

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **13 June 2014**

TRIAL CHAMBER V(A)

Before:

**Judge, Chile Eboe-Osuji, Presiding
Judge Olga Herrera Carbuccia
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 Second Request for VWU Assistance to Facilitate an Interview
with Witness 516**

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

Counsel Support Section

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 regard to Articles 43(6), 64(6)(f) and 68(4) of the Rome Statute (the 'Statute'), as well as Rules 17 and 18 of the Rules of Procedure and Evidence (the 'Rules'), issues the following 'Decision on the Second Request for VWU Assistance to Facilitate an Interview with Witness 516'.

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 5 May 2014, the Chamber issued the 'Decision on the Ruto Defence Request for VWU Assistance to Facilitate an Interview with a Witness',¹ in which it rejected the request by the defence team for Mr Ruto (the 'Ruto Defence') to order the Victims and Witnesses Unit ('VWU') to facilitate an interview with Witness 516 (the 'Witness'), a Prosecution witness.
2. On 27 May 2014, the Ruto Defence filed its 'Second Defence Request for VWU Assistance to Facilitate Interview with P-0516' ('Ruto Request'),² in which it requested the Chamber to order the VWU to facilitate an interview between the Ruto Defence and the Witness. Namely, the Ruto Defence requested the Chamber to order the VWU to contact the Witness and inform him that:
 - i. The lawyers for Mr. Ruto would like to meet with him and interview him on matters concerning the ICC case;
 - ii. The Witness is free to accept or decline such request; and
 - iii. If the Witness accepts to meet with the Defence lawyers for Mr. Ruto, he may do so either with or without a representative of the Office of the Prosecutor being present.³

¹ ICC-01/09-01/11-1289-Conf.

² Second Defence Request for VWU Assistance to Facilitate Interview with P-0516, ICC-01/09-01/11-1318-Conf, available to the Prosecution, Defence and VWU only, with Confidential Annexes A to H and J to P available to the Prosecution, Defence and VWU only. A Corrigendum of the Second Defence Request for VWU Assistance to Facilitate Interview with P-0516, available to the Defence, Prosecution and VWU only, with Confidential Annexes A to H and J to P available to the Prosecution, Defence and VWU only, was filed the following day, on 28 May 2014, ICC-01/09-01/11-1318-Conf-Corr.

³ Ruto Request, ICC-01/09-01/11-1318-Conf-Corr, para. 26.

3. The Ruto Defence further requested that the deadline for responses to its filing be shortened, pursuant to Regulation 35(1) of the Regulations of the Court (the 'Regulations'), arguing that the information provided by the Witness is likely to have an impact on its on-going investigations and trial preparation for the upcoming session, scheduled to start on 16 June 2014.⁴
4. The Ruto Defence provided annexes with the *inter partes* communication on the matter between the Office of the Prosecutor ('Prosecution') and the Ruto Defence.
5. The Ruto Defence submits that its request is necessitated by the Prosecution's inability to contact the Witness and transmit to him, in accordance with the Witness Contact Protocol, the request to be interviewed by the Ruto Defence.⁵
6. The Ruto Defence states that it notified the Prosecution of its wish to interview the Witness on 5 May 2014, in accordance with paragraph 4 of the Witness Contact Protocol,⁶ but that after 'twelve emails between the parties'⁷ and 'fifteen days'⁸ later, the Prosecution had still been unable to contact the Witness as required under paragraph 7 of the Witness Contact Protocol.
7. The Ruto Defence stresses that its current request is to be distinguished from its previously rejected request for VWU assistance, since 'it is now abundantly clear that the Prosecution is unable to contact the Witness for the purpose of conveying the Defence's wish to interview him'.⁹ In support of its request, the Ruto Defence

⁴ Ruto Request, ICC-01/09-01/11-1318-Conf-Corr, paras. 2 and 27. See also confidential Annex N for reference to Prosecution's agreement on the VWU involvement.

⁵ Ruto Request, ICC-01/09-01/11-1318-Conf-Corr, para. 23.

⁶ "Subject to the exceptions listed in paragraph 5 below, a party which intends to interview a witness of another party shall first notify the other party of this intention, setting out the suggested time and location of the interview", Witness Contact Protocol, ICC-01/09-01/11-449-Anx, para. 4.

⁷ Ruto Request, ICC-01/09-01/11-1318-Conf-Corr, para. 24.

⁸ Ruto Request, ICC-01/09-01/11-1318-Conf-Corr, para. 14.

