

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 21 November 2014

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TRIAL CHAMBER V(A)

Before: Judge, Chile Eboe-Osuji, Presiding
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

Decision on Joint Defence Request for Disclosure related to Witness 658

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

Deputy Registrar

Victims and Witnesses Unit

Mr 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 67(2) of the Rome Statute (the 'Statute') and Rule 77 of the Rules of Procedure and Evidence (the 'Rules'), renders this Decision on Joint Defence Request for Disclosure related to Witness 658.

I. PROCEDURAL HISTORY

1. On 12 November 2014, the defence team for Mr Ruto (the 'Ruto Defence') filed a request for disclosure related to Witness 658 (the 'Request'),¹ whereby it requested that the Prosecution be ordered to disclose to it the report of a psychosocial assessment of Witness 658, conducted on 26 September 2014 (the 'Report')².
2. On 13 November 2014, the defence team for Mr Sang (the 'Sang Defence') joined the request.³ Both defence teams are hereafter referred to as the 'Defence'.
3. On 13 November 2014, the Chamber shortened the response deadline to 17 November 2014.⁴
4. On 14 November 2014, the Office of the Prosecutor (the 'Prosecution') filed its response, opposing the Joint Defence Request.⁵
5. On 17 November 2014, the Chamber directed the Prosecution to provide the Chamber with three documents referred to in the 'background information' of the Report: a 'Psychosocial Assessment Report' for Witness 658, dated 2 July 2013; an 'Investigator's Report', dated 22 September 2014; and an 'Investigator's Report',

¹ Ruto Defence request for disclosure related to [P-658], ICC-01/09-01/11-1648-Conf.

² [REDACTED]

³ Sang Defence request to join the "Ruto Defence request for disclosure [REDACTED]", 13 November 2014, ICC-01/09-01/11-1651-Conf.

⁴ Email communication from Legal Officer of the Trial Chamber to the parties on 13 November 2014 at 08:22.

⁵ Prosecution Response to Joint RUTO and SANG Defence request for disclosure related to P-0658, 14 November 2014, ICC-01/09-01/11-1653-Conf ('Response').

dated 23 September 2014 (together the 'Three Documents').⁶ On the same day, the Prosecution sent the requested documents via email.⁷

6. On 19 November 2014, the Chamber held an *ex parte* hearing with the Prosecution, during which the Prosecution was given an opportunity to provide its observations on the nature of the Three Documents and its view on disclosure of these documents to the Defence.⁸ During the *ex parte* hearing, the Prosecution confirmed that the document entitled 'Investigator's report', dated 23 September 2014, had already been disclosed to the Defence.⁹
7. On 19 November 2014, the Chamber ruled that the Report and the document dated 2 July 2013 will be disclosed in lesser redacted form.¹⁰ The Chamber deferred its ruling on the third of the Three Documents – i.e., the investigator's report dated 22 September 2014.¹¹

II. SUBMISSIONS

8. In its request, the Ruto Defence informed the Chamber that it had become aware of the existence of the Report through [REDACTED] Witness 658, which were disclosed by the Prosecution on 7 November 2014.¹²
9. The Ruto Defence argues that the Report should be disclosed pursuant to Article 67(2) of the Statute and Rule 77 of the Rules of Procedure and Evidence.¹³ It

⁶ Transcript of hearing on 18 November 2014, ICC-01/09-01/11-T-155-CONF-ENG ET, page 51, lines 9-17.

⁷ Email communication from the Prosecution to the Chamber on 18 November 2014 at 16:42.

⁸ Transcript of *ex parte* hearing on 19 November 2014, ICC-01/09-01/11-T-156-EXP-ENG.

⁹ ICC-01/09-01/11-T-156-EXP-ENG, page 1.

¹⁰ Transcript of hearing of 19 November 2014, ICC-01/09-01/11-T-156-ENG-RT, page 3, lines 14-17.

¹¹ ICC-01/09-01/11-T-156-ENG-RT, page 3, lines 12-13.

¹² Request, ICC-01/09-01/11-1648-Conf, para 4.

¹³ Request, ICC-01/09-01/11-1648-Conf, para. 1.

submits that the Report's content is material to the preparation of the defence and may affect the credibility of the Prosecution's evidence. It further notes that the Prosecution acknowledged that the Report contains 'Rule 77 material'.¹⁴ Referring to the Appeals Chamber's case law on Rule 77, the Ruto Defence submits that the Defence is thus entitled to disclosure of the entire document.¹⁵

10. In its submissions, the Prosecution acknowledges that the report contains *prima facie* disclosable content, but notes that this content has already been disclosed to the Defence. Nonetheless, it submits that the Report is 'primarily comprised of personal information of a medical nature' and not 'relevant to any issue in this trial'.¹⁶ The Prosecution maintains that the Court must safe-guard the psychological well-being, dignity and privacy of witnesses and that the limited disclosure by way of extract, providing the Defence the relevant information from the Report, is more appropriate.¹⁷
11. The Prosecution further points to Rule 73(2)(a) of the Rules and argues that the Report falls under the privileged communications between a person and his psychiatrist or psychologist, as mentioned in this rule. Finally, the Prosecution submits that the Report is 'an internal document protected from disclosure under Rule 81(1)'.¹⁸

III. ANALYSIS

¹⁴ Request, ICC-01/09-01/11-1648-Conf, para. 16.

