

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 6 June 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 Related to Defence Submission of Confidential Defence Investigation
Materials**

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

Victims and Witnesses Unit

Ms Natacha Schauder ad interim

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 Article 68 of the Rome Statute (the 'Statute'), Rule 78 of the Rules of Procedure and Evidence (the 'Rules'), Regulations 29 and 34 of the Regulations of the Court (the 'Regulations') and Article 8(4) of the Code of Professional Conduct for Counsel (the 'Code of Conduct'), issues this 'Decision Related to Defence Submission of Confidential Defence Investigation Materials'.

I. Procedural history

1. On 7 March 2014, the Office of the Prosecutor (the 'Prosecution'), in light of what had arisen during the testimony of Witness 409 and Witness 442, expressed concerns relating to whether the methods of investigation used by the defence for Mr Ruto (the 'Ruto Defence') sufficiently protected the security and identity of these two witnesses.¹ The Prosecution then made requests for disclosure of three types of information related to Witness 409 and Witness 442 (the 'Disclosure Requests'):

- (i) certain correspondence written in the course of the Ruto Defence's investigation;
- (ii) all of the redacted source metadata of the documents which they have disclosed to date; and
- (iii) the logs kept by the Defence for witness contacts in connection with Witness 409 and Witness 442.²

¹ Transcript of Hearing, ICC-01/09-01/11-T-101-CONF-ENG, page 9 line 7 to page 13 line 20. See also Transcript of Hearing, ICC-01/09-01/11-T-97-CONF-ENG, page 7 line 3 to page 8 line 11.

² Transcript of Hearing, ICC-01/09-01/11-T-101-CONF-ENG, page 12 lines 3-18.

2. In the event the Chamber was not minded to grant the Prosecution access to these documents, the Prosecution requested for the Chamber to request access to these documents and, in consultation with the Victims and Witnesses Unit (the 'VWU'), take whatever steps the Chamber deemed necessary in light of its obligations under Article 68(1) of the Statute.³
3. After further discussion during the 7 March hearing where the Chamber indicated that it did not want to go 'back and forth' with submissions on this issue,⁴ the Ruto Defence consulted with its team and agreed that it was able to provide a comprehensive oral response that day.⁵ During the ensuing discussion, the Ruto Defence agreed to provide the materials sought by the Prosecution to the Chamber for it to review.⁶
4. On 13 March 2014, the Ruto Defence submitted the 'Defence submission of confidential defence investigation materials' (the 'Submission').⁷ The Ruto Defence explains that the metadata of the documents disclosed in connection with the cross-examination of Witness 409 and Witness 442 have been provided to the Prosecution, as well as the lists of defence witnesses spoken to in connection with these witnesses.⁸ However, the Ruto Defence submits that the 'protected confidential defence work product provided in confidential and *ex parte* Annexes

³ Transcript of Hearing, ICC-01/09-01/11-T-101-CONF-ENG, page 12 lines 19-23.

⁴ Transcript of Hearing, ICC-01/09-01/11-T-101-CONF-ENG, page 14 lines 8-13 ('PRESIDING JUDGE EBOE-OSUJI: And I notice that all members of your team are not with you as we speak, and I do not know to what extent that you had notice of this application being made by the Prosecutor in good time to have consulted with your colleagues for now. So that's why I say if you do need some time to consult with your colleagues so that we can have one comprehensive response, let us know. We don't want to go back and forth and hold different hearings on it').

⁵ Transcript of Hearing, ICC-01/09-01/11-T-101-CONF-ENG, page 14 lines 18-22 (indicating that, barring a difficulty in communication, a response could be given on the afternoon of 7 March), page 22 et seq (confirming this communication occurred and commencing with a response to the Disclosure Requests).

⁶ Transcript of Hearing, ICC-01/09-01/11-T-101-CONF-ENG, page 25 lines 22-25, page 37 line 12 to page 38 line 9.

⁷ ICC-01/09-01/11-1216-Conf-Red (with confidential redacted version notified on 14 March 2014).

⁸ Submission, ICC-01/09-01/11-1216-Conf-Red, para. 4. See also Annexes C, E and F of the Submission, ICC-01/09-01/11-1216-Conf-AnxC, ICC-01/09-01/11-1216-Conf-AnxE, ICC-01/09-01/11-1216-Conf-AnxF.

A, B and D should not be provided to the Prosecution or the Victims and Witnesses Unit [...].⁹

5. On 19 March 2014, the Prosecution responded to the Submission (the 'Response').¹⁰ The Prosecution requests that the Chamber: (i) disregard the arguments in the Submission because the Ruto Defence is attempting to re-litigate the question of disclosure which had been discussed during the 7 March hearing without authorisation to do so,¹¹ (ii) should further disregard the arguments in the Submission as they hold no merit,¹² and (iii) dismiss the Ruto Defence's objection and order the provision of the relevant material at least to the VWU.¹³
6. The Sang Defence did not file a response to the Submission.