⁹ Ruto Request, ICC-01/09-01/11-1318-Conf-Corr, para. 25.

points to the Prosecution's consent to the assistance of the VWU and its offer to provide all necessary assistance to the VWU in this regard.¹⁰

8. On 30 May 2014 the defence team for Mr Sang (the 'Sang Defence', together with the Ruto Defence: 'the Defence') filed an application to join the Ruto Request and to participate in the interview with Witness 516, (the 'Sang Request', together with the Ruto Request: the 'Defence Requests').¹¹
9. The Sang Defence submitted that it has a legitimate interest in interviewing the Witness, since he 'not only directly implicates Mr. Sang, but pursuant to recent Rule 77 disclosure concerning security incidents reports and Article 70 investigations, he may also have information relevant to assessing the credibility of upcoming Prosecution witnesses, in particular P-0613'.¹² It further acknowledges that it has not first requested the Prosecution to contact the Witness, as was done by the Ruto Defence, and is required by the Witness Contact Protocol. However, in its view, such a request would have been pointless, due to the difficulty the Prosecution faced in establishing contact with the Witness to transmit the Ruto Defence's request for an interview.¹³
10. On 2 June 2014, the Chamber shortened the deadline for responses to the Defence Requests to 5 June 2014.¹⁴
11. On 5 June 2014, the Prosecution filed its response,¹⁵ indicating that it does not oppose the Defence Requests. The Prosecution submits that the Ruto Request accurately reflects the *inter partes* communication, but stresses that cogent reasons

¹⁰ Ruto Request, ICC-01/09-01/11-1318-Conf-Corr, paras. 24, 25 and 27.

¹¹ Sang Defence application to join the Ruto Defence's "Second Defence Request for VWU Assistance to Facilitate Interview with P-0516, ICC-01/09-01/11-1321-Conf.

¹² Sang Request, ICC-01/09-01/11-1321-Conf, para. 3.

¹³ Sang Request, ICC-01/09-01/11-1321-Conf, para. 4.

¹⁴ E-mail from Legal Officer of the Chamber to the parties and participants, 2 June 2014 at 14:14.

¹⁵ Prosecution's response to "Corrigendum of Second Defence request for VWU assistance to facilitate interview with P-0516" [ICC-01/09-01/11-1318-Conf-Corr], ICC-01/09-01/11-1340-Conf-Exp. A confidential redacted version was filed that same day.

existed for the prolonged period of said communication.¹⁶ It submits that it has exhausted 'all means at its disposal to assist the Defence' and that intervention by the VWU is now warranted.¹⁷ In the view of the Prosecution, such intervention should be strictly limited to informing the Witness of the Defence's wish for an interview.¹⁸ The Prosecution proposes that the same language and direction to the VWU, as included in the Chamber's decision on a request for VWU assistance in transmitting information with respect to another witness,¹⁹ be used for the current witness.²⁰

II. Analysis by the Chamber

12. As a preliminary matter, the Chamber notes that the Witness, who is subject to a summons pursuant to the Chamber's 'Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation',²¹ continues to be a Prosecution witness for the purposes of the current proceedings. The section of the Witness Contact Protocol pertaining to requests by one party to interview witnesses of another party²² is therefore applicable.²³

13. The Chamber observes that, pursuant to paragraph 4 of the Witness Contact Protocol, the Ruto Defence was under an obligation to notify the Prosecution of its wish to interview the Witness and to request the Prosecution to seek his consent on the matter.²⁴ The correspondence attached to the Ruto Request shows that the

¹⁶ ICC-01/09-01/11-1340-Conf-Exp, paras 4-14.

¹⁷ ICC-01/09-01/11-1340-Conf, para. 16.

¹⁸ ICC-01/09-01/11-1340-Conf, para. 17.

¹⁹ Referring to Decision on the joint Defence request for VWU assistance to facilitate interview with Witness 323, 2 June 2014, ICC-01/09-01/11-1327-Conf, para. 35.

²⁰ ICC-01/09-01/11-1340-Conf, para. 18.

²¹ ICC-01/09-01/11-1274-Corr2, 17 April 2014.

²² Section 2 of the Witness Contact Protocol, ICC-01/09-01/11-449-Anx.

²³ See Decision on the Ruto Defence Request for VWU Assistance to Facilitate an Interview with a Witness, ICC-01/09-01/11-1289-Conf, 5 May 2014.

²⁴ Witness Contact Protocol, ICC-01/09-01/11-449-Anx, para. 4.

