

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/09-01/11  
Date: 18 September 2014

**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**

**Prosecution response to joint Defence request for leave to appeal the oral decision of 9 September 2014 (disclosure of assistance and benefits provided by the Victims and Witnesses Unit to Prosecution witnesses 604, 495, 516, and 524)**

**Source: Office of the Prosecutor**

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***Court to:***

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**Registrar**

Mr Herman von Hebel

## Introduction

1. The joint request of counsel for Mr Ruto and Mr Sang (collectively, “Defence Counsel”) to appeal the Trial Chamber’s oral decision of 9 September 2014<sup>1</sup> should be dismissed.<sup>2</sup> Defence Counsel fail to show that the issue identified for appeal would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, or that immediate resolution by the Appeals Chamber would materially advance the proceedings.<sup>3</sup> To the contrary, Defence Counsel remain fully able to test the evidence of Prosecution witnesses in cross-examination. Nothing in the Decision changes this. There is accordingly no reason for the Appeals Chamber’s exceptional intervention in a Trial Chamber’s ongoing management of its proceedings, which is the essence of an interlocutory appeal.

## Submissions

2. The Motion should be dismissed because it fails to satisfy the requirements of Article 82(1)(d) of the Rome Statute (“Statute”).

3. As a threshold requirement to seek leave to appeal, it is well established that the applicant must identify an ‘appealable’ issue arising from the decision.<sup>4</sup> Given the Trial Chamber’s previous conclusion in a similar matter,<sup>5</sup> the Prosecution takes no position on whether the issue proposed in the Motion may meet this test.<sup>6</sup> In any event, the Prosecution does not agree that the issue “has a real impact on the trial.”<sup>7</sup>

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<sup>1</sup> See ICC-01/09-01/11-T-132-Conf-Eng, pp.2-5 (“Decision”). Although only the confidential version of the transcript is presently available, the Decision was issued in open session.

<sup>2</sup> See ICC-01/09-01/11-1514 (“Motion”).

<sup>3</sup> See Statute, Article 82(1)(d).

<sup>4</sup> See ICC-01/09-01/11-1154 (“Witness 268 Decision”), para.20.

<sup>5</sup> See *e.g.* Witness 268 Decision, paras.21 (“the fact that it was the VWU who provided the assistance was of significance to the Impugned Decision [...] The Chamber is therefore satisfied that the First Issue arises from the Impugned Decision”), 23. See also Decision, p.4 (observing that “the general principle” concerning witness 268 “is also applicable to other witnesses”).

<sup>6</sup> See Motion, para.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”). See also paras.12-14.

<sup>7</sup> *Contra* Motion, para.11.

4. Defence Counsel fail to show that the issue they identify would significantly affect the fair and expeditious conduct of the proceedings.<sup>8</sup> They start from an incorrect assumption. Contrary to their view, “disclosure of the amounts provided to witnesses” is not necessary “to determine whether they have had an impact on witnesses and provided an incentive to give false testimony”.<sup>9</sup> Furthermore, the Defence criticism that the Decision erroneously distinguishes the disclosure obligations of the Prosecution and the Victims and Witnesses Unit (“VWU”) is mistaken.<sup>10</sup> Disclosure obligations under Article 67(2) of the Statute and Rule 77 of the Rules of Procedure and Evidence apply to the Prosecution alone. Not a party to the proceedings, neither the VWU—nor indeed the Registry as a whole—has any analogous disclosure obligations.<sup>11</sup>

5. As the Trial Chamber observed in the Decision, “whether or not any witness is impressed by the assistance” provided to them “remains a matter for legitimate questions by counsel”.<sup>12</sup> The Decision is thus entirely amenable to the Defence appropriately “challeng[ing] the Prosecution’s case.”<sup>13</sup> Counsel for Mr Ruto and Mr Sang are fully able to conduct cross-examination addressing the reliability and truthfulness of the witnesses’ evidence—including on the basis of information disclosed to them by the Prosecution.<sup>14</sup> The quantum of any assistance received by those witnesses is immaterial to the probative and relevant issue: whether any of the witnesses was *actually* influenced in the content of the evidence that they gave.<sup>15</sup> For the same reason, there is no need for the investigation in respect of quantum to which counsel for Mr Ruto and Mr Sang refer.<sup>16</sup> The claim of a “high” probative value for knowledge of the precise financial value of that assistance, divorced of all

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<sup>8</sup> *Contra* Motion, paras.25-26.

