

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **2 June 2014**

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TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding Judge
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 joint Defence request for VWU assistance to facilitate
interview with Witness 323**

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

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Patrick Craig

Detention Section

Others

**Victims Participation and Reparations
Section**

Trial Chamber V(A) (the ‘Chamber’) of the International Criminal Court (the ‘Court’ or ‘ICC’), in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, having considered Articles 43(6), 64(6)(f) and 68(4) of the Rome Statute (the ‘Statute’), Rules 17 and 18 of the Rules of Procedure and Evidence (the ‘Rules’), as well as Regulation 24(5) of the Regulations of the Court , renders the following ‘Decision on the joint Defence request for VWU assistance to facilitate interview with Witness 323’.

I. PROCEDURAL HISTORY AND SUBMISSIONS

Filings and communication between the parties and VWU

1. On 19 February 2014, the Office of the Prosecutor (‘Prosecution’) filed the ‘Prosecution’s supplementary request under Article 64(4)(b) and Article 93 to summon a further witness’ (‘Supplement to Summons Request’).¹ The Prosecution notified the Chamber that Witness 323 (the ‘Witness’) had withdrawn his cooperation with the Prosecution shortly before his handover to the Victims and Witnesses Unit (‘VWU’) for his testimony, which was originally scheduled to start on 17 February 2014.² The Prosecution requested the Chamber to grant the same relief as in the ‘Prosecution’s request under article 64(6)(b) and article 93 to summon witnesses’,³ namely for the Chamber to summon the Witness to testify, either via video-link or before the Court sitting in Kenya.⁴
2. On 13 March 2014, the defence team for Mr Ruto (the ‘Ruto Defence’) filed its ‘Defence request for VWU assistance to facilitate interview with P-0323’ (‘Ruto Request’),⁵ in which it requested the Chamber to authorise the VWU to

¹ ICC-01/09-01/11-1188-Conf-Exp, confidential *ex parte* Prosecution and VWU only; with a confidential redacted version, ICC-01/09-01/11-1188-Conf-Red.

² Supplement to Summons Request, ICC-01/09-01/11-1188-Conf-Red, para.3.

³ 5 December 2013, ICC-01/09-01/11-1120-Conf-Red-Corr2.

⁴ Supplement to Summons Request, ICC-01/09-01/11-1188-Conf-Red, paras 3 and 20.

⁵ Ruto Request, ICC-01/09-01/11-1218-Conf, with confidential Annexes A to K.

facilitate contact between the Ruto Defence and the Witness. It further requested the Chamber to order the VWU to inform the witness that:

- i. his lawyer, [REDACTED], has informed the Prosecution (OTP) that he is not willing to communicate with the Prosecution
- ii. the lawyers for Mr. William Ruto would like to meet with him and to interview him on matters concerning the ICC case;
- iii. he may meet with the Defence lawyers for Mr. Ruto without the Prosecution being present if he so wishes (in accordance with paragraph 10 of the [Witness Contact] Protocol);
- iv. the lawyers for Mr Ruto prefer to meet with him without his lawyer, [REDACTED], being present;
- v. if he insists that [REDACTED] is present, the Defence would, in these circumstances, not object and may still be willing to meet with him.⁶ (hereinafter: 'Five Points')

The Ruto Defence further requested the Chamber to order that the communication between VWU and the Witness be audio-recorded and disclosed to the parties.⁷

3. On 14 March 2014, the VWU sent an email informing the Chamber of its position on the requested assistance.⁸ The Chamber directed the VWU to communicate its observations through a formal filing.⁹ The VWU filed its observations on 28 March 2014.¹⁰
4. On 19 March 2014, the defence for Mr Sang (the 'Sang Defence', together with the Ruto Defence: the 'Defence') filed an application to join the Ruto Request and to participate in the interview with the Witness, (the 'Sang Request').¹¹

⁶ Ruto Request, ICC-01/09-01/11-1218-Conf, paras 18 and 28.

⁷ Ruto Request, ICC-01/09-01/11-1218-Conf, para. 28.

⁸ Email communication from the VWU to the Chamber, 14 March 2014, at 15:13.

⁹ Email communication from the Legal Officer of the Chamber to the VWU, 20 March 2014, at 11:58.

¹⁰ Victims and Witnesses Unit's Observations on "Defence request for VWU assistance to facilitate interview with P-0323" (ICC-01/09-01/11-1218-Conf) pursuant to the Trial Chamber V's instruction dated 20 March 2014, ICC-01/09-01/11-1232-Conf ('VWU Observations').

