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

Date: **23 June 2015**

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TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding
Judge Olga Herrera Carbuccia
Judge Robert Fremr

SITUATION IN THE REPUBLIC OF KENYA

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

Public redacted version

Order concerning the Asylum Application Records of Certain 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 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

Kingdom of the Netherlands

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V(A) (the ‘Chamber’) of the International Criminal Court, in the case of *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, considering Articles 64(2), 67, 86, 93(1)(i) and 99(1) of the Rome Statute (the ‘Statute’) renders this ‘Order concerning the Asylum Application Records of Certain Prosecution Witnesses’.

I. Procedural Background

1. On 17 November 2014, the Chamber issued the ‘Decision on Joint Defence Application for Further Prosecution Investigation Concerning the Asylum Application Records of Certain Prosecution Witnesses’, ordering the Office of the Prosecutor (the ‘Prosecution’) to obtain the asylum applications of [REDACTED],¹ [REDACTED]² and [REDACTED],³ as well as other potentially exculpatory information (the ‘Requested Material’).⁴
2. On 21 November 2014, the Prosecution filed the reply from the authorities of the Kingdom of the Netherlands (the ‘Dutch Authorities’) to a request for assistance on the matter (notified on 24 November 2014), informing the Chamber that the Dutch Authorities had declined to provide the Requested Material to the Prosecution.⁵
3. On 12 February 2015, following a request from the defence teams of Mr Ruto and Mr Sang (together the ‘Defence’), and further submissions from and correspondence with the parties and the Dutch Authorities,⁶ the Chamber issued

¹ [REDACTED].

² [REDACTED].

³ [REDACTED].

⁴ ICC-01/09-01/11-1655-Conf.

⁵ Prosecution’s notification of a Reply from the Kingdom of the Netherlands to a Request for Assistance in compliance with decision No. ICC-01/09-01/11-1655-Conf, ICC-01/09-01/11-1688.

⁶ Request for Consultation with the Dutch Authorities pursuant to Articles 93(3) and 97, ICC-01/09-01/11-1711-Conf; Sang Defence Application to join the "Ruto Defence Request for Consultation with the Dutch Authorities pursuant to Articles 93(3) and 97", 28 November 2014, ICC-01/09-01/11-1711-Conf. See also: Prosecution’s Response to Ruto Defence Request for Consultation with the Dutch Authorities pursuant to Articles 93(3) and 97, 28 November 2014, ICC-01/09-01/11-1719-Conf; Registry transmission of observations received from the Kingdom of the Netherlands following document ICC-01/09-01/11-1711-Conf, 2 December 2014, ICC-01/09-01/11-1726-Conf, with two confidential annexes. Transcript of hearing on 2 December 2014, ICC-01/09-01/11-T-

the 'Request for Cooperation to the Kingdom of the Netherlands concerning the Asylum Application Records of Certain Prosecution Witnesses', in which it sought to be provided with copies of the Requested Material ('Cooperation Request').⁷

4. On 3 March 2015, the Dutch Authorities handed over the Requested Material to the Chamber.⁸
5. [REDACTED] and [REDACTED] testified in [REDACTED]⁹ and [REDACTED],¹⁰ respectively, while the Chamber granted the Prosecution's request to withdraw [REDACTED], after the commencement of his testimony.¹¹

III. Analysis

6. The Chamber recalls that it previously found that asylum application records have potential importance in the evaluation of witness credibility.¹² The Chamber also found that there is a need for mutual accommodation of opposing legal rules 'that seek, on the one side, to protect the confidentiality of the asylum records and, on the other side, to protect the right of the Accused to a fair trial'.¹³

165-CONF-ENG ET; Registry transmission of additional observations received from the Kingdom of the Netherlands following the hearing on 2 December 2014, ICC-01/09-01/11-1737-Conf (notified on 4 December 2014); Transcript of hearing on 5 December 2014, ICC-01/09-01/11-T-168-CONF-ENG ET; Order on Consultations with the Kingdom of the Netherlands, 11 December 2014, ICC-01/09-01/11-1751-Conf and Anxs; Registry transmission of further observations submitted by the Dutch Authorities following the "Order on Consultations with the Kingdom of the Netherlands", 18 December 2014, ICC-01/09-01/11-1765-Conf and Anxs; Registry observations on the consultation undertaken in furtherance of Order ICC-01/09-01/11-1751-Conf, 13 January 2015, ICC-01/09-01/11-1779-Conf-Exp and Anxs; Registry transmission of observations submitted by the Dutch Authorities, 20 January 2015, ICC-01/09-01/11-1787-Conf and Anxs; Registry transmission of further observations submitted by the Dutch authorities following the "Order on Consultations with the Kingdom of the Netherlands", 27 January 2015, ICC-01/09-01/11-1798-Conf and Anxs.

