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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 version of

Decision on Appointment of Duty Counsel for a Witness

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
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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

Mr Esteban Peralta Losilla

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Mr Göran Sluiter

Trial Chamber V(A) (the ‘Chamber’) of the International Criminal Court (the ‘Court’), in the case of *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, pursuant to Articles 64(2), 64(6)(f), and 68 of the Rome Statute (the ‘Statute’); Rule 74 of the Rules of Procedure and Evidence (the ‘Rules’); and Article 8 of the Code of Professional Conduct for counsel (the ‘Code of Conduct’), renders this Decision on Appointment of Duty Counsel for a Witness.

I. PROCEDURAL HISTORY

1. On 14 October 2014, the Chamber settled the schedule for the court sessions for the period of 17 November 2014 to 12 December 2014.¹ Witness 658 (the ‘First Witness’) was scheduled to testify during that session.²
2. On 17 November 2014, the Chamber heard submissions by the parties on the disclosure of summaries [REDACTED] by the First Witness, which were [REDACTED] the Office of the Prosecutor (‘Prosecution’) in the course of Article 70 investigations into witness interference.³ In light of the time and resources required to produce [REDACTED], the Prosecution disclosed content summaries in the meantime.⁴
3. It is a matter of apparent interest for the defence teams for Mr Ruto and Mr Sang (the ‘Defence’) that the [REDACTED] revealed [REDACTED] between the First Witness and [REDACTED] (the ‘Second Witness’),⁵ the latter being scheduled to testify subsequent to the testimony of the former.
4. On 19 November 2014, the Chamber ruled that in its preparation of the First Witness for his testimony, the Prosecution was permitted to inform him of the fact that

¹ Decision on Prosecution’s Second Submission of Schedule of Evidence of Summoned Witnesses, ICC-01/09-01/11-1605-Conf.

² ICC-01/09-01/11-1605-Conf, para. 2. The first witness eventually testified from 27 November to 11 December 2014 (ICC-01/09-01/11-T-162-CONF-ENG ET to ICC-01/09-01/11-T-173).

³ Transcript of hearing of 17 November 2014, ICC-01/09-01/11-T-153-CONF-ENG ET.

⁴ ICC-01/09-01/11-T-153-CONF-ENG ET, page 15, line 16 to page 18, line 4.

⁵ See, e.g., ICC-01/09-01/11-T-153-CONF-ENG ET, page 3, lines 9 to 18.

[REDACTED]; that the Defence had been made aware of that fact and had received summaries of the [REDACTED]; and, that he, too, was to be provided with copies of the same summaries.⁶

5. Given the Prosecution's indication that issues of self-incrimination may arise during the testimony of the First Witness (although not in relation to what [REDACTED] revealed, according to the Prosecution), the Chamber directed the Registrar to assign duty counsel (at the Court's expense) pursuant to Rule 74 of the Rules.
6. On 20 November 2014, the Registry filed a Power of Attorney dated 6 November 2014, in which the First Witness indicated his appointment of Göran Sluiter (the 'Counsel'), who acts as the witness's counsel at the national level. In the Power of Attorney, the witness nominated the Counsel as his only counsel 'in respect of all ICC-matters, including [his] appearance as [a] witness'.⁷
7. Accordingly, the Counsel Support Section of the Registry retained the Counsel as duty counsel for the First Witness for purposes of Rule 74.⁸
8. On that same date, the Counsel made a request for access to the disclosures of [REDACTED].⁹ The Counsel, being also the legal representative of the Second Witness on certain matters at the national level, indicated he was 'legally obligated to advise his other client, [the Second Witness] of the existence [REDACTED]'. It is to be noted that although the Second Witness is listed as a witness for the Prosecution in the *Ruto and Sang* case, the Counsel has never been assigned to represent him in the case.

⁶ Decision on the Defence Application for Certain Measures Concerning Prosecution Witness 658, ICC-01/09-01/11-1672-Conf, paras 14 and 17.

