

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 21 January 2014

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

**Decision on Defence Applications for Leave to Appeal the Decision
on Disclosure of Information on VWU Assistance**

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

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*, pursuant to Article 82(1)(d) of the Rome Statute (the ‘Statute’), renders this Decision on Defence Applications for Leave to Appeal the Decision on Disclosure of Information on VWU Assistance.

I. PROCEDURAL HISTORY

1. On 28 October 2013, the Chamber gave an oral decision on the requests¹ of the defence for Mr Ruto (the ‘Ruto Defence’) and the defence for Mr Sang (the ‘Sang Defence’ and together with the Ruto Defence the ‘Defence’) for (1) disclosure of all costs expended by the Victims and Witnesses Unit (‘VWU’) for purposes of relocation, maintenance and/or support of Witness 268 within the witness protection and support programme,² and (2) ‘the disclosure of any evidence tending to show fraud or other acts of illegality on the part of the witness that bears a direct connection to his maintenance and support within the witness protection and support programme.’³ The Office of the Prosecutor (‘Prosecution’) opposed the first request and did not oppose the second one. The Chamber denied the first request (‘Impugned Decision’):

In the Chamber's view, the probative value of granting the request in the first limb is outweighed by both the considerations of prejudice and efficiency, not only in relation to the witness but also the operations of the Victims and Witnesses Unit and the administration of justice in general. Witnesses who come to testify, it is presumed, will have to have sustenance in their lives, whether it is afforded to them on their own or through the instrumentality of the Victims and Witnesses Unit. It therefore does not afford a *prima facie* [indiciu] of credibility that the Victims and Witnesses Unit has undertaken those reasonable tasks of providing reasonable support and maintenance to a witness rather than the witness doing it themselves.⁴

The Chamber granted the second request.

¹ Transcript of hearing of 25 October 2013, ICC-01/09-01/11-T-59-CONF-ENG, p. 83, lines 15-24; p. 84, lines 1-23; p. 87, lines 16-22; Transcript of hearing of 28 October 2013, ICC-01/09-01/11-T-60-CONF-ENG, p. 4, line 15- p. 15, line 3; p. 30, line 17- p. 33, line 18.

² Transcript of hearing of 28 October 2013, ICC-01/09-01/11-T-60-CONF-ENG, p. 44.

³ Transcript of hearing of 28 October 2013, ICC-01/09-01/11-T-60-CONF-ENG, p. 43, lines 11-14.

⁴ Transcript of hearing of 28 October 2013, ICC-01/09-01/11-T-60-CONF-ENG, p. 44, lines 8-19.

2. On 4 November 2013, the Ruto Defence⁵ and the Sang Defence⁶ filed their applications for leave to appeal the Impugned Decision ('Ruto Application' and 'Sang Application'; collectively 'Defence Applications').
3. On 8 November 2013, the Prosecution filed its response, in which it opposes the Defence Applications ('Prosecution Response').⁷ Although the Prosecution indicated that it would file 'as soon as practicable' a public redacted version of the response, it has not yet done so.

II. SUBMISSIONS

4. In the Ruto Application, the Ruto Defence seeks leave to appeal the following issue:
 - 'whether the Trial Chamber erred in applying the balancing test for disclosure of VWU expense information for the relocation, maintenance and/or support of Witness 268 by assessing the probative value of this information only on the basis of the source providing the assistance – the VWU – and not also considering whether "reasonable support and maintenance to a witness" may prima facie implicate the credibility of a witness in view of the personal circumstances of the witness and his or her family prior to the provision of such assistance ('First Issue').
5. The Sang Defence seeks leave to appeal the following issue:

⁵ Defence application for leave to appeal the Trial Chamber's oral decision of 28 October 2013 on the Defence request for disclosure of all costs expended by the VWU for relocation, maintenance and support of Witness P-268, ICC-01/09-01/11-1080.

⁶ Sang Defence Application for Leave to Appeal the Oral Decision of 28 October 2013 on disclosure of costs expended by the Victims and Witnesses Unit for purposes of relocation, maintenance and/or support of witnesses in the witness protection and support programme, ICC-01/09-01/11-1081.

⁷ Consolidated Prosecution Response to the Defence Requests for Leave to Appeal (ICC-01/09-01/11-1080 & ICC-01/09-01/11-1081) the oral decision of the Trial Chamber of 28 October 2013, ICC-01/09-01/11-1095-Conf.

