

**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**



Original: **English**

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

Date: **23 February 2015**

**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**

**Public Redacted Version of “Submissions – including three Confidential and Ex Parte Annexes” filed on 27 November 2014, with Confidential Redacted Version of Annex 1, and Public Redacted Versions of Annexes 2 and 3**

**Source:** [REDACTED]

*Document to be notified in accordance with regulation 31 of the Regulations of the Court to:*

**The Office of the Prosecutor**

**Counsel for William Samoei Ruto**

**Counsel for Joshua Arap Sang**

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the Defence**

**States Representatives**

*Amicus Curiae*

## **REGISTRY**

---

---

**Registrar**

**Counsel Support Section**

Herman von Hebel

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and  
Reparations Section**

**Other**

## **I. INTRODUCTION**

1. During a hearing on 21 November 2014, the Trial Chamber ordered [REDACTED] not to reveal to witness [REDACTED] that [REDACTED]. The Chamber further directed [REDACTED] to consult with the [REDACTED], in order to be in a position to inform the Chamber whether he had already, before the 21 November 2014 hearing took place, informed witness [REDACTED]. In its Decision of 21 November 2014, the Chamber ordered [REDACTED] to inform the Chamber whether he has already disclosed [REDACTED] to witness [REDACTED] and when any such disclosure would have been made.

2. In this filing [REDACTED] respectfully informs the Trial-Chamber that complying with some of the orders of 21 November 2014 would constitute a breach of his legal duties under [REDACTED] and can expose him to [REDACTED] criminal charges. As such, [REDACTED] cannot comply with certain orders of the Trial Chamber. It is submitted below, firstly, that there is no legal basis for the order relieving [REDACTED] as counsel from representing witness [REDACTED], secondly, that compliance with the orders would breach applicable law concerning lawyer-client privilege, and thirdly, that the order of the Chamber violates the rights of witness [REDACTED].

## **II. CONFIDENTIALITY**

3. [REDACTED].

## **III. PROCEDURAL HISTORY**

4. [REDACTED].<sup>1</sup>

5. On 21 November 2014, a hearing took place before Trial Chamber V(A) in which a number of issues concerning witness [REDACTED] were discussed.

6. On 21 November 2014, Trial Chamber V(A) issued the “Decision on the Representation by [REDACTED] as Duty Counsel for Witness [REDACTED]”. This Decision was only notified to [REDACTED] in the evening of 26 November, by an e-mail from [REDACTED].

---

<sup>1</sup> ICC-01/09-01/11-781-Conf-Exp

#### IV. APPLICABLE LAW

7. Article 64 of the Statute provides for the powers and duties of the Trial Chamber during the trial generally. In performing these functions, the Chamber specifically may provide for the protection of confidential information under Article 64(6)(c) of the Statute.

8. The Court shall take appropriate measures for the protection of victims and witnesses under Article 68 of the Statute.

9. Article 21 (3) of the Statute obliges the Chamber to interpret and apply the applicable law of the Court in consistence with internationally protected human rights law.

10. Under Rule 73 of the Rules and Procedure ('RPE'), communications made in the context of the professional relationship between a person and his or her legal counsel shall be regarded as privileged, and consequently not subject to disclosure.

11. Rule 74 RPE concerns self-incrimination by witnesses generally. Under sub-Rule 74 (3) (a) RPE, a witness may object to making any self-incriminating statement, and sub-Rule 74(10) RPE provides that the Trial Chamber may suspend the taking of testimony where an issue of self-incrimination arises. Under this latter circumstance the Chamber should provide the witness with an opportunity to obtain legal advice.

12. The legal advice to be provided to witnesses under rule 74 RPE is reiterated and further elaborated upon in the Trial Chamber's Protocol on the practices to be used to familiarise witnesses for giving testimony applicable in the case *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* (ICC-01/09-01/11) and the case *The Prosecutor v. Uhuru Muigai Kenyatta* (ICC-01/09-02/11).<sup>2</sup> Elaborating this, Trial Chamber V(A)'s first Decision on the Conduct of Trial Proceedings recognized the importance of legal assistance to witnesses by directing the Registry to "make all necessary arrangements to provide independent legal advice from a qualified lawyer to witnesses [...] who may incriminate themselves during their testimony".<sup>3</sup>

13. Under Regulation 73 (2) of the Regulations of the Court ('RoC') and Regulation 129 of the Regulations of the Registry ('RoR'), the Registrar may appoint duty counsel if a person requires legal assistance and "shall take into account the wishes of the person" as one of four relevant factors.

<sup>2</sup> ICC-01/09-01/11-704-Anx, paras 58-61.

<sup>3</sup> ICC-01/09-01/11-847-Corr, paras 29-30.

14. Article 8 of the ICC Code of Professional Conduct for Counsel prescribes that counsel shall ensure respect for professional secrecy and the confidentiality of information in accordance with the Statute, the Rules of Procedure and Evidence and the Regulations of the Court.<sup>4</sup>

15. Under article 15 (3) of the ICC Code of Conduct for Counsel, a counsel shall ensure the confidentiality of communication with the client.

