

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 5 May 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***

Confidential

**Decision on the Ruto Defence Request for VWU Assistance to Facilitate an
Interview with a Witness**

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

Counsel Support Section

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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 regard to Articles 43(6), 64(6)(f) and 68(4) of the Rome Statute (the 'Statute'), issues this 'Decision on the Ruto Defence Request for VWU Assistance to Facilitate an Interview with a Witness'.

I. Procedural history and submissions

1. On 27 March 2014, the defence team for Mr Ruto ('Defence') requested the Chamber to order the Victims and Witnesses Unit ('VWU') to facilitate an interview with a specified witness ('Witness'; 'Request').¹
2. The Defence informs the Chamber that it requested the Office of the Prosecutor ('Prosecution') to contact the Witness and seek his consent to being interviewed by the Defence.² The Defence further requested that this contact be audio-recorded and that the Prosecution refrain from making such contact if it is unwilling to record it.³ The Defence states that the Prosecution declined to audio-record such contact with the Witness.⁴ The Defence submits that as a result, and given the VWU's position that Chamber authorisation is required before it will directly facilitate witness interviews in a manner that does not exactly follow the procedures outlined in the protocol concerning the handling of confidential

¹ Defence Request for VWU Assistance to facilitate Witness Interview, ICC-01/09-01/11-1231-Conf-Exp, available only to the Ruto Defence, with Confidential *ex parte* Annexes A to C available to the Prosecution, the Ruto Defence and the VWU and Confidential *ex parte* Annex D available to the Ruto Defence only. A confidential redacted version, available to the Ruto Defence, Prosecution and VWU only, was filed on the same day, ICC-01/09-01/11-1231-Conf-Exp-Red. Having being so directed by the Chamber (e-mail communication from Legal Officer of the Chamber on 1 April 2014 at 15:54), two further confidential redacted versions were filed on 2 April 2014: Second Confidential Redacted Version of the Request, ICC-01/09-01/11-1231-Conf-Red2, available to the Prosecution, Ruto and Sang Defence and VWU only and Third Confidential Redacted Version of the Request, ICC-01/09-01/11-1231-Conf-Red3.

² Third Confidential Redacted Version of the Request, ICC-01/09-01/11-1231-Conf-Red3, para. 3. *See also* confidential *ex parte* Annexes A and B to the Request containing copies of relevant correspondence.

³ Third Confidential Redacted Version of the Request, ICC-01/09-01/11-1231-Conf-Red3, para. 3 and confidential *ex parte* Annex A.

⁴ Third Confidential Redacted Version of the Request, ICC-01/09-01/11-1231-Conf-Red3, para. 3.

information and contacts of a party with witnesses whom the opposing party intends to call established by the Chamber,⁵ it was necessary to file the Request.⁶

3. The Defence also requested that the deadline for responses to the Request be shortened, arguing that the information provided by the Witness is likely to impact the Defence's current investigations and preparations for the trial.⁷ This request was granted by the Chamber and the parties, the Legal Representative of Victims ('LRV') and the VWU were instructed to submit any responses by 10 April 2014.⁸
4. The Defence submits that its Request is based on specific concerns,⁹ and that audio-recording of the contact of the Prosecution with the Witness would avoid 'unnecessary issues arising later'.¹⁰ The Defence refers in particular to past incidents, in which, it alleges, there were considerable differences between the Prosecution's and the VWU's accounts of certain events or to witnesses having contradicted written accounts of their interactions with the Prosecution.¹¹
5. On 10 April 2014 the Prosecution responded to the Request ('Response').¹² The Prosecution submits that the Request is unfounded and premature and therefore should be dismissed.¹³ The Prosecution argues that the situation falls within the scope of the Witness Contact Protocol, which does not require audio-recording of a calling party's contact with a witness, and that the Defence has not provided any compelling reasons for why the regime established by the Witness Contact

⁵ Decision on the protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call, Annex, ICC-01/09-01/11-449-Anx ('Witness Contact Protocol').

⁶ Third Confidential Redacted Version of the Request, ICC-01/09-01/11-1231-Conf-Red3, para. 3.

⁷ Third Confidential Redacted Version of the Request, ICC-01/09-01/11-1231-Conf-Red3, para. 2.

⁸ Email communications from Legal Officer of the Chamber, dated 1 April 2014 at 15:54 and 3 April 2014 at 08:18.

⁹ Third Confidential Redacted Version of the Request, ICC-01/09-01/11-1231-Conf-Red3, para. 4.

