

**Cour
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**International
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TRIAL CHAMBER V(A)

Before: Judge, Chile Eboe-Osuji, Presiding
Judge Olga Herrera Carbuccion
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 Ruto Defence Application for Nullification of the Prosecution-Registry
Joint Protocol**

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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Legal Representatives of Victims

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Unrepresented Victims

**Unrepresented Applicants for
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The Office of Public Counsel for Victims

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States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

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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’, ‘ICC’), in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, having regard to Articles 43(6), 54(3)(f), 68(1) and (4) of the Rome Statute (the ‘Statute’) and Rules 17-19 and 77 of the Rules of Procedure and Evidence (the ‘Rules’), issues this Decision on the Ruto Defence Application for Nullification of the Prosecution-Registry Joint Protocol.

I. Procedural background

1. On 13 August 2013, the defence team for Mr Ruto (the ‘Ruto Defence’) filed an application seeking: a) the nullification of the ‘Prosecution-Registry Joint Protocol on the Mandate, Standards and Procedure for Protection’ (the ‘Protocol’); and b) an order for disclosure of all information related to assistance, care or protective measures provided to witnesses under the Protocol (together the ‘Application’).¹
2. On 3 September 2013, the Office of the Prosecutor (the ‘Prosecution’) filed its response to the Application.²
3. On 20 September 2013,³ the Registry submitted its observations on the Application.⁴

II. Submissions

The Ruto Defence

4. The Ruto Defence submits that the Protocol⁵ ‘should have no application to the present trial, nor to the Defence, as it is: (a) without legal basis as it was not issued

¹ Defence Application for: 1) Nullification of the “Prosecution – Registry Joint Protocol on the Mandate, Standards and Procedure for Protection” and 2) Order for disclosure, ICC-01/09-01/11-851-Conf.

² Prosecution response to “Defence Application for: 1) Nullification of the “Prosecution – Registry Joint Protocol on the Mandate, Standards and Procedure for Protection” and 2) Order for disclosure, ICC-01/09-01/11-901-Conf.

³ E-mail communications from Trial Chamber V-A Communications to the Registry on 5 September 2013 at 16:45 and 9 September 2013 at 17:10.

⁴ Registry’s Observations on the “Defence Application for: 1) Nullification of the “Prosecution – Registry Joint Protocol on the Mandate, Standards and Procedure for Protection” and 2) Order for disclosure, ICC-01/09-01/11-968-Conf.

or approved by this Trial Chamber or any other Chamber of the Court and not adopted by the Assembly of State Parties; and (b) contrary to the Statute, the Rules and the jurisprudence of the Court, because it: (i) undermines the core impartiality of the Victims and Witnesses Unit (the 'VWU'), (ii) circumvents the authority and responsibility of the Chambers, (iii) places witnesses and other persons at risk, and (iv) provides the basis for the Prosecution to improperly provide benefits to its witnesses while the Defence cannot.⁶ In particular, the Ruto Defence argues that the Protocol 'unlawfully interferes and alters the careful balance between the OTP and the VWU set out in the Statute and the Rules'. The Ruto Defence submits that the 'legitimacy and propriety of all actions undertaken in this case by the OTP and/or the VWU in respect of Prosecution trial witnesses pursuant to the Protocol are also called into question'.⁷ On that basis, the Ruto Defence requests disclosure, pursuant to Rule 77 of the Rules, of all pertinent information in the Prosecution's possession 'pertaining to the assistance or care (whether financial or otherwise) and/or protective measures provided to any Prosecution trial witnesses pursuant to the Protocol'.⁸ Specifically, the Ruto Defence requests disclosure of information such as: the type and nature of assistance, care or measure; duration of the same; entity providing the assistance, care, or measure; and any VWU documents or communications objecting to or expressing reservations regarding any proposed assistance, care or measure.⁹

5. The Ruto Defence states that it first became aware of the Protocol in 2011, while the current case was before the Pre-Trial Chamber. Moreover, during that same year, the Ruto Defence, along with the defence for Mr Sang, jointly submitted

⁵ The Protocol was transmitted to the Chamber in the Prosecution's Response to Defence Filing ICC-01/09-01/11-766-Conf + Conf-Anxs, 24 June 2013, ICC-01/09-01/11-784-Conf-AnxA.

