

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 10 December 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 Redacted Version of

Reasons for the Decision on the Replacement of Duty Counsel for 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

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others
[REDACTED]

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 Articles 64(2), 64(6)(f), and 68 of the Rome Statute (the ‘Statute’); Rule 74 of the Rules of Procedure and Evidence (the ‘Rules’); and Article 8 of the Code of Professional Conduct for counsel (the ‘Code of Conduct’), renders these Reasons for the Decision on the Replacement of Duty Counsel for a Witness.

I. PROCEDURAL HISTORY

1. This decision concerns the replacement of duty counsel assigned to Witness [REDACTED] (the ‘First Witness’), as part of the measures that may be taken under Rule 74 that deals with self-incrimination.
2. [REDACTED].¹ [REDACTED].²
3. On 17 November 2014, the Chamber heard submissions by the parties on the disclosure of summaries [REDACTED] by the First Witness, which were [REDACTED] the Office of the Prosecutor (‘Prosecution’) in the course of [REDACTED].³ The Prosecution informed the Chamber that it was in the process of transcribing a large number of [REDACTED]. As the transcription and translation of such [REDACTED] involve a time-consuming operation, possibly lasting some months, the Prosecution saw fit to disclose the content summaries in the meantime; whilst awaiting transcription and translation of the full [REDACTED].⁴
4. It is a matter of apparent interest for the defence teams for Mr Ruto and Mr Sang (the ‘Defence’) that [REDACTED] the First Witness and Witness [REDACTED] (the

¹ [REDACTED].

² [REDACTED].

³ Transcript of hearing of 17 November 2014, ICC-01/09-01/11-T-153-CONF-ENG ET (‘T-153’).

⁴ T-153, page 15, line 16 to page 18, line 4.

‘Second Witness’),⁵ the latter being scheduled to testify later in the trial, subsequent to the testimony of the former.

5. On 19 November 2014, the Chamber ruled that in their preparation of the First Witness for his testimony, the Prosecution was permitted to inform him of the fact that [REDACTED]; that the Defence has been made aware of that fact and have received summaries [REDACTED]; and, that he, too, was to be provided with copies of the same summaries.⁶
6. Given the Prosecution’s indication that there may be questions of self-incrimination arising during the testimony of the First Witness (not arising from what is revealed in [REDACTED], according to the Prosecution), the Chamber directed the Registrar to assign duty counsel (at the Court’s expense) pursuant to Rule 74.
7. On 20 November 2014, the Registry filed a Power of Attorney dated 6 November 2014, in which the First Witness indicated his appointment of [REDACTED]. In the Power of Attorney, the witness nominated [REDACTED] as his only counsel ‘in respect of all ICC-matters, including [his] appearance as [a] witness’.⁷
8. It was in those circumstances that the Counsel Support Section of the Registry retained [REDACTED] as duty counsel (the ‘Duty Counsel’) for the First Witness for purposes of Rule 74.⁸
9. After close of business hours in the evening of 20 November 2014, the Prosecution sent an email to the Chamber (the ‘Prosecution’s Email’), copying the Defence, informing the Chamber about a request made by the Duty Counsel, for access to the disclosures of [REDACTED].⁹ In that email, the Prosecution advised the Chamber and the other parties that the Duty Counsel, [REDACTED], had indicated he was

⁵ See, e.g., T-153, page 3, lines 9 to 18.

⁶ [REDACTED].

⁷ [REDACTED].

⁸ E-mail from the Registry to a Legal Officer of the Chamber, 20 November 2014 at 14:03.

⁹ E-mail from the Prosecution to Trial Chamber V-A Communications, 20 November 2014, at 18:42

'legally obligated to advise [REDACTED]'. It is to be noted that although [REDACTED] is listed as a witness for the Prosecution in the *Ruto and Sang* case, the Duty Counsel has not been assigned [REDACTED].

10. As a result of the Prosecution's Email, the Chamber scheduled an urgent hearing at 14:30 hours on 21 November 2014, for purposes of receiving submissions from all parties and participants (including the Duty Counsel) on the matters raised in the Prosecution's Email.¹⁰
11. The Chamber heard submissions as scheduled. And, to avoid a delay [REDACTED], the Chamber ruled that same day that the Duty Counsel was relieved as counsel representing the First Witness for the purposes of Rule 74, and that the Registry was to appoint a replacement counsel immediately. The Chamber indicated that these fuller reasons for the decision would be issued in due course.¹¹
12. These reasons also take into account aspects of the follow-up filing made by the Duty Counsel in consequence of the decision of 21 November 2014.

II. SUBMISSIONS

13. During the hearing of 21 November 2014, the Chamber heard submissions from the Duty Counsel and the parties on the following two issues: (i) whether the Duty Counsel, in the present circumstances, could continue to act as Duty Counsel for the First Witness (the 'First Issue'); and (ii) whether the Duty Counsel has an obligation to inform [REDACTED], and whether he may be excused from that obligation (the 'Second Issue').¹²

¹⁰ Transcript of hearing of 21 November 2014, ICC-01/09-01/11-T-158-CONF-ENG ET ('T-158'), page 2, lines 14 to 23.