16. Under [REDACTED], a lawyer is bound by a duty of secrecy.<sup>5</sup> [REDACTED] prescribes a penalty of imprisonment [REDACTED] or a fine for anyone who is bound to secrecy by profession or by law and violates this secrecy.<sup>6</sup>

## **V. SUBMISSIONS**

### **A. There is no legal basis for relieving a counsel from representing a client**

17. At the outset [REDACTED] objects to being relieved by the Trial Chamber from representing witness [REDACTED] as his counsel during proceedings. Though Article 64 prescribes a wide range of Trial Chamber 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<sup>7</sup> 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<sup>8</sup>, 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], as provided in the first order by the Trial Chamber, is unlawful.

18. Witness [REDACTED] right to counsel of choice has been violated. Regulation 73(2) RoC provides that any "person" may be assigned counsel other than their choosing under only two exceptions "if a person requires legal assistance and has not yet secured that assistance, or when his or her counsel is unavailable and has consented to the appointment of duty counsel". To the extent that the Trial Chamber considers the circumstances exceptional and meriting interference with this right, it has failed to explore less intrusive ways of interfering with the witnesses rights, for example, by allowing his counsel of choice to provide representation at all other points other

<sup>4</sup> ICC Code of Professional Conduct for Counsel, available at: [http://www.icc-cpi.int/NR/rdonlyres/BD397ECF-8CA8-44EF-92C6-AB4BEBD55BE2/140121/ICCASP432Res1\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/BD397ECF-8CA8-44EF-92C6-AB4BEBD55BE2/140121/ICCASP432Res1_English.pdf)

<sup>5</sup> [REDACTED].

<sup>6</sup> [REDACTED].

<sup>7</sup> See for example, Article 61(1)(b), and Regulation 73 (2) RoC

<sup>8</sup> Article 14(3)(b) of the International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html>.

than [REDACTED]. That the Trial Chamber has ordered Counsel Support Services (“CSS”) to appoint a new counsel without consulting witness [REDACTED] and without enabling him to make a free and informed decision as to second counsel of choice from the counsel available on the list shows the disproportionate nature of the Trial Chamber’s response.

19. In abruptly ordering [REDACTED] “relieved from further representation”, the Trial Chamber has not only deprived witness [REDACTED] of the counsel of his choice, but also denied him assistance from a lawyer who is knowledgeable of [REDACTED]. In this respect, it is to be noted that counsel has been directly approached by the Sang Defense to disclose confidential information related to [REDACTED].<sup>9</sup> With the Defense teams in this case virtually embodying the State of Kenya, and reasonably expected to submit questions related to [REDACTED], in answering certain questions, witness [REDACTED] should be adequately advised on [REDACTED]. With [REDACTED] not being on the list of ICC counsel, only [REDACTED] is capable of adequately advising him with regards to these issues.

20. This particular circumstance is not unanticipated. The Trial Chamber has been informed well in advance about witness [REDACTED] intention to have broader representation due to [REDACTED].<sup>10</sup> Seen in this light, the Trial Chamber has acted in violation of its obligations under Article 68(1) to protect the rights and interests of witnesses.

21. To the extent that the Trial Chamber’s orders suggest that [REDACTED], the burden of taking precautions should have been placed upon the various organs of the Court. The various communications and decisions cited in this request appear to show that all parties are aware that [REDACTED] is representing both witness [REDACTED] and witness [REDACTED]. As early as 2013, the Trial Chamber was notified of [REDACTED].<sup>11</sup> The Prosecution was certainly aware of [REDACTED] representing [REDACTED] and witness [REDACTED], as is, among other things, confirmed by the e-mail attached as Annex 3 from [REDACTED]. In this e-mail [REDACTED] informs [REDACTED] that a) [REDACTED] is aware he represents both witnesses, and b) [REDACTED] was referred to [REDACTED] by the Prosecution as counsel for both witnesses. The Chamber’s attention is drawn to the fact, also in light of the hearing of 21 November 2014, that the Sang Defence team has been aware of [REDACTED] representing both witnesses at least since 17 October. With this in mind, given the extensive resources of the organs of the International Criminal Court, it is unfair to place the burden of [REDACTED]

---

<sup>9</sup> Annex 3

<sup>10</sup> ICC-01/09-01/11-781-Conf-Exp

<sup>11</sup> ICC-01/09-01/11-781-Conf-Exp

precautions upon counsels - whose primary concerns are honoring their professional obligations to their clients. In any case, counsels are largely precluded from [REDACTED]. Where these other organs fail to take necessary precautions, vulnerable witnesses should not have to suffer the consequences.

## **B. Confidential and privileged communications**

22. [REDACTED] remains unable to inform the Trial Chamber about the content of privileged communications he may or may not have had with his clients. What [REDACTED] is, at present, authorized to inform the Chamber about, is that witness [REDACTED] has become aware of [REDACTED]. However, professional obligations towards clients, as well as the exposure to disciplinary proceedings, and even criminal prosecution under [REDACTED] law, prevent [REDACTED] from informing the Chamber how witness [REDACTED] has become aware of this fact.