- ‘whether information concerning costs incurred by VWU (and thus benefits received by witnesses) comes within the ambit of Article 67(2) and/or Rule 77 and should therefore be disclosed to the Defence.’ (‘Second Issue’).

A. Ruto Defence Submissions

6. The Ruto Defence submits that the First Issue is appealable as the Chamber, in its application of the balancing test, did not consider what ‘reasonable support and maintenance’ may mean to a witness and his or her family members in view of the particular circumstances of the witness.⁸ The Defence adds that if the assistance places a witness or his or her family members in significantly improved material circumstances as compared to those prior to the VWU’s intervention, it may *prima facie* impact on the credibility of the witness’s evidence.⁹
7. The Ruto Defence submits that the First Issue significantly affects both the fair and expeditious conduct of the proceedings and also the outcome of the trial.¹⁰ The Ruto Defence argues that the fairness of the proceedings would be significantly affected if the defence were denied access to relevant material.¹¹ The Ruto Defence adds that if there is a denial of access to the information requested on the legal basis set out in the Impugned Decision, the Defence will be significantly prejudiced both by i) not having had in hand the information necessary to fully and most efficiently undertake the investigation and, if appropriate, conduct cross-examination, and ii) by the unnecessary expenditure of time and resources in seeking to mitigate the impact of this denial of access.¹² The Ruto Defence further argues that the resulting need to investigate and gather evidence to replace the material to which the defence would be denied access would cause delays in the

⁸ Ruto Application, ICC-01/09-01/11-1080, para. 21.

⁹ Ruto Application, ICC-01/09-01/11-1080, para. 22.

¹⁰ Ruto Application, ICC-01/09-01/11-1080, paras 7 and 24.

¹¹ Ruto Application, ICC-01/09-01/11-1080, para. 26.

¹² Ruto Application, ICC-01/09-01/11-1080, paras 27 and 28.

proceedings and would thus affect the expeditious conduct of the proceedings.¹³ To substantiate, the Ruto Defence points out that in the event the Defence is able to elicit information that tends to show that the assistance the VWU provided to Witness 268 and his family has acted as an inducement for his testimony, the Defence may deem it necessary to submit a request for reconsideration of the Impugned Decision and recall of the witness for further questioning – both of which would significantly impact on the expeditiousness of proceedings.¹⁴

8. The Ruto Defence further submits that the issue may significantly affect the outcome of trial because the Chamber may not have important evidence that is relevant to the Chamber's evaluation of the credibility of Witness 268's testimony if the Impugned Decision was wrongly decided.¹⁵

9. The Ruto Defence also submits that an immediate resolution of the issue, in the particular circumstances, will materially advance the proceedings for two basic reasons. First, the Ruto Defence submits that the trial is in its early stages and it is of crucial importance to resolve the question of the scope of the defence's right of access to relevant material at an early stage of trial proceedings as such determination would impact not only Witness 268 but also all future witnesses for whom the Defence may make a similar request.¹⁶ Second, the Ruto Defence further submits that it is important for the Appeals Chamber to 'authoritatively weigh-in' on the appropriate approach a Chamber should take when balancing the organisational interests of the independent Registry vis-à-vis the interests of accused persons to investigate and, if necessary, cross-examine a Prosecution witness on matters concerning that witness's credibility.¹⁷

¹³ Ruto Application, ICC-01/09-01/11-1080, para. 29.

¹⁴ Ruto Application, ICC-01/09-01/11-1080, paras 30 and 31.

¹⁵ Ruto Application, ICC-01/09-01/11-1080, paras 8 and 33.

¹⁶ Ruto Application, ICC-01/09-01/11-1080, paras 10, 34, 35 and 36.

¹⁷ Ruto Application, ICC-01/09-01/11-1080, para. 37.

