

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 14 November 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 on Potential Violation of the Protocol on
Contacting Witnesses and related Disclosure Request**

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

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 considered Articles 67(1), 68(1) of the Rome Statute (the 'Statute'), Rules 77 and 81(2) of the Rules of Procedure and Evidence (the 'Rules'), renders this Decision on Defence Request on Potential Violation of the Protocol on Contacting Witnesses and related Disclosure Request.

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 7 October 2013, the defence team for Mr Ruto ('Ruto Defence') raised concerns¹ with respect to a potential breach for the protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call ('Contact Protocol').²
2. The Ruto Defence notified the Chamber that one of its witnesses informed it that members of the Office of the Prosecutor ('Prosecution') met him. Further, the witness told the Ruto Defence that he received a total of 64,000 Kenyan shilling from the Prosecution.³ According to the Ruto Defence, the witness stated that he was asked questions related to the issue of witness interference and his potential involvement with witness interference. The Ruto Defence recounted that, as a result, the witness felt he was being dissuaded from continuing to be a defence witness and felt intimidated by the meeting.⁴
3. The Ruto Defence submits that, despite the Prosecution's knowledge of the witness's status as a defence witness, the meeting was arranged without prior notification to the Ruto Defence and in the absence of members of the Victims and

¹ ICC-01/09-01/11-T-43-CONF-ENG.

² 24 August 2012, 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, with Annex containing the protocol.

³ ICC-01/09-01/11-T-43-Conf-Eng, page 5, lines 22-23.

⁴ ICC-01/09-01/11-T-43-Conf-Eng, page 6, lines 1-4, 18-19.

Witnesses Unit ('VWU').⁵ It further submits that this amounts to a violation of the Contact Protocol⁶ and requests that the Prosecution be ordered to desist from contacting defence witnesses without prior notification of the calling party and in the absence of members of the VWU.⁷ Additionally, the Ruto Defence requests the disclosure of the recording of the meeting with this witness, in order to evaluate the content of the meeting.⁸

4. The Prosecution responded that the Ruto Defence's request involves a matter which has been addressed before Pre-Trial Chamber II and that it could only provide additional details on an *ex parte* basis.⁹ The Chamber allowed the Prosecution to make such a filing by the end of that same day.¹⁰
5. The defence team for Mr Sang ('Sang Defence', together with the Ruto Defence the 'Defence') voiced its concerns about the fact that a Ruto Defence witness received money from the Prosecution, stated its intention to also call this person as a witness and consequently submitted that it was also affected by the incident.¹¹
6. On the same day, the Prosecution filed its 'Prosecution's Response to Defence's oral notification of contact with Defence witness' ('Prosecution Response').¹² Therein, it explained that the interview conducted with the witness, who had been previously interviewed by the Prosecution earlier in 2013 before becoming a Defence witness, was related to a matter currently pending before Pre-Trial Chamber II.¹³ Before

⁵ ICC-01/09-01/11-T-43-Conf-Eng, page 11, lines 2-7.

⁶ ICC-01/09-01/11-T-43-Conf-Eng, page 6, lines 10-15 and page 11, lines 11-13.

⁷ ICC-01/09-01/11-T-43-Conf-Eng, page 8, lines 6-11.

⁸ ICC-01/09-01/11-T-43-Conf-Eng, page 9, lines 6-10.

⁹ ICC-01/09-01/11-T-43-Conf-Eng, page 9, lines 18-23.

¹⁰ ICC-01/09-01/11-T-43-Conf-Eng, page 9, lines 24-25.

¹¹ ICC-01/09-01/11-T-43-Conf-Eng, page 10, lines 14-17.

¹² ICC-01/09-01/11-1014-Conf-Exp, confidential *ex parte*, Prosecution only, with one confidential *ex parte*, Prosecution only, Annex. The filing was notified on 8 October 2013.

¹³ Prosecution Response, ICC-01/09-01/11-1014-Conf-Exp, paras 4-16.

arranging the meeting the Prosecution sought leave to conduct such interview with Pre-Trial Chamber II, which was granted.¹⁴

7. The Prosecution had informed Pre-Trial Chamber II that it wished to interview a defence witness in this case and that the Contact Protocol might circumscribe the Prosecution's contact with the witness.¹⁵ The Prosecution submits that it was concerned that informing the Ruto Defence of the meeting would place the witness at risk of harm.¹⁶ The Prosecution further informed Pre-Trial Chamber II that it intended to notify Trial Chamber V(A) of the contact with the witness and requested permission to inform this Chamber, in case the request for an interview was granted.¹⁷ Accordingly, Pre-Trial Chamber II authorised the Prosecution to inform this Chamber on a confidential *ex parte* basis of the decision authorising the interview.¹⁸
8. In respect of the request of the Ruto Defence for disclosure of the recordings of the meeting the Prosecution argues that this would prejudice ongoing investigations in the matter pending before Pre-Trial Chamber II.¹⁹ The Prosecution assesses that this leg of the investigation could be sufficiently estimated within a period of three months to permit disclosure of the interview with the witness and any related disclosable material.²⁰ With regard to the issue of payments made by the Prosecution to the witness the Prosecution does not object to the disclosure of the information regarding the payments.²¹ It submits that the witness 'was reimbursed only for the actual expenses incurred as a result of his interview',²² further

¹⁴ Prosecution Response, ICC-01/09-01/11-1014-Conf.Exp, paras 13-16.

