

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 23 May 2013

Date of public redacted version: 11 December 2017

TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding Judge
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
Order regarding Defence Counsel's 'Provision of Information'**

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

The Office of the Prosecutor

Counsel for William Samoei Ruto

Mr Karim A. A. Khan

Mr Kioko Kilukumi Musau

Mr David Hooper

Ms Shyamala Alagendra

Counsel for Joshua Arap Sang

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

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V(A) (“Chamber”) of the International Criminal Court (“Court”, “ICC”), in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, pursuant to Articles 64(6)(c) and 64(6)(f) of the Rome Statute (“Statute”) renders the following Order regarding Defence Counsel’s ‘Provision of Information’.

1. On 7 May 2013, the Defence for Mr Ruto (“Defence”) filed its ‘Provision of Information’¹ wherein it notified the Chamber that it had reason to believe that an offence against the administration of justice or sanctionable conduct may have occurred (“Notification”). The Notification was filed on a confidential *ex parte* basis available only to named counsel from the Defence team, Mr Karim Khan and Ms Shyamala Alagendra (“Defence Counsel”). The stated justification for this classification was to “preserve, to the maximum extent possible, the confidential nature of the information and to abide to the fullest extent, with all orders of the Court.”²
2. The Notification informs the Chamber that during the course of the Defence’s investigations, a member of the Defence team made contact [REDACTED] in order to arrange an interview concerning allegations in the case, in particular those relating to the burning of the [REDACTED].³ Following this initial contact, [REDACTED] sent the Defence member two emails, with the subject heading [REDACTED] and attaching an audio file and a draft transcript of an audio recording.⁴ It is clear that the audio file and draft transcript are confidential materials emanating from the Office of the Prosecutor (“Prosecution”).
3. The Defence Counsel submit that, unlike in previous incidences where confidential Prosecution material was inadvertently disclosed to it, in the present

¹ ICC-01/09-01/11-725-Conf-Exp.

² ICC-01/09-01/11-725-Conf-Exp, para. 8.

³ ICC-01/09-01/11-725-Conf-Exp, para.4 and Annex 1, para. 4.

⁴ ICC-01/09-01/11-725-Conf-Exp-Anx 1, para. 6 and sub-annexes A-D.

case it did not consider it “possible or appropriate” to bring this matter to the attention of the Prosecution by way of *inter partes* communication.⁵ Specifically, it submits that “revealing the circumstances of the inquiry may prejudice defence investigations” and may cause the Defence to “lose valuable investigative leads and information” if [REDACTED] were to become aware that the Defence communicated with the Prosecution.⁶ Accordingly, the Defence Counsel instead notified the Chamber in order for it “to deal with this issue as it may deem appropriate”.

4. At the outset, the Chamber wishes to commend the Defence Counsel for bringing this matter to its attention, raising as it does very serious concerns about the confidentiality of internal Prosecution documents.
5. Having carefully considered this matter, the Chamber is of the view that it is essential for the Prosecution to be fully informed and provided with copies of the emails and attachments it received from [REDACTED] so that appropriate investigative steps may be taken, including investigations into offences against the administration of justice pursuant to Article 70 of the Statute. Whilst recognising the reservations expressed by the Defence Counsel about raising this matter in *inter partes* communications, the Chamber nonetheless considers this to be the most appropriate way to proceed as it will provide the Prosecution with a more complete view of the facts and documents necessary to conduct its investigations.
6. The Chamber accordingly directs the Defence Counsel to provide the Prosecution with copies of the emails and attachments sent by [REDACTED]⁷ and to notify the Chamber once this has been done. It is noted that this direction is addressed to

⁵ ICC-01/09-01/11-725-Conf-Exp, para.6.

⁶ ICC-01/09-01/11-725-Conf-Exp, para.6.

⁷ Being the documents included in ICC-01/09-01/11-725-Conf-Exp-Anx1 sub-annexes A- D.

Defence Counsel only, rather than the Defence as a whole, given that the Notification states that not all members of the Defence have access to the relevant materials.⁸ It is further noted that although the Notification was filed *ex parte* Defence Counsel only, the Chamber does not consider there to be a need to apply such classification to the present Order and accordingly it is notified to all members of the Defence.

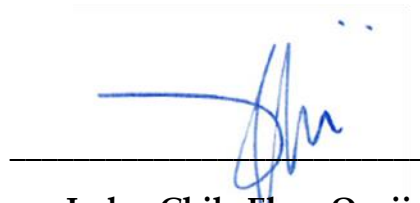
7. In response to the concerns of the Defence Counsel, the Chamber notes that the documents in question appear to relate to the separate case against Mr Kenyatta (*Prosecutor v. Uhuru Muigai Kenyatta*, ICC-01/09-02/11). As such, the Chamber considers that there is no reason why the Defence need disclose the materials to the Prosecution staff members responsible for the daily conduct of the present case. The Defence may direct its communication directly to the Prosecutor and Deputy Prosecutor with a request that particular care be taken to avoid disseminating the fact of the relationship between [REDACTED] and the Defence to members of the Prosecution who do not need to know of that fact for purposes of any investigation into any breach implicated. Furthermore, the Defence can request the Prosecution to make every effort to ensure that [REDACTED] is not made aware that the Defence provided the materials to the Prosecution. Should the Defence consider that judicial orders directed to the Prosecution are necessary in this regard, it may make such a request to the Chamber.

FOR THE FOREGOING REASONS, the Chamber hereby;

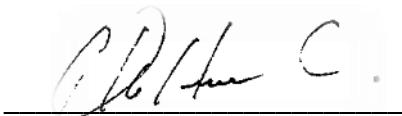
⁸ ICC-01/09-01/11-725-Conf-Exp, para.8.

DIRECTS Defence Counsel to provide the Prosecution forthwith with copies of the emails and attachments it received from [REDACTED] and to notify the Chamber once it has done so.

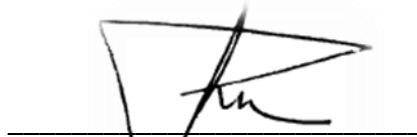
Done in both English and French, the English version being authoritative.



Judge Chile Eboe-Osuji, Presiding Judge



Judge Olga Herrera Carbuca



Judge Robert Fremr

Dated 23 May 2013

At The Hague, The Netherlands