B. Sang Defence Submissions

10. The Sang Defence submits that the Second Issue is not a mere disagreement, but a fundamental issue which will have a real impact on the proceedings and the ability of the Defence to challenge the prosecution case and present its own case.¹⁸
11. The Sang Defence argues that depriving the Defence of access to exculpatory evidence or evidence relevant to the veracity, credibility or improper motivation of a witness's testimony affects the fair conduct of these proceedings as it limits the Defence's ability to challenge the prosecution case.¹⁹ The Sang Defence further argues that the Second Issue also affects the expeditious conduct of these proceedings. It submits that non-disclosure of this information will require the Defence to conduct significant additional investigations which will lead to a delay in the proceedings and may also require recalling earlier prosecution witnesses.²⁰ Additionally, the Sang Defence submits that following a final decision, if an appeal was made and allowed on this basis, it may necessitate a re-trial, which would adversely impact on the Court's limited resources.²¹
12. In the alternative, the Sang Defence submits that this issue may bear upon the potential outcome of this trial. Like the Ruto Defence, the Sang Defence argues that the denial of access to evidence that may pertain to the credibility or motivations of prosecution witnesses deprives the Court of information relevant to the assessment of evidence.²²
13. The Sang Defence also submits that the immediate resolution of this issue would materially advance the proceedings. It argues that a decision in favour of disclosure at this time would enable the Defence to rely on this information for the remainder

¹⁸ Sang Application, ICC-01/09-01/11-1081, para. 8.

¹⁹ Sang Application, ICC-01/09-01/11-1081, paras 11 and 12.

²⁰ Sang Application, ICC-01/09-01/11-1081, para. 13

²¹ Sang Application, ICC-01/09-01/11-1081, para. 13.

²² Sang Application, ICC-01/09-01/11-1081, para. 14.

of the trial and would also assist the Chamber in assessing the weight which is to be attributed to a witness's testimony.²³

C. Prosecution Submissions

14. In the Prosecution Response, it is submitted that the Defence Applications should be dismissed as neither issue arises from the Impugned Decision nor meets the additional criteria under Article 82(1)(d) of the Statute.²⁴
15. In relation to the First Issue, the Prosecution submits that there is no indication that the Chamber failed to consider whether reasonable support and maintenance to a witness may implicate the credibility of a witness. The Prosecution, thus, submits that the leave to appeal arises out of a mischaracterisation of/disagreement with the decision of the Chamber.²⁵ The Prosecution submits that in fact the Chamber considered the nature of the information and approved the disclosure of material that actually had the potential to impact on the credibility of Witness 268.²⁶ In relation to the Second Issue, the Prosecution submits that that issue seeks to litigate a question which was never decided by the Chamber in the Impugned Decision.²⁷ The Prosecution argues that the Chamber (i) neither made a blanket decision as to whether, generally, the costs expended by the VWU in relation to prosecution witnesses who are part of the witness protection programme fall within the confines of Article 67(2) of the Statute or Rule 77 of the Rules of Procedure and Evidence ('Rules'), (ii) nor did it make a decision impacting on all witnesses.²⁸
16. The Prosecution further argues that the issues presented by the Defence ('Issues') do not significantly affect the fair conduct of the proceedings. The Prosecution first submits that any financial information that actually has the potential to impact on

²³ Sang Application, ICC-01/09-01/11-1081, paras 15 and 16.

²⁴ Prosecution Response, ICC-01/09-01/11-1095-Conf, para. 4.

²⁵ Prosecution Response, ICC-01/09-01/11-1095-Conf, para. 10.

²⁶ Prosecution Response, ICC-01/09-01/11-1095-Conf, para. 10.

²⁷ Prosecution Response, ICC-01/09-01/11-1095-Conf, para. 11.

²⁸ Prosecution Response, ICC-01/09-01/11-1095-Conf, para. 11.

the credibility of Witness 268 or any other witness would be disclosed (as has been disclosed in the past) to the Defence regardless of whether the Appeals Chamber resolves the issues proposed for appeal.²⁹ Second, it submits that the fact that the expenses are paid by the VWU, a neutral body which has independently assessed both their necessity and reasonableness, provides sufficient protection against the payment of disproportionate or inappropriate benefits and, thus, adequately protects the fairness of the proceedings.³⁰ Third, the Prosecution submits that it has already agreed that even where there is some doubt as to whether a particular payment may have an impact on credibility, the matter can be submitted to the Chamber, who would then decide on the disclosability of the information.³¹ Fourth, the Prosecution adds that the Defence's claims regarding the impact of the Impugned Decision on the fair conduct of proceedings are speculative.³² Fifth, the Prosecution argues that the generalised financial information requested by the Defence, without context regarding, for example, the cost of living in the relevant location, would not be useful for assessing whether the specific payment can provide an inappropriate incentive impacting on the credibility of Witness 268, or any other witness.³³ Sixth, the Prosecution argues that the Impugned Decision does not prevent the Defence from challenging the credibility of the witness in cross-examination.³⁴

17. The Prosecution additionally submits that the Defence's claims that the Issues significantly affect the expeditious conduct of the proceedings are speculative.³⁵
18. The Prosecution argues that the Issues do not significantly affect the outcome of trial and an immediate resolution by the Appeals Chamber will not materially

²⁹ Prosecution Response, ICC-01/09-01/11-1095-Conf, para. 14.