¹¹ Decision on the Representation by [REDACTED], communicated to the parties and participants via e-mail (see E-mail from Trial Chamber V-A Communications, 21 November 2014 at 17:54.

¹² T-158, page 66, lines 8 to 15.

14. On the First Issue, the Duty Counsel indicated that as of the time of oral submissions on 21 November 2014, he had not yet seen any material and did not see any conflict of interests, which would merit consultation [REDACTED] on this issue.¹³ On the Second Issue, he submitted that any communication that he may have with [REDACTED] is privileged and that he would not answer any questions, or raise any issue, related to such privileged communication.¹⁴ The Duty Counsel repeated twice that he could not answer the Chamber's questions in relation to [REDACTED],¹⁵ at least not before first consulting with [REDACTED].¹⁶ He would endeavour to consult with [REDACTED] as quickly as possible and revert to the Chamber.¹⁷
15. The Duty Counsel also submitted that if he would 'detect [REDACTED] a conflict of interest, that conflict of interest will be resolved in accordance with the applicable codes of conduct'. He further added that 'if there is confidential information and obligations [he is] aware of related to confidential information, [...] these obligations will be fully respected'.¹⁸
16. The Prosecution submitted that the issue of a conflict of interests might only arise if the Duty Counsel were to be appointed as counsel for the Second Witness for the purposes of Rule 74.¹⁹ The Prosecution further averred that from their own investigative point of view, they saw no difficulty with the revelation of [REDACTED].²⁰ Nevertheless, the Prosecution submitted that counsel are obligated by the Court's Code of Conduct to maintain confidentiality of information, which is disclosed confidentially. Therefore, '[a]ny information relating to [REDACTED] that is disclosed to [the Duty Counsel] for the purposes of his representing the First

¹³ T-158, page 66, lines 18 to 21.

¹⁴ T-158, page 66, lines 22 to 24.

¹⁵ T-158, page 68, lines 1 to 3; and lines 12 to 14.

¹⁶ T-158, page 68, lines 12 to 15.

¹⁷ T-158, page 77, lines 19 to 21.

¹⁸ T-158, page 77, lines 1 to 5.

¹⁹ T-158, page 69, lines 9 to 13.

²⁰ T-158, page 69, lines 14 to 19.

Witness would be disclose[d] confidentially and he would be under a duty to the Court not to disclose it outside the Court'.²¹

17. The defence team for Mr Ruto (the 'Ruto Defence') stressed that the Court's Code of Conduct has primacy over domestic codes of conduct for the legal profession, notwithstanding the fact that such domestic codes may provide interpretative inspiration for the Court's Code of Conduct.²² The Ruto Defence submitted that if the Duty Counsel could govern himself according to the requirements of Rule 74, there would be no conflict of interests. However, if the Duty Counsel would not be able to give that undertaking, a conflict would exist.²³
18. The Ruto Defence further submitted that it is not up to counsel in a criminal case to decide unilaterally to share with third parties ([REDACTED]) confidential information received in the course of the proceedings.²⁴ In that regard, the Ruto Defence registered the particular concern that the position asserted by the Duty Counsel invites the troubling question whether he may, standing upon his own unilateral view of a professional duty or privilege, share [REDACTED] matters raised during the confidential questioning of the First Witness.²⁵
19. The defence team for Mr Sang (the 'Sang Defence') anticipated that there would be a conflict of interests for the Duty Counsel.²⁶ It pointed to Articles 7(3) and 8(1) of the Code of Conduct, which state that a counsel appearing before the Court is bound by the Court's legal framework and has to respect the professional secrecy and confidentiality of information in accordance with that legal framework.²⁷ It submitted that the existence of [REDACTED] is at this moment confidential

²¹ T-158, page 70, line 23 to page 71, line 2.

²² T-158, page 72, lines 1 to 4.

²³ T-158, page 72, lines 12 to 16.

²⁴ T-158, page 72, line 18 to page 73, line 1.

²⁵ T-158, page 74, line 22 to page 75, line 1.

²⁶ T-158, page 75, lines 5 to 9; and page 76, line 16.

²⁷ T-158, page 75, line 15 to 20.

information and that the Duty Counsel cannot rely on [REDACTED] to violate the Court's rule pertaining to confidential information.²⁸

