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TRIAL CHAMBER V(a)

Before: Judge Olga Herrera Carbuccion
Judge Robert 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***

Public redacted version of

**Prosecution Response to Joint Defence Request to Be Provided with Full, Non-
Redacted Screening Notes (ICC-01/09-01/11-677-Conf)**

Source: The Office of the Prosecutor

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

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Introduction

1. Further to the Prosecution's ongoing review of information in its possession, the Prosecution identified additional screening notes which contain material which it assessed to be covered by either Article 67(2) of the Statute ("PEXO") or by Rule 77 of the Rules ("Rule 77").

2. The Prosecution initiated the process of disclosing the relevant material to the Defence by providing relevant excerpts of the PEXO or Rule 77 contained in these screening notes.¹ These excerpt documents naturally varied in the level of detail they provided depending on the level of detail contained in the screening note itself as well as the extent of the PEXO or Rule 77 material contained therein. While some screening notes contained limited PEXO or Rule 77 information, other screening notes contained more extensive information of this nature and if so, were more extensively disclosed.²

3. On 2 April 2013, the Defence filed its Joint Defence Request to Be Provided with Full, Non-Redacted Screening Notes³ ("Defence request") wherein it requested the Chamber to order the Prosecution to disclose all screening notes in the Prosecution's possession (in a full un-redacted format), and not just those screening notes which contain PEXO or Rule 77 material.

4. The Prosecution has no objection to providing the Defence with the full original screening notes of trial witnesses (though with limited and strictly necessary redactions), though it is not required to do so by the Statute or the Rules. With respect to non-trial witnesses, the Prosecution is obliged only to

¹ Thus far, the Prosecution has identified material possibly characterized as either PEXO or Rule 77 in 28 of the screening notes of witnesses whom the Prosecution intends to call for trial.

² For example, the Prosecution refers to the screening note of witness P-0028 from which the excerpts provided were so extensive so as to comprise almost the entirety of the screening note.

³ ICC-01/09-01/11-666-Conf-Exp

disclose the PEXO and Rule 77 material contained in the screening notes, and may provide this information by extracting it from the screening note (with the context of the information so that it makes sense) and disclosing it in a separate document. This practice is important in order to protect the security of witnesses who will not testify at trial.

Confidentiality

5. This response is submitted on a confidential basis as it contains information of a confidential nature the disclosure of which could pose a risk to witnesses and individuals at risk due to the activities of the Court. Furthermore, the attached Annex A is submitted on a confidential *ex parte*, prosecution only, basis as it contains the content of the redactions sought, and so disclosure to the Defence of this annex would defeat the purpose of parts of this filing.

Submissions

Screening notes of trial witnesses

6. Regarding the screening notes of those individuals on the Prosecution's List of Witnesses ("trial witnesses"), the Prosecution will undertake to disclose any screening documents that exist with appropriate security redactions. Because the notes of non-recorded screenings are not "prior statements" under the Statute, Rules and jurisprudence, they are not disclosable per se, but only to the extent they contain information that falls within Article 67(2) or Rule 77. Nonetheless, the Prosecution has no objection to disclosing the full screening notes of trial witnesses with appropriate redactions.

7. It has been affirmed by the jurisprudence of this Court that the status of screening notes is distinct to that of a “prior statement” as per Rule 76(1) and remain internal work product protected from disclosure by Rule 81(1). The Prosecution is under no obligation to disclose internal work product *unless* it contains either PEXO or Rule 77 information, in which case it should be disclosed to the Defence. Whether the information contained in the screening note is disclosable is fact specific and must be assessed on a case-by-case basis regarding the content of the note and the matters discussed during the screening process. It remains the obligation of the Prosecution to conduct on an ongoing basis reviews of material in its possession to assess for PEXO of Rule 77 content, and if necessary serve any relevant information to the Defence.⁴ As held by Trial Chamber III in the Bemba case:

“Pre-assessment interviews (which are compiled prior to taking a statement from a witness) are self-evidently not “statements” for the purpose of Rule 76(1) of the Rules, given particularly the terms of Rule 111 of the Rules. By the latter provision, which is significantly headed “record of questioning in general”, a record shall be made of formal statements made by any person who is questioned in connection with an investigation or with proceedings. The record is to be signed by the person who records and conducts the questioning, and by the person who is questioned and his or her counsel, if present...Screening notes, on the other hand, are the result of a preliminary procedure, conducted prior to taking a statement, during which the individual is assessed so that a decision can be made as to whether or not a statement is to be taken. There are no requirements in any of the Regulations that any record made during this initial process is to be signed by the potential interviewee. In other words, pre-interview assessments are a stage precedent to an interview when a formal statement is taken for the purposes of Rule 76(1) and Rule 111 of the Rules.”⁵

⁴ ICC-01/05-01/08-750-Red, paras. 29-37; ICC-01/04-01/06-2585, para.21; ICC-01/04-01/07-888, para. 10.