<sup>9</sup> *Contra* Motion, para.18.

<sup>10</sup> *Contra* Motion, paras.16, 21.

<sup>11</sup> *See also below* fn.21.

<sup>12</sup> Decision, p.5.

<sup>13</sup> *Contra* Motion, para.25.

<sup>14</sup> *See* ICC-01/09-01/11-904-Conf, paras.59-63. *See also below* fn.25.

<sup>15</sup> *See* Motion, paras.17-19, 22.

<sup>16</sup> *Contra* Motion, para.25.

context, is speculative and inconsistent with the facts.<sup>17</sup> No reasonable inference of a motive to lie can be drawn from such an arbitrary figure.<sup>18</sup>

6. The forensic purpose for which Defence Counsel seek disclosure of VWU payments is to “determine whether they have had an impact on witnesses and provided an incentive to give false testimony”.<sup>19</sup> However, it is standard procedure for detailed witness statements to be taken from all Prosecution witnesses—and the same applies to witnesses 604, 495, 516, and 524. Thus, the extent of assistance actually provided by VWU must necessarily be irrelevant to the evidence (their prior statements) upon which the Prosecution wishes to rely in this instance, since that evidence was given *before* VWU’s involvement.<sup>20</sup> As such, withholding knowledge of the quantum of VWU’s subsequent assistance cannot fetter the ability of the Defence to conduct the necessary cross-examination.

7. The Trial Chamber’s remarks concerning the VWU further demonstrate that maintaining the confidentiality of VWU activities will not significantly affect the fair and expeditious conduct of the proceedings.<sup>21</sup> Consistent with the practice of the ICTR,<sup>22</sup> ICTY,<sup>23</sup> and the STL,<sup>24</sup> the non-disclosure of information relating to

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<sup>17</sup> *Contra* Motion, para.24.

<sup>18</sup> *Contra* Motion, para.24. *See also* para.23 (reaffirming that the Defence seek only “generalized figures”).

<sup>19</sup> *See* Motion, para.18.

<sup>20</sup> Any subsequent deviations from these statements will be apparent and may be fully ventilated in cross-examination.

<sup>21</sup> It is moreover correct and appropriate to recognise the special status of VWU. Allowing the Defence request, and requiring VWU to provide generalised figures showing the amount of funds necessary on occasion to provide adequate witness protection, would lead to the perverse outcome of rewarding organised campaigns of witness intimidation. Such intimidation would either prevent witnesses from testifying outright or would, at the least, create a basis for cross-examining and potentially impugning the credibility of those witnesses who reasonably seek the Court’s protection on the basis of the cost of that very protection. This cannot be a fair or just outcome.

<sup>22</sup> *See e.g.* ICTR, *Prosecutor v. Karemera*, ICTR-98-44-PT, Decision on Defence Motion for Full Disclosure of Payments to Witnesses and to Exclude Testimony from Paid Witnesses, 23 August 2005, para.7 (“The management of witnesses and victims necessarily implies expenditure including, but not limited to, costs for transportation connected with the investigation and/or hearings. Materials relating to expenses paid which are reasonably required for the management of witnesses and victims do not fall within the ambit of Rule 68 and need not be disclosed. Material or information within the Prosecutor’s knowledge concerning any benefits paid to and/or promises made to witnesses and victims beyond that which is reasonably required has a different character and should therefore be disclosed as evidence which may affect the credibility of witnesses”); ICTR, *Prosecutor v. Bizimungu*, ICTR-99-50-T, Decision on Prosper Mugiraneza’s Motion for Records of All Payments Made Directly or Indirectly to Witness D, 28 September 2006, para.13 (quoting *Karemera* and

reasonable and standardised assistance to enable witnesses to give evidence does not prejudice any right of the Defence.<sup>25</sup> As such, the Decision cannot significantly affect the fairness or expedition of the proceedings. Moreover, as the Trial Chamber correctly observed, the approach taken in the Decision in fact preserves the witnesses' ability to give meaningful responses in cross-examination, and thus bolsters—rather than erodes—the fairness of the proceedings. It is unacceptable to require disclosures that risk the Witness Protection Programme.<sup>26</sup> This would undermine the fairness of the proceedings by putting vulnerable witnesses at risk. And putting generalised and unexplained figures to a witness relating to the cost of VWU protective activities—sums which the witness themselves may never be aware were spent on their behalf—“poses the risk of being misleading”<sup>27</sup> and significantly diminishing the probative value, if any, of the witness' response. In this context, Defence Counsel are simply wrong to assert that fairness requires a witness to be

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continuing, “The Chamber is of the view that some expenses associated with a witness protection programme are also likely to be reasonable and necessary and therefore not exculpatory under Rule 68. The Chamber is also mindful that the sum total of monies distributed under a witness protection programme would be deceptive without knowing the cost of living in the country administering the program, exchange rates, as well as other economic factors. Such details might be difficult to disclose without compromising the safety of the Witness by potentially revealing his whereabouts”).