III. ANALYSIS AND CONCLUSIONS

Preliminary Matters

Urgency

20. As indicated, the matter that gave rise to this decision was first raised in the Prosecution's Email, sent to the Chamber after business hours on Thursday 20 November 2014. In the email, the Prosecution had correctly noted that the matter was urgent. Consequently, at the beginning of the proceedings in the morning of 21 November 2014, before continuation of the testimony of the witness then on the stand, the Chamber immediately directed the parties to be prepared to make brief oral submissions at 2:30 pm, after the lunch break. An invitation was extended to the Duty Counsel, to attend and speak to the matter as well, if he was in a position to do so. The Duty Counsel duly appeared at the appointed time for submissions.
21. During the oral submissions, some of the counsel appearing (but not all of them) noted that they had not had sufficient time to prepare for their oral submissions.²⁹ It was indeed the case that prolonged notice of hearing (with the issues clearly indicated) was not given to the parties and participants. Counsel were given about four hours of notice or less that there would be a hearing resulting from the Prosecution's Email. It must be observed, however, that the hearing was fixed by the Chamber precisely in the flow of the urgency of the circumstances within which the matter was raised by the Prosecution, and which deserved an urgent decision by the Chamber. The ideal will always remain to give counsel advance notice and enough time to prepare for submissions. But, the dynamics of trial proceedings do not

²⁸ T-158, page 75, line 21 to 25.

²⁹ T-158, page 68, lines 21 to 23; and page 69, lines 2 to 3, respectively.

always permit that ideal. And it is expected that experienced and learned counsel must be ready always to make on-the-spot submissions on legal questions arising in the flow of a trial in progress, especially as regards questions occasioned by counsel themselves. The intervening period between the announcement of the hearing (in the morning) and its actual holding (in the afternoon) afforded ample time within which counsel should have prepared for their submissions — given the urgency of the matter that needed to be resolved in an on-going trial.

22. Following submissions heard from the Duty Counsel and the parties, the Chamber rendered its decision on an urgent basis on the same day. The urgency of the decision was necessitated by the need to avoid the foreseeable delay [REDACTED].

Witness's Entitlement to Counsel for Purposes of Rule 74

23. The Chamber notes the First Witness's preference for the Duty Counsel (especially communicated by the Witness's Power of Attorney). Standing on that fact, the Duty Counsel has made submissions to the effect that the First Witness had exercised his 'right to counsel of choice' which 'appears to have been violated' by virtue of the decision that relieved the Duty Counsel of his retainer in the continued representation of the First Witness for purposes of Rule 74.³⁰ This argument is founded, it seems, upon a certain understanding of the law that the Duty Counsel has indicated, including in the following way:

Though Article 64 prescribes a wide range of Trial Chambers powers, no explicit mention is made of any capacity to compel an individual not to engage a counsel of his or her choice. Given the *emphasis throughout the Statute and regulations* on the autonomy and *right of individuals* to have an *advocate of their choosing*, and furthermore the strong tendency in international human rights law of the same, it is implausible that the drafters would implicitly incorporate such a transgressive power. In the absence of an explicit power, removing an individual's lawyer merely on the grounds [REDACTED],

³⁰ [REDACTED] ('*Ex Parte* Submissions of the Duty Counsel'), para 18

as provided in the first order by the Trial Chamber, appears unlawful.³¹ [Footnotes omitted and emphases added].

24. The argument does not persuade. It lacks legal support beyond the vague allusions to law. In the Chamber's view, a *witness* does not have a determinative say on the appointment of a duty counsel for purposes of Rule 74.
25. It is important to keep in mind here that the Statute's recognition in Article 67(1)(d) of the right of an *accused* 'to legal assistance of the accused's choosing'³² is not to be confused with the entitlement of a *witness* to an 'opportunity to obtain legal advice if he or she so requests' for the purposes of a testimony subject to Rule 74. Such an entitlement for a witness, whose testimony may lead to self-incrimination, does not amount to the same free choice of counsel that an *accused* has.
26. Notably, in both Article 14(3)(d) of the International Covenant on Civil and Political Rights and Article 6(3)(c) of the European Convention on Human Rights, it is indicated — as in Article 67(1)(d) of the Statute — that the distinguishing condition of application of the right to 'legal assistance of [own] choosing' is that the proceeding in question is a trial of the claimant of the right 'in the determination of any criminal charge against' him or her.
27. But even so, in the view of this Chamber, even an accused's right to choice of counsel is not without limits, when truly it is in the interest of justice to observe sensible limitations. Serious issues about proper qualification, competence, professional misconduct, and so on, may occasion limits to the right of an accused to representation (or continued representation) by counsel of his or her choice.
28. Notwithstanding the foregoing and the fact that the Chamber is not engaged in the process of 'determination of any criminal charge against' the First Witness and the other witnesses that engaged the Rule 74 concern, the Chamber has been keen to

³¹ *Ibid*, para 17.

³² Article 67(1)(d) of the Statute.

permit witnesses to be provided with legal advice (for the purposes of Rule 74) by counsel of their choice, in the absence of a compelling reason for a judicial override of such free choice. Indeed, several of the witnesses who have thus far appeared, and whose testimony was subject to Rule 74, have been allowed their choice of counsel. It is in the same vein that the Chamber welcomed the First Witness's choice of [REDACTED] as the duty counsel for the witness. But subsequent developments strongly recommended the decision both to relieve him of the role of duty counsel for the First Witness, in the interest of proper administration of justice in the case, and to immediately direct the Registrar to appoint a new duty counsel for the witness.