¹¹ Sang Defence application to join in the Ruto Defence request for VWU assistance to facilitate interview with P-0323, and to participate in the interview, ICC-01/09-01/11-1222-Conf.

5. In the annexes to its request, the Ruto Defence provided the Chamber with the correspondence between the Ruto Defence, the Prosecution and the VWU on the matter of the Ruto Defence contacting Witness 323.
6. On 7 March 2014, VWU responded to the Prosecution and the Ruto Defence that it was of the view that guidance of the Chamber was necessary, as it considered that the request for VWU assistance falls outside of scope of the protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call ('Witness Contact Protocol').¹² At the same time, the VWU indicated its readiness to contact the witness, or his lawyer, to inform him of the Ruto Defence's request to meet.¹³

Submissions

7. The Ruto Defence submitted the Witness has withdrawn as a Prosecution witness.¹⁴ It stated that it wished to contact this person, for it considered he may have information relevant to its case and which the Ruto Defence may wish to put before the Chamber.¹⁵
8. The Ruto Defence regarded its request to be necessary, as it had been unable to communicate with the witness in accordance with the Witness Contact Protocol, because the witness has refused contact with the calling party, i.e. the Prosecution. It submitted that this situation is not addressed in the Witness Contact Protocol, and noted that the need for its request further arose from the

¹² See Annex to Decision on the protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call, 24 August 2012, ICC-01/09-01/11-449-Anx.

¹³ Email communication from the VWU to the Ruto Defence, copying in the Prosecution and the Chamber, on 7 March 2014 at 16:05.

¹⁴ Ruto Request, ICC-01/09-01/11-1218-Conf, para. 5.

¹⁵ Ruto Request, ICC-01/09-01/11-1218-Conf, paras 6 and 9.

fact that the Prosecution and the VWU both insisted on the Chamber expressly authorising the VWU to facilitate contact with the witness.¹⁶

9. The Ruto Defence declined to itself contact the witness's lawyer in order to facilitate contact between the Prosecution and the Witness, as proposed by the Prosecution in its 4 March 2014 email, as it was 'not agreeable to play the role of Prosecution intermediary'. However, it would be agreeable to the VWU assisting in contacting the witness.¹⁷
10. The Ruto Defence submitted that the VWU should inform the witness of all Five Points, and stated it considered the Prosecution's objection to communication of the fourth and fifth points¹⁸ as 'without any basis or merit'.¹⁹
11. The Ruto Defence additionally submitted that the VWU's suggestion that the Ruto Defence and Prosecution should first agree on the questions to be put to the witness, is without any legal basis.²⁰ The Defence further stated it would be pointless to require the Prosecution's presence during any discussion between the Ruto Defence and the witness since the witness is unwilling to communicate with the Prosecution and that such presence could be perceived as oppressive.²¹ However, it did not object to a VWU representative being present during its interview with the witness.²²
12. Lastly, the Ruto Defence contended it is in the witness's interest to keep the interactions between him and the Ruto Defence confidential – even from his

¹⁶ Ruto Request, ICC-01/09-01/11-1218-Conf, para. 2.

¹⁷ Ruto Request, ICC-01/09-01/11-1218-Conf, para. 16.

¹⁸ *See* Ruto Request, ICC-01/09-01/11-1218-Conf-AnxJ (the Prosecution indicated that it viewed the proposed points 4 and 5 of the Five Points to go beyond the scope of seeking the consent of the Witness to being interviewed).

¹⁹ Ruto Request, ICC-01/09-01/11-1218-Conf, para. 23.

²⁰ Ruto Request, ICC-01/09-01/11-1218-Conf, para. 25.

²¹ Ruto Request, ICC-01/09-01/11-1218-Conf, para. 26.

²² Ruto Request, ICC-01/09-01/11-1218-Conf, para. 27.

lawyer – until further information is available on any potential impact on the witness's security of his continuing cooperation with the Court being known.²³

13. In the Sang Request, the Sang Defence requested to be included in any order or direction made by the Chamber authorising the VWU to facilitate contact with Witness 323.²⁴ It submitted it has a legitimate interest in interviewing the witness in order to establish the veracity of the testimony that the witness is expected to give about a certain announcement he heard Mr Sang broadcast on KASS FM.²⁵ The Sang Defence acknowledged that it had not made a request, similar to the one made by Ruto Defence, to meet with the witness. However, in its view such a request would be futile, due to: i) the Witness Contact Protocol did not foresee a situation where a witness would be unwilling to communicate with the calling party; and ii) the lack of resolution of the discussions between the Ruto Defence, Prosecution and the VWU.²⁶

