

**Cour
Pénale
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**International
Criminal
Court**

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

Date: 27 May 2013

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

Public Redacted Version of "Defence Submissions on the Disclosure of Screening Notes" (ICC-01/09-01/11-708-Conf), submitted on 29 April 2013

Source: Defence for Mr. William Samoei Ruto

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

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I. Introduction

1. Pursuant to Trial Chamber V's order of 22 April 2013, the Defence of Mr. William Samoei Ruto ("defence") files these submissions concerning the disclosure by the prosecution of the screening notes of trial and non-trial witnesses.¹

II. Submissions

2. The defence position regarding the disclosure of screening notes can be stated in the following seven points.
3. *First*, the defence requires disclosure of the full original screening notes of all trial witnesses. The defence confirms that it has received courtesy copies of the redacted screening notes of 36 trial witnesses. In respect of the remaining 5 trial witnesses,² the defence requires confirmation from the prosecution that either there are no screening notes for these witnesses or the screening sessions were audio-recorded and are currently being transcribed in readiness for disclosure.³ If neither of these cases apply, then the defence requests immediate disclosure of courtesy copies of the relevant screening notes.
4. *Second*, the defence has not received disclosure of the full screening notes for 10 of the 11 non-trial witnesses identified by the prosecution.⁴ The defence understands that the prosecution is only seeking the "temporary withholding" of the identities of these 10 witnesses pending completion of security assessments.⁵ The defence underlines that the identities of such witnesses can constitute exculpatory

1 ICC-01/09-01/11-691-Conf. This response is filed confidentially pursuant to Regulation 23*bis* of the Regulations of the Court.

2 The defence has not received courtesy copies of screening notes for the following witnesses: P-0013, P-0032, P-0247, P-0488 and P-0534.

3 The defence understands that a limited number of screening sessions were audio-recorded and the audio-recordings are currently being transcribed (see ICC-01/09-01/11-677-Conf, para. 14).

4 The 10 witnesses are P-0087, P-0199, P-0304, P-0411, P-0412, P-0439, P-0441, P-0450, P-0459 and P-0489 (see ICC-01/09-01/11-677-Conf, paras. 16 and 17). The defence has received disclosure of the screening notes for P-0041. The defence also acknowledges that it has received a summary of a screening note for P-0439.

5 ICC-01/09-01/11-677-Conf, para. 23.

material and are necessary also to a proper understanding of the disclosed material⁶ or, in the prosecution's words, is "necessary context" to understand the PEXO and Rule 77 excerpts.⁷ The defence, therefore, requests disclosure of all this information including identities as soon as possible. The defence observes that identities can only be withheld on the basis of sound, properly substantiated justifications. Justifications which cite to [REDACTED]⁸ are clearly speculative, unsubstantiated and, crucially, highly prejudicial.⁹ As further observed below, many "justifications" for redactions proposed by the prosecution recently have failed to establish the requisite objectively justifiable risk and have been rejected.¹⁰

5. *Third*, the defence notes the prosecution's position that it will only disclose PEXO and Rule 77 excerpts of the non-trial witnesses' screening notes and not incriminatory evidence.¹¹ The defence advises that if, following a complete review of the screening notes, it believes that access is required to the full screening note of a particular non-trial witness for the purposes of its investigations, it will request that the relevant redactions be lifted in accordance with the redactions protocol.¹²
6. *Fourth*, the defence requests that the proposed redactions to all the screening notes (trial and non-trial witnesses) be carefully considered because the categories of redactions sought (identifying information of family members of prosecution

6 E.g. *Prosecutor v. Bizimungu et al.*, ICTR-99-50-T, Decision on Prosper Mugiraneza's Motion to Compel Disclosure of Exculpatory Evidence Pursuant to Rule 68, 10 December 2003; *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Motion for Disclosure under Rule 68, 1 March 2004; and *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Disclosure of Identity of Prosecution Informant, 24 May 2006. See also *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on Nzuwonemeye Request for Disclosure of Identifying Information of Witness XXO and Authorisation to Interview Him, 31 October 2005, para. 4 in which the identity of a Prosecution witness in another case was held to constitute exculpatory material.

7 ICC-01/09-01/11-677-Conf, para. 21.

8 ICC-01/09-01/11-677-Conf, para. 19.

9 Similar concerns about the prosecution's current *modus operandi* have been expressed in ICC-01/09-01/11-693-Conf, paras. 2 and 15.

10 See the recent decision ICC-01/09-01/11-695-Conf-Red. This is discussed more fully in paragraph 6 below.

11 ICC-01/09-01/11-677-Conf, para. 19.

12 ICC-01/09-01/11-458, paras. 19-21.

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))¹³ and the justifications advanced¹⁴ are the same as those criticised by this Chamber in a recent decision.¹⁵ In the decision, the Chamber observed that, in respect of the proposed B.2 redactions, it was [REDACTED]¹⁶ and concluded that the prosecution had failed to identify the objectively justifiable risk.¹⁷ The Chamber also found that [REDACTED], that [REDACTED] and that [REDACTED].¹⁸ The defence is handicapped in its ability to comment further on the proposed redactions given that it is not provided access to any of the specific justifications. However, it appears that the approach which was the subject of the above criticisms is being followed here and, therefore, the defence submits that it is likely that many of the proposed redactions should be rejected.