¹⁵ ICC-01/09-120-Conf-Exp, para. 13.

¹⁶ ICC-01/09-01/11-1014-Conf.Exp, para. 18.

¹⁷ ICC-01/09-120-Conf-Exp, para. 16.

¹⁸ ICC-01/09-119-Conf-Exp, page 6.

¹⁹ Prosecution Response, ICC-01/09-01/11-1014-Conf-Exp, para. 25.

²⁰ Prosecution Response, ICC-01/09-01/11-1014-Conf-Exp, para. 27.

²¹ Prosecution Response, ICC-01/09-01/11-1014-Conf-Exp, para. 28.

²² Prosecution Response, ICC-01/09-01/11-1014-Conf-Exp, para. 28.

explaining that the amount was determined according to the time the witness spent at the interview location and the information provided by the witness himself.²³

9. The Prosecution states that it was explained to the witness that the purpose of the interview was not the subject matter of the case currently pending before this Chamber and the witness 'was specifically encouraged on tape to continue to cooperate with the defence as to their case before the ICC'.²⁴
10. On 8 October 2013, the Ruto Defence provided further information relating to the witness who was contacted and the manner in which the interview with the Prosecution was set up, according to the witness.²⁵ The Ruto Defence specifies its request to be provided by the Prosecution with 'the full nature and extent of its contact and communications' with the witness including 'all interviews, recordings of the same and investigation notes or logs relating to the Prosecution's contact and interactions' with the witness, as well as an overview of all payments and other disbursement made to the witness ('Requested Information').²⁶ Further, it restated its request that the Prosecution is ordered to desist from any breaches of the Contact Protocol in its future contacts with defence witnesses.²⁷
11. On 10 October 2013, the Sang Defence filed its response to the filing submitted by the Ruto Defence, arguing that the requested information is material to the preparation of the defence and must accordingly be disclosed under Rule 77 of the Rules. It joins the relief sought by the Ruto Defence.²⁸

²³ Prosecution Response, ICC-01/09-01/11-1014-Conf-Exp, paras 28-30.

²⁴ ICC-01/09-01/11-1014-Conf-Exp, para. 21 and ICC-01/09-01/11-1014-Conf-Exp-AnxA, p. 2.

²⁵ Provision of information relating to Ruto Defence witnesses and investigations and request for disclosure and related relief, ICC-01/09-01/11-1019-Conf-Exp, confidential *ex parte*, available to the Ruto and Sang Defence and the VWU only with confidential and *ex parte* annexes A to C available to the Ruto and Sang Defence and the VWU only, paras 9, 12-14.

²⁶ ICC-01/09-01/11-1019-Conf-Exp, paras 15-16.

²⁷ ICC-01/09-01/11-1019-Conf-Exp, para. 17.

²⁸ Sang Defence Request for Relief related to Provision of Information relating to Ruto Defence witnesses and investigations and request for disclosure and related relief, ICC-01/09-01/11-1026-Conf-Exp, confidential *ex parte*, available to the Ruto and Sang Defence and VWU only, paras 5-6.

II. ANALYSIS AND CONCLUSIONS

12. The Chamber will first address the issue of a potential violation of the Contact Protocol by the Prosecution and in a second step address the disclosure request.

i) Violation of the Contact Protocol

13. The Contact Protocol provides that the non-calling party seeking to interview a witness of another party shall inform that party of its intention prior to any contact with the witness.²⁹ This notification obligation shall not apply if 'the non-calling party has an objectively justified basis for determining that notification could jeopardise the security of the Witness, in which circumstance the VWU shall be immediately notified in order to assess the validity of the party's concern and any contact with the Witness, pending the VWU's assessment, shall be audio or video recorded [...]'.³⁰ In the Prosecution's Response and the summary of the interview provided in Annex A, the Prosecution stated the reasons for its conclusion that an objective risk to the witness's security exists, which were assessed by the Chamber. The Chamber has no reason to doubt the Prosecution's explanation for why there was an objectively justified basis that notifying the Ruto Defence of this contact could have jeopardised the security of the witness. However, the Chamber also notes that the Prosecution provides no indication that it informed the VWU of its concerns in order for them to conduct an independent assessment. On the information provided, the Chamber therefore concludes that the Prosecution has breached the Contact Protocol to the extent that the VWU was not given the opportunity to make an independent assessment of the Prosecution's concerns. For any deviation from, or modification of, the Contact Protocol, the appropriate course of action for the party concerned would have been to seek the authorisation of the Chamber prior to any contact with the witness. Further, if the Prosecution was

²⁹ ICC-01/09-01/11-449-Anx, para. 4.

³⁰ ICC-01/09-01/11-449-Anx, para. 5.

unsure about how to proceed, it should have, without prejudice to the jurisdiction of the Pre-Trial Chamber, sought the Chamber's guidance on the matter.