⁶ Application, ICC-01/09-01/11-851-Conf, paras 3, 34-35.

⁷ Application, ICC-01/09-01/11-851-Conf, para. 4.

⁸ Application, ICC-01/09-01/11-851-Conf, paras 5 and 48.

⁹ Application, ICC-01/09-01/11-851-Conf, para. 49.

observations to the Protocol, as it was transmitted to counsel for the defence and the Office of Public Counsel for Defence for comments. The Ruto Defence however notes that the Protocol had already been adopted by then and that it continues to operate, despite their objection.¹⁰

6. The Ruto Defence further notes that in all relevant communications with VWU as regards protection related matters, the VWU has never referred to the Protocol. In the view of the Ruto Defence, this issue affects the 'transparency of the whole process and implementation of the same'¹¹ and '*prima facie* calls into question whether the VWU was able to evaluate on an equal basis, using the same criteria', applications for protection submitted by the Prosecution as compared to those submitted by the Ruto Defence.¹² It submits that the Protocol is a 'Prosecution-centric document' and does not take into account the interests of the defence.¹³
7. The Ruto Defence argues that the Protocol is contrary to the ruling of the Appeals Chamber in the case of *The Prosecutor v Germain Katanga* (the '*Katanga* case'), which concluded that 'preventive relocation' of witnesses by the Prosecution was 'contrary to the statutory scheme'.¹⁴ The Ruto Defence submits that the Katanga Appeals Judgment 'expressly made determinations' regarding the proper place of the VWU within the Court and the need for the VWU to act impartially.¹⁵ The Ruto Defence further argues that in light of the Katanga Appeals Judgment, it is clear that actions such as [REDACTED], do not fall within the parameters contemplated by the Appeals Chamber, which referred to 'general measures' that

¹⁰ Application, ICC-01/09-01/11-851-Conf, paras 8-12.

¹¹ Application, ICC-01/09-01/11-851-Conf, paras 14-15.

¹² Application, ICC-01/09-01/11-851-Conf, para. 16.

¹³ Application, ICC-01/09-01/11-851-Conf, paras 40-41.

¹⁴ Application, ICC-01/09-01/11-851-Conf, para. 20, referring to *Katanga* case, Judgment on the appeal of the Prosecutor against the "Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules" of Pre-Trial Chamber I (the '*Katanga* Appeals Judgment'), 26 November 2008, ICC-01/04-01/07-776.

¹⁵ Application, ICC-01/09-01/11-851-Conf, paras 21-27, referring to *Katanga* Appeals Judgment, ICC-01/04-01/07-776, paras 72, 73, 77, 78, 80, 92, 98 and 101.

may be taken by the Prosecution.¹⁶ The Ruto Defence therefore submits that ‘it is clear that the VWU is the only entity within the Court mandated and expertly equipped to provide in an impartial fashion, and properly taking into account the interests of persons concerned, any assistance or care that may be necessary and appropriate’.¹⁷

8. The Ruto Defence further argues that the Prosecution may unduly influence witnesses through the direct provision of benefits and assistance under the Protocol.¹⁸
9. The Ruto Defence contends that the Protocol puts witnesses and their families at risk and circumvents the authority and role of the Trial Chamber, in particular, the Protocol allows the Prosecution to unilaterally take protective measures, without the agreement of the VWU. Moreover, in its view, the Protocol envisions no role for a Chamber in the event of disagreement.¹⁹

Prosecution

10. The Prosecution argues that the Protocol is consistent with the Katanga Appeals Judgment, as it regulates the cooperation between the VWU and the Prosecution in order to avoid disagreements, and thus the Chamber will only intervene ‘in the rare situation as when there is a disagreement between the two’.²⁰ The Prosecution submits that the Katanga Appeals Judgment is expressly limited to ‘preventive relocation of witnesses’ and does not limit the duty and power of the Prosecution

¹⁶ Application, ICC-01/09-01/11-851-Conf, paras 28-32, and 37, referring to Katanga Appeals Judgment, ICC-01/04-01/07-776, para. 98.