7. *Fifth*, the defence requests that the proposed redactions to the screening notes of trial and non-trial witnesses which cover “information related to the Prosecution's objectives and techniques of investigation” be rejected.¹⁹ The authority which the prosecution relies on for its application to redact this type of information only establishes that “internal work product” is not “ordinarily” disclosable.²⁰ If, however, such screening notes do contain disclosable information, such information should be provided to the defence in a suitably usable and intelligible form.²¹ A live investigative issue for the defence is the OTP's investigation and prosecution of this case including the consequences of any shortcomings and defects on such prosecution investigations on the credibility of

13 ICC-01/09-01/11-677-Conf, para. 9; ICC-01/09-01/11-688-Conf, para. 4.

14 ICC-01/09-01/11-677-Conf, para. 10; ICC-01/09-01/11-688-Conf, para. 6.

15 ICC-01/09-01/11-695-Conf-Red.

16 ICC-01/09-01/11-695-Conf-Red, para. 34.

17 ICC-01/09-01/11-695-Conf-Red, para. 35.

18 ICC-01/09-01/11-695-Conf-Red, para. 36 (footnotes omitted).

19 ICC-01/09-01/11-677-Conf, para. 11; ICC-01/09-01/11-688-Conf, para. 7.

20 ICC-01/04-01/06-2656-Red, para. 16.

21 ICC-01/04-01/06-2656-Red, para. 18.

evidence that will be presented at trial. Accordingly, the defence requests disclosure of all information relevant to this line of investigation which is contained in the screening notes. In any event, the defence submits that no cogent grounds have been advanced by the prosecution as to why such information should be redacted. No convincing or credible arguments have been raised to justify the overly broad attempt by the Prosecution to withhold evidence falling within this category. Rather, the Defence submit that it is both necessary for the Defence, and generally in the wider interests of justice, that the Prosecutor's investigative objectives be disclosed, as well as the techniques actually used in this case, which may cast light on the adequacy and propriety of investigations actually conducted by the Prosecution. Certainly, such evidence has been found to be relevant and admissible in other cases before the Court.²²

8. *Sixth*, the screening notes of the 36 trial witnesses have only been disclosed in batches since 16 April 2013. Since disclosure, the defence has not had an opportunity to review the proposed redactions to these screening notes in full. However, as indicated above, the defence will have recourse to the redactions protocol should it prove necessary at a later stage to request that certain redactions be lifted.²³ Therefore, there is a remedy available to the defence should further review reveal that it requires access to certain information for the purposes of its investigations.

9. *Seventh*, despite the defence first raising the issue of the disclosure of screening notes on 14 February 2013, this issue is still outstanding²⁴ and, as detailed in

²² *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1603-tENG, Decision on the Application by the Defence for Mathieu Ngudjolo for Postponement of the Commencement Date for the Hearings on the Merits (Rule 132(1) of the Rules of Procedure and Evidence), 5 November 2009 (notified on 12 February 2010), paras.17 and 19; *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-2434-Red2, Redacted Decision on Intermediaries, 31 May 2010, paras. 138 and 150.

²³ ICC-01/09-01/11-458, paras. 19-21.

²⁴ The defence observes that 14 February 2013 was over a month after the "final" disclosure deadline set by the Trial Chamber of 9 January 2013.

paragraphs 3 and 4 above, full disclosure of the screening notes of trial and non-trial witnesses is not yet complete. It is unclear when full disclosure will be made. It appears likely that information contained in disclosed screening notes has been improperly redacted and will have to be provided to the Defence. The effect of the failure to disclose the material in the screening notes has already been explained in the "Second Defence Request to Vacate the Trial Commencement Date".²⁵ Suffice to say that the failure to disclose the screening notes forms part of the backdrop rendering unfeasible the proposed date for trial.

Relief Requested

10. For the reasons submitted above, the defence:

- (a) requests disclosure as soon as possible of the screening notes for the remaining 5 trial witnesses and disclosure of the relevant PEXO and Rule 77 excerpts from the screening notes of identified non-trial witnesses;
- (b) anticipates that many of the proposed redactions to the screening notes submitted to the Trial Chamber are not supported by the necessary objectively justifiable risk and, thus, requests immediate disclosure of this information.

Respectfully submitted,



Karim A.A. Khan QC
Lead Counsel for H.E. William Samoei Ruto

²⁵ ICC-01/09-01/11-692-Conf, paras. 23-29.

Dated this 27th Day of May 2013
At The Hague, Netherlands