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TRIAL CHAMBER V(A)

Before: Judge, Chile Eboe-Osuji, Presiding
Judge Olga Herrera Carbuca
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

**Decision on the Defence Request for Disclosure of Information Related to
Security Arrangements Provided to Prosecution Witnesses**

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 Kioko Kilukumi Musau

Ms Shyamala Alagendra

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Mr Joseph Kipchumba Kigen-Katwa

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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

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 64(6)(f) and 67(2) of the Rome Statute (the ‘Statute’) and Rule 77 of the Rules of Procedure and Evidence (the ‘Rules’), issues this Decision on the Defence Request for Disclosure of Information Related to Security Arrangements Provided to Prosecution Witnesses.

I. Procedural history and submissions

1. On 30 May 2013, the Office of the Prosecutor (‘Prosecution’) submitted to the Chamber an update on the security situation of [REDACTED] (‘Update’), in which the Prosecution explained that there is a continuing need to delay the disclosure of the identity of the witness, in order to protect the witness’s safety, security, and well-being.¹
2. On 7 June 2013, the defence team for Mr Ruto (‘Defence’), in response to the Prosecution’s Update, requested that the Trial Chamber order the Prosecution to provide full details of: a) what is mean by ‘under the care of the Prosecution’ and respond in full to the Defence’s disclosure request of 7 and 27 May 2013; b) the security arrangements which it is providing to all its trial witnesses including [REDACTED], and the reason why such arrangements are not being provided by the Victims and Witnesses Unit (‘VWU’); c) breakdown of amounts of monies

¹ Prosecution Further Submission on the Security Situation of [REDACTED], ICC-01/09-01/11-759-Conf-Exp, available only to the Prosecution and the VWU, with confidential *ex parte* annexes A-D. A confidential redacted version of the document was filed on 31 May 2013, ICC-01/09-01/11-759-Conf-Red. The Chamber notes that two more updates were provided since then, in which the Prosecution has confirmed the need for continuing delayed disclosure of the witness’s identity. See: Prosecution Further Submission on the Security Situation of [REDACTED], 13 June 2013, ICC-01/09-01/11-772-Conf-Exp and ICC-01/09-01/11-772-Conf-Red; Prosecution Further Submission on the Security Situation of [REDACTED], 27 June 2013, ICC-01/09-01/11-789-Conf-Exp and ICC-01/09-01/11-789-Conf-Red. Moreover, on 11 July 2013, the Prosecution filed a third update, in which it informed that it will no longer rely on [REDACTED] for trial. See: Prosecution Further Submission on the Security Situation of [REDACTED], ICC-01/09-01/11-811-Conf-Red, para. 4.

which the Prosecution has expended for the 'care' of witnesses from the commencement of its involvement in the Kenya situation to date ('Request').²

3. The Defence submits that it has previously requested clarification concerning information related to the security arrangements of [REDACTED], particularly since the witness is 'in the care of the Prosecution'. The Defence states that its request is still outstanding.³ The Defence notes that through the Prosecution's Update it learned that [REDACTED] is in the same situation, and thus effectively 'under the care of the Prosecution'.⁴
4. The Defence contends that the fact that the Prosecution is currently providing protective measures and security arrangements for at least these two prosecution witnesses, rather than the VWU, is of obvious concern to the Defence.⁵ The Defence further argues that this information is 'essential to an assessment of the relevant witness's credibility' and accordingly, falls within Article 67(2) of the Statute and/or Rule 77 of the Rules.⁶
5. The Defence further refers to the jurisprudence of the Appeals Chamber, which has concluded that the Prosecutor's preventative relocation of witnesses is carried out 'in the absence of any statutory scheme that regulates the provision of such measures; and in circumstances in which those staff with specific expertise in witness protection and security are located within the VWU'.⁷ The Defence submits that the 'Prosecution's usurpation of the VWU's role in relation to the security and welfare of witnesses has, or is very likely to, taint the integrity of proceedings and the truth finding process'.⁸ The Defence further argues that these

² Defence Response to the "Prosecution Further Submission on the Security Situation of [REDACTED]", ICC-01/09-01/11-766-Conf with confidential annexes A-F, para. 22.

³ Request, paras 9-10.

⁴ Request, para. 11.

⁵ Request, para. 17.

⁶ Request, para. 18.

⁷ Request, para. 19.

