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

Date: **15 September 2014**

**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**

**Joint Defence Request for Leave to Appeal the Oral Decision of 9 September 2014  
on Disclosure of Assistance and Benefits provided by the Victims and Witnesses  
Unit to Prosecution witnesses 604, 495, 516 and 524**

**Source:** Defence for Mr. William Samoei Ruto and Joshua arap Sang

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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## I. INTRODUCTION

1. On 9 September 2014, Trial Chamber V(A) (“Chamber”), issued an oral decision refusing a defence request for disclosure of assistance and benefits provided by the Victims and Witnesses Unit (“VWU”) to Prosecution witnesses 604, 495, 516 and 524, all of whom have been summonsed to testify before the Chamber by video-link (“Decision”).<sup>1</sup> It held:

[T]he VWU is an independent impartial unit, tasked with determining what is reasonable in the expense required of the Court in the protection of witnesses. The reasonableness of the VWU assessment – especially in the new socio-economic context of a place to which a witness has been externally relocated – is not undermined by the possibility that particular witnesses (perhaps not every witness) may well view the prospect of such assistance, or its actual delivery, as remarkably impressive given the circumstances of the socio-economic context from which the witness has been relocated. Whether or not any witness is impressed by the assistance, or the prospect of it, in that way remains a matter for legitimate questions by counsel without prejudice to the VWU’s assessment as to the reasonableness of the assistance. Of course, the principle applies both to internally relocated witnesses and to externally relocated ones. .... And in the absence of the fuller context, the generalised information as to expenses poses the risk of being misleading. That prospect also is not acceptable to the Chamber. For the foregoing reasons and based on the information currently before it, the Chamber rejects the request for disclosure of expenditure by the VWU. That is the ruling.<sup>2</sup>

2. The Defence for Mr. William Samoei Ruto and the Defence for Mr. Joshua arap Sang (jointly “the Defence”) seek leave to appeal this Decision on the following issue: whether the Chamber erred in considering that the level of neutrality of the unit which provides financial and other support and the asserted reasonableness of its payments are critical to the question as to whether such information should be disclosed to the Defence.
3. The Defence submits that this issue satisfies the criteria for leave to appeal under Article 82(1)(d) of the Rome Statute (“Statute”); namely, there is a clearly identifiable issue which derives from the Decision. This appealable issue significantly affects the fairness and expeditiousness of the proceedings, as well

<sup>1</sup> ICC-01/09-01/11-T-132-Conf-Eng, 9 September 2014, page 2 line 11 – page 5 line 22.

<sup>2</sup> Ibid, page 4 line 23 – page 5 line 22.

as the outcome of the trial, and an immediate resolution by the Appeals Chamber would materially advance the proceedings.

4. The Defence is cognisant of the Chamber's prior ruling in respect of a similar request for leave to appeal in relation to Prosecution witness 268, holding that – though an appealable issue, it did not significantly affect the fairness and expeditiousness of the proceedings or the outcome of the trial, nor would an Appeals Chamber's decision materially advance the proceedings.<sup>3</sup> The Defence, however, submits that the issue concerned here is distinguishable from the issue already ruled upon. Previously, the Chamber issued a ruling which concerned witness 268 only.<sup>4</sup> Indeed, this was one of the reasons cited by the Prosecution for arguing that the applications for leave to appeal of both defence teams should be dismissed.<sup>5</sup> The Chamber has now made it clear that “the general principle set out in the ruling [concerning witness 268] is also applicable to other witnesses.”<sup>6</sup> Accordingly, the issue at hand has a scope which is significantly wider than that previously denied leave to appeal.

## II. APPLICABLE LAW

5. Article 82(1)(d) of the Statute provides:

1. Either party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence:

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

<sup>3</sup> Decision on Defence Applications for Leave to Appeal the Decision on Disclosure of Information on VWU Assistance, ICC-01/09-01/11-1154, 21 January 2014, paras. 21-26.

<sup>4</sup> ICC-01/09-01/11-T-60-Conf-Eng, 28 October 2013, pages 43-44.