A Further Preliminary Matter

29. On another preliminary matter, the Chamber notes, at this juncture, the submissions heard from the Duty Counsel in the following regard: that if he would 'detect [REDACTED] a conflict of interest, that conflict of interest will be resolved in accordance with the applicable codes of conduct'; and that 'if there is confidential information and obligations [he is] aware of related to confidential information, [...] these obligations will be fully respected'.³³ However, the submissions of the Duty Counsel both in terms and in the oral tenor of his arguments left matters considerably uncertain as to whether he would or would not disclose confidential information [REDACTED]— a matter quite separate from whether he would respect the obligation of confidentiality by refraining from revealing such information [REDACTED]. Matters were not helped in this regard by his refusal to have an *ex parte* audience with the Chamber for the purpose of answering the simple question whether or not he had already disclosed the concerned information [REDACTED].
30. An overriding concern remains the Duty Counsel's apparent predisposition to consider that he alone is best able to decide how to resolve troubling questions that

³³ T-158, page 77, lines 1 to 5.

intersect his client's interests and those of other parties affected by the litigation before the Chamber.

Lawyers Code of Conduct as Part of the Rule of Law

31. As the questions presented concern the professional duties of counsel appearing before the Chamber, it is considered useful to make the following observations.

32. It is recalled that the Code of Conduct, applicable to counsel appearing before the Court, including those representing witnesses,³⁴ addresses the duties of counsel in case of a conflict of interests.³⁵ It also obliges counsel to respect the Court's rules on secrecy and confidentiality and not to reveal any confidential information, unless such disclosure is provided for under the Court's legal framework.³⁶ When these questions arise in the face of the Trial Chamber, in the course of an on-going trial, the Chamber is authorised to resolve them, pursuant to duties and powers prescribed under Article 64(2) and Article 64(6)(f) in particular. The Chamber does not accept, then, the thesis implicit in aspects of the submissions heard from the Duty Counsel to the effect that a lawyer's duty to his clients is cast in terms so absolute as to prevent the concerned lawyer from even providing to the adjudicating judges such information on an *ex parte* basis — at the explicit invitation of the judges — as may enable the judges (acting with due sensitivity) to strike an informed balance between the competing interests engaged in the question presented for determination.

33. In the nature of things, the lawyer's code of professional conduct is necessarily part of the rule of law. It is never a code of norms existing at a place outside of — or superior to — the rule of law in general. It seldom justifies any lawyer to assert the position that it is up to him or her alone to decide how to act, as a participant in the judicial process, when the interests of a particular client collide with the interests of

³⁴ See Article 1 of the Code of Conduct.

³⁵ Article 16 of the Code of Conduct.

³⁶ Article 8 of the Code of Conduct.

other persons or clients or indeed with the broader interests of justice. To the contrary, in a free and democratic society operating within the rule of law, lawyers' professional obligations are generally couched in a way that permits the overarching and modulating influence of the law and the interests of justice as ministered by judges having jurisdiction in the matter. Three relevant deontological documents that indicate that theme at the international level are the *International Principles on Conduct for the Legal Profession* of the International Bar Association (the 'IBA Principles of Conduct'), the *Charter of Core Principles of European Lawyers* of the Council of Bars and Law Societies of Europe (the 'CCBE Charter of Core Principles'), and the *CCBE Code of Conduct for European Lawyers* (the 'CCBE Code of Conduct').

34. The IBA Principles of Conduct clearly state that a lawyer's professional obligations are not exclusively intended — and non-negotiably so — only for the advancement and protection of the interests of his or her clients. Rather, beyond the narrow interests of clients,

the lawyer, who faithfully serves a client's interests and protects the client's rights, also fulfils the functions of the lawyer in society — which are to forestall and prevent conflicts, to ensure that conflicts are resolved in accordance with recognised principles of civil, public or criminal law and with due account of rights and interests, to negotiate and draft agreements and other transactional necessities, to further the development of the law, and to defend liberty, justice and the rule of law.³⁷

35. To that effect, the IBA's fifth Principle of Conduct states as follows: 'A lawyer shall treat client interests as paramount, subject always to there being no conflict with the lawyer's duties to the court and the interests of justice, to observe the law, and to maintain ethical standards.'³⁸ [Emphases added.]

³⁷ IBA, *International Principles on Conduct for the Legal Profession* (Adopted by the IBA at the Warsaw Council 2011) p 10.

³⁸ IBA Principles of Conduct, Principle 5 (Clients' interest).

36. In a similar vein, the CCBE Code of Conduct also recognises the overarching and modulating influence of the rule of law. The general canon of the Code puts it as follows:

*Subject to due observance of all rules of law and professional conduct, a lawyer must always act in the best interests of the client and must put those interests before the lawyer's own interests or those of fellow members of the legal profession.*³⁹
[Emphases added.]