⁷ Corrected version of "Request for Cooperation to the Kingdom of the Netherlands concerning the Asylum Application Records of Certain Prosecution Witnesses" (12 February 2015, ICC-01/09-01/11-1815-Conf), 13 February 2015, ICC-01/09-01/11-1815-Conf-Corr and Conf-Anx.

⁸ Registry's Second Report on the Implementation of the "Request for Cooperation to the Kingdom of the Netherlands concerning the Asylum Application Records of Certain Prosecution Witnesses", 4 March 2015, ICC-01/09-01/11-1829-Conf+Anxs. See also: Registry Report on the Implementation of the "Request for Cooperation to the Kingdom of the Netherlands concerning the Asylum Application Records of Certain Prosecution Witnesses", 24 February 2015, ICC-01/09-01/11-1823-Conf+Anxs.

⁹ [REDACTED].

¹⁰ [REDACTED].

¹¹ [REDACTED].

¹² ICC-01/09-01/11-1815-Conf-Corr, para. 24.

¹³ ICC-01/09-01/11-1815-Conf-Corr, para. 29.

7. In its Cooperation request, the Chamber undertook to deal with the Requested Material as follows:

Step 1: Upon the Chamber's completion of its perusal of the documents, the Chamber shall return the documents to the Dutch Government, with no copies retained at the ICC. [It is recalled that one of the conditions indicated above is that the Chamber will not make any copies of the documents that the Dutch Government provides to the Chamber, in response to this request for assistance]; and

Step 2: In the event that the Chamber considers that non-disclosure of any particular document to the parties poses a serious risk of rendering the trial unfair, the Chamber shall make a further request to the Dutch Government, for purposes of disclosure of the implicated documents, but only after the documents have been returned to the possession and control of the Dutch Authorities. And in the event that the Chamber considers that non-disclosure of any particular document to the parties poses no serious risk of rendering the trial unfair, the Chamber shall consider the request for assistance fully satisfied with no need for further judicial action.¹⁴

8. Having heard the testimonies of [REDACTED] and [REDACTED], the Chamber will be able to assess the witnesses' credibility on the basis of their testimony in court and notes that the Requested Material will have no additional value, if any, on the Chamber's eventual credibility analysis. The Chamber notes, in particular, that for both of these witnesses, some aspects of their asylum requests were ventilated during their testimony, such that the Chamber will be able to make an assessment of credibility that is necessary from the perspective of witnesses' application for asylum.¹⁵
9. As for [REDACTED], considering that the Prosecution withdrew the witness, and has confirmed that it will not rely on this witness or anything he said in court, the information related to this witness that is contained in the Requested Material is inconsequential to the case. Moreover, the Chamber does not consider that the said information, if disclosed to the Defence, would change the Chamber's ultimate determination, namely the innocence or guilt of the accused in this case.

¹⁴ Cooperation Request, ICC-01/09-01/11-1815-Conf-Corr, para. 51.

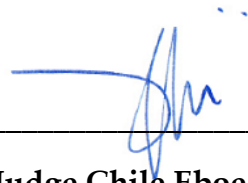
¹⁵ [REDACTED].

10. In the circumstances, the Chamber considers that returning the material to the Dutch authorities without disclosure to the parties does not pose any serious risk of rendering the trial unfair.

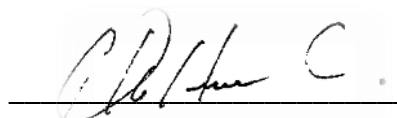
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

DIRECTS the Registry to facilitate the return of the Requested Material to the Dutch Authorities.

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



Judge Chile Eboe-Osuji
(Presiding)



Judge Olga Herrera Carbuccia



Judge Robert Fremr

Dated 23 June 2015

At The Hague, The Netherlands