

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 23 April 2013

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***

Confidential

Confidential redacted version of the Decision on disclosure of documents in possession of the Prosecution and contact with a witness by the non-calling party

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 Karim Khan

Mr Kioko Kilukumi Musau

Mr David Hooper

Counsel for Joshua Arap Sang

Mr Joseph Kipchumba Kigen-Katwa

Mr Silas Chekera

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

Deputy Registrar

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

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(2) and 67 of the Rome Statute ("Statute") and Rule 77 of the Rules of Procedure and Evidence ("Rules"), issues this Decision on disclosure of documents in possession of the Prosecution and contact with a witness by the non-calling party ("Decision").

I. Procedural Background and Submissions

1. On 24 August 2012, the Chamber issued the 'Decision on the protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call', including an annex containing the protocol ("Protocol").¹ The Protocol establishes a procedure in which a party wishing to contact and interview a witness whom another party intends to call needs to seek the consent of the witness via the calling party. The calling party must, upon notification of the intention of the non-calling party to contact the witness, seek the consent of the witness within five days of receiving the notification.²
2. On 25 February 2013, the Office of the Prosecutor ("Prosecution") filed a confidential *ex parte*, Prosecution and Victims and Witnesses Unit ("VWU") only, submission related to Witness 15's security situation to which it annexed two documents ("First Submission").³

¹ ICC-01/09-01/11-449 and ICC-01/09-01/11-449-Anx.

² ICC-01/09-01/11-449-Anx, paras 4-7.

³ "Prosecution's Submissions on P-0015's Security and Interference", filed on 25 February 2013 and notified on 26 February 2013, ICC-01/09-01/11-624-Conf-Exp.

3. On 25 March 2013, the Prosecution filed, on a confidential *ex parte* basis, further submissions on the situation of Witness 15, annexing 23 documents ("Second Submission").⁴ A confidential redacted version of the Second Submission was filed on 26 March 2013.⁵
4. On 9 April 2013, the Defence filed its response to the Second Submission ("Response").⁶
5. In the First Submission, the Prosecution informs the Chamber that it received a letter from a Kenyan lawyer on 19 February 2013 ("Letter").⁷ The Letter states that Prosecution Witness 15 approached the lawyer and his law firm for the purpose of preparing an affidavit under oath relating to prior statements he had made about the post election violence ("First Affidavit").⁸ The First Affidavit was attached to the Letter. In it, the witness declares that the allegations he made in interviews with the Prosecution and on other occasions are not true, that he never attended any meetings at Mr Ruto's house and that he was promised rewards and resettlement if he testified before the Court. Further, he states that the former Prosecutor of the Court and other members of the Prosecution dictated the evidence he should give and that he received money from the Prosecution. Finally, the witness states that he is withdrawing any prior statements he made.

⁴ "Prosecution's further submissions on P-0015", filed on 25 March 2013 and notified on 26 March 2013, ICC-01/09-01/11-662-Conf-Exp, Prosecution and VWU only, with confidential, *ex parte*, Prosecution and VWU only annexes A to J.

⁵ ICC-01/09-01/11-662-Red, notified on 27 March 2013. On 27 March 2013, upon order of the Chamber, annexes B to H, J and K to ICC-01/09-01/11-662-Conf-Exp were reclassified as confidential.

⁶ ICC-01/09-01/11-672-Conf. The time limit for the Defence response was shortened, pursuant to Regulation 34 by order of the Chamber. Email from TC V Communications, 3 April 2013, 1:29 PM.

⁷ ICC-01/09-01/11-624-Conf-Exp-AnxA.

⁸ ICC-01/09-01/11-624-Conf-Exp-AnxB.