<sup>5</sup> Public Redacted Version of « Prosecution Consolidated Response to the Defence Requests for Leave to Appeal (ICC-01/09-01/11-1080 & ICC-01/09-01/11-1081) the oral decision of the Trial Chamber of 23 October 2013 » 8 November 2013, ICC-01/09-01/11-1095-Conf, ICC-01/09-01/11-1095-Red, 29 January 2014, paras. 11, 21. Notably, the Prosecution now takes the opposite position. See Prosecution's Response to « Sang Defence Application for Disclosure of Assistance and Benefits and Provided by the Victims and Witnesses Unit to P-604, P-495, P-516 and P-524, who are Subject to Summonses to Appear for This Trial Session » ICC-01/09-01/11-1487-Conf (5 September 2014), paras. 9-10, alleging the issue is covered by the Chamber's earlier ruling in respect of witness 268.

<sup>6</sup> ICC-01/09-01/11-T-132-Conf-Eng, 9 September 2014, page 4 lines 21-22.

6. The issue which is sought to be appealed under Article 82(1)(d) must derive from the decision and should not be “merely a question over which there is disagreement or conflicting opinion”.<sup>7</sup> An appealable issue is identifiable by a subject, “the resolution of which is essential for the determination of matters arising in the judicial cause under examination”.<sup>8</sup>
7. The term “fair conduct” under Article 82(1)(d) “is associated with the norms of a fair trial, the attributes of which are an inseverable part of the corresponding human right, incorporated in the Statute by distinct provisions of it (articles 64(2) and 67(1)) and article 21(3)”.<sup>9</sup> The term “expeditious conduct” is intertwined with the notion of proceedings “within a reasonable time”, namely “the speedy conduct of proceedings, without prejudice to the rights of the parties concerned”, and is as such an “attribute of a fair trial”.<sup>10</sup>
8. In order to determine whether an issue has any impact on the outcome of the trial, the Chamber “must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence”.<sup>11</sup>
9. An immediate resolution by the Appeals Chamber may materially advance the proceedings where the Appeals Chamber is in a position to move the proceedings forward by ensuring that they follow “the right course”. This involves an assessment by the Chamber as to whether the alleged error, “might taint either the fairness of the proceedings or mark the outcome of the trial”, which would warrant the Appeals Chamber’s immediate resolution.<sup>12</sup>

### III. SUBMISSIONS

#### *The Issue*

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<sup>7</sup> Pre-Trial Chamber II, “Decision on the Prosecutor’s Request for Leave to Appeal the Decision Rejecting the Amendment of Charges (ICC-01/09-01/11-859)”, 6 September 2013, ICC-01/09-01/11-912, para. 18.

<sup>8</sup> Ibid, para. 18.

<sup>9</sup> Ibid, para. 19.

<sup>10</sup> Ibid, para. 19.

<sup>11</sup> Ibid, para. 20.

<sup>12</sup> Ibid, para. 21.

10. The issue is whether the Chamber erred in considering that the level of neutrality of the unit which provides financial and other support and the asserted reasonableness of its payments are critical to the question as to whether such information should be disclosed to the Defence.
11. This issue arises directly from the Trial Chamber's oral ruling of 9 September 2014. It is not a mere disagreement but, to use the Chamber's own words, a "point of principle",<sup>13</sup> which is to be applied to the disclosure regime in respect of every witness. The consequence of applying this "point of principle" is that the Defence is barred from ever knowing the full amount of benefits and assistance received by witnesses, as a result of testifying on behalf of the Prosecution. Accordingly, the issue defined is a fundamental issue which has a real impact on the trial.
12. It is of significance that the Chamber previously acknowledged that a similar issue qualified as an issue under Article 82(1)(d) and did not amount to a mere disagreement with the Decision. On this previous occasion, which related to witness 268, the Ruto Defence identified and described this similar issue as follows: "whether the Trial Chamber erred in applying the balancing test for disclosure of VWU expense information for the relocation, maintenance and/or support of Witness 268 by assessing the probative value of this information only on the basis of the source providing the assistance – the VWU – and not also considering whether "reasonable support and maintenance to a witness" may *prima facie* implicate the credibility of a witness in view of the personal circumstances of the witness and his or her family prior to the provision of such assistance".<sup>14</sup>
13. The Chamber accepted that "the fact that it was the VWU who provided the assistance was of significance to the Impugned Decision" and that "it does not afford a *prima facie* indicium of credibility that the VWU undertook those reasonable tasks of providing reasonable support and maintenance to a witness

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<sup>13</sup> ICC-01/09-01/11-T-132-Conf-Eng, 9 September 2014, page 4 lines 22-23.