¹⁷ Application, ICC-01/09-01/11-851-Conf, para. 33.

¹⁸ Application, ICC-01/09-01/11-851-Conf, paras 38-39.

¹⁹ Application, ICC-01/09-01/11-851-Conf, paras 42-47.

²⁰ ICC-01/09-01/11-901-Conf, para. 8.

with respect to other protection tools. Accordingly, no witness in the present case has been 'preventively relocated'.²¹

11. The Prosecution further argues that the Protocol does not purport to be a legally binding document and its interpretation and application is subject to the Statute, Rules and Regulations of the Court and subject to any decision of the Chambers.²² Its scope is to regulate cooperation between the Prosecution and the VWU as generally agreed by the two, and pursuant to the Statute and the Rules.²³ The Prosecution further contends that, pending conclusion of agreements with the Defence and with victims, the Protocol applies *mutatis mutandis* to the protection of persons at risk on account of their interaction with either defence or victims and may be the basis for an analogous Protocol to be established between the Registry and Defence teams.²⁴
12. The Prosecution also submits that the Ruto Defence provides no support for their assertion that the Protocol gives the Prosecution the power to influence witness's testimony. In fact, the Prosecution contends that the Protocol regulates in detail the manner in which support and assistance is to be provided and argues that 'unregulated and *ad hoc* protection measures would be far more susceptible to abuse'.²⁵
13. Moreover, the Prosecution notes that the Statute places a positive duty of protection on the Prosecution with respect to witnesses, which is not shared by the Defence. Thus, in the Prosecution's view, the submission that there is 'lack of parity in resources is irrational'. Additionally, the Prosecution states that the

²¹ ICC-01/09-01/11-901-Conf, paras 9 and 14.

²² ICC-01/09-01/11-901-Conf, para. 11.

²³ ICC-01/09-01/11-901-Conf, paras 6-7 and 11-12.

²⁴ ICC-01/09-01/11-901-Conf, para. 13.

²⁵ ICC-01/09-01/11-901-Conf, para. 15.

Defence and the VWU could reach a similar agreement, particularly as regards Defence witnesses that exit the ICC Protection Programme.²⁶

14. The Prosecution also submits that the Protocol does not bind the VWU in its protection of Defence witnesses and can therefore not be 'Prosecution-centric', because it only applies to the protection of Prosecution witnesses.²⁷ Moreover, in their view, the Protocol does not circumvent the authority of the Trial Chamber, since it 'repeatedly states that in case of disagreement between the OTP and the VWU, the Chamber may be seized to resolve the disagreement'.²⁸
15. Regarding the risks to witnesses and their families, the Prosecution stresses that 'as a matter of course, interim protection measures are only implemented after consultation with the VWU' and 'are only implemented as a response to a credible and imminent threat to a witness that requires an immediate response'.²⁹ Thus, the Protocol 'actually assists in *alleviating* such risks'.³⁰
16. In response to the request for disclosure of information, the Prosecution submits that it should be dismissed. However, it informs that, to date, it has disclosed a 'first batch of spread sheets detailing payments made to witnesses by the Prosecution', which correspond to the first ten witnesses then scheduled to appear, as well as Witness 15. The Prosecution states that additional spread sheets for the remaining trial witnesses will be provided to the Defence. The Prosecution informs that these include dates of payments, a description of payments and also record payments made by the Prosecution on behalf of the VWU. The Prosecution therefore submits that this information is sufficient to allow the Defence to assess the extent to which it may consider such payments to amount to 'undue influence

²⁶ ICC-01/09-01/11-901-Conf, para. 16.

²⁷ ICC-01/09-01/11-901-Conf, para/ 17.

²⁸ ICC-01/09-01/11-901-Conf, para. 18.

²⁹ ICC-01/09-01/11-901-Conf, para. 20.