6. The Prosecution informs the Chamber that, upon receipt of the First Affidavit, [REDACTED].⁹ The Prosecution also states that the witness reconfirmed his willingness to testify for the Prosecution.¹⁰
7. The Prosecution alleges that [REDACTED].¹¹ It further submits to the Chamber that [REDACTED].¹²
8. The Prosecution informs the Chamber that it will disclose the Letter and First Affidavit to the Defence, [REDACTED].¹³
9. In the Second Submission the Prosecution provides an update on the situation of Witness 15. It informs the Chamber that the lawyer purporting to act on behalf of Witness 15 sent a second letter containing a further affidavit of Witness 15 to the Prosecution in which the witness reiterates the information provided in the First Affidavit and makes further claims that the Prosecution tried to influence him with respect to his testimony before the Court ("Second Affidavit").¹⁴ Further, the Prosecution states that the lawyer sent two additional affidavits from Witness 15's wife and his father-in-law in which they affirm that Witness 15 provided the Second Affidavit voluntarily.¹⁵
10. Additionally, the Prosecution informs the Chamber of the following further events related to Witness 15: that it contacted the witness several times and tried unsuccessfully to meet with him; that the lawyer claiming

⁹ ICC-01/09-01/11-624-Conf-Exp, para.10. [REDACTED].

¹⁰ ICC-01/09-01/11-624-Conf-Exp, para. 10.

¹¹ ICC-01/09-01/11-624-Conf-Exp, para. 6.

¹² ICC-01/09-01/11-624-Conf-Exp, para. 12.

¹³ ICC-01/09-01/11-624-Conf-Exp, para. 11.

¹⁴ ICC-01/09-01/11-662-Conf-Red, paras 8-9.

¹⁵ ICC-01/09-01/11-662-Red, para. 10.

to act on behalf of the witness contacted the Prosecution again and demanded that all future contact regarding this witness go through his law firm; that reports appeared in the Kenyan media relating to the witness and his relationship with the Court; and that the witness issued a public letter in which he reiterates that the Prosecution and the Court pressured him to testify.¹⁶ The Prosecution emphasises that during its communications with the witness following the provision of the Second Affidavit, he expressed concerns about his security and claimed that he was forced to sign the Second Affidavit.¹⁷

11. The Prosecution informs the Chamber that it has disclosed to the Defence the First and Second Affidavits of Witness 15, the affidavits of his wife and her father and the accompanying letter from the lawyer. However, it reiterates that [REDACTED]¹⁸

12. Finally, the Prosecution informs the Chamber of a request by the Defence to contact Witness 15 in order to inquire if the witness is willing to meet and speak with the Defence. The Prosecution, citing the problems it has experienced in meeting with the witness, requests a variation of the five-day deadline imposed in the Protocol to obtain the witness's consent and assures the Chamber that it "[...] will endeavour to transmit the Defence's request to P-0015 as soon as practicable."¹⁹

13. In its Response, the Defence requests the Chamber to order the Prosecution to withdraw Witness 15 from its list of witnesses or, alternatively,

¹⁶ ICC-01/09-01/11-662-Conf-Red, paras 11-27.

¹⁷ ICC-01/09-01/11-662-Conf-Red, para. 15.

¹⁸ ICC-01/09-01/11-662-Conf-Exp, para. 30.

¹⁹ ICC-01/09-01/11-662-Conf-Red, para. 33.

authorise the Defence to contact Witness 15 through the person acting as his lawyer.²⁰

14. The Defence submits that it is “clear that P-15 is no longer willing to cooperate with the prosecution[...]²¹ and that “the prosecution no longer has any legal or moral basis for keeping witness P-15 on its List of Witnesses”.²² Furthermore, the Defence avers that, considering the contents of the First and Second Affidavits, the evidence provided by the witness is now exculpatory. It submits that the Prosecution’s retention of Witness 15 on its list of witnesses and the Prosecution’s incapacity to contact the witness to ask for his consent to meet with the Defence effectively hinder the Defence in its investigation of exculpatory evidence.²³

15. On 10 April 2013, the Prosecution informed the Chamber and the Defence in an email communication that it had succeeded in contacting Witness 15 and that he consents to a meeting with the Defence.²⁴

II. Analysis and Conclusion

16. In respect of the Prosecution’s intention [REDACTED]. Accordingly, the Chamber considers that they have to be disclosed to the Defence pursuant to Rule 77 of the Rules. Further, these documents or parts thereof may also fall under Article 67(2) of the Statute.