II. Analysis

A. Whether to disregard the written arguments in the Submission

7. As a preliminary matter, the Chamber notes the Prosecution's argument that the written arguments in the Submission should be disregarded. The Chamber indeed indicated on 7 March 2014 that it wished to hear 'one comprehensive response' on the Disclosure Requests,¹⁴ and the Ruto Defence agreed to provide this response orally during the 7 March hearing after it had consulted within its team.¹⁵ For filing a further response without seeking leave, the Ruto Defence is engaging in the kind of 'back and forth' submissions which the Chamber was seeking to avoid. The Chamber, pursuant to Regulations 29 and 34 of the Regulations, will

⁹ Submission, ICC-01/09-01/11-1216-Conf-Red, para. 6.

¹⁰ Prosecution's response to the confidential redacted version of the "Defence submission of confidential defence investigation materials", 19 March 2014, ICC-01/09-01/11-1221-Conf.

¹¹ Response, ICC-01/09-01/11-1221-Conf, paras 7-9, 22.

¹² Response, ICC-01/09-01/11-1221-Conf, paras 10-17, 22.

¹³ Response, ICC-01/09-01/11-1221-Conf, paras 18-22.

¹⁴ Transcript of Hearing, ICC-01/09-01/11-T-101-CONF-ENG, page 14 lines 8-13.

¹⁵ See Transcript of Hearing, ICC-01/09-01/11-T-101-CONF-ENG, page 14 lines 18-22, page 22 line 9 to page 40 line 6.

accordingly disregard the arguments in the Submission which go beyond the Ruto Defence's explanation as to what has and has not been disclosed to the Prosecution.

B. The Disclosure Requests

8. Turning to what remains outstanding regarding the Disclosure Requests, the Chamber notes that much of what the Prosecution originally requested has now been disclosed. On the information provided by the Ruto Defence,¹⁶ the Chamber considers that the parts of the Disclosure Requests related to metadata and contact logs can be dismissed as moot. The only remaining issue to resolve is whether to order disclosure of certain correspondence written in the course of the Ruto Defence's investigation, namely Annexes A and B of the Submission.¹⁷
9. The Chamber notes that the Ruto Defence has made no indication that it intends to use Annexes A and B of the Submission as evidence at trial. As such, the Ruto Defence would ordinarily have no obligation to disclose these letters to the Prosecution.¹⁸ Further, the Chamber also notes that the Prosecution argued that it required disclosure of the relevant correspondence in order to determine whether:
(i) the Ruto Defence's investigative methods have threatened the security of Prosecution witnesses, in case additional protective measures need to be implemented, and (ii) the Ruto Defence breached the Chamber's protocol concerning the handling of confidential information (the 'Confidential

¹⁶ Submission, ICC-01/09-01/11-1216-Conf-Red, para. 4. See also Annexes C, E and F of the Submission, ICC-01/09-01/11-1216-Conf-AnxC, ICC-01/09-01/11-1216-Conf-AnxE, ICC-01/09-01/11-1216-Conf-AnxF.

¹⁷ Annex D of the Submission is also inaccessible to the Prosecution, but this annex does not reference any written correspondence which has not already been disclosed to the Prosecution.

¹⁸ Rule 78 of the Rules.

Information Protocol').¹⁹ The Chamber considers that it is capable of ruling on both of these points without receiving the views of the Prosecution.

10. Accordingly, the Chamber will not order disclosure of Annexes A and B of the Submission to the Prosecution.

C. Whether the Ruto Defence's investigative methods have threatened the security of Prosecution witnesses and/or breached the Confidential Information Protocol.

11. The Chamber recalls its obligation under Article 68(1) of the Statute to 'take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses'. The Chamber also recalls paragraphs 19 and 20 of the Confidential Information Protocol, which provide that:

19. Parties and participants shall not disclose to the public any confidential material obtained in the course of the proceedings before the ICC, except to the extent it proves to be necessary and inevitable for their investigation and/ or preparation of the case. In cases where such disclosure may reasonably be seen as inconsistent with specific conditions of confidentiality applicable to a document or information, the party or participant may only disclose it with the leave of the Chamber.

20. Should it become necessary for the purposes of conducting investigations and/or preparation of the case to refer to the identity of any individual who is or has been involved, directly or indirectly, with the activities of the Court, the party or participant shall under no circumstances reveal (i) that the person is involved, directly or indirectly, with the activities of the Court; or (ii) the nature of such involvement.

12. The Chamber further recalls Article 8(4) of the Code of Conduct, which provides, in relevant part:

[...] Counsel shall not reveal the identity of protected victims and witnesses, or any confidential information that may reveal their identity and whereabouts, unless he or she has been authorized to do so by an order of the Court.

¹⁹ Transcript of Hearing, ICC-01/09-01/11-T-101-CONF-ENG, page 12 line 24 to page 13 line 11, referencing Annex to Decision on the protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call, 24 August 2012, ICC-01/09-01/11-449-Anx.