³⁰ ICC-01/09-01/11-901-Conf, para. 21.

on the witnesses'. The Prosecution submits that the Ruto Defence has failed to establish how the disclosure of additional details related to protective measures is material for the preparation of their defence. Additionally, the Prosecution states that the disclosure of these details would have 'extremely serious security implications'.³¹

The Registry

17. The Registry observes that the 'duty of care and protection towards witnesses and victims as envisaged by the Statute is not exercised exclusively by the VWU', but is also a duty of the Trial Chamber and Prosecutor.³² The Registry further asserts that the Statute and the case law of the Court clearly grants a 'core role' to the Registry and a 'limited mandate' to the Prosecution regarding witness protection. It notes that, in relation to the relocation of individuals, the jurisprudence of the Court has recognised the Registry as 'the sole organ statutor[ily] entitled to set up and manage a witness protection programme in charge of implementing such intrusive protective measure'.³³ The Registry emphasises that 'participation in the protection programme is assessed and implemented by the VWU'.³⁴

18. In relation to the Protocol, the Registry affirms that this was negotiated and adopted upon a recommendation by the Assembly of State Parties, and 'acting within the Presidency's overall responsibility' in order 'to improve coordination between the VWU and the OTP and clarify responsibilities for each other on issues of witness protection'.³⁵ The Registry explains that the Defence and victims representatives were not involved in this process since the Statute provides for

³¹ ICC-01/09-01/11-901-Conf, paras 23-24.

³² ICC-01/09-01/11-968-Conf, paras 2-3.

³³ ICC-01/09-01/11-968-Conf, paras 4-6, referring to Katanga Appeals Judgment, ICC-01/04-01/07-776, paras 97, 83-91, 99 and 100.

³⁴ ICC-01/09-01/11-968-Conf, para. 7.

³⁵ ICC-01/09-01/11-968-Conf, para. 9.

consultation between the VWU and the OTP. A workable system between these two organs was thus set up, which once in place and assessed, applies *mutatis mutandis* to the protection of Defence witnesses.³⁶ The Registry further informs that the Protocol has been in place for more than two years and ‘the Prosecutor and the Registrar will have to enter into further exchange and dialogue in order to streamline and develop further their cooperation in the field of witness’ protection’.³⁷ The Registry also welcomes the opportunity to enter into a similar exchange and dialogue with the Defence and legal representative’s teams to ensure an effective protection of all witnesses and victims.³⁸

III. Analysis

Nullification of the Protocol

Legal Basis for the Protocol

19. The Chamber considers that the Protocol, as an operational document designed to regulate cooperation on a particular matter between two independent organs of the Court, does not *per se* require the pre-approval of a Chamber in order to be validly adopted.
20. Pursuant to Articles 34 and 42 of the Statute, the Prosecution is established as an independent and separate organ of the Court, while, pursuant to Article 43(6) of the Statute, the VWU is constituted under the direct supervision of the Registrar. However, both the Prosecution and the VWU have express statutory mandates relating to the protection of victims and witnesses.³⁹ In particular, pursuant to Articles 43(6) and 68(1) and (4) of the Statute, the VWU and the Prosecution may

³⁶ ICC-01/09-01/11-968-Conf, para. 10.

³⁷ ICC-01/09-01/11-968-Conf, para. 12.

³⁸ ICC-01/09-01/11-968-Conf, para. 13.

³⁹ See e.g. Articles 43(6), 54(3)(f), 68(1) and (4) of the Statute.

hold consultations in order to provide protective measures for victims and witnesses. For example, Article 43(6) of the Statute states that the VWU shall 'provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses'.

