questions mentioned in the Application (the 'Request').³
4. On 11 September 2013, the defence teams for Mr Ruto (the 'Ruto Defence')⁴ and Mr Sang (the 'Sang Defence')⁵ respectively filed their responses to the Request.

¹ ICC-01/09-01/11-524, with an annex containing the Witness Preparation Protocol.

² Notification: Examination of 5 Witnesses who are participating victims, ICC-01/09-01/11-909-Conf.

³ ICC-01/09-01/11-T-26-CONF-ENG, p. 44, lines 9-11.

⁴ Defence Response to Common Legal Representative's Oral Request for authorisation to conduct a preparation session with dual status Witness P-536, ICC-01/09-01/11-925-Conf.

⁵ Sang Defence Response to Oral Application of the Victims' Representative for Authorization to Prepare Witness P-536 Prior to Testimony, ICC-01/09-01/11-927-Conf.

II. SUBMISSIONS

5. The Legal Representative submits that preparation of the first dual-status witness is necessary because he has only met the witness in a 'very general sense' ten days prior to making his request. The Legal Representative claims that because he has not yet met with the witness on an individualised basis 'it would not be prudent for [him] to examine [the witness] before [he has] had at least occasion to meet with [her]'.⁶
6. The Ruto Defence responds that the Request should be rejected for four reasons: (i) the application is premature pursuant to the directions provided in the 'Decision on the Conduct of Trial Proceedings (General Directions)';⁷ (ii) the Witness Preparation Protocol does not apply to the Legal Representative because he is not a calling party⁸; (iii) any request which would modify the Witness Preparation Protocol at this point in the proceedings is 'grossly dilatory';⁹ and (iv) the 'individualised' meeting is wholly improper because it involves discussion of substantive issues related to a witness's testimony that fall outside the permissible scope of the Witness Preparation Protocol's provisions.¹⁰
7. The Sang Defence also responds that the Request should be rejected because the Witness Preparation Protocol applies only to calling parties and the Request is inconsistent with the purposes of witness preparation.¹¹ However, should the Chamber be minded to grant the Request, the Sang Defence requests that the entirety of the Witness Preparation Protocol be followed by the Legal Representative,

⁶ ICC-01/09-01/11-T-26-CONF-ENG, p. 44, lines 20-25.

⁷ ICC-01/09-01/11-925, para. 3; referring to para. 19 of ICC-01/09-01/11-847-Corr.

⁸ ICC-01/09-01/11-925, paras 4-5.

⁹ ICC-01/09-01/11-925, para. 6.

¹⁰ ICC-01/09-01/11-925, para. 7.

¹¹ ICC-01/09-01/11-927, paras 8-9.

including the immediate disclosure of any new information emanating from the preparation session.¹²

III. ANALYSIS AND CONCLUSION

8. At the outset, the Chamber indicates that the present decision does not address the Legal Representative's pending Application for authorisation to examine Witness 536. The Application will be ruled upon in accordance with the procedure set out in the 'Decision on the Conduct of Trial Proceedings (General Directions)'.¹³ The present decision is without prejudice to the Chamber's ruling on that application.
9. The Chamber notes that under the terms of the Witness Preparation Protocol, the Legal Representative is not a 'calling party' with respect to Witness 536¹⁴ –the calling party is the Prosecution. Therefore, the protocol does not on its terms comprehend the preparation for which the Legal Representative seeks authorisation.
10. Further, the Witness Preparation Protocol prohibits using witness preparation 'for the purpose of seeking new evidence or continuing the calling party's investigations'.¹⁵ However, in view of the Legal Representative's limited prior contact with the witness, it appears that the preparation for which he seeks authorisation may involve seeking evidence or conducting investigations. It thus seems that the requested meeting with Witness 536 would serve purposes other than witness preparation within the meaning of the Witness Preparation Protocol.

¹² ICC-01/09-01/11-927, para. 12.

¹³ 9 August 2013, ICC-01/09-01/11-847-Corr, paras 16 and 19.

¹⁴ Witness Preparation Protocol, ICC-01/09-01/11-524-Anx, paras 5 ('Witness preparation is the responsibility of the calling party') and 6 ('Witness preparation should be conducted by the lawyer of the calling party who will question the witness in court').