⁵ ICC-01/05-01/08-750-Red, para. 31, [Emphasis added]

8. The jurisprudence of the Court fully supports the Prosecution's previous disclosure of PEXO and Rule 77 excerpts to the Defence, as the Prosecution enjoys the discretion as to the form that the provision of relevant material may take.⁶ Nonetheless, in this case the Prosecution will disclose to the Defence the screening notes of all trial witnesses in their full original form, with the application of limited and strictly necessary redactions. Appended to this filing are all the screening notes of those trial witnesses which do contain PEXO or Rule 77, and which the Prosecution hereby applies to the Chamber for authorization to maintain the aforementioned redactions.⁷ In the meantime, the Prosecution will provide courtesy copies with the redactions sought in place for the Defence to obtain advance notice of the content. The remaining screening notes of the other trial witnesses will follow in a subsequent application for necessary redactions within the next week.

9. The redactions that the Prosecution seeks authorization to apply to the screening notes in this case cover identifying information of family members of Prosecution witnesses (Rule 81(4) – category B.2), and/or of innocent third parties and other persons at risk on account of the activities of the Court (Rule 81(4) – category B.3).

10. All the B.2 and B.3 redactions sought are strictly necessary, are of no relevance to the Defence, and do not hinder the comprehension of the material. The Prosecution appends to this application confidential *ex parte* Prosecution and VWU only Annex A wherein these trial witnesses' screening notes are

⁶ See ICC-01/05-01/08-750-Red, para. 33 – Trial Chamber III held that where a screening note contains exculpatory material or Rule 77 material, and that material has not been covered by the witness' statement, "[t]he prosecution must disclose the screening notes, or the relevant information." [Emphasis added]

See also ICC-01/04-01/06-2656-Conf, para. 18 – [REDACTED]. [Emphasis added]

See also ICC-01/04-01/07-888, para. 10

⁷ Regarding the application of limited and appropriate redactions to the screening notes to be disclosed, see ICC-01/04-01/06-2656-Conf, para. 18 *supra*.

provided for the inspection of the Chamber with the B.2 and B.3 redactions sought highlighted in purple, as well as tables outlining the redactions sought.

11. In addition, the Prosecution has applied certain limited redactions which do not require the authorization of the Chamber, namely to: locations of interview (highlighted in green), identifying information of leads and sources (also highlighted in green) and internal work product within the screening notes (highlighted in yellow), including any subjective opinions or conclusions of Prosecution investigators recorded in the screening notes, and information related to the Prosecution's objectives and techniques of investigation.⁸ The Prosecution has also applied redactions to the names of Prosecution investigators⁹ (highlighted in blue). These redactions can also be inspected by the Chamber *in camera* along with the proposed highlights in Annex A.

12. Finally, the screening note of witness P-0524 has been assessed to contain PEXO information. However, P-0524 is one of the last witnesses whose identity has still not been disclosed to the Defence, though this is anticipated in the very near future. In the meantime, the Prosecution proposes that it would be appropriate to disclose the screening note at the same time as disclosure of P-0524's identity. In the meantime, the Prosecution includes this screening note within Annex A for the Chamber's inspection. There are no B.2 or B.3 redactions sought in this screening note.

13. The Prosecution informs that the review of all materials in its possession for either PEXO or Rule 77 value remains ongoing and the Prosecution will continue to disclose as soon as practicable any relevant material.

⁸ See ICC-01/04-01/06-2656-Conf, para. 17(iii) to 17(vi).

⁹ The Prosecution notes that redactions to the names of certain investigators has previously been granted by the Chamber in ICC-01/09-01/11-518.

Audio-recorded screening sessions of trial witnesses

14. A limited number of screening sessions of the Prosecution's trial witnesses were audio-recorded at the time, typically because at the stage of screening there were grounds to believe that it was necessary to apply the provisions of Article 55(2) and Rule 112. These audio-recordings are currently in the process of being transcribed and the Prosecution will disclose these transcripts to the Defence forthwith in full form.