⁷ Annex to Corrected version of Registration in the case-file of communications concerning the legal representation of Witness P-0658, 20 November 2014, ICC-01/09-01/11-1677-Conf-Anx.

⁸ E-mail from the Registry to a Legal Officer of the Chamber, 20 November 2014, at 14:03.

⁹ E-mail from the Prosecution to Trial Chamber V-A Communications, 20 November 2014, at 18:42.

9. Consequently, the Chamber scheduled an urgent hearing the following day, for purposes of receiving submissions from all parties and participants (including the Counsel) on the request made by the Counsel.¹⁰ The Chamber heard submissions and ruled that same day that the Counsel was relieved from representing the First Witness for the purposes of Rule 74, and that the Registry was to appoint a replacement counsel immediately.¹¹
10. On 10 December 2014, the Chamber issued the reasons for the aforesaid decision discharging the Duty Counsel for the First Witness.¹² In the meantime, the Prosecution informed the Chamber of its communication with the Counsel, this time in relation to the Second Witness, and his upcoming 'possible voluntary testimony' (the 'Counsel's Communication').¹³
11. On 12 December 2014, the Chamber held a status conference with the parties in order to discuss, among other matters, the Counsel's Communication that the Prosecution communicated to the Chamber on 9 December 2014.¹⁴
12. The present decision deals with certain issues raised in the Counsel's Communication in respect of the Second Witness.

II. SUBMISSIONS

13. The Counsel first informed the Prosecution by way of a letter that the Second Witness was concerned, *inter alia*, about the fact that his [REDACTED], but nevertheless expressed his willingness to give testimony in the present case.¹⁵ Thereafter, in a subsequent letter, the Counsel requested certain guarantees

¹⁰ Transcript of hearing of 21 November 2014, ICC-01/09-01/11-T-158-CONF-ENG ET, page 2, lines 14 to 23.

¹¹ Decision on the Representation by Mr Sluiter as Duty Counsel for Witness 658, communicated to the parties and participants via e-mail (see E-mail from Trial Chamber V-A Communications, 21 November 2014, at 17:54).

¹² Reasons for the Decision on the Replacement of Duty Counsel for a Witness, ICC-01/09-01/11-1749-Conf.

¹³ Prosecution's Communication of Information [REDACTED] and Request for a Status Conference, 9 December 2014, ICC-01/09-01/11-1745-Conf.

¹⁴ ICC-01/09-01/11-T-174-CONF-ENG ET.

¹⁵ Counsel's Communication, ICC-01/09-01/11-1745-Conf, Annex A.

regarding the Second Witness's testimony, namely that: (i) he testifies entirely *in camera*; (ii) he is represented by the Counsel; and (iii) neither the witness nor the Counsel are asked to reveal the content of their privileged communications in court.¹⁶ The Counsel also stated that, absent the aforesaid 'guarantees', the Second Witness could not testify at the Court, as his rights and interests would 'only be adequately protected with the involvement of the [REDACTED]' (thus testifying pursuant to Article 93(1)(b) procedure).¹⁷

14. During the status conference held on 12 December 2014, the Prosecution stated that it supports the Second Witness's request for testimony entirely *in camera*, but that it is unlikely to satisfy the other conditions set by the Counsel.¹⁸ Accordingly, the Prosecution maintains its request to have the Second Witness appear [REDACTED], unless it is able to reach an agreement with him so that he comes to court voluntarily.¹⁹
15. The Defence for Mr Ruto submitted that the Chamber should consider the suitability of the Counsel to represent the Second Witness, particularly in light of the Chamber's decision related to the First Witness. In its view, there is a risk that if the Counsel represents the Second Witness, he may discuss matters of his testimony with the First Witness, who the Defence may wish to recall in an eventual defence case.²⁰ Moreover, it suggested that now that it is clear that the Court has the right to issue a subpoena, the Second Witness could be summonsed to testify before the Court, and not before a [REDACTED]. The Defence for Mr Ruto also stated that its preference is for the Second Witness to testify *viva voce* before the Chamber, as was the case for the First Witness.²¹

¹⁶ Counsel's Communication, ICC-01/09-01/11-1745-Conf, Annex B.