37. Indeed, the modulations indicated above are but distillates of elemental backgrounds of the indicated understanding that the interests of clients do not always control the resolution of questions of professional conduct of lawyers when tensions exist between those interests and other interests that are also important to society. In this respect, the Commentary to the CCBE Charter of Core Principles recognises, with respect to the 'Principle of Respect for the Rule of Law and the Fair Administration of Justice', that the lawyer is not only a legal representative to the client, but that the lawyer is also 'an officer of the court' or 'a minister of justice.'⁴⁰ And that raises a special dilemma in the context of the 'Principle of Loyalty to the Client', described as follows:

Some of the most delicate problems of professional conduct arise from the interaction between the principle of loyalty to the client and principles which set out the lawyer's wider duties – principle (d) (dignity and honour), principle (h) (respect towards professional colleagues) and in particular principle (i) (respect for the rule of law and the fair administration of justice). In dealing with such issues the lawyer must make it clear to the client that the lawyer cannot compromise his or her duties to the court and to the administration of justice in order to put forward a dishonest case on behalf of the client.⁴¹

38. As will be seen presently, the CCBE Code of Conduct makes clear that the lawyer's duty as an officer of the court or minister in the administration of justice is broader than the concern against the odious conduct of courtroom dishonesty on behalf of

³⁹ CCBE *Code of Conduct*, General Principles, para. 2.7 (The Client's Interest).

⁴⁰ CCBE, *A Commentary on the Charter of Core Principles of the European Legal Profession*, Principle (i) – respect for the rule of law and the fair administration of justice.

⁴¹ CCBE, *A Commentary on the Charter of Core Principles of the European Legal Profession*, Principle (e) - loyalty to the client.

the client. But, before engaging that discussion, it may be important to consider the dilemma presented to the lawyer as elaborated upon in the CCBE Code of Conduct, as follows:

In a society founded on respect for the rule of law the lawyer fulfils a special role. The lawyer's duties do not begin and end with the faithful performance of what he or she is instructed to do so far as the law permits. A lawyer must serve the interests of justice as well as those whose rights and liberties he or she is trusted to assert and defend and it is the lawyer's duty not only to plead the client's cause but to be the client's adviser. Respect for the lawyer's professional function is an essential condition for the rule of law and democracy in society.

A lawyer's function therefore lays on him or her a variety of legal and moral obligations (sometimes appearing to be in conflict with each other) towards:

- the client;
- the courts and other authorities before whom the lawyer pleads the client's cause or acts on the client's behalf;
- the legal profession in general and each fellow member of it in particular;
- the public for whom the existence of a free and independent profession, bound together by respect for rules made by the profession itself, is an essential means of safeguarding human rights in face of the power of the state and other interests in society.⁴²

39. What then could be involved in the lawyer's duty towards the Court? As indicated earlier, it comprises more than the requirement to avoid courtroom dishonesty. And, that is evident in the following outlines of the duty identified in the CCBE Code of Conduct, under the fourth canon of the Code entitled 'Relations with the Courts':

4.1. Rules of Conduct in Court

A lawyer who appears, or takes part in a case, before a court or tribunal must comply with the rules of conduct applied before that court or tribunal.

4.2. Fair Conduct of Proceedings

A lawyer must always have due regard for the fair conduct of proceedings.

4.3. Demeanour in Court

A lawyer shall while maintaining due respect and courtesy towards the court defend the interests of the client honourably and fearlessly without regard to the lawyer's own interests or to any consequences to him- or herself or to any other person.

⁴² CCBE, *Code of Conduct for European Lawyers*, Preamble, para 1.1.

4.4. False or Misleading Information

A lawyer shall never knowingly give false or misleading information to the court.

4.5. Extension to Arbitrators etc.

The rules governing a lawyer's relations with the courts apply also to the lawyer's relations with arbitrators and *any other persons exercising judicial or quasi-judicial functions*, even on an occasional basis. [Emphases added.]

40. It thus becomes clear that the CCBE Code of Conduct requires European lawyers to comply with the rules of conduct applied before a court or tribunal before which they appear as participants in a case. The rules of conduct that must be observed are not only the deontological rules applicable at the host forum, but also the rules that guide the conduct of the proceedings before that court or tribunal. Lawyers are free to decline to participate in the proceedings or to withdraw therefrom. But, when they voluntarily participate, they must respect the legal framework of the court or tribunal before whom they appear.
41. In this connection, the Chamber must note that, among other measures, there is ample authority for any court of law to deny right of audience — or strike from the list of counsel — lawyers who consider themselves beyond the powers of the particular court or the legal framework that guide the work of that court. At the ICC, such a power is sufficiently accommodated in the text of Article 64(2) that requires a Trial Chamber to ensure a fair trial and expeditious conduct of the proceedings; but also by Article 64(6)(f) which requires the Trial Chamber to '[r]ule on any other relevant matters.' And there is ample precedent in courts and tribunals for the exercise of the power to relieve counsel of their privilege of audience where the interest of justice requires. The authority will not be exercised lightly, but it must be exercised when necessary, for purposes of orderly conduct of the affairs of the particular court.
42. The ultimate essence in the foregoing discussion may be articulated as follows. In extremis, there may be much to be said for lawyers who practice in a political