21. The Chamber considers that, contrary to the submissions of the Ruto Defence, the existence of an operational protocol on witness protection between these two organs of the Court is appropriate and falls within the contemplation of the Court's statutory framework. The Protocol is a written agreement putting in place a consultation mechanism and dividing tasks between the two organs of the Court in their shared mandates for the protection of victims and witnesses. In the Chamber's view, formalising their cooperation in this way has potential to provide greater clarity, predictability, certainty and accountability regarding their respective roles and mandates.
22. The Chamber notes that, while the Chamber is itself mandated and empowered to rule on matters pertaining to the protection of victims and witnesses,⁴⁰ this does not necessitate judicial pre-approval of all actions and agreements relating to such matters as between the Prosecution and the VWU. In fact, as discussed further at paragraph 28 below, the statutory framework clearly envisages the Prosecution taking steps not subject to primary judicial approval to fulfil its duty to protect individuals in the course of proceedings, for example pursuant to Article 54(3)(f) of the Statute.

⁴⁰ See e.g. Articles 64(6)(e) and 68(1) of the Statute.

23. Moreover, as submitted by the Registry, the consultation process leading to the adoption of the Protocol was initiated upon a recommendation of the Assembly of States Parties to further develop the system for addressing security risks.⁴¹

24. For the reasons discussed above, the Chamber does not consider that the Protocol lacks legal basis such that it should have no application in the present case.

Consistency of the Protocol with the Statute, Rules and jurisprudence of the Court

25. As described in the submissions section, the Ruto Defence has raised a number of grounds upon which it submits that the Protocol is contrary to the Statute, Rules and jurisprudence of the Court and these will be considered below.

26. First, the Chamber is of the view that the Protocol does not *per se* undermine the ‘core impartiality of the VWU’. The mandate of the VWU encompasses all witnesses, victims appearing before the Court, and other persons who are at risk on account of the testimony of such witnesses.⁴² Furthermore, Rule 18(b) of the Rules reinforces the obligation of the VWU to act ‘impartially when cooperating with all parties’. The Chamber does not accept that the entering into of an operational agreement with the Prosecution, consistent with the statutory requirement of cooperation on protection matters, prejudices such independence and impartiality.

27. In respect of the Ruto Defence contention that the Protocol is a ‘Prosecution-centric’ document, the Chamber notes that the Protocol does not purport to have any wider scope than the regulation of cooperation in respect of persons at risk ‘on account of their interaction with the Prosecution’.⁴³ Moreover, Rule 18(b) of the Rules explicitly requires the VWU to maintain an ‘appropriate separation of

⁴¹ ICC-01/09-01/11-968-Conf, para. 9. See also ICC-01/09-01/11-901-Conf, para. 12. See also Strategic Plan of the Court, 4 August 2006, para. 31 and Annex p.14 and Report of activities of the Court, ICC-ASP/7/25, Annex (p.18), 29 October 2008.

⁴² Article 43(6) of the Statute.

⁴³ Article 2(1) of the Protocol.

services provided to the prosecution and defence witnesses'. Consequently, although the specific legal basis upon which the Protocol would be applicable '*mutatis mutandis*' to the Defence is not apparent to the Chamber, it is a matter of common sense and efficiency that some of the principles and mechanisms provided for in the Protocol could be applied and adapted in order to protect Defence witnesses, in the absence of a separate protocol designed to regulate the relationship between the VWU and the different defence teams that represent accused persons before this Court. Ideally, of course, it is desirable that the Registry, as expressed in its observations, makes similar agreements, if possible, with the Defence teams and legal representative for victims.

28. Second, the Chamber also does not consider that the Protocol *per se* circumvents the authority and responsibility of the Chamber. Although a Trial Chamber has a mandate to protect victims and witnesses, it is not best placed at all times to engage in primary assessment of the general security situation or the specific needs of a witness or victim in a particular case for purposes of needed protective action. Article 68(1) and (4) of the Statute foresees situations in which the VWU may advise the Prosecutor on the appropriate protection of victims and witnesses, without necessarily requiring a ruling of the Chamber as a first step. In light of these statutory provisions, Regulation 96 of the Regulations of the Registry provides that the inclusion of individuals in the ICC Protection Programme is triggered by an application of the Prosecution or of counsel, and is ultimately a decision of the Registrar of the Court, in which the involvement of the judiciary is not necessarily expected in the ordinary course.

