

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/11
Date: 18 January 2013

TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding
Judge Christine Van den Wyngaert
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
*THE PROSECUTOR v. WILLIAM SAMOEI RUTO and JOSHUA ARAP SANG***

Confidential Redacted Version

Decision on the prosecution's application pursuant to Article 56

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

The Office of the Prosecutor
Ms Fatou Bensouda

Counsel for William Samoei Ruto
Mr Kioko Kilukumi Musau
Mr David Hooper

Legal Representatives of Victims

Counsel for Joshua Arap Sang
Mr Joseph Kipchumba Kigen-Katwa
Mr Joel Kimutai Bosek
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
Ms Silvana Arbia

Deputy Registrar

Victims and Witnesses Unit
Ms Maria-Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V ("Chamber") of the International Criminal Court in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* renders the following Decision on the prosecution's application pursuant to Article 56.

I. Procedural Background

1. On 19 November 2012, the Office of the Prosecutor ("prosecution") filed the "Prosecution's Application pursuant to Article 56".¹ On 22 November 2012, the prosecution filed a confidential redacted version of the same application ("Application").² In the Application, the prosecution "applies to take the evidence of a key Prosecution witness ["Witness"], in advance of trial [set for 10 April 2013], in order to preserve his testimony in the event that he is not available at the time of trial".³
2. On 29 November 2012, the Chamber issued an order which shortened the time limit for the defence teams to respond to the Application and directed the Victims and Witnesses Unit ("VWU") to provide the Chamber with: (i) an assessment of the Witness's security and health situation ("Security/Health Assessment") and (ii) a psychosocial report ("Psychosocial Report").⁴
3. On 7 December 2012, the VWU filed the Security/Health Assessment requested by the Chamber.⁵
4. On 10 December 2012, the defence teams (collectively referred to as "defence") filed a consolidated response to the Application ("Response").⁶

¹ ICC-01/09-01/11-474-Conf-Exp (with one *ex parte* annex).

² Confidential Redacted Version of Prosecution's Application pursuant to Article 56, ICC-01/09-01/11-474-Conf-Red.

³ Application, ICC-01/09-01/11-474-Conf-Red, para. 1.

⁴ Order regarding 'Prosecution's application pursuant to Article 56', 29 November 2012, ICC-01/09-01/11-491-Conf.

⁵ ICC-01/09-01/11-499-Conf-Exp (with one *ex parte* annex).

⁶ Joint Defence Response to Prosecution's Application pursuant to Article 56, 10 December 2012, ICC-01/09-01/11-504-Conf.

5. On 14 December 2012, the VWU filed the Psychosocial Report requested by the Chamber.⁷

II. Submissions

Prosecution Submissions

6. In the Application, the prosecution argues that the Witness, who was identified as Witness 8 at the pre-trial stage, has allegedly experienced a "marked deterioration in his emotional and psychological stability"⁸ and, in addition to the stress created by his experiences in the post-election violence and his status as a witness, has a history of alcohol-related behavioural problems.⁹ The prosecution argues that these issues create a "serious risk" that the Witness will be unavailable to testify at trial.¹⁰ The prosecution therefore asks "that the Chamber take the evidence of this witness as soon as possible in closed session, permitting the defence to be present and to cross-examine him".¹¹
7. The prosecution argues that this request falls within the ambit of Article 56 of the Statute, which authorises the Chamber to take necessary measures to preserve evidence in a unique investigative opportunity.¹² The prosecution submits that its request does not unfairly prejudice the accused because the defence would be allowed to be present during the taking of the Witness's testimony, be able to cross-examine the Witness and be permitted to make all available arguments as to the weight to be given to this evidence should it be admitted during the trial.¹³ The prosecution emphasises that Article 56 of the Statute "does not require a particular

⁷ ICC-01/09-01/11-512-Conf-Exp (with one *ex parte* annex).

⁸ Application, ICC-01/09-01/11-474-Conf-Red, paras 2-3.

⁹ Application, ICC-01/09-01/11-474-Conf-Red, paras 9, 14-17.

¹⁰ Application, ICC-01/09-01/11-474-Conf-Red, paras 3, 17.

¹¹ Application, ICC-01/09-01/11-474-Conf-Red, para. 6.

¹² Application, ICC-01/09-01/11-474-Conf-Red, para. 1.

¹³ Application, ICC-01/09-01/11-474-Conf-Red, para. 24.

showing of risk or specify a standard of proof” and argues that, given the absence of prejudice to the accused in the present case, the Chamber “should not require a high degree of certainty as to future unavailability”.¹⁴ The prosecution requests that the Chamber hold consultations subject to Rule 114 of the Rules and Article 56 at the earliest opportunity and authorise the taking of pre-trial testimony from the Witness as a unique investigative opportunity.¹⁵

Defence Submissions

8. In the Response, the defence requests the Chamber to deny the Application in its entirety.¹⁶ The defence asserts that the investigative opportunity identified in the Application is not “unique” within the meaning of Article 56 of the Statute,¹⁷ arguing that “[t]he situations where a unique opportunity can be said to arise will be rare and exceptional” and that a situation where the prosecution is “unsure as to whether a witness will remain stable for the next three and a half months and become potentially unwilling or unable to give testimony in the trial due to his drinking problem, does not present the one-of-a-kind or seize-the-moment situation so as to qualify as an unique opportunity”.¹⁸ The defence also challenges the timeliness of the Application, raising questions as to why the Witness’s “longstanding drinking problem and psychosocial issues” have only become an emergency at this late stage.¹⁹
9. The defence submits that significant prejudice would result from granting the relief requested in the Application.²⁰ The defence observes that the prosecution has not yet disclosed the Witness’s identity to the defence or any medical evidence in

¹⁴ Application, ICC-01/09-01/11-474-Conf-Red, para. 22.