tyranny: they may understandably insist upon protecting the paramount interests of clients, notwithstanding the diktats either of laws that further the objectives of the ruling tyranny or of judicial orders of courts that demonstrably lack independence from the oppressive regime. But in a free and democratic society, things must work differently. The overarching rule of law necessarily involves the adjustment of the tensions that arise from time to time among competing interests within society. These adjustments are made in the applicable substantive and the procedural law, and are especially articulated in the decisions of the Courts that would have taken into account the specific circumstances of the particular cases under consideration. Within that complex, the function of the court cannot be the exclusive accommodation of the insular interests that any lawyer may assert for a particular client in absolute terms, without regard to the need for the law to regulate the interaction between the interests of that client and other important interests in society. The power of a Court to adjust the interest of a lawyer's client relative to other intersecting interests before the Court cannot be inferior to the power of the Court to adjust the interests between a prosecutor and an accused or between a plaintiff and a defendant. That is the essential message of the IBA and CCBE deontological texts considered above. It is for that reason that those codes generally couch the lawyer's protection of a client's interests as *'subject always to there being no conflict with the lawyer's duties to the court and the interests of justice, to observe the law, and to maintain ethical standards.'*⁴³

43. It is possible, then, to state a simple, practical rule of thumb for the lawyer facing the dilemma presented when a decision of a Court requires the lawyer to act in a way that the lawyer considers inconsistent with the lawyer's duties to the client. The simple guide is this. A lawyer on his or her own must in the first place always remember to — and should — insist with vigour on the protection of his client's interest even before the Court. The lawyer is to make every effort, with due dignity,

⁴³ See IBA Principles of Conduct, Principle 5 (Clients' interest).

to ensure that the Court understands the lawyer's viewpoint and concerns on the merits of the concerns — not in the bare assertion of a strongly held view or position without more. In this regard, any available opportunity for *ex parte* conference with the judges may be pursued, as appropriate. Failure to engage in that initial resolute assertion of the client's interests may amount to an abnegation of the professional duty to clients. But, having asserted a client's interest with unflinching vigour in that way, the lawyer must in the end obey the decisions of the Court — as a matter of the rule of law as it operates in a free and democratic society — and may pursue all available appellate procedures against a decision that he or she finds unpalatable. In the end, disciplinary bodies of the Bar or Law Society in any free and democratic society can be trusted to recognise the clear defence available to the lawyer⁴⁴ who would not have acted as he or she did, but for a direct order from the Court.

⁴⁴ So, too, can prosecutors and judges, where there is any serious concern about a criminal proceeding against a lawyer for violation of professional secrecy: see the *Ex Parte* Submissions of the Duty Counsel, *supra*, para 16.

The Issues Presented by the Prosecution's Email

I. First Issue

44. A minimum of these two concerns are implicated in the First Issue: (i) avoidance of the possibility of conflict of interests; and, (ii) preservation of the confidentiality of the trial proceedings.

Conflict of interests

45. The default interest that raises issues of conflict of interests as a matter of professional responsibility for lawyers is the interest of a client. The interests that may come into conflict with the client's interest include — but are not limited to — the following: (i) the interest of the lawyer representing the client; (ii) the interest of another client that the lawyer also represents; and (iii) the interest of justice. When any of these other interests come into conflict with that of the lawyer's client, the question often arises whether the lawyer may continue to act in the case.
46. In the Chamber's view, there is a foreseeable risk of conflict of interests between the interests of the First Witness and [REDACTED]. The risks arise, first, because of the specific information that the Prosecution's [REDACTED]. The Duty Counsel himself appears to have clearly recognised the prospect of [REDACTED]. As he put it: '[REDACTED]'.⁴⁵ The Defence Counsel's submissions are generally to the same effect. That possibility thus raises the question whether the Duty Counsel ought — as a matter of prudence (on his part and on the part of the Chamber) — to continue in his role as duty counsel for the First Witness.
47. The Chamber notes that there is a general requirement of Bar ethics around the world — [REDACTED] — that places upon counsel the primary duty to take care to

⁴⁵ *Ex Parte* Submissions of the Duty Counsel, *supra*, para 27.

avoid potential conflicts of interest.⁴⁶ There is much wisdom in that requirement: considering that, long before a case comes to Court, it is counsel that are armed with the information that enables them to predict the potential for conflict of interests. But that primary obligation on counsel to predict (as best they can) the potential for conflicts of interest and take steps to avoid them, does not negate the role of a Court to take appropriate steps to avoid the potential for such a conflict where timeous information has come to the attention of the Court in that regard.

48. According to the Duty Counsel, no conflict of interests exists to his knowledge at the moment.⁴⁷ Apparently to the same effect, the Prosecution also submitted that it sees no conflict of interests between [REDACTED]; but that measures could be taken to resolve such a conflict of interests if it does materialise later in the proceedings.⁴⁸ The difficulty with that suggestion is that it is counterintuitive to the value of the *potential* in the rule that steps should be taken in advance to avoid conflicts of interest when indicia of such potential become apparent. The reason for that avoidance rule is that the damage may not always be easily remedied when a potential conflict of interests materialises later in the course of a trial. There is much wisdom in taking anticipatory action to avert a difficulty with the benefit of foresight. In circumstances in which, as the Duty Counsel submits, the '[REDACTED]', the Chamber is not convinced that it was desirable, from the perspective of conflict of interests between [REDACTED], to permit the Duty Counsel to continue to represent the First Witness for purposes of Rule 74.

