

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/11
Date: 26 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***

Confidential

**Decision on Defence Request for an Order to the Prosecution to Disclose Audio
Recordings Related to Witness 536 and P-540**

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
Ms Caroline Buisman

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

Detention Section

**Victims Participation and Reparations
Section**

Others
Pre-Trial Chamber II

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 Article 67(2) of the Rome Statute (the 'Statute'), Rules 77 and 81 of the Rules of Procedure and Evidence (the 'Rules') and Regulation 42 of the Regulations of the Court (the 'Regulations'), issues this Decision on Defence Request for an Order to the Prosecution to Disclose Audio Recordings Related to Witness 536 and P-540.

I. Procedural history and submissions

1. On 19 September 2013, the defence team for Mr Ruto (the 'Ruto Defence') filed the 'Defence request for an Order to the Prosecution to disclose audio recordings related to P-536 and P-540' (the 'Request').¹
2. On the morning of 20 September 2013, the Chamber ordered that: (i) the Request, along with its Annexes A, E and F, be notified to the Legal Representative of Victims (the 'LRV') and (ii) for any responses to the Request to be made orally that same day.² The Chamber directed that any information which could not be revealed orally in front of the other participants was to be submitted by the end of the day by way of an *ex parte* filing.³
3. On the afternoon of 20 September 2013, the Chamber heard the responses of the Office of the Prosecutor (the 'Prosecution'),⁴ the defence team of Mr Sang (the 'Sang Defence')⁵ and the LRV.⁶ The Prosecution also supplemented its

¹ ICC-01/09-01/11-955-Conf-Red (with six annexes).

² Transcript of Hearing, 20 September 2013, ICC-01/09-01/11-T-34-CONF-ENG, pages 35, line 24 to 37, line 8, page 54, lines 11-14.

³ Transcript of Hearing, ICC-01/09-01/11-T-34-CONF-ENG, page 37, lines 2-4.

⁴ Transcript of Hearing, ICC-01/09-01/11-T-34-CONF-ENG, pages 69, line 6 to 72, line 22.

⁵ Transcript of Hearing, ICC-01/09-01/11-T-34-CONF-ENG, pages 74, line 22 to 76, line 17.

⁶ Transcript of Hearing, ICC-01/09-01/11-T-34-CONF-ENG, pages 76, line 20 to 77, line 6.

submissions by way of an *ex parte* filing,⁷ and filed Witness 536/P-540 related investigative materials into the case record which were disclosed to the defence teams (the 'Investigative Materials').⁸

4. In the Request, the Ruto Defence informs the Chamber that on 13 September 2013 it received, as part of a disclosure package, a Prosecution investigation report dated 12 September 2013 which concerned certain Prosecution Article 70 investigations and described interactions Witness 536 had with an intermediary also known as P-540 during a 'sting operation' to seek the arrest of P-540.⁹ Furthermore, as a result of subsequent disclosures made by the Prosecution on 16 September 2013, the Ruto Defence learned of an audio recorded conversation the Prosecution had with P-540 on 15 September 2013.¹⁰ The Ruto Defence says this recording, as well as any recorded conversations between Witness 536 and P-540, are material to the preparation of the defence and that there are no valid justifications for their non-disclosure.¹¹ In particular, the Ruto Defence says that these recordings are relevant to the preparation of its cross-examination of Witness 536, who is currently testifying before the Chamber.¹²
5. Accordingly, the Ruto Defence requests the Chamber to order the Prosecution to disclose to it: (a) the audio recording of the Prosecution's 15 September 2013

⁷ Prosecution Response to the "Defence request for an Order to the Prosecution to disclose audio recordings related to P-536 and P-540", 20 September 2013, ICC-01/09-01/11-965-Conf-Exp (confidential redacted version notified on 23 September 2013).

⁸ Prosecution's filing of Additional material in response to Defence filing ICC-01/09-01/11-955-Conf-Red, 20 September 2013, ICC-01/09-01/11-970-Conf (with four annexes; notified on 23 September 2013) (the 'Investigative Materials Submission'). *See also* Update to Defence filings ICC-01/09-01/11-955-Conf-Exp and ICC-01/09-01/11-955-Conf-Red, 22 September 2013, ICC-01/09-01/11-973-Conf (notified 23 September 2013).

⁹ Request, ICC-01/09-01/11-955-Conf-Red, para. 4. *See also* Annex D of the Investigative Materials Submission, ICC-01/09-01/11-970-Conf-AnxD.

