

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **13 October 2014**

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

**Decision on Joint Defence Applications for Leave to Appeal the Second Oral
Decision on Disclosure of Information on VWU Assistance**

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

The Office of the Prosecutor

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Mr James Stewart
Mr Anton Steynberg

Counsel for William Samoei Ruto

Mr Karim Khan
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Legal Representatives of Victims

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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

Counsel Support Section

Victims and Witnesses Unit

Nigel Verrill

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*, pursuant to Article 82(1)(d) of the Rome Statute (the 'Statute'), renders this Decision on Joint Defence Application for Leave to Appeal the Second Oral Decision on Disclosure of Information on VWU Assistance.

I. PROCEDURAL HISTORY

1. On 28 October 2013, the Chamber gave an oral decision on the requests¹ of the defence for Mr Ruto (the 'Ruto Defence') and the defence for Mr Sang (the 'Sang Defence' and together with the Ruto Defence: the 'Defence') for (1) disclosure of all costs expended by the Victims and Witnesses Unit ('VWU') for purposes of relocation, maintenance and/or support of Witness 268 within the witness protection and support programme,² and (2) 'the disclosure of any evidence tending to show fraud or other acts of illegality on the part of the witness that bears a direct connection to his maintenance and support within the witness protection and support programme' ('First VWU Disclosure Decision'). The Chamber denied the first request and granted the second request.³
2. On 4 November 2013, the Ruto Defence⁴ and the Sang Defence⁵ filed their applications for leave to appeal the First VWU Disclosure Decision.
3. On 21 January 2014, the Chamber rejected the Defence applications for leave to appeal the First VWU Disclosure Decision ('Prior Leave to Appeal Decision').⁶

¹ Transcript of hearing of 25 October 2013, ICC-01/09-01/11-T-59-CONF-ENG, p. 83, lines 15-24; p. 84, lines 1-23; p. 87, lines 16-22; Transcript of hearing of 28 October 2013, ICC-01/09-01/11-T-60-CONF-ENG, p. 4, line 15- p. 15, line 3; p. 30, line 17- p. 33, line 18.

² Transcript of hearing of 28 October 2013, ICC-01/09-01/11-T-60-CONF-ENG, p. 44.

³ Transcript of hearing of 28 October 2013, ICC-01/09-01/11-T-60-CONF-ENG, p. 43, lines 11-14.

⁴ Defence application for leave to appeal the Trial Chamber's oral decision of 28 October 2013 on the Defence request for disclosure of all costs expended by the VWU for relocation, maintenance and support of Witness P-268, ICC-01/09-01/11-1080.

⁵ Sang Defence Application for Leave to Appeal the Oral Decision of 28 October 2013 on disclosure of costs expended by the Victims and Witnesses Unit for purposes of relocation, maintenance and/or support of witnesses in the witness protection and support programme, ICC-01/09-01/11-1081.

4. On 9 September 2014, the Chamber issued a second oral decision, refusing a Sang Defence request for disclosure of VWU assistance and benefits provided to four other Prosecution witnesses ('Impugned Decision').⁷
5. On 15 September 2014, the Defence filed a joint request for leave to appeal the Impugned Decision ('Application').⁸
6. On 18 September 2014, the Office of the Prosecutor ('Prosecution') filed its response to the Application ('Response').⁹

II. SUBMISSIONS

A. Defence Submissions

7. The Defence seeks leave to appeal the following issue: 'whether the Trial Chamber erred in considering that the level of neutrality of the unit which provides financial and other support and the asserted reasonableness of its payments are critical to the question as to whether such information should be disclosed to the Defence' ('Issue').¹⁰
8. The Defence submits that although it is cognisant of the Chamber's Prior Leave to Appeal Decision, the Issue is distinguishable from the previous one, as the Chamber has made it clear in the Impugned Decision that it has set a 'general

⁶ Decision on Defence Applications for Leave to Appeal the Decision on Disclosure of Information on VWU Assistance, ICC-01/09-01/11-1154.