17. The Chamber notes that there is no formal relief requested in the First or Second Submission with regard to the non-disclosure of the documents.

²⁰ ICC-01/09-01/11-672-Conf, para. 14.

²¹ ICC-01/09-01/11-672-Conf, para. 2.

²² ICC-01/09-01/11-672-Conf, para. 6.

²³ ICC-01/09-01/11-672-Conf, paras 11-13.

²⁴ Email communication to Trial Chamber V Communications of 11 April 2013, 11:02 AM.

Considering that the Prosecution's disclosure obligations are ongoing, and considering that trial is scheduled to commence on 28 May 2013, the Chamber holds that the Prosecution must, if it wishes to delay disclosure for these documents, submit a formal application to the Chamber identifying precisely which documents it seeks to withhold, for how long, and the factual and legal basis for non-disclosure.

18. In respect of the Prosecution's request to vary the five-day deadline to seek the consent of Witness 15 to meet with the Defence, the Chamber considers, given that the Prosecution has succeeded in contacting the witness, that the request is now moot.

19. As to the Defence's request for the witness to be removed from the Prosecution's list of witness the Chamber notes the Defence's observation that it is clear that Witness 15 is unwilling to testify. However, in its First Submission the Prosecution states that the witness remains willing to testify²⁵ and in its Second Submission it submits that, when asked on 22 March 2013 whether he remained willing to cooperate with the Court, Witness 15 "responded that this was up to the Prosecution and the ICC".²⁶ Therefore, the Chamber does not consider it necessary to order Prosecution to remove Witness 15 from its list of witnesses at this stage.

20. However, the Chamber observes that there seems to be uncertainty as to the situation of Witness 15. The Prosecution informs the Chamber that it is "uncertain what is happening with P-0015"²⁷ and that it [REDACTED].²⁸

²⁵ ICC-01/09-01/11-624-Conf-Exp, para. 10.

²⁶ ICC-01/09-01/11-662-Conf-Red, paras 18 and 24.

²⁷ ICC-01/09-01/11-662-Conf-Red, para. 29.

²⁸ ICC-01/09-01/11-662-Conf-Exp, para. 31.

Having regard to the Defence's right to have adequate time for the preparation of the trial, considering that both parties describe Witness 15 as one of the key witnesses²⁹ and taking into account that the starting date for the trial is scheduled for 28 May 2013,³⁰ the Chamber is of the view that it is necessary for the Defence to be notified immediately if the Prosecution no longer intends to call Witness 15 as a witness during the trial. The Chamber therefore directs the Prosecution to inform the Chamber and the Defence immediately in the event of any change to the position of Witness 15.

21. In respect of the Defence's alternative request to authorise the Defence to contact Witness 15 in order to seek his consent to meet with the Defence the Chamber considers that, given that the Prosecution has informed the Defence that the witness expressed his consent, that the request is moot.

²⁹ ICC-01/09-01/11-624-Conf-Exp, para. 4 and ICC-01/09-01/11-672-Conf, para. 3.

³⁰ "Decision concerning the start date of trial", 8 March 2013, ICC-01/09-01/11-642, p. 10.

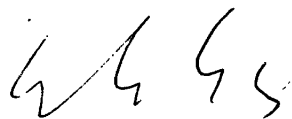
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Defence's request to order the Prosecution to withdraw Witness 15;

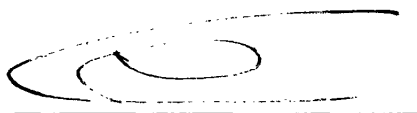
ORDERS the Prosecution to disclose forthwith the documents specified in paragraphs 16 and 17 of the Decision to the Defence or to file a formal request for delayed disclosure; and

DIRECTS the Prosecution to inform the Chamber and the Defence immediately in the event of any change to the Prosecution's intention to call Witness 15 to testify at trial.


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



Judge Kuniko Ozaki, Presiding



Judge Christine Van den Wyngaert



Judge Chile Eboe-Osuji

Dated this 23 April 2013

At The Hague, The Netherlands