Ruto Defence fulfilled this obligation.²⁵ The Chamber also notes the obligations of the calling party contained in paragraph 7 of the Witness Contact Protocol, which includes a time frame of five days for the calling party to contact the Witness.²⁶

14. The Chamber considers that the Prosecution attempted to comply with its obligation to contact the Witness and seek his consent to be interviewed by the Ruto Defence, but has been unsuccessful, as shown by relevant correspondence attached to the Ruto Request.²⁷

15. The Chamber recalls its previous finding that the requested assistance of the VWU is not provided for in the Witness Contact Protocol, but that within the Registry, the VWU, a neutral organ specifically tasked to deal with witnesses, is best placed to address a Witness on a request coming from one of the parties. Such conduct does not interfere with the VWU's responsibilities under the Statute and the Rules (particularly Rule 18(b) of the Rules) to act impartially when cooperating with all parties in the proceedings.²⁸

16. The Chamber previously rejected a request by the Ruto Defence for VWU assistance to facilitate an interview with the Witness,²⁹ as it considered VWU involvement 'premature' at that stage.³⁰ However, in light of the information now before it, the Chamber considers that the current exceptional situation, in which the calling party is clearly unable to establish contact with the Witness and to transmit a request pursuant to paragraph 7 of the Witness Contact Protocol,

²⁵ ICC-01/09-01/11-1318-Conf-Corr-AnxA.

²⁶ "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.

²⁷ ICC-01/09-01/11-1318-Conf-Corr-AnxC. See also, for further unsuccessful attempts by the Prosecution, ICC-01/09-01/11-1318-Conf-Corr-AnxE, ICC-01/09-01/11-1318-Conf-Corr-AnxF, ICC-01/09-01/11-1318-Conf-Corr-AnxJ, ICC-01/09-01/11-1318-Conf-Corr-AnxL and ICC-01/09-01/11-1318-Conf-Corr-AnxN.

²⁸ ICC-01/09-01/11-1327-Conf.

²⁹ The rejected request was the 'Defence Request for VWU Assistance to facilitate Witness Interview', 16 May 2014, ICC-01/09-01/11-1231-Conf-Exp.

³⁰ ICC-01/09-01/11-1289-Conf.

provides sufficient justification to depart, in this instance, from the procedure set out in the Witness Contact Protocol.

17. The Chamber therefore grants the Ruto Request, subject to the same conditions as set out in its 2 June 2014 decision.³¹

18. As to the Sang Request, the Chamber accepts the Sang Defence's submission that, in the current circumstances, making a request to the Prosecution pursuant to paragraph 4 of the Witness Contact Protocol would not have been effective, given the clear difficulties of the Prosecution in contacting the Witness. The Chamber therefore grants the Sang Request, subject to the aforementioned conditions.

19. On the basis of the foregoing, the Chamber decides that the requests for interviews by the Defence shall be transmitted directly to the Witness forthwith by the VWU. The VWU shall transmit the following information to the Witness:

- 1) That the Defence would like to meet with him and interview him on matters concerning the ICC case;
- 2) Whether he is willing to meet the lawyers for Mr Ruto, or whether he wishes to decline the request. If he is willing to meet them, whether he agrees to be contacted by these lawyers directly;
- 3) Whether he is willing to meet the lawyers for Mr Sang, or whether he wishes to decline the request. If he is willing to meet them, whether he agrees to be contacted by these lawyers directly;
- 4) Whether he agrees to a representative of the Prosecution being present during the interview(s).

The VWU is directed to inform the parties of the answers given by the Witness without delay.

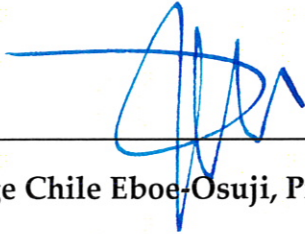
³¹ ICC-01/09-01/11-1327-Conf, paras 30-32.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

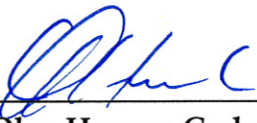
GRANTS the Ruto Request and Sang Request;

DIRECTS the VWU to transmit directly to Witness 516 the information as set out in paragraph 19 and to thereafter convey the responses of the Witness to the parties without delay.

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



Judge Chile Eboe-Osuji, Presiding Judge



Judge Olga Herrera Carbuca



Judge Robert Fremr

Dated 13 June 2014

At The Hague, The Netherlands