49. The second risk indicated in the nature of conflict of interests is apparent in the Duty Counsel's submissions reflecting an insistence that — [REDACTED] — the Duty Counsel is professionally obligated to reveal [REDACTED] that the Duty Counsel gains while representing the First Witness for the purposes of Rule 74. It needs to be stressed, for present purposes, that the Duty Counsel has not been retained to

⁴⁶ [REDACTED].

⁴⁷ T-158, page 67, lines 17 to 19.

⁴⁸ T-158, page 69, lines 4 to 13 and page 71, lines 14 to 20.

represent [REDACTED]. But, the Duty Counsel's insistence that he has a right or duty to inform [REDACTED] about matters of interest that the Duty Counsel learns in the course of representing the First Witness raises the potential for conflict of interests not only as regards the interests [REDACTED], but also between the interests which the Duty Counsel asserts ([REDACTED]) and the interest of justice in maintaining the confidentiality of the proceedings in the necessary part.

50. The potential for conflict of interests in this respect arises because the Duty Counsel was retained to represent the First Witness as counsel for purposes of Rule 74, in light of the possibility of self-incrimination. The Duty Counsel's retainer in this regard (at the Court's expense) was part of the measures that the Chamber usually takes to reassure a witness subject to Rule 74. More than the assignment of counsel for the witness, the measures under Rule 74 include maintaining the confidentiality of certain types of information revealed in the testimony of the witness. The Duty Counsel's insistence that he is professionally obligated to reveal [REDACTED] information that comes into his knowledge by virtue of his representation of the First Witness, regardless of the Chamber's directions to the Duty Counsel, thus clearly sets up the interests of the First Witness (as the beneficiary of the confidentiality measures under Rule 74) and [REDACTED]. There is no known principle of justice that requires the Chamber to suffer the Duty Counsel to use his privileged position in the representation [REDACTED]. There is an evident conflict of interests in that.

51. Worse still, the Duty Counsel asserts a position that would make it impossible to inquire into any breach of the Rule 74 confidentiality — by his repeated insistence that he could never be compelled to 'inform the Trial Chamber about the content of privileged communications he may or may not have had [REDACTED]⁴⁹ (including [REDACTED]).

⁴⁹ See *Ex Parte* Submissions of the Duty Counsel, *supra*, para 22.

52. The manner in which the Duty Counsel's insistence also raises the potential for conflict of interests between the interests that the Duty Counsel asserts [REDACTED] and the interests of justice is appropriately discussed below as regards confidentiality of proceedings.

Confidentiality of Proceedings

53. Beyond the question of conflict of interests, the positions asserted by the Duty Counsel as regards the issues presented also raises certain difficulties in the nature of the need to preserve the confidentiality of the trial proceedings in the necessary part — not only as regards information that should be kept confidential as an ordinary feature of the confidential part of the proceedings, but also as a matter of the special requirements of Rule 74, for which the Duty Counsel was retained as counsel for the First Witness.
54. Beyond the concern that the Duty Counsel's insistence that he is obligated to pass on [REDACTED] information that comes into the Duty Counsel's knowledge by virtue of his representation of the First Witness, regardless of the Chamber's directions to the Duty Counsel, there is this specific concern. Long before the arrival of the Duty Counsel to the current proceedings as duty counsel for the First Witness for the purposes of Rule 74, the proceedings have been guided by a consistent regime of rulings by the Chamber, directing parties and participants to maintain the confidentiality of certain manner of information revealed to them as a necessary incident of their participation in the proceedings. Among the information to be kept confidential in that manner — but by no means the only ones — are the fact that protected witnesses are witnesses in the case, as well as the pseudonyms of protected witnesses. This will necessarily require the Duty Counsel to avoid revealing [REDACTED] information such as: (a) the fact that he is representing the First Witness in this case as counsel for purposes of Rule 74; (b) information or legal advice that may enable [REDACTED] to discern easily that the First Witness is the

person whom the Duty Counsel is representing; (c) information that may enable [REDACTED] to discern the person testifying under the pseudonym of the First Witness. But, according to the Duty Counsel's submissions, his professional obligations [REDACTED] may well be inconsistent with this regimen of confidentiality. The submissions of the Duty Counsel appears to be to the effect that he will not yield to the Chamber's orders to refrain from violating such confidentiality if he considers that he should provide such confidential information [REDACTED].