29. Thus, unless there is a disagreement between the Prosecution and the Registry, the Chamber will not intervene in the implementation of the protection measures provided for in the Protocol. This is, for example, also reflected in Articles 18 and 19 of the Protocol, which provide that the Prosecution and the VWU shall jointly

present the Situation Threat and Risk Assessment to the Chamber, indicating any outstanding areas of disagreement.

30. Moreover, the Chamber observes that the Protocol anticipates that it shall be updated to 'reflect the relevant jurisprudence' of the Court.⁴⁴ Consequently, if the Chamber makes any ruling that does not accord with what has been agreed to by the Prosecution and the Registry, the Protocol shall be modified accordingly. In this regard, the Protocol also complies with the jurisprudence of the Court, including the Katanga Appeals Judgment.
31. Third, in respect of the Ruto Defence argument that the Protocol allows the Prosecution to take actions contrary to the Statute, Rules and jurisprudence, the Chamber notes, as a preliminary observation, that the Protocol expressly provides that it is to be read 'subject to the Statute, Rules and Regulations of the Court and subject to any decision of the Chambers'.⁴⁵ Therefore, the parties to the Protocol are restricted to interpreting and applying it in a manner consistent with the statutory framework, jurisprudence of the Court and the directions of the Chamber.
32. Additionally, although the Katanga Appeals Judgment provides guidance on interpretation of the relevant statutory framework, the Chamber is not persuaded that it has established a 'four-part test' which exhaustively delimits the scope of the Prosecution's protection mandate. The Katanga Appeals Judgment deals with the specific situation of 'preventive relocation', in circumstances where there was disagreement between the VWU and the Prosecution on the implementation of protective measures. Contrary to the Ruto Defence submission that the Protocol provides justification for the OTP to create a 'parallel' VWU, the Chamber considers that the Protocol's objective is cooperation and information sharing

⁴⁴ See Article 2(4) of the Protocol.

⁴⁵ See Article 2(4) of the Protocol.

between the Prosecution and the VWU.⁴⁶ This is consistent with the emphasis placed on the importance of effective cooperation in the Katanga Appeals Judgment.⁴⁷ The Protocol sets a mechanism that restricts ‘unilateral and unchecked action by the Prosecutor’, such as the ‘preventive relocation’ disallowed by the *Katanga* Appeals Judgment. The Chamber will briefly consider below various specific forms of protection provided for in the Protocol.

33. The Chamber is of the view that in respect of [REDACTED], the Protocol is not contrary to the statutory framework and jurisprudence of the Court. The Protocol simply regulates in a clear manner the interaction required between the VWU and the Prosecution when [REDACTED]. Article 48 of the Protocol provides that the [REDACTED]. The same Article states that [REDACTED]. In this regard, both the Registry and the Prosecution have reaffirmed in their submissions that [REDACTED] is assessed and implemented by the VWU, albeit in consultation with the Prosecution, in accordance with Article 43(6) of the Statute. Moreover, in the event that there is disagreement between the VWU and the Prosecution as regards [REDACTED], the Protocol foresees the involvement of the Chamber.⁴⁸

34. The Chamber notes that, apart from [REDACTED], the Protocol also foresees other security arrangements and measures such as [REDACTED]. The Chamber considers that such measures may, in certain circumstances, be taken by the Prosecution within the statutory framework, including pursuant to Articles 54(3)(f) and 68(1) of the Statute. Indeed, the *Katanga* Appeals Judgment expressly recognised the need for a residual degree of flexibility in relation to emergency and interim measures in particular.⁴⁹ Thus, the Chamber considers that Article 28

⁴⁶ See Articles 6 and 7 of the Protocol.

⁴⁷ *Katanga* Appeals Judgment, paras 98 and 101.

⁴⁸ See for example Article 52(4) of the Protocol, which provides that when the Prosecution disagrees with the Registrar’s decision on [REDACTED], the Prosecution may request a Chamber to review the Registrar’s decision.

⁴⁹ *Katanga* Appeals Judgment, paras 102-103.

of the Protocol, which deals with the allocation of responsibilities as regards these measures, does not infringe the statutory framework.