15. These transcripts may also require limited and necessary B.2 and B.3 redactions in order to protect the identities of any family members of the witnesses and/or of innocent third parties and other persons at risk on account of the activities of the Court. An appropriate application to the Chamber will be made to this end in due course.

Screening notes of non-trial witnesses which contain PEXO or Rule 77 material

16. Finally, pursuant to the Prosecution's review of screening notes in its possession, the Prosecution identified eleven screening notes of individuals who were either not spoken to any further after the screening session, or, were subsequently interviewed but were then not included on the Prosecution's list of trial witnesses. These are the screening notes of P-0041, P-0087,¹⁰ P-0199, P-0304, P-0411, P-0412, P-0439, P-0441, P-0450,¹¹ P-0459 and P-0489. The Prosecution refers to these individuals collectively as "non-trial witnesses".

17. One of these screening notes is that of P-0041, a [REDACTED] media monitor in Kenya during the election period who provided information in his screening session which was contrary to the Prosecution's allegations.

¹⁰ A statement was taken of P-0087, but the Prosecution determined not to proceed with this individual as a trial witness.

¹¹ [REDACTED].

However, this individual confirmed to the Prosecution in November 2012 that he was in direct contact with Mr. SANG, who had read P-0041's published work on hate speech in the Kenyan media. Further, P-0041 advised that in the course of this contact, he had confirmed to Mr. SANG that he had spoken to the Prosecution. Given these circumstances, the Prosecution will disclose this screening note to the Defence, with appropriate redactions.

18. Regarding the remaining ten of these screening notes of non-trial witnesses, the Prosecution submits that the PEXO identified in them is limited and relates to very minor inconsistencies as to the dates of attacks as alleged by the Prosecution, such as the attack on a certain location commenced either the day before or the day after the date alleged. P-0439 additionally proffers his personal assessment that the violence was spontaneous and unplanned, with no substantiation.

19. With respect to these non-trial witnesses, the Prosecution will extract the Article 67(2) and Rule 77 information contained in the screening notes, together with the appropriate context, and disclose only that information in a separate document. The Prosecution is under no obligation under the Statute and Rules to disclose further, and prior jurisprudence allows the Prosecution to extract the disclosable information and provide it in a separate document. Further, this practice will protect the safety and interests of non-trial witnesses. In some instances, some of these non-trial witnesses have provided incriminatory information along with the Article 67(2) and Rule 77 information. If that incriminatory information were provided to the Defence, then it could change the risk profile for that non-trial witness and the Prosecution could be obliged to take steps to provide security measures to the person. While it is true that the designation of these individuals as non-trial witnesses might mitigate that risk,

often disclosure of screening notes will occur prior to the Prosecution's designation of witnesses and further there remains the possibility that witnesses who have not been included on the witness list could be added to that list at a later point. Finally, in many circumstances the mere fact of having provided incriminatory information against the suspect or the accused to the OTP can put that person in jeopardy. Accordingly, in the case of non-witnesses, the Prosecution will fulfill its disclosure obligations under the Statute and Rules by extracting only the PEXO and Rule 77 information from the screening note and disclosing that separately.

20. With respect to the ten screening notes referenced in paragraph 18 above, the Prosecution can also only disclose the information but not the identities of the persons providing the information at this time. The Prosecution remains conscious of its obligations under both Article 67(2) and Rule 77, and balances it against its obligations under Article 68(1) to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. It is therefore incumbent upon the Prosecution to properly assess any risk each of these individuals may be exposed to should their identities be disclosed to the Defence. To disclose their identities without assessing any risk to them would be a derogation of the statutory obligation to protect all individuals who come into contact with the Court.

21. In the meantime, the Prosecution will provide forthwith the relevant information to the Defence in separate documents containing the relevant excerpts of the PEXO or Rule 77 (the Prosecution reiterates its above submission regarding the acceptability of excerpts), as well as excerpts which provide the reader with the necessary context to understand them.

22. The individual security assessments by the Protection Unit have already commenced, and as soon as this has been completed, the Prosecution will file an update to this response.

Relief Requested

23. For the foregoing reasons, the Prosecution requests the Chamber to: (i) authorize the ongoing category B.2 and B.3 redactions to the content of the screening notes of trial witness as outlined in Annex A, and (ii) authorize the temporary withholding of identity of non-trial witnesses pending completion of their individual security assessments.



Fatou Bensouda, Prosecutor

Dated this 23rd day of May, 2013
At The Hague, The Netherlands