⁷ ICC-01/09-01/11-T-132-Conf-ENG, page 2, line 11 to page 5, line 22. See also: 'Sang Defence Application for Disclosure of Assistance and Benefits Promised and Provided by the Victims and Witnesses Unit to P-604, P-495, P-516 and P-524, who are Subject to Summonses to Appear for this Trial Session', 3 September 2014, ICC-01/09-01/11-1482-Conf + Conf-AnxsA to H.

⁸ Joint Defence Request for Leave to Appeal the Oral Decision of 9 September 2014 on Disclosure of Assistance and Benefits provided by the Victims and Witnesses Unit to Prosecution witnesses 604, 495, 516 and 524, ICC-01/09-01/11-1514.

⁹ Prosecution response to joint Defence request for leave to appeal the oral decision of 9 September 2014 (disclosure of assistance and benefits provided by the Victims and Witnesses Unit to Prosecution witnesses 604, 495, 516, and 524), ICC-01/09-01/11-1524.

¹⁰ Application, ICC-01/09-01/11-1514, para. 2.

principle' that is applicable to other witnesses, while the First VWU Disclosure Decision related solely to Witness 268.¹¹

9. The Defence argues that the Issue arises from the Impugned Decision, as it is a 'point of principle' that has as consequence that the 'Defence is barred from ever knowing the full amount of benefits and assistance received by a witness, as a result of testifying on behalf of the Prosecution'.¹² It is their view that this is a 'fundamental issue which has a real impact on the trial'.¹³ The Defence also observes that in its Prior Leave to Appeal Decision, the Chamber acknowledged that a similar issue qualified under Article 82(1)(d) of the Statute.¹⁴ The Defence submits that although worded differently, the Issue addresses the same point in principle as the relevance of the impartiality of the VWU to the requested disclosure is disputed.¹⁵
10. The Defence argues in this regard that the Chamber erroneously distinguishes the disclosure of the Prosecution from that of the VWU on that basis.¹⁶ Furthermore, the Defence notes that disclosure of assistance provided by the VWU to witnesses is not requested to challenge the decisions rendered by the VWU, but rather to determine its impact on witnesses.¹⁷
11. The Defence argues that the issue affects the fair conduct of proceedings since:
 - (a) the accused have the right to full disclosure and the determination of whether a violation of the right to disclosure occurred is a fact-specific determination;¹⁸

¹¹ Application, ICC-01/09-01/11-1514, para. 4.

¹² Application, ICC-01/09-01/11-1514, para. 11.

¹³ Application, ICC-01/09-01/11-1514, para. 11.

¹⁴ Application, ICC-01/09-01/11-1514, para. 12. The Defence refers to the Prior Leave to Appeal Decision, ICC-01/09-01/11-1154, paras 4 and 21.

¹⁵ Application, ICC-01/09-01/11-1514, para. 14.

¹⁶ Application, ICC-01/09-01/11-1514, paras 14-17.

¹⁷ Application, ICC-01/09-01/11-1514, para. 18.

¹⁸ Application, ICC-01/09-01/11-1514, para. 21.

- (b) access to such evidence directly impacts on the ability of the accused to challenge the Prosecution's case and present a full defence, it also has an impact on the Chamber's mandate to ascertain the truth;¹⁹
 - (c) the Defence's request does not pose a risk to witnesses or overburden the VWU or the Prosecution;²⁰
 - (d) it is necessary to weigh the interests of the VWU to keep their work confidential and the interest of the Defence (particularly the probative value of the information sought);²¹ and
 - (e) deprivation of this material cannot be rectified at a later stage of the proceedings.²²
12. The Defence submits that the issue affects the expeditious conduct of the proceedings as the issue of benefits received by witnesses 'is one of the most critical issues in this trial' and should be dealt with now.²³ Moreover, it argues that if no leave is granted, and eventually the Appeals Chamber agrees with the Defence, it can only order a re-trial.²⁴
13. The Defence also states that the issue impacts on the outcome of trial since the denial of access to evidence that pertains to credibility or motivation of witnesses may clearly influence outcome. It further contends that this Issue is not theoretical, but has been effectively raised by Prosecution witnesses.²⁵
14. The Defence finally submits that an immediate resolution by the Appeals Chamber would advance the proceedings, as the error made by the Chamber 'has the potential to taint the fairness of these proceedings' and impacts on 'the Defence's

¹⁹ Application, ICC-01/09-01/11-1514, para. 22.