⁸ Request, para. 19.

matters go to the core of the credibility of Prosecution witnesses and the Prosecution's case as a whole, and thus requests that the Prosecution be ordered to disclose full details of such security arrangements and 'care', as requested by the Defence on 7, 14 and 27 May 2013.⁹

6. On 24 June 2013,¹⁰ the Prosecution responded to the Defence's Request ('Response').¹¹ The Prosecution submits that it has no objection to disclosing expenditures related to witnesses under the care of the Prosecution. The Prosecution states that this information will be disclosed shortly and that this will satisfy the Defence's Request a) in part and request c) in full. Regarding the Defence Request b), the Prosecution submits that this is not possible, since any disclosure of details about protective measures or security arrangements of trial witnesses would defeat the purpose of ensuring witness security.¹²
7. The Prosecution also submits that in response to the other requests of the Defence included in its e-mail requests of 7 and 27 May 2013, the Prosecution indicates that [REDACTED]. Since then, the witness became the Prosecution's responsibility.¹³
8. The Prosecution submits that the legal basis for assuming responsibility for the care of witnesses is in Article 43(6) of the Statute, which states that the VWU shall provide security and assistance to witnesses in consultation with the Prosecution. The Prosecution further observes that the VWU and the Prosecution have established a "Prosecution-Registry Joint Protocol on the Mandate, Standards and Procedure for Protection" ('Joint Protocol'), which governs the care and

⁹ Request, para. 21.

¹⁰ A deadline to respond was set by the Chamber, as it noted that filing ICC-01/09-01/11-766-Conf should be treated as a new application. See Email communication from Trial Chamber V-A Communications to the parties at 16:41 on 10 June 2013.

¹¹ Prosecution's Response to Defence Filing ICC-01/09-01/11-766-Conf + Conf-Anxs, ICC-01/09-01/11-784-Conf. A corrigendum of this filing was filed on 26 June 2013, ICC-01/09-01/11-784-Conf-Corr.

¹² Response, para. 7.

¹³ Response, paras 8-9.

management of witnesses, including situations where care of a witness reside with the Prosecution.¹⁴

9. The Prosecution further submits, referring to the Appeals Chamber's jurisprudence, that although the VWU is primarily responsible for the care of witnesses, the Prosecutor is also responsible to ensure that that appropriate measures are taken to protect the safety of victims and witnesses. The OTP argues that under limited circumstances care of witnesses may fall to the OTP when participation of witnesses in VWU programmes is not feasible or appropriate.¹⁵
10. On 26 June 2013, the Defence applied for leave to reply to the Prosecution's Response ('Leave to reply').¹⁶ The Defence seeks leave to reply on two issues. Firstly, the Defence wishes to make submissions on the legal basis of the Prosecution submitting the Joint Protocol on an *ex parte* basis and the relevance of the content and implementation by the Prosecution or the VWU of the Joint Protocol to the Defence's Request. Secondly, the Defence wishes to make submissions on whether the Response fully and adequately addresses the relief sought by the Defence in item a) of their Request.¹⁷ As regards the first issue, the Defence already submits in its Leave to reply that the Joint Protocol is a 'new' issue and is not discussed or otherwise reference in the confidential redacted version of the Prosecution's Update on [REDACTED]. The Defence contends that it remains unaware of the exact content and scope of the Joint Protocol, as well as the specific nature of its application to individual Prosecution witnesses.¹⁸ The Defence submits that the this sole reference to the Joint Protocol after two years of court proceedings, contradicts the apparent centrality of this document as regards

¹⁴ Response, para. 10 and confidential *ex parte* Annex A.

¹⁵ Response, paras 11-12.

¹⁶ Defence Application for Leave to Reply to "Prosecution's Response to Defence Filing ICC-01/09-01/11-766-Conf + Conf-Anxs (ICC-01/09-01/11-784-Conf), ICC-01/09-01/11-787-Conf.

¹⁷ Leave to reply, para. 2.

¹⁸ Leave to reply, para. 11.

witness protection.¹⁹ The Defence thus submits that given that in its Request it applies for full disclosure of details of what is meant by “under the care of the Prosecution”, the Defence should be granted leave to make submissions on the classification as *ex parte* of the Joint Protocol.²⁰ As regards the second issue, the Defence submits that the Prosecution has not yet provided in their Response a detailed and comprehensive update on the status of each specific request listed in the Defence’s communications of 7 and 27 May 2013. The Defence thus seeks leave to identify those requests that still remain outstanding.²¹

II. Analysis by the Chamber

11. At the outset, the Chamber considers that the Defence has already implicitly made submissions on the two items identified in their Leave to reply. Accordingly, the Chamber is of the view that further submissions on these matters are unnecessary in this regard. However, the Chamber clarifies that for future applications the parties are to refrain from including the submissions of the reply in the request for leave to reply itself.
12. The Chamber reiterates that matters such as the present one should preferably be dealt with *inter partes*, respectful of the rights of the accused and a fair trial, but also of the safety, physical and psychological well-being of witnesses.
13. The Chamber has identified four issues as emerging from the Request and the Leave to reply.
14. The Defence firstly requests the breakdown of amounts of monies which the Prosecution has expended for the ‘care’ of witnesses from the commencement of its involvement in the Kenya situation to date.