¹⁷ Counsel's Communication, ICC-01/09-01/11-1745-Conf, Annex B.

¹⁸ ICC-01/09-01/11-T-174-CONF-ENG ET, page 21, line 25 to page 22, line 6.

¹⁹ ICC-01/09-01/11-T-174-CONF-ENG ET, page 22, lines 7-14.

²⁰ ICC-01/09-01/11-T-174-CONF-ENG ET, page 26, line 11 to page 27, line 4.

²¹ ICC-01/09-01/11-T-174-CONF-ENG ET.

16. The Defence for Mr Sang submitted that the Second Witness, through the Counsel, should not impose demands on the Chamber. It also submitted that the Counsel is not well suited to represent the witness. In its view, the appointment of lawyer is only for the limited purposes of Rule 74, and not 'overall ICC matters', as stated by the Counsel. It also does not agree with the request to hold entirety of the testimony *in camera* and expressed its preference for the witness to be summonsed, in case he does not want to testify voluntarily.²²

III. ANALYSIS AND CONCLUSIONS

17. Although several matters were raised at the status conference on 12 December 2014, the present decision is limited only to the question of suitability of Mr Sluiter as counsel for the Second Witness, as raised by Defence counsel. The other matters will be dealt with in separate decisions.

18. As regards the second request made by the Second Witness, namely that he be represented by the Counsel, the Chamber considers, as it has done previously, that 'a witness does not have a determinative say on the appointment of a duty counsel for purposes of Rule 74',²³ and that this entitlement should not be confused with the right of an *accused* to legal assistance of the accused's choosing, pursuant to Article 67 of the Statute, which is nevertheless not without limits.²⁴

19. Moreover, the Chamber recalls that it has determined that any negotiations to persuade a witness to testify voluntarily should not involve the Chamber in what should be a discussion or negotiation between the calling party and the witness, and whoever is representing him or her in the national jurisdiction.²⁵ But that determination is without prejudice to the question raised by the Defence counsel about the suitability of Mr Sluiter as counsel for the Second Witness – a question

²² ICC-01/09-01/11-T-174-CONF-ENG ET.

²³ ICC-01/09-01/11-1749-Conf, paras 24-27.

²⁴ Article 67(1)(d) of the Statute.

²⁵ ICC-01/09-01/11-T-174-CONF-ENG ET, page 29, lines 2-12.

arising from the list of demands that the Counsel communicated to the Prosecution and relayed in full to the Chamber – as conditions with which the witness would appear voluntarily.

20. The Chamber recalls that previously it has been keen to permit witnesses to be provided with legal advice (for the purposes of Rule 74) by counsel of their choice, in the absence of a compelling reason for a judicial override of such free choice. However, as in the case of the Counsel with the First Witness, certain circumstances may strongly recommend the judicial override of such free choice of counsel for the witness in the interest of proper administration of justice in the case.²⁶
21. Although the Counsel was not present during the status conference held on 12 December 2014, the Chamber observes that in submissions related to the First Witness, the Counsel stated the following: that if he ‘detect[ed] between clients [the First Witness and the Second Witness] a conflict of interest, that conflict of interest [would] be resolved in accordance with the applicable codes of conduct’; and that ‘if there [was] confidential information and obligations [he was] aware of related to confidential information, [...] these obligations [would] be fully respected’.²⁷ The Chamber noted in this regard in its prior ruling that the Counsel ‘left matters considerably uncertain as to whether he would or would not disclose confidential information to the Second Witness *as his client* – a matter quite separate from whether he would respect the obligation of confidentiality by refraining from revealing such information to someone who is not his client’.²⁸ The same uncertainty and potential conflict of interest is involved now in relation to the upcoming testimony of the Second Witness as the Counsel remains convinced that ‘he alone is best able to decide how to resolve troubling questions that intersect his client’s interests and those of other parties affected by the litigation before the Chamber’²⁹

²⁶ ICC-01/09-01/11-1749-Conf, para. 28.