³⁰ Prosecution Response, ICC-01/09-01/11-1095-Conf, para. 15.

³¹ Prosecution Response, ICC-01/09-01/11-1095-Conf, para. 16.

³² Prosecution Response, ICC-01/09-01/11-1095-Conf, para. 17.

³³ Prosecution Response, ICC-01/09-01/11-1095-Conf, para. 18.

³⁴ Prosecution Response, ICC-01/09-01/11-1095-Conf, para. 19.

³⁵ Prosecution Response, ICC-01/09-01/11-1095-Conf, para. 20.

advance the proceedings.³⁶ First, the Prosecution submits that even if the Impugned Decision was affected by any form of error, the limited scope of the Decision – pertaining to only one witness – makes it very unlikely that there will be an impact on the outcome of the trial.³⁷ Second, the Prosecution adds that the safeguards currently in place ensure that the proceedings follow the right course. For instance, the Impugned Decision already ensures the disclosure to the Defence of any evidence tending to show fraud or other acts of illegality on the part of Witness 268 which bears a direct connection to his maintenance and support within the witness protection and support programme.³⁸

III. APPLICABLE LAW

19. Article 82(1)(d) of the Statute sets out the requirements applicable to the granting of a request for leave to appeal, which are as follows:

i. whether the decision involves an issue that would significantly affect:

i. the fair and expeditious conduct of proceedings; or

ii. the outcome of the trial; and

ii. in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

20. The Chamber recalls that, for the purposes of the first prong of this test, the Appeals Chamber has defined an ‘issue’ as ‘an identifiable subject or topic

³⁶ Prosecution Response, ICC-01/09-01/11-1095-Conf, paras 21, 22 and 23.

³⁷ Prosecution Response, ICC-01/09-01/11-1095-Conf, para. 21.

³⁸ Prosecution Response, ICC-01/09-01/11-1095-Conf, para. 22.

requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion'.³⁹

IV. ANALYSIS AND CONCLUSIONS

21. The Chamber notes that the First Issue is based on the proposition that the Impugned Decision assesses the probative value of information on the VWU's assistance *only* on the basis of the source providing the assistance. While this is not an accurate representation of the Impugned Decision, the Chamber accepts that the fact that it was the VWU who provided the assistance was of significance to the Impugned Decision. In particular, the Chamber found that it does not afford a *prima facie* indicium of credibility that the VWU undertook those reasonable tasks of providing reasonable support and maintenance to a witness rather than the witness doing it themselves.⁴⁰ The Chamber is therefore satisfied that the First Issue arises from the Impugned Decision.
22. As to the Second Issue, the Sang Defence may be understood to seek to challenge whether VWU costs *could* be disclosed at all. However, this issue does not arise from the Impugned Decision. The Chamber's finding was limited to disclosure of the VWU undertaking *reasonable* tasks to provide *reasonable* support and assistance. The Impugned Decision thus did not preclude disclosure of the kind sought by the Sang Defence in *all* circumstances. Read in this context, the Second Issue has a different meaning: the Sang Defence appears to be seeking to challenge that VWU costs must *always* be disclosed. However, the issue phrased in such a general way could be understood as an attempt to impermissibly seek leave to appeal of the

³⁹ *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 9.

⁴⁰ Transcript of hearing of 28 October 2013, ICC-01/09-01/11-T-60-CONF-ENG, p. 44, lines 15-19.

overall disposition of the Impugned Decision.⁴¹ Nonetheless, the Chamber will accept that the Second Issue arises from the Impugned Decision because, on the understanding that the Sang Defence is alleging a legal error as to how the Chamber should have approached the disclosure request at issue, such an error would have materially affected the analysis.