35. Fourth, and flowing from the findings made above, including the ultimate authority of the Chamber in cases of disagreement between the Registry and the Prosecution, the Chamber does not find that the Protocol places witnesses and their families at risk.

36. Finally, the Chamber also considers that the Protocol does not, as alleged by the Ruto Defence, provide the basis for the Prosecution to improperly provide benefits to its witnesses. As stated above, it is not the Protocol, but the Statute, which gives the Prosecution a distinct role vis-à-vis the protection of witnesses and victims, which is not shared by the Defence teams. However, as previously mentioned, the Protocol could be adapted to meet the equivalent needs of Defence witnesses. Additionally, although it is recognised that the Prosecution, as a party to proceedings, cannot be considered impartial in the manner of the Registry, the Ruto Defence submission appears to presuppose a degree of bad faith on the part of the Prosecution which the Chamber does not accept. To the extent the defence believes that there may have been a provision of improper benefits in any particular case, impacting the credibility of a witness, such matters may be explored in cross-examination.

Disclosure of information

37. The Ruto Defence has requested disclosure of 'all [...] information [...] pertaining to the assistance or care (whether financial or otherwise) and/or protective measures provided to any Prosecution trial witness pursuant to the Protocol',

including certain specifically identified categories of information. This request is made '[o]n the basis of the illegitimate nature of the Protocol'.⁵⁰

38. In light of the findings made above in respect of the Protocol, which reject the Ruto Defence submissions as to its 'illegitimacy' or inapplicability in this case, the Chamber does not consider that the materiality of the requested information, even on a *prima facie* basis, has been established in this instance.
39. The Chamber recalls the two-step analysis required by Rule 77 of the Rules.⁵¹ The Chamber shall first determine, on a *prima facie* basis, whether the information requested is 'material to the preparation of the defence' and, secondly, if the information has been found to be so material, whether it falls within one of the exceptions to disclosure provided for in the Statute or in Rules 81 and 82 of the Rules.⁵²
40. However, the Chamber notes that it has previously ruled, on a different basis, on the Prosecution's obligation to disclose information related to payments, benefits or assistance (including protective measures) provided to its witnesses, which the Chamber determined were disclosable in the circumstances of this case in accordance with Rule 77 of the Rules.⁵³ The Chamber considers that there is significant overlap between the information to be disclosed pursuant to its previous ruling and the scope of the instant request. The Ruto Defence will obtain all relevant disclosable material in light of the Chamber's previous ruling. The Chamber also notes that the Prosecution undertook to provide spread sheets detailing payments made by it to each of the Prosecution witnesses. As indicated

⁵⁰ ICC-01/09-01/11-851-Conf, paras 5, 48-49.

⁵¹ ICC-01/09-01/11-904-Conf, paras 26-28.

⁵² ICC-01/09-01/11-904-Conf, para. 26. See also: *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled 'Decision on the Defence's Request for Disclosure of Documents in the possession of the Office of the Prosecutor', 28 August 2013, ICC-02/05-03/09-501, para. 35.

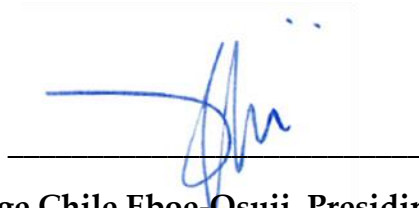
⁵³ See Decision on Disclosure of Information related to Prosecution Intermediaries, 4 September 2013, ICC-01/09-01/11-904-Conf, p.27.

above, to the extent that any additional information is sought, the Chamber does not consider that materiality has been established. It is additionally noted that the defence would have the opportunity to elicit such information relevant to the credibility of the witness during cross-examination. Consequently, the Chamber finds no reason to amend or supplement its previous ruling and the disclosure request in the Application is rejected.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

DISMISSES the Application.

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



Judge Chile Eboe-Osuji, Presiding Judge



Judge Olga Herrera Carbuccia



Judge Robert Fremr

Dated 14 November 2013

At The Hague, The Netherlands