13. The Chamber considers that a case-by-case assessment is required for determining whether revealing the identifying information of witnesses is 'necessary and inevitable' or in breach of the Confidential Information Protocol. Much will depend on considerations of common sense factors which may include, but are not limited to the following: (i) the relevance and necessity of the inquiry to the matters at issue; (ii) the degree of the witness' identifying information which is revealed during the investigation; (iii) the degree of information about the purpose of the inquiry which is revealed during the investigation; (iv) whether making the same investigative request with less identifying information would significantly reduce the chance of obtaining the information sought through the investigation and (v) the proximity between the investigative inquiry and the time which the witness is scheduled to testify.
14. With these considerations in mind, the Chamber expresses its concern with certain aspects of the Ruto Defence's approach to its investigation. For example, KEN-D09-0031-0064 and KEN-D09-0031-0070 are letters by which the Ruto Defence inquires whether Witness 442 attended a particular school.²⁰ Witness 442 is identified by name, the sender is identified as writing 'on behalf of the Defence Team of H.E. William Samoei Ruto' and the letters are dated 27 and 28 February 2014, less than one week before the start of Witness 442's testimony before the Court.
15. Asking such pointed requests so soon before a witness' testimony has the potential to identify the person as a Court witness. Counsel must take every care to avoid conducting their investigation in a manner that may have such a potential, as was the case here. The Chamber considers that Annex A of the

²⁰ Annex D of the Submission, ICC-01/09-01/11-1216-Conf-Exp-AnxD, line 1.

Submission is a letter of a similarly concerning nature related to Witness 409.²¹

The Chamber also notes that Annex D of the Submission contains responses to investigative requests brought with respect to Witness 128, Witness 326 and Witness 356.²²

16. However, the Chamber considers that the letter in Annex B of the Submission requests information in a manner which less clearly reveals the focus of the investigation. The nature of the request was also such that requesting the same information in a more general way would be reasonably expected to significantly reduce the chances of obtaining the information sought through the investigation. As such, the Chamber considers that Annex B of the Submission reveals confidential information in a 'necessary and inevitable' way consistent with the Confidential Information Protocol.²³

17. On the basis of the material before it, the Chamber considers it important to remind the Ruto Defence that care needs to be taken when using confidential information in its investigations. In order to confirm that no additional protective measures are appropriate for the witnesses implicated by the Submission, the Chamber considers that an updated VWU assessment would be of assistance.

18. Accordingly, the Chamber directs the Ruto Defence to disclose Annexes A and D of the Submission, along with the documents listed in Annex D of the Submission, to the VWU. The Chamber also directs the VWU to provide an updated assessment on the security and well-being of Witness 128, Witness 326, Witness 356, Witness 409 and Witness 442. Following receipt of this updated assessment,

²¹ Annex A of the Submission, ICC-01/09-01/11-1216-Conf-Exp-AnxA.

²² Annex D of the Submission, ICC-01/09-01/11-1216-Conf-Exp-AnxD, lines 5-17 (Witness 128, Witness 326 and Witness 356).

²³ Annex B of the Submission, ICC-01/09-01/11-1216-Conf-Exp-AnxB.

the Chamber will consider whether any further measures pursuant to Article 68(1) of the Statute are appropriate.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

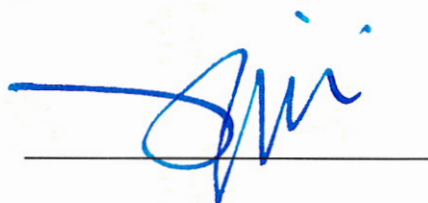
DISMISSES as moot the part of the relief sought in the Disclosure Requests identified in paragraph 1 (ii) and (iii) of the present decision;

REJECTS the relief sought in the Disclosure Requests identified in paragraph 1 (i) of the present decision;

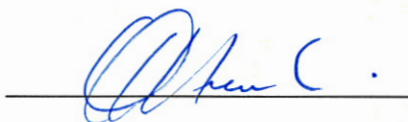
DIRECTS the Ruto Defence to disclose the information to the VWU identified in paragraph 18 of the present decision; and

DIRECTS the VWU to provide the updated security assessment identified in paragraph 18 above within 30 days of notification of the present decision.

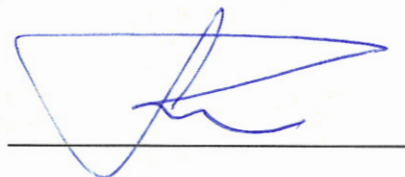
Done in both English and French, the English version being authoritative.

A blue ink signature, appearing to be 'Chile Eboe-Osuji', written over a horizontal line.

Judge Chile Eboe-Osuji, Presiding Judge

A blue ink signature, appearing to be 'Olga Herrera Carbuccion', written over a horizontal line.

Judge Olga Herrera Carbuccion

A blue ink signature, appearing to be 'Robert Fremr', written over a horizontal line.

Judge Robert Fremr

Dated 6 June 2014

At The Hague, The Netherlands