¹⁹ Leave to reply, para. 12.

²⁰ Leave to reply, para. 13.

²¹ Leave to reply, para. 17.

15. The Defence secondly requests information on the involvement of the Prosecution for witnesses in its care. In this regard, the Chamber observes that the Defence requests detailed information as regards [REDACTED], particularly: [REDACTED].²² The Chamber understands that the Defence is also requesting this same information as regards [REDACTED].²³
16. Moreover, the Chamber notes that the Defence also requests the reclassification of the Joint Protocol contained in Annex A of the Prosecution's Response.
17. Lastly, the Defence requests to receive information on the security arrangements the Prosecution is providing to all its trial witnesses, and the reasons why such arrangements are not being provided by the VWU.
18. The Chamber is of the understanding, pursuant to the parties' submissions that the Prosecution has agreed to disclose to the Defence expenditures of all trial witnesses. Therefore, this part of the Request is moot.
19. In principle, the Chamber is of the view that information related to the protective measures put in place vis-à-vis Prosecution witnesses is not *per se* subject to disclosure pursuant to Article 67(2) of the Statute and/or Rule 77 of the Rules. However, this information is subject to disclosure obligations when it becomes relevant to the known issues in the case and as such, exculpatory in nature and/or is material to the preparation of the defence.²⁴ Moreover, even if such information becomes relevant pursuant to Article 67(2) of the Statute and/or Rule 77 of the Rules, the Chamber still needs to consider whether non-disclosure of certain information is necessary to protect the safety, physical and psychological well-being, dignity and privacy of the witnesses concerned pursuant to Article 68(1) of

²² Request, Annexes E and F.

²³ Request, paras 11, 19 and 21.

²⁴ *Prosecution v Thomas Lubanga Dyilo*, Decision issuing confidential and public redacted versions of "Decision on the 'Prosecution's Request for Non-Disclosure of the Identity of Eight Individuals providing Rule 77 Information' of 5 December 2008 and 'Prosecution's Request for Non-Disclosure of Information in One Witness Statement containing Rule 77 Information' of 12 March 2009", 24 June 2009, ICC-01/04-01/06-1980 + Anx2, para. 46.

the Statute, while safeguarding the rights of the accused under Article 67 of the Statute.²⁵

20. In the case at hand, the Chamber considers that by agreeing to disclose the expenditures of its witnesses, the Prosecution may have already addressed the Request, at least in part. The Chamber therefore sees no need to rule on these requests before the Defence has received the disclosure indicated by the Prosecution. If, after receiving these materials, the Defence remains unsatisfied with the state of disclosure, it may then make a discrete application to the Chamber.
21. Moreover, the Chamber agrees with the Defence that the information contained in the Joint Protocol could be of use for the defence and that the Prosecution has failed, pursuant to Regulation 23*bis*(1) of the Regulations of the Court, to state the factual and legal basis for its classification as confidential *ex parte*, available only to the Prosecution and the Registry. Likewise, the Chamber considers that disclosure of a redacted version of the Joint Protocol could address to some extent the present Request.
22. As regards the Defence's request to receive information on the security arrangements the Prosecution is providing to all its trial witnesses, and the reasons why such arrangements are not being provided by the VWU, the Chamber agrees with the Prosecution that granting the Defence a blanket authorisation to access the information of security arrangements of all Prosecution witnesses would defeat the purpose of any protective measures currently in place. The Chamber therefore considers that such disclosure must be analysed on a case-

²⁵ *Katanga case*, Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 13 May 2008, ICC-01/04-01/07-476, para. 59 ; *Lubanga case*, ICC-01/04-01/06-1980 + Anx2, para. 48.

by-case basis, when information exists that such security arrangements have become a live issue in the present case.

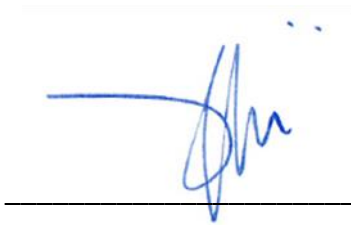
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Defence's Leave to reply.

REJECTS the Defence's Request.

ORDERS the Prosecution, in consultation with the VWU, to file a Confidential Redacted version of the Joint Protocol no later than 7 days after notification of this Order.

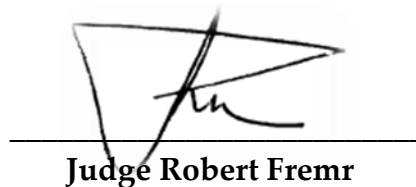
Done in both English and French, the English version being authoritative.

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Judge Chile Eboe-Osuji, Presiding Judge

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

Judge Olga Herrera Carbuccion

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

Judge Robert Fremr

Dated 22 July 2013

At The Hague, The Netherlands