23. As outlined above in the applicable law, the [REDACTED] places [REDACTED] lawyers under a duty of secrecy. In addition to disciplinary proceedings, the [REDACTED] prescribes a penalty [REDACTED] detention for violation of this duty. On top of [REDACTED]'s national professional obligations, the rules of the ICC also call into question the legality of the Chamber's order. Rule 73(1) refers to "communication made in the context of the professional relationship between *a person* and his or her counsel" (emphasis added) as not being subject to disclosure. Articles 8 and 15(3) of the ICC Code of Conduct for Counsel speak neutrally, not about the accused, but rather about an obligation to protect the confidentiality and secrecy of counsel's "clients". Thus the Code of Conduct also emphasises the statutory protection of client-counsel confidentiality which should not easily be displaced.

24. As early as Monday 24 November [REDACTED] informed the Office of the Prosecutor about the advice he received from the [REDACTED], requesting the Prosecution to submit it to the Trial Chamber. The e-mail from [REDACTED] to [REDACTED], including the [REDACTED], is annexed to this request in Annex 2. The advice confirms that [REDACTED] has acted fully in accordance with his professional obligations; it also confirms that there is no conflict of interest preventing [REDACTED] from representing both witnesses. In addition, the redacted version of the request for advice sent [REDACTED] is attached in Annex 1. It is submitted that it gives the Trial Chamber insight as to how [REDACTED] has approached this issue in good faith, acting in the interests of his clients, and with full respect for the applicable law.

### C. The Rights of Witness [REDACTED]

25. In its Decision of 21 November 2014, the Chamber ordered [REDACTED] to keep any information that has come into his knowledge as duty counsel for witness [REDACTED] confidential, specifically the fact of [REDACTED]. [REDACTED] submits the following observations in respect of this order.

26. Firstly, this matter is moot, because [REDACTED] does not know more than his client - witness [REDACTED] - at this stage. [REDACTED] has not been given access to [REDACTED]. He only knows of the *existence* of [REDACTED], but witness [REDACTED] has also become aware of that.

27. Secondly, on 20 November 2014, the Office of the Prosecutor informed [REDACTED] directly and without any condition about the fact that [REDACTED]. When providing this information, the Prosecution was fully aware that [REDACTED] is representing witness [REDACTED], [REDACTED] as an ICC witness. Under the current circumstances, [REDACTED]. The fair trial rights enshrined in article 6 of the European Convention on Human Rights apply to anyone with a criminal charge against him.<sup>12</sup> A person is 'charged' when he or she is notified by the competent authority of an allegation that he or she has committed a criminal offence or when preliminary investigations are opened.<sup>13</sup>

28. However, the notion of charge has also been given a broader meaning in human rights case law. In *Foti v. Italy* (ECtHR) it is said:

Whilst "charge", for the purposes of Article 6 § 1 (art. 6-1), may in general be defined as "the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence", it may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect (see, inter alia, the *Eckle* judgment of 15 July 1982, Series A no. 51, p. 33, § 73).<sup>14</sup>

<sup>12</sup> European Convention on Human Rights, article 6, available at:

[http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf).

<sup>13</sup> Case of *Eckle v Germany*, Judgment of 15 July 1982, para. 73, available at

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57476>; Case of *Deweert v Belgium*, Judgment of 27 February 1980, para. 42, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57469>; Case of *Ringeisen v Austria*, Judgment of 16 July 1971, Series A no. 13, para. 110, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57565>.

<sup>14</sup> Case of *Foti v Italy*, para. 52, Judgment of 10 December 1982, Application no. 7604/76; 7719/76; 7781/77; 7913/77, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57489>.



29. It is submitted that the direct notification by the prosecuting authorities of the ICC to counsel, [REDACTED].

30. The notion of criminal charge under ECtHR case law has an autonomous meaning and is not dependent upon the determination by prosecutorial authorities. The jurisprudence of the ECtHR should guide Chambers, not only on account of Article 21 (3) of the Statute, but also because the language of Article 67 (1) of the Statute is identical to the relevant part of the *chapeau* to Article 6 ECHR: ‘[i]n the determination of any charge(...)’.

31. In light of the aforementioned notification made to [REDACTED] by the Prosecutor, [REDACTED]. [REDACTED]. In accordance with Article 21(3) of the Statute, this provision must be interpreted and applied in a manner consistent with internationally recognized human rights. Article 14(3) of the International Covenant on Civil and Political Rights provides for the right to have legal assistance of a counsel of a person’s own choosing, and also the right to communicate with this counsel.<sup>15</sup> This right to communicate has been interpreted by the Human Rights Committee to the effect that “lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognized professional ethics without restrictions, influence, pressure or undue interference from any quarter”.<sup>16</sup>

32. Any interference with [REDACTED] entitles him to an effective remedy and will be addressed before the competent (Pre-Trial) Chambers of this Court.

Respectfully submitted

[REDACTED]

Dated this 23<sup>rd</sup> Day of February 2015

At [REDACTED]

<sup>15</sup> Article 14(3)(b) and (d) of the International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html>.

<sup>16</sup> UN Human Rights Committee, CCPR General Comment 32 (2007), para 71, available at: <http://www1.umn.edu/humanrts/gencomm/hrcom32.html>.