¹⁰ Confidential Redacted version of the Request, ICC-01/09-01/11-1231-Conf-Exp-Red, paras 4 and 7.

¹¹ See e.g. Third Confidential Redacted Version of the Request, ICC-01/09-01/11-1231-Conf-Red3, paras 5 and 7.

¹² ICC-01/09-01/11-1266-Conf-Exp, confidential, *ex parte*, available to the Prosecution and the VWU only. On the same day, two confidential redacted versions were filed: Confidential Redacted Version of the Response, ICC-01/09-01/11-1266-Conf-Exp-Red, available to the Prosecution, Ruto Defence and the VWU only; and Second Confidential Redacted Version of the Response, ICC-01/09-01/11-1266-Conf-Red2.

¹³ Response, ICC-01/09-01/11-1266-Conf-Red2, para. 2.

Protocol should be deviated from in this instance.¹⁴ In this context, the Prosecution stresses the differences between the present Request and requests concerning other witnesses, where the Witness Contact Protocol was either not directly applicable or specific circumstances, such as where a witness had explicitly indicated he no longer wished to speak to the Prosecution, warranted departure from it.¹⁵

6. The Prosecution rejects any suggestion that it cannot be trusted to accurately convey such requests to witnesses.¹⁶ The Prosecution further submits that the specific claims made by the Defence regarding alleged past inconsistencies are either immaterial to the present issue, as their circumstances were different, or should be treated with scepticism in light of: (i) the fact that the Prosecution did not have an opportunity to respond to the redacted allegations in the Request; and (ii) evidence suggesting witnesses have been bribed in order to withdraw their cooperation from the Prosecution.¹⁷
7. The Prosecution states that it objects as a matter of principle to expanding audio-recording beyond the requirements set out in the Statute or as ordered by the Chamber.¹⁸ The Prosecution stresses that the Chamber was aware of the possibility of audio-recording but chose to limit it to the exceptional circumstances detailed in paragraph 5 of the Witness Contact Protocol, and therefore there is no legal basis for the Defence's request in the current case.¹⁹
8. Furthermore, the Prosecution submits that the suggested involvement of the VWU at this stage would be premature, as it cannot be assumed at present that

¹⁴ Second Confidential Redacted Version of the Response, ICC-01/09-01/11-1266-Conf-Red2, paras. 1, 3, 24-27.

¹⁵ Second Confidential Redacted Version of the Response, ICC-01/09-01/11-1266-Conf-Red2, paras. 16-18.

¹⁶ Second Confidential Redacted Version of the Response, ICC-01/09-01/11-1266-Conf-Red2, paras 3, 27 and 31. *See also* Second Confidential Redacted Version of the Response, ICC-01/09-01/11-1266-Conf-Red2, para. 4.

¹⁷ Second Confidential Redacted Version of the Response, ICC-01/09-01/11-1266-Conf-Red2, paras. 28, 32 and 33.

¹⁸ Second Confidential Redacted Version of the Response, ICC-01/09-01/11-1266-Conf-Red2, para. 4.

¹⁹ Second Confidential Redacted Version of the Response, ICC-01/09-01/11-1266-Conf-Red2, para. 26.

- the Witness refuses to engage with the Prosecution in all matters, including a request to be interviewed by the Defence.²⁰ The Prosecution also states that the Witness is not a witness participating in the ICCPP or a witness subject to an assisted move for whom "all contacts shall occur exclusively through VWU".²¹
9. On 10 April 2014, the VWU filed its observations ('VWU Observations').²² The VWU notes that the notification of the Request to it was the first time it was made aware of the Defence request to contact the Witness.²³ The VWU states that the current situation differs from that of witnesses whom the Prosecution was unable to contact, as in the present case there are no indications of such difficulty and the Prosecution has, in fact, expressed its willingness to contact the Witness.²⁴ The VWU submits that it should not be placed in an *inter partes* dispute and that any involvement by the VWU should only be as a last resort and under strict guidance from the Chamber.²⁵ The VWU further submits that the intervention requested by the Defence could damage the principle of neutrality which the VWU is required to maintain. In that regard, the VWU stresses that its neutrality from the perspective of witnesses must be preserved and it should not be put in a position where its interaction with the Witness may become a point of contention.²⁶ However, the VWU states that should the Chamber order the VWU to assist in the facilitation of the interview, its involvement should be limited to no more than informing the Witness of the Defence's wish to conduct an interview with him.²⁷
10. The defence team for Mr Sang and the LRV did not file responses by the specified deadline.