¹⁵ Request, ICC-01/09-01/11-1648-Conf, para. 15.

¹⁶ Response, ICC-01/09-01/11-1653-Conf, para. 3.

¹⁷ Response, ICC-01/09-01/11-1653-Conf, para. 3.

¹⁸ Response, ICC-01/09-01/11-1653-Conf, para. 4.

12. The Chamber notes the Prosecution's acknowledgement that the Report contains '*prima facie* disclosable content',¹⁹ and the Prosecution's disclosure to the Defence of the said information as 'Rule 77 information' by way of investigator's report containing an extract of the Report.²⁰ The Chamber also notes that the Prosecution has already disclosed the related document dated 23 September 2014. The Chamber has reviewed the content of the Report and considers it to contain further information that is subject to disclosure pursuant to Rule 77 of the Rules.
13. The Chamber is not persuaded that the Prosecution's grounds of objection are sufficient to protect the documents from disclosure in the circumstances of this matter. First, that the documents are in the nature of investigators' reports prepared following contacts between Prosecution staff and witnesses for the Prosecution, even if the Prosecution calls them different names for different purposes. In that respect, it is to be noted that while such reports may sometimes qualify as internal document for the purposes of Rule 81 of the Rules, they may also be subject to be disclosure if the relevant report contains information that is material to the preparation of the defence. Indeed, the Prosecution has already disclosed the document of 23 September 2014, which is part of the series. Second, the Prosecution has indeed conceded in its submissions that certain contents of the Report are *prima facie* disclosable.
14. Furthermore, the Chamber is not persuaded as to the sustainability of the privilege that is permissible to mental health practitioners in relation to the patients whom they treat. It is to be borne in mind that the primary reason for that kind of privilege is that 'the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment'.²¹

¹⁹ Response, ICC-01/09-01/11-1653-Conf, para. 3.

²⁰ Investigator's report, dated 10 November 2014, ICC-01/09-01/11-1648-Conf-AnxC.

²¹ See *Jaffee v Redmond* 518 US 1 (1996) (Supreme Court of the United States), page 10.

That is to say, the business of the professional to whom the privilege is due is the treatment of patients. For obvious reasons, the Prosecutor whose business is to prosecute alleged crimes may not, without more, generally claim the privilege that is due to a professional whose own business is to treat sick people. This is especially so when the Prosecutor insists on using the concerned witness for the particular purpose of prosecuting a crime. That is not to say that the Prosecutor is absolved from the obligation to provide whatever care that she can provide (through the skill of her qualified staff) to any witness that she intends to use in the prosecution of cases. But, there is no necessary conflict between that duty and the duty to disclose required information in relation to Prosecution witnesses.

15. In any event, the mental health care practitioner privilege is difficult to sustain when the Prosecution's psychological assessment is appreciably textured by the Prosecution's prosecutorial objectives – as is evident on the face of these documents.
16. Ultimately, the disclosability of Prosecution's psychological assessment reports be determined on a case-by-case basis. In the present circumstances, it is not sufficient for the Prosecution to merely extract information that it deems subject to Rule 77 of the Rules. The Defence should be in a position to appreciate the entire document, subject to limited redactions that protect other interests of the witness as regards information with little or no relevance to the preparation of the defence.
17. The Chamber has since received the views of the Victims and Witnesses Unit about the need for certain redactions to information about third parties.²² Having taken those views into account, the Chamber now directs that the document dated 22 September 2014 must also be disclosed to the Defence in redacted form. The

²² E-mail from the Victims and Witnesses Unit to Trial Chamber V-A Communications, 19 November 2014, at 11:07.

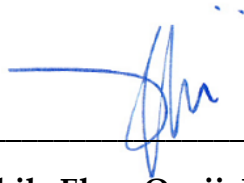
Prosecution is therefore ordered to implement the proposed redactions and disclose the three items to the Defence forthwith.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the Request;

ORDERS the Prosecution to promptly disclose to the Defence the redacted versions of the Report, the Psychosocial Assessment Report for Witness 658, dated 2 July 2013, and the Investigator's Report, dated 22 September 2014.

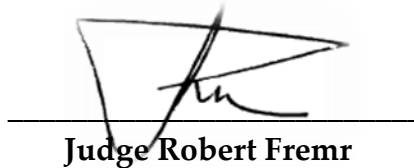
Done in both English and French, the English version being authoritative.

A blue ink signature, appearing to be 'Chile Eboe-Osuji', written over a horizontal line.

Judge Chile Eboe-Osuji, Presiding Judge

A black ink signature, appearing to be 'Olga Herrera Carbuccion', written over a horizontal line.

Judge Olga Herrera Carbuccion

A black ink signature, appearing to be 'Robert Fremr', written over a horizontal line.

Judge Robert Fremr

Dated 21 November 2014

At The Hague, The Netherlands