

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 29 April 2013

TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding
Judge Richard Fremr
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

**Sang Defence Submissions in relation to Order on Defence response
to Prosecution's submissions regarding Screening Notes**

Source: Defence for Mr. Joshua Arap Sang

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

The Office of the Prosecutor

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Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
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States' Representatives

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Detention Section

**Victims Participation and Reparations
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Other

I. INTRODUCTION

1. The following submissions by the defence for Mr Sang are made on an expedited basis in response to the Trial Chamber's '*Order on Defence response to Prosecution's submissions regarding Screening Notes*'¹ and the prosecution's '*Response to Joint Defence Request to Be Provided with Full, Non- Redacted Screening Notes*'² and '*Application for Redactions to Further Screening Notes of Trial Witnesses to Be Disclosed to the Defence*'.³
2. In short, yes. The defence maintains, in principle, its request made in the application '*Joint Defence Request to be Provided with Full, Non-Redacted Screening Notes*'⁴, namely that the prosecution be ordered to disclose all screening notes in their original, non-redacted format, instead of as merely summaries or excerpts.⁵ This includes screening notes of trial and non-trial witnesses, be the material considered incriminating, potentially exonerating, or Rule 77. Should the prosecution seek to make such disclosure with redactions, this should be done in compliance with the Redactions Protocol⁶ effective for this case, and in line with the guidance the Chamber recently provided through its '*Decision on the Prosecution's application for authorization to maintain certain redactions*'.⁷

II. SUBMISSIONS

3. The prosecution argues that it is under no obligation, pursuant to the Statute or the Rules, to disclose screening notes of trial witnesses, though it has "no objection" to disclosing them.⁸ This is an incorrect assessment of its disclosure obligations. It is

¹ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-691-Conf, Order on Defence response to Prosecution's

² *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-677-Conf, Prosecution Response to Joint Defence Request to Be Provided with Full, Non- Redacted Screening Notes, 12 April 2013 ("First Response").

³ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-688-Conf, Prosecution Application for Redactions to Further Screening Notes of Trial Witnesses to Be Disclosed to the Defence, 18 April 2013 ("Second Response").

⁴ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-666-Conf, Defence Request to be Provided with Full, Non-Redacted Screening Notes, 2 April 2013 ("Request").

⁵ Request, para. 7.

⁶ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-458-AnxA, Decision on the Protocol Establishing a Redaction Regime, 27 September 2012.

⁷ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-695-Conf-Red, Confidential redacted version of the "Decision on the Prosecution's application for authorisation to maintain certain redactions", 23 April 2013.

⁸ Second Response, para. 7.

therefore necessary for the Chamber to order the prosecution to comply with its duties in respect to screening notes. It is not enough for the defence to rely on a temporary assurance from the prosecution that it will make the necessary disclosures. Though many screening notes have now been disclosed, it is not clear if this is all of the relevant material that is in the prosecution's possession, nor does it ensure that the prosecution will continue to disclose additional screening notes of new witnesses (such as those proposed to be added to the List of Witnesses).

4. In terms of the proposed redactions, the defence objects to the prosecution's automatic application of redactions to the identifying information of leads and sources.⁹ The identities of these individuals are critical for purposes of defence investigations. In any event, the prosecution's approach is contrary to the Redaction Protocol, which requires that "in case the lead provides material that is disclosed, and provided there are no additional security concerns, the lead will be disclosed as the source in the context of that disclosure".¹⁰

III. CONCLUSION AND RELIEF REQUESTED

5. The defence maintains its relief sought in its original application and appreciates that the Chamber has duly noted the need to resolve all outstanding disclosure issues in this case sufficiently in advance of trial.¹¹



Joseph Kipchumba Kigen-Katwa
On behalf of Joshua Arap Sang
Dated this 29th Day of April 2013
In Nairobi

⁹ First response, para. 11 and Second Response, para. 7.

¹⁰ Redactions Protocol, Annex, para. 42.

¹¹ Order.