

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **21 March 2013**

Date of public redacted version: **11 December 2017**

TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding
Judge Christine Van den Wyngaert
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR v. WILLIAM SAMOEI RUTO and JOSHUA ARAP SANG

Public redacted version of

**Decision on the request for reclassification of defence filing ICC-01/09-01/11-630
regarding Witness 15**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms Fatou Bensouda

Counsel for William Samoei Ruto

Mr Kioko Kilukumi Musau

Mr David Hooper

Counsel for Joshua Arap Sang

Mr Joseph Kipchumba Kigen-Katwa

Mr Silas Chekera

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

Ms Silvana Arbia

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V (“Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, pursuant to Articles 64(7), 67(1) and 68(1) of the Rome Statute (“Statute”) and Regulation 23 *bis* of the Regulations of the Court (“Regulations”), renders the following Decision on the request for reclassification of defence filing ICC-01/09-01/11-630 regarding Witness 15.

I. Procedural history and submissions

1. On 27 February 2013, the Office of the Prosecutor (“Prosecution”) disclosed a new statement which is identified by the Prosecution as “P-15’s recantation” (“Witness 15 Statement”).¹
2. On 1 March 2013, the defence teams for Mr Ruto and Mr Sang (“Defence”) publicly filed the “Joint Defence Request for an Order for the Prosecution to Indicate Forthwith whether it Intends to Withdraw Witness P-0015 [REDACTED]” (“Defence Filing”).²
3. Later on 1 March 2013, the Prosecution filed the “Request for reclassification of Defence filing ICC-01/09-01/11-630” (“Request”).³ The Prosecution requests the Chamber to: (i) re-classify the Defence Filing as confidential, (ii) reiterate to the Defence its obligations regarding confidential material; and (iii) order the Defence to provide an explanation as to why this filing was designated as public and not confidential.⁴ As an interim measure, the Chamber instructed the Registry to limit access to the Defence Filing to the parties to the proceedings only pending further determination.⁵

¹ See Prosecution’s Communication of the Disclosure of Evidence, 27 February 2013, ICC-01/09-01/11-628 with confidential Annex A (notified on 28 February 2013).

² ICC-01/09-01/11-630.

³ ICC-01/09-01/11-632-Conf (notified on 4 March 2013).

⁴ Request, ICC-01/09-01/11-632-Conf, para. 10.

⁵ Email communication from a Legal Officer of Trial Chamber V to the Registry at 17:51 on 1 March 2013.

4. On 5 March 2013, the Prosecution confirmed that it continues to rely on Witness 15.⁶
5. Also on 5 March 2013, the Defence responded to the Request (“Response”),⁷ submitting that the Request should be rejected in full.
6. In the Request, the Prosecution argues that the Defence Filing “contains information of a highly confidential nature” and that the Defence has “breached its obligations of confidentiality by discussing the contents of and further directly quoting from materials which were disclosed as confidential”.⁸ The Prosecution argues that, in addition to the references to the Witness 15 Statement, the Defence “compounds this breach of confidentiality by making further references to the contents of previous filings of the Prosecution which were, and still are, classified as confidential”.⁹ The Prosecution also submits that Witness 15 has been put at risk by the Defence’s references to the other agencies to whom Witness 15 has previously spoken about Kenya’s post-election violence.¹⁰
7. In the Response, the Defence argues that “[t]here is nothing stated about witness P-15 in the [Defence Filing] that necessitates the derogation of the right of the accused to a public trial”.¹¹ The Defence submits that “[i]t is routine practice in this case and indeed in other ICC cases for parties to make limited public reference to information or submissions contained in otherwise confidential filings or exhibits”.¹² The Defence submits that “[w]hile on reflection it may have been better, or at least more cautious, had the defence sought reclassification from

⁶ Prosecution response to Defence filing ICC-01/09-01/11-630, 5 March 2013, ICC-01/09-01/11-634-Conf.