<sup>14</sup> Ruto Defence Application for Leave to Appeal the Trial Chamber's Oral Decision of 28 October 2013 on the Defence request for disclosure of all costs expended by the VWU for relocation, maintenance and support of Witness P-268, ICC-01/09-01/11-1080, paras. 6 and 19. Cited in Decision on Defence Applications for Leave to Appeal the Decision on Disclosure of Information on VWU Assistance, ICC-01/09-01/11-1154, 21 January 2014, para. 4.

rather than the witness doing it themselves.”<sup>15</sup> On this basis, the Chamber was satisfied that the identified issue arose from the impugned decision.<sup>16</sup>

14. Though worded differently, the issue identified here addresses the same point of principle. In this case, the Chamber similarly ruled against disclosure of the information sought from the VWU on the ground that “the VWU is an independent impartial unit, tasked with determining what is reasonable in the expense required of the Court in the protection of witnesses.”<sup>17</sup> The relevance of the impartiality of the VWU to the request is disputed.
15. In this regard, it is noteworthy that the Prosecution has an obligation to disclose to the Defence all financial support it offers to its witnesses. The Chamber has held that such information may be relevant to test the credibility of the witnesses and is therefore “prima facie material to the preparation of the Defence case”.<sup>18</sup>
16. The Defence submits that the Chamber erroneously distinguishes the disclosure obligations of the Prosecution and of the VWU on the ground that the VWU is an “independent impartial unit”. However, similarly to the VWU, the Prosecution is also ascribed the role of “an impartial truth-seeker or organ of justice” under Article 54(1)(a), and not merely that of a party to the proceedings “whose exclusive interest is to present the facts and evidence as seen by him or her in order to accuse and to secure the indictee’s conviction”.<sup>19</sup> Given that both the Prosecution and the VWU have an obligation to act as an impartial entity, the Defence submits that there is no basis on which to distinguish between them as regards the issue at hand.
17. The Defence reiterates that, for the witnesses, it makes no difference whether they are receiving benefits from the Prosecution or the VWU.<sup>20</sup> Indeed, and as

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<sup>15</sup> Decision on Defence Applications for Leave to Appeal the Decision on Disclosure of Information on VWU Assistance, ICC-01/09-01/11-1154, 21 January 2014, para. 21.

<sup>16</sup> Ibid, para. 21.

<sup>17</sup> ICC-01/09-01/11-T-132-Conf-Eng, 9 September 2014, page 4 lines 23-25.

<sup>18</sup> Decision on Disclosure of Information related to Prosecution Intermediaries, ICC-01/09-01/11-904, 4 September 2013, para. 59.

<sup>19</sup> Antonio Cassese: ‘The Statute of the International Criminal Court: Some Preliminary Reflections’ (1999) 10 EJIL 168.

<sup>20</sup> Sang Defence Application for Disclosure for Assistance and Benefits Promised and Provided by the Victims and Witnesses Unit to P-604, P-495, P-516 and P-524 who are Subject to Summonses to Appear for this Trial Session, ICC-01/09-01/11-1482-Conf, paras. 8, 9, 11.

argued previously by the Defence,<sup>21</sup> and stated plainly by witness 604 in court today,<sup>22</sup> the witnesses often do not know the difference between funds coming from the Prosecution and funds provided by the VWU. What is important is that they are receiving benefits as a direct result of their cooperation with, and testimony proffered to the Prosecution. It makes no difference whether the entity which offered the financial assistance is neutral and the expenses reasonable.

18. The Chamber acknowledges the possibility that “particular witnesses (perhaps not every witness) may well view the prospect of such assistance, or its actual delivery, as remarkably impressive given the circumstances of the socio-economic context from which the witness has been relocated”.<sup>23</sup> However, the Chamber states that this possibility does not undermine the reasonableness of the VWU assessment.<sup>24</sup> The Defence does not suggest that it does. The Defence emphasises that disclosure of the amounts provided to witnesses is not requested to challenge the decisions rendered by the VWU and/or allege impropriety on its part, but rather to determine whether they have had an impact on witnesses and provided an incentive to give false testimony, i.e. matters which go to the credibility of witnesses.
  
19. This is not a theoretical possibility but a real issue which has now become a core matter in the trial. Many of the witnesses who are testifying now or in the upcoming sessions have recanted and claim they initially gave false testimony and then changed their minds, often as a result of a dispute over money with the Prosecution and/or VWU. The Defence have provided ample concrete examples of such claims made by witnesses who are scheduled to appear in this and future

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<sup>21</sup> Ibid, para 9 and footnote 10.