14. On 21 March 2014, the Prosecution filed its joint response to the Ruto Request and the Sang Request (the 'Prosecution Joint Response').²⁷ It agreed that the circumstances surrounding the Ruto Request and Sang Request are not provided for in the Witness Contact Protocol.²⁸ According to the Prosecution, it is therefore prudent to seek the Chamber's guidance. The Prosecution requested the Chamber to consider whether it is appropriate for the Defence to interview the witness at this particular time, for the following reasons: 'i) there are reasonable grounds to apprehend that this witness may have been subjected to undue influence to recant his statement; ii) there are reasonable grounds for concern as to his safety; iii) the Prosecution has no access to this

²³ Ruto Request, ICC-01/09-01/11-1218-Conf, para. 24.

²⁴ Sang Request, ICC-01/09-01/11-1222-Conf, para. 5.

²⁵ Sang Request, ICC-01/09-01/11-1222-Conf, paras 2 and 4.

²⁶ Sang Request, ICC-01/09-01/11-1222-Conf, para. 3.

²⁷ Prosecution's joint Response to (i) the "Defence request for VWU assistance to facilitate interview with P-0323"(ICC-01/09-01/11-1218-Conf); and (ii) the "Sang Defence application to join in the Ruto Defence request for VWU assistance to facilitate interview with P-0323, and to participate in that interview (ICC-01/09-01/11-1222-Conf), ICC-01/09-01/11-1224-Conf-Exp.

²⁸ Prosecution Joint Response, ICC-01/09-01/11-1224-Conf-Exp, paras 2 and 20.

witness; and iv) P-0323 is currently the subject of a pending request to be summonsed before the Chamber'.²⁹

15. However, if the Chamber considers a meeting between the Ruto Defence and the Witness permissible, the Prosecution submitted that additional safeguards should be implemented. It argued that either the interview be conducted in the presence of two representatives of the Prosecution, or, if the Witness objects to attendance of the Prosecution, for representatives of the VWU to be present during the interview, who would then also be tasked with ensuring the interview is video-taped and made available to all parties.³⁰ The Prosecution submitted that there can be no legitimate claim of privilege or confidentiality in respect of the interview with the Witness, as the Witness Contact Protocol provides for 'the presence of the Prosecution at the Defence's interview'.³¹ Moreover, the Prosecution submitted that it would be grossly unfair to the calling party if the opposing party were to possess undisclosed information obtained from a witness, before the start of that witness's testimony.³² According to the Prosecution, these safeguards do not prejudice the Defence.
16. The Prosecution requested that its presence is communicated to the Witness as an option. In this respect, the Prosecution noted that the Witness's 'alleged refusal' to be in contact with the Prosecution has only been received through a third party and should be confirmed by the Witness himself.³³
17. As to the modalities of the VWU contacting the Witness, the Prosecution submitted it does not object to the Chamber ordering the VWU to contact the witness, nor does it object to the VWU informing the witness of its role and mandate, including its independence from both parties. The Prosecution

²⁹ Prosecution Joint Response, ICC-01/09-01/11-1224-Conf-Exp, paras 3, 23 and 34.

³⁰ Prosecution Joint Response, ICC-01/09-01/11-1224-Conf-Exp, paras 24 and 34.

³¹ Prosecution Joint Response, ICC-01/09-01/11-1224-Conf-Exp, paras 26.

³² Prosecution Joint Response, ICC-01/09-01/11-1224-Conf-Exp, paras 26.

³³ Prosecution Joint Response, ICC-01/09-01/11-1224-Conf-Exp, paras 25.

agreed with the Ruto Defence that the conversation between representatives of the VWU and the witness should be audio-recorded and made available to the parties.³⁴ In addition, the Prosecution requested that the VWU speaks to the witness directly, rather than through any third party, and solely for the purpose of conveying the request for an interview.³⁵