¹⁰ Request, ICC-01/09-01/11-955-Conf-Red, para. 10.

¹¹ Request, ICC-01/09-01/11-955-Conf-Red, paras 11-15.

¹² Request, ICC-01/09-01/11-955-Conf-Red, para. 14.

interview with P-540 and (ii) any audio recordings in the Prosecution's possession of phone calls between Witness 536 and P-540.¹³

6. The Prosecution opposes the Request on several grounds during the hearing and in its *ex parte* filing. The Prosecution argues that: (i) the Chamber is not competent to dispose of the Request, as it affects protective measures previously issued in another proceeding before Pre-Trial Chamber II,¹⁴ (ii) the Ruto Defence does not satisfy the *prima facie* relevance threshold to trigger disclosure,¹⁵ (iii) the audio recordings sought fall within the scope of Rule 81(2) and 81(4) of the Rules¹⁶ and (iv) withholding the requested audio recordings does not unfairly prejudice the accused.¹⁷
7. The Sang Defence supports the Request, submitting that these audio recordings would assist in its cross-examination and investigations.¹⁸
8. The LRV expresses the view that any use of this material, if disclosed, must be done in a manner such that no prejudice is done to the well-being of Witness 536.¹⁹

II. Analysis and conclusions

9. The Chamber recalls the Appeals Chamber's guidance in determining the scope of the Prosecution's disclosure obligations under Rule 77 of the Rules.²⁰ Rule 77 of

¹³ Request, ICC-01/09-01/11-955-Conf-Red, para. 16.

¹⁴ ICC-01/09-01/11-965-Conf-Exp, paras 2-3; Transcript of Hearing, ICC-01/09-01/11-T-34-CONF-ENG, pages 71, line 24 to 72, line 3; Annex D of the Investigative Materials Submission, ICC-01/09-01/11-970-Conf-AnxD.

¹⁵ Transcript of Hearing, ICC-01/09-01/11-T-34-CONF-ENG, pages 71, lines 15-19; ICC-01/09-01/11-965-Conf-Exp, paras 4-6.

¹⁶ Transcript of Hearing, ICC-01/09-01/11-T-34-CONF-ENG, pages 71, lines 19-22; ICC-01/09-01/11-965-Conf-Exp, paras 7-11.

¹⁷ ICC-01/09-01/11-965-Conf-Exp, paras 12-16.

¹⁸ Transcript of Hearing, ICC-01/09-01/11-T-34-CONF-ENG, pages 74, line 22 to 76, line 17.

¹⁹ Transcript of Hearing, ICC-01/09-01/11-T-34-CONF-ENG, pages 76, line 20 to 77, line 6.

²⁰ Appeals Chamber, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled "Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor", 28 August 2013, ICC-02/05-03/09-501, OA 4 ('Banda & Jerbo OA4 Judgment').

the Rules has two stages.²¹ First, it must be determined whether the 'books, documents, photographs and other tangible objects' sought are material to the preparation of the defence.²² Any assessment of whether information is material to the preparation of the defence should be made on a *prima facie* basis.²³ If the items in question are material to the preparation of the defence, they must be disclosed to the defence subject to the restrictions on disclosure as provided for in the Statute and Rules 81 and 82 of the Rules.²⁴ In particular, Rule 81(2) of the Rules provides for a restriction on disclosure when such disclosure 'may prejudice further or ongoing investigations'.

10. The Chamber will now turn to its analysis of the Request.

11. Turning to the first stage of the Rule 77 test, the Chamber notes that the items sought by the Ruto Defence concern the circumstances surrounding the testimony of Witness 536, particularly in relation to her forensic connection to the intermediary who brought her into the case. These circumstances may, in an appreciable way, not only concern the exculpation of the accused, but also the credibility of Witness 536's testimony or the credibility of the Prosecution's case as a whole. For these reasons, the Chamber finds that the recordings requested by the Ruto Defence are *prima facie* material to the preparation of the defence in the present case. Indeed, the Prosecution's own assessment that the Investigative Materials and portions of its 15 September 2013 conversation with P-540 needed to be disclosed to the defence would indicate the *prima facie* materiality of the items in question.

²¹ Banda & Jerbo OA4 Judgment, ICC-02/05-03/09-501, para. 35.