23. Both Issues appear to be more than mere disagreements regarding the correctness of the Chamber's reasoning.
24. The Chamber further notes that the Defence's arguments regarding the impact of the Issues on the fair and expeditious conduct of proceedings are based on the assertion that if the Impugned Decision is affected by errors of the kind described by the Defence, the accused persons may be deprived of information necessary to fully and efficiently conduct investigations and cross-examination. The Chamber, however, notes that even if these arguments of the Defence are accepted and that the effect of the Chamber's resolution of the Issues is that the Defence is deprived of relevant information, it still needs to be demonstrated that the Issues 'would significantly affect the fair and expeditious conduct of the proceedings', always keeping in mind that the test addresses the propriety of an interlocutory appeal, as opposed to an appeal on the merits at the end of the case.
25. In relation to the alleged deprivation of information, the Chamber notes that the Prosecution's disclosure obligations include a duty to disclose material of relevance to the credibility of witnesses, as long as such material falls within the scope of Article 67(2) of the Statute and/or Rule 77 of the Rules. The Chamber also takes note of the Prosecution's assurance to the Defence and the Chamber that, in accordance with the Prosecution's disclosure obligations, it does disclose to the Defence any information in the Prosecution's possession that may have a bearing on the

⁴¹ See Decision on the joint defence request for leave to appeal the decision on witness preparation, 11 February 2013, ICC-01/09-01/11-596, paras 11-12.

credibility of a witness.⁴² The Chamber therefore finds the Defence's arguments regarding deprivation of information to be speculative. Further, the Chamber notes that the Defence does not substantiate its assertion that the alleged denial of access to information will necessitate additional investigations such as to significantly affect the fairness of the proceedings.

26. For these reasons, the Chamber is of the view that the Defence has not demonstrated that the Issues would significantly affect the fairness of the proceedings as required by Article 82(1)(d) of the Statute. Similarly, the Defence has not shown that the Issues would significantly affect the expeditious conduct of the proceedings. As discussed earlier, the argument regarding the alleged need to conduct additional investigations is unsubstantiated and speculative.
27. The Chamber notes that the alternative arguments of the Defence that the Issues significantly affect the outcome of the trial⁴³ are based on the allegation of denial of access to relevant information and, for the reasons set out above, the Chamber is not persuaded by the arguments of the Defence. In addition, the Defence's argument that the information to which the Defence has no access has the potential of significantly affecting not only the Chamber's assessment of the credibility of Witness 268, but also the outcome of the trial is unsubstantiated. In particular, the Defence's argument appears to be based on the understanding that (1) the information withheld by the VWU has a potential of affecting the credibility of Witness 268 to the extent that the Chamber would not rely on part or all of his evidence; and (2) the Chamber's inability to rely on that evidence would significantly affect the outcome of the trial. The Chamber finds this to be too speculative to be able to support the view that the Issues would significantly affect the outcome of the trial.

⁴² See, for example: 'We say that where there is some indicia that the witness protection system has been abused by a witness..., then that is the sort of information which we would deem necessary to disclose under this provision', Transcript of hearing of 28 October 2013, ICC-01/09-01/11-T-60-CONF-ENG, p. 27, lines 18-23.

⁴³ Ruto Application, ICC-01/09-01/11-1080, para. 33; Sang Application, ICC-01/09-01/11-1081, para. 14.

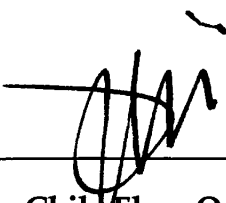
28. At any rate, the Chamber considers that not every issue that would significantly affect the fairness and expeditiousness of the proceedings or the outcome of the trial can be certified for an interlocutory appeal. It must also be an issue for which, in the opinion of the Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings. Therefore, the Chamber needs to form the view that this is a matter that requires an immediate resolution in order for the proceedings to materially advance. To form such a view, the Chamber needs to be persuaded, *inter alia*, that there is advantage in resolving the Issues at this stage, bearing in mind that issues of this kind may also be raised in an appeal against the final decision under Article 74 of the Statute. Having regard to the foregoing considerations in respect of the alleged denial of access to information and the speculative nature of the Defence's arguments of prejudice, the Chamber is unable to form the opinion that an immediate resolution of the Issues by the Appeals Chamber may materially advance the proceedings.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

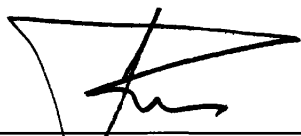
REJECTS the Defence Applications; and

DIRECTS the Prosecution to file a public redacted version of the Prosecution Response.

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



Judge Chile Eboe-Osuji
(Presiding)

Judge Olga Herrera Carbuccion

Judge Robert Fremr

Dated 21 January 2014

At The Hague, The Netherlands