⁷ Joint Defence Response to Prosecution Request for Reclassification of Defence filing ICC-01/09-01/11-630, 5 March 2013, ICC-01/09-01/11-636-Conf.

⁸ Request, ICC-01/09-01/11-632-Conf, paras 3, 7.

⁹ Request, ICC-01/09-01/11-632-Conf, para. 8.

¹⁰ Request, ICC-01/09-01/11-632-Conf, para. 9.

¹¹ Response, ICC-01/09-01/11-634-Conf, para. 8.

¹² Response, ICC-01/09-01/11-634-Conf, paras 9-11.

the Chamber, the defence does not consider the use made of the exculpatory documents to be of itself a *per se* breach of its obligation of confidentiality". The Defence, after considering each of the Prosecution's disputed references, submits that none of its references would risk revealing Witness 15's identity or any other information that it was "restrained from putting in the public domain".¹³ The Defence requests for the Defence Filing to remain public and for the Request and Response to be reclassified as public.¹⁴

II. Analysis and conclusions

8. The Chamber recalls the general principle of publicity in this Court's proceedings which can be derived from Articles 67(1) and 64(7) of the Statute.¹⁵ In contrast to the Prosecution's arguments, the Chamber does not consider that any reference to the content of confidential filings constitutes a *per se* breach of confidentiality. Rather, in determining whether references to confidential filings amount to a breach of confidentiality, the crucial question is whether the references defeat the purpose of the confidential classification. However, if any doubt exists as to whether information contained in a filing classified as "confidential" may be referred to in a public filing, the proper course is to file submissions confidentially and request a reclassification under Regulation 23 *bis* of the Regulations as necessary in due course.
9. Turning to the Defence Filing, the Chamber considers the references to confidential Prosecution submissions in the Defence Filing to be acceptable references in a public submission, given that no information protected by the

¹³ Response, ICC-01/09-01/11-634-Conf, paras 13-18.

¹⁴ Response, ICC-01/09-01/11-634-Conf, para. 21.

¹⁵ Article 67(1) of the Statute provides that "[i]n the determination of any charge, the accused shall be entitled to a public hearing [...]". Article 64(7) of the Statute provides that "The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence".

confidential classification of those submissions has been revealed by these references. As such, the Chamber does not consider it necessary to order the Defence to explain its conduct and believes that both parties fully understand the importance of protecting confidential information.

10. However, paragraph 2 of the Defence Filing contains a summary of the substance and direct quotations from the Witness 15 Statement. In order to ensure that the purpose of the confidential classification is preserved and bearing in mind the Chamber's duty to protect the safety of witnesses under Article 68(1) of the Statute, the Chamber is of the view that this information should not be publicly available. Pursuant to Regulation 23 *bis*(3) of the Regulations, the Defence is correspondingly ordered to file a public redacted version of the Defence Filing which redacts the entirety of paragraph 2.

11. In order to avoid drawing undue attention to what is now the confidential version of the Defence Filing, the Chamber decides to maintain the confidential classification of the Request and Response.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

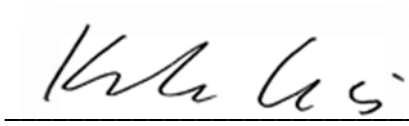
PARTIALLY GRANTS the relief sought in the Request;

DENIES the remainder of the relief sought in the Request;

ORDERS the Registry to reclassify the Defence Filing (ICC-01/09-01/11-630) as confidential; and

ORDERS the Defence to file a public redacted version of the Defence filing in accordance with paragraph 10 of the present decision.

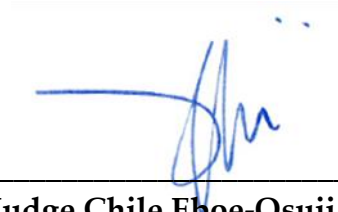
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding Judge



Judge Christine Van den Wyngaert



Judge Chile Eboe-Osuji

Dated 21 March 2013

At The Hague, The Netherlands