18. The Prosecution requested that the message to be conveyed to the witness, as suggested by the Ruto Defence (and supported by the Sang Defence), be reformulated in what it considers to be more neutral terms.³⁶
19. In response to allegations by the Ruto Defence that the Prosecution's email of 27 February 2014 had been 'incomplete and did not accurately and/or fully convey what had transpired',³⁷ and that the Prosecution should have conveyed to the Ruto Defence that the witness did not wish to be in contact with the Prosecution at 'the first available opportunity',³⁸ the Prosecution noted it had to carefully strike 'a balance between its on-going responsibilities for the security of the witness under Article 68 (1) and its obligations *vis-à-vis* the Defence' under the Witness Contact Protocol.³⁹ The Prosecution submitted its obligation to protect witnesses does not cease simply because a witness appears uncooperative.⁴⁰
20. On 25 March 2014, the Ruto Defence filed an application for leave to reply to the Prosecution Joint Response ('Ruto Defence Leave Request'),⁴¹ in which it requested leave to reply to two issues arising from the Prosecution Joint

³⁴ Prosecution Joint Response, ICC-01/09-01/11-1224-Conf-Exp, paras 27 and 34.

³⁵ Prosecution Joint Response, ICC-01/09-01/11-1224-Conf-Exp, paras 28 and 34.

³⁶ Prosecution Joint Response, ICC-01/09-01/11-1224-Conf-Exp, paras 28, 30 and 34.

³⁷ Ruto Request, ICC-01/09-01/11-1218-Conf, para. 13.

³⁸ Ruto Request, ICC-01/09-01/11-1218-Conf, para. 13.

³⁹ Prosecution Joint Response, ICC-01/09-01/11-1224-Conf-Exp, para. 18.

⁴⁰ Prosecution Joint Response, ICC-01/09-01/11-1224-Conf-Exp, para. 19.

⁴¹ Defence Application for Leave to Reply to the "Prosecution's joint response to (i) the 'Defence request for VWU assistance to facilitate interview with P-0323' (ICC-01/09-01/11-1218-Conf); and (ii) the 'Sang Defence application to join in the Ruto Defence request for VWU assistance to facilitate interview with P-0323, and to participate in that interview (ICC-01/09-01/11-1222-Conf)", ICC-01/09-01/11-1227-Conf.

Response.⁴² First, the Prosecution's 'unanticipated new request' that the Chamber gives serious consideration to the appropriateness of permitting the Ruto Defence to interview the witness. Second, the Prosecution's proposal for additional safeguards.⁴³ The Ruto Defence wished to make submissions on the necessity of these safeguards, the justification therefor provided by the Prosecution, and their impact on the willingness of the witness to meet with the Ruto Defence.⁴⁴

21. In its observations, the VWU submitted that it is crucial for the VWU to maintain its neutrality and that it 'should not be put in a situation to act on behalf of the parties or to record the interaction between the parties and the witnesses'.⁴⁵ Whilst indicating that if the Chamber authorises the VWU to do so, it is, exceptionally, ready to contact the witness or his lawyer and 'inform him of the Defence's wish to interview him', the VWU stresses that it does not want to be placed 'in the middle of an *inter partes* debate'. For that reason, it submits that any VWU intervention should be strictly limited to that just outlined.⁴⁶

II. ANALYSIS BY THE CHAMBER

Ruto Defence Leave Request

22. The Chamber does not consider it beneficial for its decision to receive further submissions.
23. The Chamber does not consider that the first issue gives rise to leave to reply. Furthermore, the Chamber does not consider that the Prosecution 'invites the Chamber to consider the unprecedented option of barring the Defence from

⁴² Ruto Defence Leave Request, ICC-01/09-01/11-1227-Conf, paras 2 and 15.

⁴³ Ruto Defence Leave Request, ICC-01/09-01/11-1227-Conf, paras 2 and 15.

⁴⁴ Ruto Defence Leave Request, ICC-01/09-01/11-1227-Conf, para. 13.

⁴⁵ VWU Observations, ICC-01/09-01/11-1232-Conf, para. 6.

⁴⁶ VWU Observations, ICC-01/09-01/11-1232-Conf, paras 4-13.

interviewing' the Witness, as stated by the Ruto Defence.⁴⁷ The Prosecution merely asks the Chamber to consider whether an interview by the Defence is opportune *at this time*.⁴⁸ Although the Ruto Defence phrases the Prosecution's response as an 'unanticipated new request' to the Chamber,⁴⁹ it is not a new issue of law or fact.

24. Similarly, the second issue mentioned by the Ruto Defence does not merit leave to reply, either. The Ruto Request contains a proposal for the format to arrange the requested interview with the Witness that varies from the usual format under the Witness Contact Protocol. The Prosecution, in response, proposes a different format for the Chamber to consider. The two proposals and related submissions are sufficient for the Chamber to make its determination and further submissions by the Ruto Defence would not assist the Chamber.