14. However, the Chamber takes into account: (i) the limited nature of the breach, (ii) the fact that the Prosecution sought permission from Pre-Trial Chamber II to contact the witness and fully informed it of the status of the person as a defence witness in this case and the existence of the Contact Protocol, which indicates that it did not set out to contact the witness without prior authorisation from a judicial body of the Court, and (iii) the fact that the witness was explicitly encouraged by the Prosecution to continue his cooperation with the Ruto Defence. Further, the Chamber is of the view, considering the request made in the application before Pre-Trial Chamber II, that the Prosecution had the intention of notifying this Chamber of the contact with the witness.
15. Considering the above, the Chamber is satisfied that the Prosecution did not intend to circumvent the spirit of the Contact Protocol. Accordingly, while the Chamber considers that a limited breach of the Contact Protocol has occurred, taking the specific circumstances under consideration, it finds it sufficient to instruct the parties to submit to this Chamber a request for authorisation for any future deviations from the Contact Protocol. With this instruction, the Chamber considers that the Ruto Defence request for an order for the Prosecution to desist from breaching the Contact Protocol can be rejected as unnecessary.

ii) Disclosure Request

16. With respect to the part of the disclosure request regarding the Requested Information, the Chamber notes that in its response the Prosecution did not object to the disclosure to the Defence of the information related to payments made to this witness. Accordingly, the Chamber grants the request for disclosure of all material

related to payments made by the Prosecution to the witness and supporting documentation.

17. As for the remainder of the materials for which disclosure is sought, the Chamber recalls the prior jurisprudence of the Appeals Chamber with regard to Rule 77 of the Rules.³¹ Rule 77 of the Rules has two stages.³² First, it must be determined whether the 'books, documents, photographs and other tangible objects' sought are material to the preparation of the defence.³³ Any assessment of whether information is material to the preparation of the defence should be made on a *prima facie* basis.³⁴ 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.³⁵ In particular, Rule 81(2) of the Rules provides for a restriction on disclosure when such disclosure 'may prejudice further or ongoing investigations'.
18. With regard to the assessment of materiality for the defence's preparation, the Chamber considers that 'all interviews, recordings of the same and investigation notes or logs relating to the Prosecution's contact and interactions' with the witness are material to the preparation of the Defence. The Chamber also notes that the fact that the Prosecution indicates that it will disclose information related to the contact once it completes the relevant part of its investigation³⁶ suggests that it also believes that the kind of information sought by the Ruto Defence falls within its disclosure obligations.

³¹ 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').

³² Banda & Jerbo OA4 Judgment, ICC-02/05-03/09-501, para. 35.

³³ Banda & Jerbo OA4 Judgment, ICC-02/05-03/09-501, para. 35.

³⁴ Banda & Jerbo OA4 Judgment, ICC-02/05-03/09-501, para. 42.

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

³⁶ Prosecution Response, ICC-01/09-01/11-1014-Conf-Exp, para. 27.

19. The next step of the analysis is whether one of the restrictions of disclosure applies to the remainder of the Requested Information. Rule 81(2) of the Rules permits withholding material or information whose disclosure could prejudice further or ongoing investigations. From the information provided in the Prosecution Response, including the summary of the interview as provided at Annex A of the Prosecution Response, the Chamber is satisfied that disclosing the remainder of the Requested Information may prejudice further or ongoing investigations which are under consideration by another chamber of this Court. Accordingly, the Chamber rejects the request for disclosure of the Requested Information at this point in time, other than the information related to payments which the Prosecution agreed to disclose (see paragraph 16 above). However, the Chamber notes that the Prosecution indicated that it would be able to disclose the material 'within a period of three months' to the Defence.³⁷ Accordingly, the Chamber orders the Prosecution to disclose the remainder of the Requested Information by no later than 7 January 2014.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY,

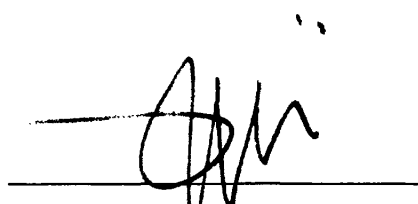
GRANTS the request for disclosure regarding all material related to payments made by the Prosecution to the witness and supporting documentation,

ORDERS the Prosecution to disclose all interviews, recordings of the same and investigation notes or logs relating to the Prosecution's contact and interactions with the witness to the Defence by no later than 7 January 2014, and

REJECTS the remainder of the request.

³⁷ Prosecution Response, ICC-01/09-01/11-1014-Conf-Exp, para. 27.

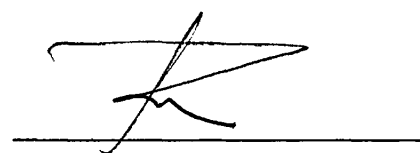
Done in both English and French, the version being authoritative.



Judge Chile Eboe-Osuji
(Presiding)



Judge Olga Herrera Carbuccion



Judge Robert Fremr

Dated 14 November 2013

At The Hague, The Netherlands