²⁷ ICC-01/09-01/11-T-158-CONF-ENG ET, page 77, lines 1 to 5.

²⁸ ICC-01/09-01/11-1749-Conf, para. 29.

²⁹ ICC-01/09-01/11-1749-Conf, para. 30.

and that the Counsel has an absolute obligation towards his clients, that patently collide with the interests of justice and the interests of other persons or clients.³⁰

22. Moreover, as already was determined by the Chamber, there is a foreseeable risk of conflict of interest between the interests of the First Witness and the Second Witness. Additionally, the Chamber recalls that the Counsel had clearly recognised the prospect of [REDACTED] possibly revealing alleged criminal conduct against the Second Witness and that this had raised the question of whether the Counsel ought — as a matter of prudence (on his part and on the part of the Chamber) — to act as duty counsel for the First Witness and now for the Second Witness.³¹ The Chamber also indicated that there was a risk arising from the Counsel's 'insistence that he has a right or duty to inform the Second Witness about matters of interest that the Duty Counsel learns in the course of representing the First Witness'.³² The Chamber thus considers that the Counsel's representation of the Second Witness would raise the potential for conflict of interest as regards both, the First Witness and the Second Witness, and also the interest of justice in maintaining the confidentiality of the proceedings in the necessary part.³³

23. As noted by the Chamber in its prior decision, Rule 74 requires counsel to maintain the confidentiality of certain types of information revealed in the testimony of the witness concerned. The Counsel's insistence that he is professionally obligated to reveal to his clients the information that comes into his knowledge by virtue of his representation of another client (*i.e.* the one he represents pursuant to Rule 74) clearly sets up the interests of the First Witness and the Second Witness, as with the interest of justice implicated by the Chamber's consistent decision to keep confidential certain parts of the proceedings. Moreover, the Counsel's insistence that he may not be compelled to reveal what information he provides to his clients would

³⁰ ICC-01/09-01/11-1749-Conf, paras 31-33.

³¹ ICC-01/09-01/11-1749-Conf, para. 46.

³² ICC-01/09-01/11-1749-Conf, para. 49.

³³ ICC-01/09-01/11-1749-Conf, para. 49.

make it impossible to inquire into any breach of the Rule 74 confidentiality.³⁴ Accordingly, as already determined by the Chamber, the Counsel's uncompromising position on the information he requires passing to his clients, clashes with the consistent regime of confidentiality applied in this case for Rule 74 purposes.³⁵

24. In light of the above, the Chamber considers that, for the same reasons (hereby incorporated by reference with necessary variation) that the Counsel was relieved from representing the First Witness, it is not appropriate to appoint him as duty counsel for the limited purpose of self-incrimination in respect of the Second Witness.

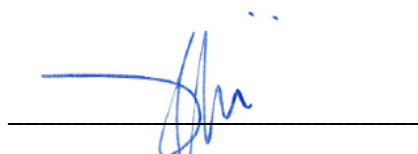
FOR THE FOREGOING REASONS, THE CHAMBER

DIRECTS the Counsel Support Section to appoint a duty counsel (other than Mr Sluiter) to represent the Second Witness, for the purposes of Rule 74 of the Rules.

³⁴ ICC-01/09-01/11-1749-Conf, paras 50-52.

³⁵ ICC-01/09-01/11-1749-Conf, paras 53-56.

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



Judge Chile Eboe-Osuji
(Presiding)



Judge Olga Herrera Carbuccia



Judge Robert Fremr

Dated 12 January 2015
At The Hague, The Netherlands