25. The Chamber therefore rejects the Ruto Defence Leave Request.

Ruto Request and Sang Request

26. As a preliminary matter, the Chamber clarifies that the Witness, who is subject to a summons pursuant to the Chamber's 'Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation',⁵⁰ continues to be a Prosecution witness for the purposes of the current proceedings. The section of the Witness Contact Protocol pertaining to

⁴⁷ Ruto Defence Leave Request, ICC-01/09-01/11-1227-Conf, para. 10.

⁴⁸ Prosecution Joint Response, ICC-01/09-01/11-1224-Conf-Exp, paras 23 and 34.

⁴⁹ Ruto Defence Leave Request, ICC-01/09-01/11-1227-Conf, para. 2.

⁵⁰ ICC-01/09-01/11-1274-Corr2, 17 April 2014.

contacts with witnesses of another party⁵¹ is therefore, in principle, applicable.⁵²

27. Pursuant to paragraph 4 of the Witness Contact Protocol, the Defence was under an obligation to notify the Prosecution of its wish to interview the Witness and request the Prosecution to seek his consent.⁵³ The Ruto Defence fulfilled this obligation, as shown by the correspondence attached to the Ruto Request.⁵⁴ The obligations of the calling party are contained in paragraph 7 of the Witness Contact Protocol.⁵⁵ The Chamber notes that, when conveying such requests, no requirement exists for the contact between the witness and the calling party to be audio-recorded.⁵⁶ The Prosecution attempted to comply with its obligation to contact the witness and seek his consent to be interviewed by the Ruto Defence, but has been unsuccessful in its attempts.⁵⁷
28. The Chamber considers the present situation, in which the calling party is unable to transmit a request pursuant to paragraph 7 of the Witness Contact Protocol, to be of an exceptional nature and, as such, provide sufficient justification to depart from the procedure set out in the Witness Contact Protocol in this instance.
29. The Prosecution requested the Chamber to take into consideration whether it would be appropriate for the Defence to interview the Witness at this time.

⁵¹ Section 2 of the Witness Contact Protocol, ICC-01/09-01/11-449-Anx.

⁵² See Decision on the Ruto Defence Request for VWU Assistance to Facilitate an Interview with a Witness, ICC-01/09-01/11-1289-Conf, 5 May 2014.

⁵³ Witness Contact Protocol, ICC-01/09-01/11-449-Anx, para. 4.

⁵⁴ Email communication from the Ruto Defence to the Prosecution on 13 February 2014 at 11:44, as provided to the Chamber in Confidential Annex B to the Ruto Request.

⁵⁵ ‘After being notified, the party calling the Witness shall seek the consent of the Witness within five days of receiving notification. In doing so, the calling party shall not in any way attempt to influence the Witness's decision as to whether or not to agree to be interviewed by the other party. If the Witness consents, the calling party shall inform the non-calling party and contact shall be facilitated as appropriate’, Witness Contact Protocol, ICC-01/09-01/11-449-Anx, para. 7.

⁵⁶ It is noted, by way of contrast, that other provisions of the Witness Contact Protocol do explicitly envisage an obligation for certain witness contacts to be audio- or video-recorded, *see e.g.* Witness Contact Protocol, ICC-01/09-01/11-449-Anx, para. 5.

⁵⁷ Email communication from the Prosecution to the Ruto Defence on 20 February 2014 at 15:17, as provided to the Chamber in Confidential Annex D to the Ruto Request.

When instituting the Witness Contact Protocol, it was foreseen by the Chamber that a non-calling party would, in principle, be free to interview a witness of another party, subject to the witness's consent. It was also foreseen that the calling party may object to such a request for an interview, in which case the parties should raise the matter with the Chamber. The matter is now before the Chamber, and the Chamber notes that the Prosecution did not substantiate its submission that there are reasonable grounds to apprehend that this witness may have been subjected to undue influence to recant his statement; and that there are reasonable grounds for concern as to his safety.⁵⁸ Moreover, the fact that the Prosecution has no access to the Witness is the motivation for the Ruto Request and cannot in itself serve as a basis to deny, for now, such an interview. The Chamber considers that the Prosecution has not explained why the Defence should not be permitted to interview the Witness at this time. The fact that the Witness is subject to a summons may have a bearing on the matters at hand, but it is not, in itself, a reason to deny the Ruto Defence request to interview him.