²⁰ Second Confidential Redacted Version of the Response, ICC-01/09-01/11-1266-Conf-Red2, paras 2 and 23.

²¹ Second Confidential Redacted Version of the Response, ICC-01/09-01/11-1266-Conf-Red2, para. 18.

²² ICC-01/09-01/11-1265-Conf-Exp, available to the Prosecution, Ruto Defence and the Registry only.

²³ VWU Observations, ICC-01/09-01/11-1265-Conf-Exp, para. 2.

²⁴ VWU Observations, ICC-01/09-01/11-1265-Conf-Exp, para. 3.

²⁵ VWU Observations, ICC-01/09-01/11-1265-Conf-Exp, para. 5.

²⁶ VWU Observations, ICC-01/09-01/11-1265-Conf-Exp, paras. 5-8.

²⁷ VWU Observations, ICC-01/09-01/11-1265-Conf-Exp, para. 10.

II. Analysis by the Chamber

11. The Chamber observes that requests by one party to interview witnesses of another party are regulated by the Witness Contact Protocol. Pursuant to paragraph 4 of the Witness Contact Protocol, the Defence was under an obligation to notify the Prosecution of its wish to interview the Witness and request the Prosecution to seek his consent.²⁸ The Defence fulfilled this obligation, as shown from the correspondence attached to the Request.²⁹ The obligations of the calling party are contained in paragraph 7 of the Witness Contact Protocol, which sets a time frame for making contact with the witness, a prohibition on attempting to influence his or her decision, and a duty to inform the non-calling party of the witness's consent and to facilitate the interview should such consent be given.³⁰ When conveying such requests, there is no requirement for the contact between the witness and the calling party to be audio-recorded.³¹ In this instance, the Prosecution, on its part, was willing to comply with its obligation as the calling party to contact the Witness and seek his consent to be interviewed by the Defence, but refused the Defence's request to audio-record this contact.
12. The Chamber notes that, in certain instances, exceptional circumstances may justify departing from the procedures outlined in the Witness Contact Protocol. However, neither a general concern of possible future disputes between the parties regarding the contact with the Witness, nor the other submissions made by the Defence in this matter, provide such a justification. In the present

²⁸ Witness Contact Protocol, ICC-01/09-01/11-449-Anx, para. 4.

²⁹ ICC-01/09-01/11-1231-Conf-Exp-AnxA and ICC-01/09-01/11-1231-Conf-Exp-AnxB.

³⁰ "After being notified, the party calling the Witness shall seek the consent of the Witness within five days of receiving notification. In doing so, the calling party shall not in any way attempt to influence the Witness's decision as to whether or not to agree to be interviewed by the other party. If the Witness consents, the calling party shall inform the non-calling party and contact shall be facilitated as appropriate", Witness Contact Protocol, ICC-01/09-01/11-449-Anx, para. 7.

³¹ It is noted, by way of contrast, that other provisions of the Witness Contact Protocol do explicitly envisage an obligation for certain witness contacts to be audio- or video-recorded, *see e.g.* Witness Contact Protocol, ICC-01/09-01/11-449-Anx, para. 5.

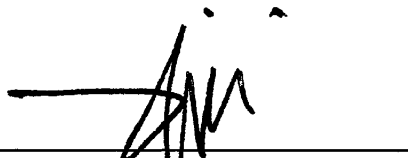
circumstances, the Chamber considers that the Witness Contact Protocol continues to provide an appropriate mechanism for regulating such contacts with witnesses by the parties.

13. Regarding the requested involvement of the VWU, the Chamber notes that the exceptions detailed in paragraphs 5, 14 and 15 of the Witness Contact Protocol do not apply, and therefore there is no basis in the Witness Contact Protocol for such involvement. Moreover, it is not currently apparent that the Prosecution would be unable to contact the Witness for the said purpose. Consequently, the involvement of the VWU on that basis would be premature at this stage.
14. For the reasons stated above, the Request is denied. If the Defence maintains its wish to interview the Witness, the procedures outlined in paragraphs 4 and 7 of the Witness Contact Protocol should be followed.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request.

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

A handwritten signature in black ink, consisting of a horizontal line followed by a stylized, cursive 'C' and 'O'.

Judge Chile Eboe-Osuji, Presiding Judge

A handwritten signature in black ink, featuring a stylized 'O' and 'H'.

Judge Olga Herrera Carbuccion

A handwritten signature in black ink, featuring a stylized 'R' and 'F'.

Judge Robert Fremr

Dated 5 May 2014

At The Hague, The Netherlands