¹⁵ Witness Preparation Protocol, ICC-01/09-01/11-524-Anx, para. 2.

11. The Chamber, however, notes that the Request was made in unusual circumstances, whereby Witness 536 is coming to the seat of the Court sooner than initially expected. Therefore, as meeting with this victim represented by the Legal Representative prior to her testimony as a witness would enable the Legal Representative to prepare a more meaningful and efficient examination, the Application should be granted.
12. The Witness Preparation Protocol provides for a number of safeguards, the purpose of which is to prevent prejudice to the accused. The Chamber is of the view that in the particular circumstances of the present case the Legal Representative should be allowed to meet the witness prior to her testimony, despite the limited time that remains to the commencement of that testimony. However, in order to ensure that such a meeting does not cause prejudice to the accused, the Legal Representative shall observe the provisions of the Witness Preparation Protocol as set out below.
13. In view of the unusual circumstances and having regard to the questions the Legal Representative intends to ask to the witness, the Chamber exceptionally allows the Legal Representative to seek new evidence and conduct his investigations during his meeting with Witness 536. All other general principles set out in the Witness Preparation Protocol are applicable.¹⁶ The provisions regarding 'Responsibility for conducting witness preparation', 'Location' and 'Timing' are also applicable in so far as relevant.¹⁷ The Legal Representative will have to observe the requirements of record keeping.¹⁸ The provisions of the protocol which concern the 'Required and Permissible Conduct'¹⁹ are applicable unless the conduct referred to in that section of the Witness Preparation Protocol is meant for the calling party only and the

¹⁶ Witness Preparation Protocol, ICC-01/09-01/11-524-Anx, paras 1, 3, 4.

¹⁷ Witness Preparation Protocol, ICC-01/09-01/11-524-Anx, paras 5-11.

¹⁸ Witness Preparation Protocol, ICC-01/09-01/11-524-Anx, paras 12-14.

¹⁹ Witness Preparation Protocol, ICC-01/09-01/11-524-Anx, paras 15-26.

activities listed therein will have been completed by the Prosecution. All provisions related to the 'Prohibited Conduct' shall apply.²⁰

14. Finally, as regards the obligation to disclose the information obtained during a preparation session which is subject to disclosure,²¹ the Chamber notes that the disclosure obligations at the Court are not generally applicable to the Legal Representative in the same way as they apply to the parties. For instance, in certain circumstances the Chamber may request the victims to submit incriminating evidence in the course of the trial, even though such evidence will not have been disclosed to the accused prior to the commencement of the trial.²² However, given the unusual circumstances in which the Legal Representative will be authorised to meet Witness 536 and, in particular, the short time that remains until that witness's testimony, the Chamber finds it appropriate to require the Legal Representative to disclose to the Prosecution and the Defence, before the commencement of the evidence of Witness 536, any new information that he obtains during the meeting with the witness.

²⁰ Witness Preparation Protocol, ICC-01/09-01/11-524-Anx, paras 27-29.

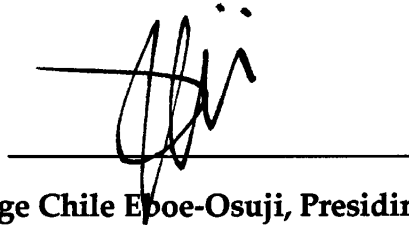
²¹ Witness Preparation Protocol, ICC-01/09-01/11-524-Anx, para. 30.

²² *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled "Decision on the Modalities of Victim Participation at Trial", 16 July 2010, ICC-01/04-01/07-2288, para. 37.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the Request subject to the conditions listed in paragraphs 13 and 14 above.

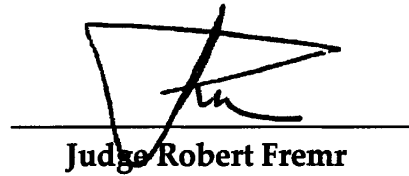
Done in both English and French, the English version being authoritative.

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Judge Chile Eboe-Osuji, Presiding Judge

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Judge Olga Herrera Carbuccion

A handwritten signature in black ink, featuring a large, stylized 'F' and 'R' followed by a horizontal stroke, positioned above a solid horizontal line.

Judge Robert Fremr

Dated 13 September 2013

At The Hague, The Netherlands