²⁰ Application, ICC-01/09-01/11-1514, para. 23.

²¹ Application, ICC-01/09-01/11-1514, para. 24.

²² Application, ICC-01/09-01/11-1514, para. 25.

²³ Application, ICC-01/09-01/11-1514, para. 26.

²⁴ Application, ICC-01/09-01/11-1514, para. 27.

²⁵ Application, ICC-01/09-01/11-1514, para. 28.

ability to present its case'. To avoid a re-trial, immediate resolution by the Appeals Chamber is necessary.²⁶

B. Prosecution Submissions

15. The Prosecution in its response stated that the request should be dismissed.²⁷
16. The Prosecution submits that the Issue does not have a real impact on the fairness and expeditiousness of proceedings since:
 - (a) disclosure of amounts provided to witnesses is not necessary to determine impact on the witnesses and incentive to give false testimony;²⁸
 - (b) disclosure obligations under Article 67(2) of the Statute and Rule 77 of the Rules of Procedure and Evidence (the 'Rules') apply to the Prosecution alone – the VWU is not a party of the proceedings and has no analogous disclosure obligations;²⁹
 - (c) the Impugned Decision allows the Defence to appropriately challenge the witnesses regarding assistance provided, including on the basis of information disclosed by the OTP and thus the claim of high probative value of this information is speculative and inconsistent with the facts;³⁰
 - (d) withholding this information from the Defence does not fetter their ability to conduct cross-examination;³¹ and
 - (e) non-disclosure of information of VWU-provided assistance is standard practice in other tribunals and does not prejudice any right of the Defence – doing otherwise, 'would undermine the fairness of the proceedings by putting vulnerable witnesses at risk'.³²

²⁶ Application, ICC-01/09-01/11-1514, para. 29.

²⁷ Response, ICC-01/09-01/11-1524, para. 1.

²⁸ Response, ICC-01/09-01/11-1524, para. 4.

²⁹ Response, ICC-01/09-01/11-1524, para. 4.

³⁰ Response, ICC-01/09-01/11-1524, para. 5.

³¹ Response, ICC-01/09-01/11-1524, para. 6.

³² Response, ICC-01/09-01/11-1524, para. 7.

17. The Prosecution further contends that the issue does not affect the outcome of the trial, as it does not affect the ability of the Defence to challenge the Prosecution case. In its view, there is no risk that the truth will be distorted on the material question, which is whether or not the witnesses gave truthful evidence.³³
18. Finally, the Prosecution submits that an immediate resolution by the Appeals Chamber would not materially advance the proceedings, as the Defence remains fully able to conduct cross-examination, and is in fact doing so.³⁴

III. APPLICABLE LAW

19. Article 82(1)(d) of the Statute sets out the requirements applicable to the granting of a request for leave to appeal, which are as follows:
- i. whether the decision involves an issue that would significantly affect:
 - i. the fair and expeditious conduct of proceedings; or
 - ii. the outcome of the trial; and
 - ii. in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.
20. The Chamber recalls that, for the purposes of the first prong of this test, the Appeals Chamber has defined an 'issue' as 'an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion'.³⁵

³³ Response, ICC-01/09-01/11-1524, para. 8.

³⁴ Response, ICC-01/09-01/11-1524, para. 9.

³⁵ *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 9.