<sup>23</sup> See e.g. ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Accused's Sixtieth, Sixty-First, Sixty-Third, and Sixty-Fourth Disclosure Violation Motions, 22 November 2011, para.23 (“any material in the possession of the Prosecution establishing that a witness requested and/or received a benefit from being a Prosecution witness may affect the credibility of the said witness and therefore should be disclosed”, assessed on a “case-by-case basis”); ICTY, *Prosecutor v. Karadžić*, IT-95-5/18-T, Public Redacted Version of ‘Decision on Accused's Sixty-Seventh and Sixty-Eighth Disclosure Violation Motions’ Issued on 1 March 2012, 1 March 2012, paras.18-26 (documents concerning witnesses' security concerns and the measures needed to ensure their protection cannot be construed as involvement in the witnesses potentially receiving a benefit by virtue of their status, and are not disclosable).

<sup>24</sup> See STL, *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Decision on Prosecution Witness Expenses, 9 May 2014, paras.8-10, 12.

<sup>25</sup> The Prosecution notes that the Trial Chamber in this case ordered the Prosecution to comply with more stringent disclosure obligations: ICC-01/09-01/11-904-Conf, paras.59-63. Although the Prosecution did not—and does not—think this matter is appropriate for interlocutory appeal in this case, it observes that the Trial Chamber's reasoning with respect to VWU's role in “impartial[ly]” determining and providing “what is reasonable in the expenses required [...] in the protection of witnesses” may equally be applicable to some aspects of the Prosecution's dealings with witnesses, especially in the early stages of an investigation. See Decision, p.4. As counsel for Mr Ruto and Mr Sang note, and notwithstanding the adversarial nature of courtroom proceedings, the Prosecution too acts independently and impartially: see Motion, para.16.

<sup>26</sup> See Decision, p.5 (“to be fit for its intended purpose, the information needs to be appreciated in its full context and that poses a risk to the Witness Protection Programme”). Counsel for Mr Ruto and Mr Sang merely disagree with the Trial Chamber's assessment that the contextualised information would pose such a risk: see Motion, para.23. See further above fn.22 (citing *Bizimungu*, in which the Trial Chamber noted the dangers of such information being disclosed, and deciding to review the relevant material for itself).

<sup>27</sup> Decision, p.5. See also above fn.22 (citing *Bizimungu*).

confronted with such information, either from the point of view of the witness or the Accused.<sup>28</sup>

8. Defence Counsel likewise fail to show that the issue they identify would significantly affect the outcome of the trial.<sup>29</sup> Since, as described above, the Decision does not affect the ability of the Accused to challenge the case against them, it has no more impact on the outcome of the trial than it does on the fairness of the proceedings. There is no risk that the truth will be “distorted” on the material question, which is whether or not the witnesses have given truthful evidence.<sup>30</sup>

9. In any event, the Motion cannot be granted because immediate resolution by the Appeals Chamber of the issue identified by Defence Counsel would not materially advance the proceedings.<sup>31</sup> Counsel remain fully able to conduct proper cross-examinations—and are doing so. Intervention by the Appeals Chamber is simply not required.

### Conclusion

10. For the reasons above, the Motion should be dismissed.



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Fatou Bensouda, Prosecutor

Dated this 18<sup>th</sup> day of September 2014  
At The Hague, The Netherlands

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<sup>28</sup> *Contra* Motion, para.25.

<sup>29</sup> *Contra* Motion, para.28.

<sup>30</sup> *Contra* Motion, para.28. Indeed, there is a far greater probability of the truth being “distorted” by permitting Defence counsel to cross-examine witnesses on generalised payment information, without the necessary context relating to the specific purpose of the payments, the location of the witness, particular security situations which might necessitate certain expenses and other information that would permit a proper appreciation of the reasonableness of the payments. *See above* para.7.

<sup>31</sup> *Contra* Motion, para.29.