30. Regarding the requested involvement of the VWU, the Chamber notes that, although the Witness Contact Protocol foresees a role for the VWU,⁵⁹ the current situation is not provided for. The Chamber further notes the Registry's mandate to assist the Chamber with the conduct of proceedings. The Chamber considers that within the Registry the VWU, a neutral organ specifically tasked to deal with witnesses, is best placed to transmit a request by one of the parties to a witness. It recognises that such transmission of information does not interfere with the VWU's responsibilities under the Statute and the Rules (particularly Rule 18(b) of the Rules) to act impartially when cooperating with all parties in the proceedings. The Chamber consequently directs the VWU to communicate to Witness 323 the information set out below in paragraph 35.

⁵⁹ See paragraphs 5, 14 and 15 of the Witness Contact Protocol.

31. Regarding the request to have the VWU's contact with the witness audio-recorded, the Chamber notes that the parties agree on the audio-recording of the communication between the VWU and the witness, but the VWU has not expressed its view on such a condition to be placed on it.⁶⁰ Neither of the parties has provided a legal basis or justification for such a request. In light of the information before it, as well as the neutral position of the VWU, the Chamber considers it neither necessary nor appropriate to record the contemplated contact and therefore rejects this part of the Ruto Request.
32. Furthermore, the Prosecution requested the implementation of certain 'safeguards'. As to the request that the interview be conducted in the presence of two representatives of the Prosecution, the Chamber considers that this proposed safeguard finds no basis in the Witness Contact Protocol or any other applicable instrument. On the contrary, the Witness Contact Protocol provides for the presence of one representative of the calling party, if the witness consents.⁶¹ The Chamber sees no reason to depart from the protocol in this regard.
33. The Chamber will now turn to the Prosecution's request that in case the witness refuses to have a member of the Prosecution present, the VWU be tasked to be present and video-record the interview. The Chamber observes that the Witness Contact Protocol does not address whether interviews should be video-recorded. It further notes that the Prosecution has not presented the Chamber with any arguments to justify ordering such recording, other than its submission that it would be 'grossly unfair' that a non-calling party would be able to obtain information from a witness that the calling party does not

⁶⁰ The Chamber notes that the VWU stated that its assistance should be 'strictly limited' to contacting the Witness to inform him about the Defence's wish to interview him (VWU Observations, ICC-01/09-01/11-1232-Conf, para. 13).

⁶¹ See paragraph 10 of the Witness Contact Protocol.

possess.⁶² In the view of the Chamber it would be premature to consider, at this stage, when it is not yet clear whether the Witness accepts to be interviewed by the Defence and whether he accepts the Prosecution to be present during such interviews. The Chamber therefore, without prejudice, rejects the Prosecution's request.

34. As to the Sang Request, in the circumstances, the Chamber accepts the Sang Defence's submission that making a request to the Prosecution pursuant to paragraph 4 of the Witness Contact Protocol would not have been effective. Given that the Sang Defence also wishes to contact Witness 323, the Chamber grants the Sang Defence's request, subject to the same conditions as the Ruto Defence. These conditions are set out next.

35. On the basis of the foregoing, the Chamber decides that the Ruto Defence and the Sang Defence may interview the Witness. The requests for these interviews shall be transmitted directly to the Witness forthwith by the VWU. The VWU shall transmit the following information to the Witness:

- 1) That his lawyer, [REDACTED], has informed the Prosecution that he is not willing to communicate with the Prosecution;
- 2) That the Defence would like to meet with him and interview him on matters concerning the ICC case;
- 3) Whether he is willing to meet with the lawyers for Mr Ruto, or whether he wishes to decline the request. If he is willing to meet them, whether he agrees to be contacted by these lawyers through [REDACTED].

⁶² Prosecution Joint Response, ICC-01/09-01/11-1224-Conf-Exp, para. 26.

- 4) Whether he is willing to meet with the lawyers for Mr Sang, or whether he wishes to decline the request. If he is willing to meet them, whether he agrees to be contacted by these lawyers through [REDACTED].
- 5) Whether he agrees to a representative of the Prosecution being present during the interview(s).

The VWU is directed to inform the parties of the answers given by Witness 323 without delay.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the Ruto Request and Sang Request in part;

DIRECTS the VWU to transmit directly to Witness 323 the information as set out in paragraph 35 and to thereafter convey the responses of the witness to the parties without delay;

REJECTS the Ruto Defence Leave Request;

REJECTS all other requests.

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



Judge Chile Eboe-Osuji, Presiding Judge



Judge Olga Herrera Carbuccion



Judge Robert Fremr

Dated 2 June 2014

At The Hague, The Netherlands