²² Banda & Jerbo OA4 Judgment, ICC-02/05-03/09-501, para. 35.

²³ Banda & Jerbo OA4 Judgment, ICC-02/05-03/09-501, para. 42.

²⁴ Banda & Jerbo OA4 Judgment, ICC-02/05-03/09-501, para. 35.

12. As to the second stage of the Rule 77 test, the Chamber notes the Prosecution's submissions that the materials sought reveal the Prosecution's investigative methodology, form part of a developing investigation in another case and are currently subject to protective measures before Pre-Trial Chamber II. However, the Chamber must also consider that recordings which are *prima facie* material to the preparation of the defence remain undisclosed after the commencement of the trial. Further, the Investigative Materials disclosed reveal the Prosecution's investigative methodology in such detail that the Chamber fails to see how much additional prejudice their investigation would suffer from having to disclose the audio recordings at issue. The Prosecution also expresses concern as to the safety and security of Witness 536 and P-540, along with others.²⁵ However, the Prosecution provides no substantiation as to why this would be so in view of the information already disclosed and the ability to make any redactions which fall within the scope of the Redaction Protocol.²⁶
13. In the final analysis, the interest of the accused in protecting their fair trial rights in the substantive case that has now commenced should not be so readily overridden by the interest of the Prosecution. In that regard, the Chamber wishes to emphasise the fact that the case before this Chamber has progressed well beyond the initial investigation. The charges have been confirmed and the trial has commenced. It cannot be known at this time whether the Article 70 case before Pre-Trial Chamber II will progress as far, and the Chamber notes the many instances in which charges were not confirmed following Prosecution investigations²⁷ or were withdrawn prior to the commencement of the trial.²⁸ It is

²⁵ ICC-01/09-01/11-965-Conf-Exp, para. 9.

²⁶ Annex A of the Decision on the protocol establishing a redaction regime, 27 September 2012, ICC-01/09-01/11-458.

²⁷ Pre-Trial Chamber II, *The Prosecutor v. William Samoei Ruto et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-01/11-373 (Henry Kiprono Kosgey's case dismissed); Pre-Trial Chamber II, *The Prosecutor v. Francis Kirimi Muthaura et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 26 January 2012, ICC-01/09-02/11-

for this reason that the interest of the accused in protecting their fair trial rights in the primary case that has now commenced should not be so readily overridden by the interest of the Prosecution's investigation in a spinoff case.

14. Accordingly, on the basis of the information before it, this Chamber would grant the request and order disclosure of the materials sought.

15. However, for purposes of comity between Chambers and noting Regulation 42(3) of the Regulations,²⁹ the Chamber only grants the Request subject to any pre-existing order or predisposition of Pre-Trial Chamber II that prevents the disclosure. Accordingly, the parties are directed to seize Pre-Trial Chamber II of this issue for the appropriate relief.

382-Red (Mohammed Hussein Ali's case dismissed); Pre-Trial Chamber I, *The Prosecutor v. Callixte Mbarushimana*, Decision on the confirmation of charges, 16 December 2011, ICC-01/04-01/10-465-Red; Pre-Trial Chamber I, *The Prosecutor v. Bahar Idriss Abu Garda*, Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243-Red.

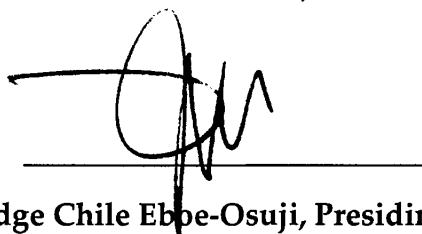
²⁸ Trial Chamber V, *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Decision on the withdrawal of charges against Mr Muthaura, 18 March 2013, ICC-01/09-02/11-696.

²⁹ 'Any application to vary a protective measure shall first be made to the Chamber which issued the order [...]'.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the Request, subject to the direction indicated in paragraph 15 of the present decision.

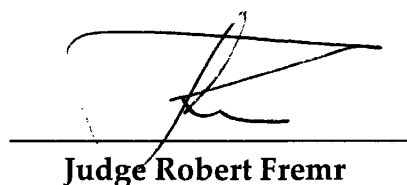
Done in both English and French, the English version being authoritative.

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Judge Chile Ebbe-Osuji, Presiding Judge

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Judge Olga Herrera Carbuca

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Judge Robert Fremr

Dated 26 September 2013

At The Hague, The Netherlands