<sup>22</sup> ICC-01/09-01/11-136-Conf, Real-time Transcript, 15 September 2014, p. 35, ln 10-13 (Q: Do you recall who paid it? Was it the OTP or was the witnesses unit? A: I don’t understand between the VWU and the OTP, but I received the money).

<sup>23</sup> ICC-01/09-01/11-T-132-Conf-Eng, 9 September 2014, page 5, lines 2-5.

<sup>24</sup> Ibid, page 4 line 25 – page 5 line 5.



sessions.<sup>25</sup> There is also evidence that Prosecution witnesses have submitted false claims and defrauded the ICC.<sup>26</sup>

20. Accordingly, the issue identified above follows from the Chamber's oral ruling of 9 September 2014 and amounts to more than a mere disagreement with the Chamber's ruling.

### *Fair Conduct of the Proceedings*

21. The issue discussed here clearly affects the fair conduct of the proceedings. The right of an accused to have full disclosure is a core aspect of his or her right to receive a fair trial. This is recognised in Articles 67(1) and (2) of the Statute, as well as Rule 77 of the Rules of Procedure and Evidence. Whether a violation of the right to disclosure has occurred is a fact-specific determination and will depend on the overall circumstances of the case, the importance and type of information concerned, as well as the stage of the proceedings.<sup>27</sup>
22. Access to exculpatory evidence, or evidence relevant to the veracity, credibility or improper motivation of a witness, directly impacts on the ability of the accused to challenge the Prosecution's case and present a full defence. Not only is the information sought material to test the credibility of the witnesses' various contradictory accounts, but also to verify whether witnesses have encouraged each other to provide false testimony under the promise of financial assistance and other benefits. The Defence cannot emphasize enough how important this information is in terms of the Chamber's mandate to ascertain the truth.
23. The Defence does not seek disclosure of details which could place witnesses at risk, and disclosure of expenses does not place an onerous or unfair burden on the Prosecution or the VWU, nor does it pose "a risk to the Witness Protection

<sup>25</sup> Sang Defence Application for Disclosure for Assistance and Benefits Promised and Provided by the Victims and Witnesses Unit to P-604, P-495, P-516 and P-524 who are Subject to Summonses to Appear for this Trial Session, ICC-01/09-01/11-1482-Conf, paras. 10, 13-22.

<sup>26</sup> E.g. P-0356, P-0613 and P-0604 (e.g. ICC-01/09-01/11-136-Conf, Real-time Transcript, 15 September 2014, page 48 lines 17-18; page 57 lines 9-11).

<sup>27</sup> See e.g. Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-621, PTC I, ICC, 20 June 2008, paras 8, 65-66, 70 and 124-125.

Programme”.<sup>28</sup> This holds true, in particular because the request is limited to “generalized figures of the expenses without their detailed particulars”.<sup>29</sup> There is no risk of this generalized information being misleading as it will merely be used to assess the impact thereof on the witnesses and the veracity of their claims that the varying promises of financial assistance provided an incentive to give false testimony and/or to recant subsequently. Indeed, VWU disclosures could take the same form as Prosecution disclosures.

24. The Defence submits that it is necessary to weigh the interests of the VWU to keep its work methods confidential, in particular as regards the Witness Protection Programme, against the probative value of the information sought and the interest of the Defence to receive it. The Defence reiterates that the probative value of the information sought is high, as it may demonstrate a motive for witnesses to present false allegations in the first place.
  
25. Accordingly, the Defence submits that depriving the Defence of access to this information significantly affects the fair conduct of these proceedings as it limits the Defence’s ability to mount a defence and challenge the Prosecution’s case. The Defence is largely constrained from investigating and attempting to find this information on its own, due to the protective measures in place with respect to these witnesses. The deprivation of this material cannot be rectified at a later stage – as suggested by the Trial Chamber<sup>30</sup> – in an eventual appeal of the Article 74 judgment after the case has been completed. If the Defence is right, it is essential that the information be made available now in order to confront the witness with the information. This is fair to the witnesses who should be offered an opportunity to comment on the information in light of the explanations they have offered for recanting their evidence. This is also fair on the persons accused – as the Chamber tends to make up its mind about the credibility of witnesses during the course of their testimony. Simultaneous confrontation with all relevant and available information is therefore essential to give full effect to the right of the persons accused to confront their accusers.