¹⁵ Application, ICC-01/09-01/11-474-Conf-Red, para. 30.

¹⁶ Response, ICC-01/09-01/11-504-Conf, para. 22.

¹⁷ Response, ICC-01/09-01/11-504-Conf, paras 3, 5-6.

¹⁸ Response, ICC-01/09-01/11-504-Conf, para. 7-8.

¹⁹ Response, ICC-01/09-01/11-504-Conf, para. 10.

²⁰ Response, ICC-01/09-01/11-504-Conf, paras 4, 12-19.

support of its Application; were such disclosure to be made, the defence asserts that it would have to review all these new materials, compare them to other evidence in the case, conduct the necessary additional investigation and prepare for a hearing just for this Witness while simultaneously preparing for the entire trial.²¹ The defence argues that it does not have the resources to conduct “parallel investigations and analysis into other aspects of the case” and that granting the relief in the Application would lead to an “ineffective cross-examination” and would be “detrimental to the defence’s overall preparation for the start of trial, and could delay the official start of the case”.²²

10. Finally, the defence identifies various safeguards which it argues should be implemented to minimise prejudice if the Chamber were minded to grant the relief requested in the Application over its objection.²³

VWU Submissions

11. [REDACTED].²⁴ [REDACTED].²⁵
12. [REDACTED].²⁶ [REDACTED].²⁷
13. [REDACTED].²⁸ [REDACTED].²⁹ [REDACTED].³⁰
14. [REDACTED].

²¹ Response, ICC-01/09-01/11-504-Conf, paras 12-14.

²² Response, ICC-01/09-01/11-504-Conf, paras 14-15.

²³ Response, ICC-01/09-01/11-504-Conf, paras 20-21.

²⁴ Security/Health Assessment, ICC-01/09-01/11-499-Conf-Exp, para. 2.

²⁵ Security/Health Assessment, ICC-01/09-01/11-499-Conf-Exp, para. 3.

²⁶ Security/Health Assessment, ICC-01/09-01/11-499-Conf-Exp, para. 3. *See also* Application, ICC-01/09-01/11-474-Conf-Exp-Anx1.

²⁷ Security/Health Assessment, ICC-01/09-01/11-499-Conf-Exp, paras 6-7.

²⁸ Security/Health Assessment, ICC-01/09-01/11-499-Conf-Exp, para. 5.

²⁹ Security/Health Assessment, ICC-01/09-01/11-499-Conf-Exp, para. 5.

³⁰ Security/Health Assessment, ICC-01/09-01/11-499-Conf-Exp, para. 5.

III. Analysis and Conclusions

15. Regardless of whether the relief requested by the prosecution is available under Article 56(1) of the Statute at this stage of the proceedings,³¹ the Chamber is of the view that the prosecution has failed to substantiate its claim that evidence may not be available because of the Witness's security situation or health situation.
16. As for security concerns, the prosecution does not provide evidence of any concrete threat to the security of the witness after he returned to Kenya [REDACTED]. On the basis of the VWU's submissions in the Security/Health Assessment, the Chamber is not persuaded that the Witness's security situation has become so unmanageable that there would be concerns about the Witness no longer being available subsequently for trial. Indeed, the appropriate initial response to alleged security problems of this kind would be to take all protective measures to safeguard the security of the witness available under the current circumstances, and neither the prosecution nor VWU provides a clear indication that those measures were exhausted.
17. As for health concerns, although these concerns are persistent and recurring ones for the Witness, the prosecution provides no supporting materials attesting that the Witness's undeniable existing emotional and behavioural difficulties are at risk of deteriorating to such an extent that he may no longer be available to testify at trial which is scheduled to start in April this year.

³¹ Article 56(1) of the Statute provides, in part:

(a) Where the Prosecutor considers an investigation to present a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial, the Prosecutor shall so inform the Pre-Trial Chamber.

(b) In that case, the Pre-Trial Chamber may, upon request of the Prosecutor, take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the defence. [...]

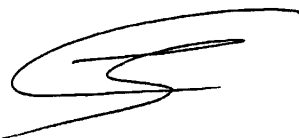
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the relief requested in the Application.

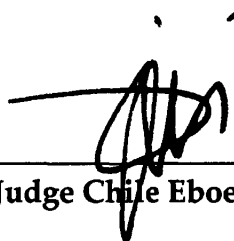
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding



Judge Christine Van den Wyngaert



Judge Chile Eboe-Osuji

Dated 18 January 2013

At The Hague, The Netherlands