IV. ANALYSIS AND CONCLUSIONS

21. The Chamber observes that the Issue at hand is in fact very similar, if not identical, to the first issue identified by the Chamber in its Prior Leave to Appeal Decision.³⁶ Consequently, the Chamber considers that the same criteria apply for the current Issue, which in the view of the Chamber arises from the Impugned Decision and qualifies under Article 82(1)(d) of the Statute.
22. The Chamber, however, is not persuaded by the Defence argument that the Impugned Decision applied a 'point of principle' that is distinct from the issue identified in the First VWU Disclosure Decision. In fact, the Chamber notes that the Defence acknowledges that, although worded differently, the Issue addresses the same point in principle as the issue arising from the First VWU Disclosure Decision, as the relevance of the impartiality of the VWU is disputed.³⁷ Moreover, even if the Chamber were to accept the Defence's submission that the Issue arising from the Impugned Decision has a more general application than the issue arising from the First VWU Disclosure Decision, the Chamber's conclusion, as regards the impact of the Issue on the fair and expeditious conduct of proceedings, would similarly apply to the current Application.
23. Consequently, the Chamber finds that the arguments of the Defence regarding deprivation of information are speculative.³⁸ The Defence is able (and has been able in hearings related to the witnesses concerned) to conduct cross-examination, based on information received as a result of their own investigations and/or material disclosed by the Prosecution pursuant to Article 67(2) of the Statute and/or Rule 77 of the Rules. For these reasons, the Chamber is of the view that the Defence has not

³⁶ Prior Leave to Appeal Decision, ICC-01/09-01/11-1154, para. 21.

³⁷ Application, ICC-01/09-01/11-1514, para. 14.

³⁸ Prior Leave to Appeal Decision, ICC-01/09-01/11-1154, para. 25.

demonstrated that the Issue would significantly affect the fairness and expeditiousness of the proceedings as required by Article 82(1)(d) of the Statute.³⁹

24. In relation to the Defence arguments on how the Issue would significantly affect the outcome of the trial, the Chamber notes that this alternative argument was based on the allegation of denial of access to relevant information and, consequently, for the reasons set out above, the Chamber is not persuaded by the arguments of the Defence.⁴⁰ Moreover, the Chamber observes that the Defence has been able to cross-examine the relevant witnesses on matters of credibility and motivation, despite the alleged 'denial of access to evidence' that, in the view of the Defence, may clearly influence the outcome of the trial.⁴¹ Consequently, the Chamber finds the Defence's argument to be too speculative to be able to support the view that the Issue would significantly affect the outcome of the trial.

25. Finally, the leave application does not overcome the final threshold which contemplates that the Chamber forms the opinion that an immediate resolution by the Appeals Chamber may materially advance the proceedings. In this regard, the Chamber reiterates its finding that:

[...] not every issue that would significantly affect the fairness and expeditiousness of the proceedings or the outcome of the trial can be certified for an interlocutory appeal. It must also be an issue for which, in the opinion of the Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings. Therefore, the Chamber needs to form the view that this is a matter that requires an immediate resolution in order for the proceedings to materially advance. To form such a view, the Chamber needs to be persuaded, *inter alia*, that there is advantage in resolving the Issues at this stage, bearing in mind that issues of this kind may also be raised in an appeal against the final decision under Article 74 of the Statute.⁴²

26. The Chamber considers that the same reasoning applies in relation to the current Issue and thus concludes that the Defence has not shown how an immediate

³⁹ Prior Leave to Appeal Decision, ICC-01/09-01/11-1154, paras 24-26.

⁴⁰ Prior Leave to Appeal Decision, ICC-01/09-01/11-1154, para. 27.

⁴¹ Application, ICC-01/09-01/11-1514, para. 28.

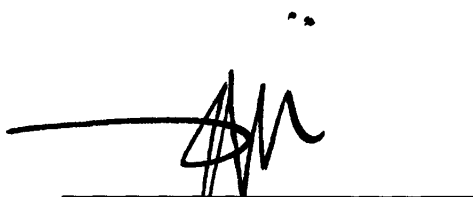
⁴² Prior Leave to Appeal Decision, ICC-01/09-01/11-1154, para. 28.

resolution of the Issue by the Appeals Chamber may materially advance the proceedings.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Defence Application.

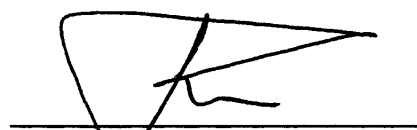
Done in both English and French, the English version being authoritative.



Judge Chile Eboe-Osuji
(Presiding)



Judge Olga Herrera Carbuccia



Judge Robert Fremr

Dated 13 October 2014

At The Hague, The Netherlands