<sup>28</sup> ICC-01/09-01/11-T-132-Conf-Eng, 9 September 2014, page 5 lines 15-16.

<sup>29</sup> Ibid, page 5 lines 12-13.

<sup>30</sup> Decision on Defence Applications for Leave to Appeal the Decision on Disclosure of Information on VWU Assistance, ICC-01/09-01/11-1154, 21 January 2014, paras. 24-28.

*Expeditious conduct of the proceedings*

26. This issue also affects the expeditious conduct of these proceedings. The receipt of benefits by witnesses is now one of the most critical issues in this trial with witnesses claiming that the benefits offered by the Prosecution and/or VWU gave them an incentive to give a false account in order to “qualify as a witness”.<sup>31</sup> This issue should therefore be dealt with now, as it can no longer be postponed to a later stage.
27. If no leave is granted and if, eventually the Appeals Chamber agrees with the Defence, it can only order a re-trial at which all witnesses who claimed they have given a false account because of promised benefits must be re-called. This has a very real and significant impact on the expeditiousness of the proceedings.

*Impact on the Outcome of the Trial*

28. The Defence submits that this issue may also significantly affect the outcome of the trial. Indeed, denial to the Defence of access to evidence that pertains to the credibility or motivations of Prosecution witnesses may clearly influence the outcome of these proceedings. This is all the more so because it is no longer a theoretical issue, but one effectively raised by Prosecution witnesses. The Defence should be given an opportunity to test these claims made by Prosecution witnesses before the Chamber. Credibility of witnesses, as well as their potential motivations to make false allegations unquestionably pertain to the weight to be given to their testimony. Accordingly, denying the Defence access to material that may explain the reason why witnesses have provided different, contradictory and even false accounts deprives the Court of information relevant to the assessment of evidence. The potential consequence is that the initial statements, which the Defence and witnesses themselves claim were false, as well as the Prosecution’s alleged reasons for the witnesses’ recantations, will not be assessed in light of the actual circumstances which resulted in those statements being made in the first place. The impact this could have on the outcome is clear as the truth may be distorted.

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<sup>31</sup> KEN-OTP-0138-0314\_R01, Transcript of Prosecution Interview with P-16, 26 July 2014, pages 21-22, cited in: Sang Defence Application for Disclosure for Assistance and Benefits Promised and Provided by the Victims and Witnesses Unit to P-604, P-495, P-516 and P-524 who are Subject to Summonses to Appear for this Trial Session, ICC-01/09-01/11-1482-Conf, para. 10.

*Material Advancement of the Proceedings*

29. The Defence submits that an immediate resolution of the issue would materially advance the proceedings. It is submitted that denying the Defence access to information which is material to test the credibility of the upcoming Prosecution witnesses is an error that has the potential to taint the fairness of these proceedings. The Defence is unable to obtain the information sought through any other way. It directly impacts on the Defence's ability to present its case, as well as the Chamber's ability to assess the weight of the evidence offered by the Prosecution witnesses concerned, which cannot be sufficiently remedied through a later appeal against the Chamber's final judgment. Indeed, in the event that the Appeals Chamber agrees with the Defence, it would have little choice other than order a re-trial, which would have an adverse impact on the Court's limited resources and unnecessarily delay the proceedings. To avoid this, the Appeals Chamber's resolution of this issue, which equally affects the examination of Prosecution witnesses to follow, at this stage rather than after judgment, is clearly warranted.

**IV. RELIEF SOUGHT**

30. For the reasons adumbrated above, the Defence submits that Article 82(1)(d) has been satisfied and leave to appeal should be granted. The issue identified above is one which significantly affects both the fair and expeditious conduct of the proceedings and the outcome of the trial. In addition, resolution of this issue at this stage of the proceedings would materially advance the proceedings.

Respectfully submitted,




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**Mr. Karim A. A. Khan QC**  
Lead Counsel for William Samoei Ruto  
Dated this 15<sup>th</sup> Day of September 2014  
At The Hague, Netherlands




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**Mr. Joseph Kipchumba Kigen-Katwa**  
Lead Counsel for Joshua Arap Sang  
Dated this 15<sup>th</sup> Day of September 2014  
The Hague, Netherlands