55. What is more, the special feature of the First Witness testifying under the protection of Rule 74, also engages, as mentioned earlier, the need to maintain the confidentiality of certain aspects of this witness's testimony. This has been a regular feature of the Chamber's orders as regards every witness who has testified under the protection of Rule 74. Again, the Duty Counsel's position is not satisfactorily consistent with a predisposition to submit to this regime of confidentiality, even with specific direction of the Trial Chamber.
56. The Chamber is mindful of the Duty Counsel's averment that 'if there is confidential information and obligations [he is] aware of related to confidential information, [...] these obligations will be fully respected'.⁵⁰ The Chamber is satisfied that this averment would cover violations of confidentiality in the nature of gratuitous revelations to the public [REDACTED]. But, as indicated earlier, the averment does not appease the concern that the Duty Counsel would not reveal [REDACTED] confidential information that the Duty Counsel considers himself entitled to reveal to them, regardless of the existing regimen of confidentiality and the specific direction of the Chamber. The lingering concern stems not only from the Duty Counsel's indicated views [REDACTED] in that regard; but also from his amply indicated indisposition to submit to inquiry into any breach of the Rule 74 confidentiality, given his repeated insistence that he could not be compelled to

⁵⁰ T-158, page 77, lines 1 to 5.

‘inform the Trial Chamber about the content of privileged communications he may or may not have had [REDACTED]’.

II. Second Issue

57. The Second Issue necessarily arises as an incident of respect of confidentiality of the proceedings. In that regard, the Chamber, parties and participants are interested in not only maintaining the confidentiality of proceedings as indicated above, but also to know if such confidentiality has already been compromised and the extent to which that is the case.
58. It is noted in that connection that the extent of the Duty Counsel’s knowledge of confidential information, as may have been revealed to him in consequence of his appearance thus far as duty counsel to the First Witness, is that [REDACTED]. The Duty Counsel, it seems, has not received information from the Court or the parties in the nature of the summaries, the transcripts or [REDACTED]. The only concern at this stage would appear to be limited to the question whether he may reveal [REDACTED] or whether he had already made that revelation as of the time of the oral submissions of 21 November 2014.
59. Against the foregoing background, the Chamber ordered the Duty Counsel to keep confidential any such information that came into his knowledge in consequence of such information having been revealed to him in this case, by virtue of his role thus far as duty counsel for the First Witness; in particular, the Chamber ordered the Duty Counsel to refrain from communicating such information [REDACTED]. The Duty Counsel was further ordered to inform the Chamber, following his consultation with the relevant authorities in the governance structure of his national Bar, whether he has already disclosed [REDACTED]; and when any such disclosure [REDACTED] would have been made.

60. In his follow-up filing communicated to the Chamber on 28 November 2014, the Duty Counsel appeared to have continued to insist as follows: (a) that the Chamber ought not require him to refrain from communicating [REDACTED] information that came into the Duty Counsel's knowledge in the course of his representation of the First Witness; nor (b) ought the Chamber to require him to disclose to the Chamber whether or not he has already revealed such confidential information [REDACTED]. Nonetheless, the Duty Counsel was able to communicate the following information to the Chamber:

[REDACTED] remains unable to inform the Trial Chamber about the content of privileged communications he may or may not have had [REDACTED]. What [REDACTED] is, at present, authorized to inform the Chamber about, is that [REDACTED]. However, professional obligations [REDACTED], as well as the exposure to disciplinary proceedings, and even criminal prosecution [REDACTED], prevent [REDACTED] from informing the Chamber [REDACTED].⁵¹

61. The Chamber is satisfied that the information quoted above from the Duty Counsel's filing is sufficient, in the circumstances, to address the needs of the Chamber and of the parties and participants to know whether [REDACTED] information of interest to the current proceedings. In the current circumstances, the Chamber sees no need, at this time, for further action on its part. Any remaining concern has been adequately addressed by his removal from the case.

IT IS FOR THE FOREGOING REASONS, THAT THE CHAMBER IN ITS DECISION OF 21 NOVEMBER 2014

RELIEVED the Duty Counsel from further representation in this case, as duty counsel for the First Witness;

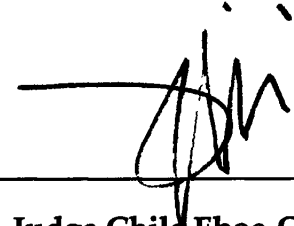
INSTRUCTED the Counsel Support Section to assign new duty counsel to the First Witness, with immediate effect;

⁵¹ *Ex Parte* Submissions of the Duty Counsel, *supra*, para 22

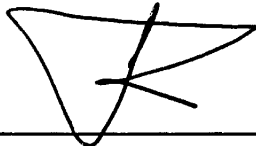
ORDERED the Duty Counsel to respect the confidentiality of the proceedings; and specifically to refrain from communicating confidential information [REDACTED]; and

ORDERED the Duty Counsel to inform the Chamber whether he has already disclosed [REDACTED]; and when any such disclosure [REDACTED] would have been made.

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



Judge Chile Eboe-Osuji
(Presiding)

Judge Olga Herrera Carbuccion

Judge Robert Fremr

Dated 10 December 2014
At The Hague, The Netherlands