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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 Response to ‘Prosecution’s application regarding the disclosure of the identities of certain individuals who will not appear as trial witnesses (ICC-01/09-01/11-810-Conf-Exp)’ ”, submitted on 15 July 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. The Defence for Mr. William Samoei (“Defence”) respectfully requests that the Trial Chamber dismiss the “Prosecution’s application regarding the disclosure of the identities of certain individuals who will not appear as trial witnesses (ICC-01/09-01/11-810-Conf-Exp)” (“Application”).¹ The Defence is compelled to submit that the Prosecution’s Application is not only devoid of any legal or factual merit, but it contains material and fundamental inaccuracies of a type that should have no part in a filing from any party – especially the party entrusted with the onerous and critical task of fairly prosecuting cases within the jurisdiction of this Court.
2. First, the Application seeks to deny the Defence access to and use of information [REDACTED]. [REDACTED].² The erroneous foundation of the Application is, therefore, manifest *ab initio*.³
3. Second, [REDACTED] the Application is otherwise erroneous because it fails to properly set out and apply the test which governs applications to withhold information. Instead, the Application seeks to introduce elements into the established test which have no basis in law.
4. Third, [REDACTED] exposes the Prosecution’s contention of threats and intimidation to [REDACTED] individuals by the Defence as a nightmare scenario as wholly belied by the facts of this case.
5. Separately, the Defence submits that the Application reveals continuing systemic failings in the Office of the Prosecutor that have the clear potential to occasion a miscarriage of justice and/or erode public and institutional confidence in the Office. Taken at its best, the Application reveals that there are serious communication and operational problems within the Prosecution. Figuratively

¹ ICC-01/09-01/11-810-Red.

² [REDACTED].

³ See *infra*, paras. 6, 7 and 9 [REDACTED].

speaking, it appears that the Prosecution's right hand does not to know what its left hand is doing. The uncomfortable and troubling reality is that, notwithstanding the baseless contention that disclosing information to the Defence will present a security hazard to witnesses and non-witnesses, it is the Prosecution's own serious failings which have been manifest time and time again, to the extent that the Defence submits that in critical and important respects, it is an Office that is simply not "fit for purpose".

II. Submissions

The Defence are legally entitled to the identities of the non-trial witnesses

6. The serious flaws in the Application are revealed from the outset. Paragraph 3 of the Application states that in its "Decision on Defence request to be provided with screening notes and Prosecution's corresponding requests for redactions" ("Decision"),⁴ the Trial Chamber "*endorsed the approach of the Prosecution*"⁵ that the Prosecution provide "*all disclosable material received from non-trial witnesses in an extract form, together with the appropriate context, in a separate document with the individual's witness code, but not their identity.*"⁶ This is wrong. Rather, the Decision states that "*consistently with the Ruto Defence's arguments, the Chamber considers that the identity of the person concerned is generally needed in order to provide sufficient context to his or her screening note excerpt.*"⁷ The Prosecution's error is fundamental and is fatal to its Application.

7. It was on the basis of the Decision that the Defence took receipt of two disclosure packages containing, *inter alia*, excerpts of screening notes of non-trial witnesses on 6 May 2013.⁸ [REDACTED].⁹ Separately, on 10 July 2013, the Defence accepted

⁴ ICC-01/09-01/11-743-Conf. A public redacted version was also issued, ICC-01/09-01/11-743-Red.

⁵ Application, para. 3 (citing to Decision, para. 23).

⁶ *Ibid.*, para. 2(ii).

⁷ Decision, para. 23 (emphasis added).

⁸ The disclosure packages were: (i) Trial PEXO – Package 25; and (ii) Trial Rule 77 – Package 30. The Ringtail reports for both packages are provided as annexes A and B respectively.

⁹ See *supra* note 2. [REDACTED].

disclosure of, *inter alia*, the excerpt of the screening note for P-0276.¹⁰
[REDACTED].¹¹

8. The Defence submits that [REDACTED].^{12 13}
9. [REDACTED] the Defence submits that it is legally entitled to this information by virtue of the Trial Chamber's Decision which controls this matter.¹⁴ Even taken in isolation, the Defence submits that none of the arguments advanced by the Prosecution in its Application justify the withholding of the identities of the twelve non-trial witnesses from the Defence.
10. The Defence finds the Prosecution's conduct in filing the Application, its false averments to the Trial Chamber and its apparently haphazard approach to disclosure nothing short of disquieting. In the *Kenyatta* case, the Trial Chamber noted that disclosure errors in that case resulted from a "*deficient internal review procedure, [and that] the Prosecution can reasonably be expected, if it has not already done so, to make appropriate changes to its internal procedures.*"¹⁵ It is regrettable and unacceptable that three months later the Prosecution's internal procedures still fall short of what can be fairly expected of a fully functional Office demonstrably capable of fulfilling its statutory obligations.

The Prosecution fails to interpret and apply the correct test for withholding the identities

11. It is well-established in the jurisprudence of this Court that the requirements for imposing "redactions are: (i) the existence of an objectively justifiable risk to the safety of the person concerned in case of disclosure, (ii) the risk must emanate from disclosure to the accused in particular and not the public in general, (iii) the infeasibility of less restrictive measure and (iv) an overall assessment as to

¹⁰ Disclosure was made as part of Trial PEXO – Package 31 - KEN-OTP-0107-0631, See **annex D** .

¹¹ See **annex C**.

¹² ICC-01/09-01/11-449-Anx, para. 35

¹³ [REDACTED].

¹⁴ Decision, para. 23 ("[T]he identity of the person concerned is generally needed in order to provide sufficient context to his or her screening note excerpt.").

¹⁵ ICC-01/09-02/11-728, para. 97.

whether the requested redactions are prejudicial to or inconsistent with the rights of the accused and the requirements of a fair and impartial trial.”¹⁶

12. In the Application, the Prosecution makes a series of crucial errors in its interpretation and application of this test. Properly considered, there is no legal basis on which to set aside “the overarching principle...that full disclosure should be made.”¹⁷ Accordingly, there is nothing in the Application justifying the non-disclosure of any of the twelve non-trial witnesses detailed therein.
13. In considering the merits, or otherwise, of the Application, it is important to emphasise that, contrary to the arguments set out in paragraph 10 of the Application, disclosure is *not* being made to the public at large, including the non-trial witnesses’ communities or “supporters/associates of the accused”.¹⁸ It is being made to the Defence of Mr. Ruto. How communities and other individuals may or may not react or treat the information is completely irrelevant to the determination of the Application. As the above test explicitly states, the risk to be assessed is disclosure to the accused and the Defence, not the public in general.
14. Crucially, in this regard, no information or evidence is provided in the Application to support any argument that disclosure of the non-trial witnesses’ identities to the Defence and Mr. Ruto poses a real risk. The Prosecution simply ignores the second limb of the test which requires it to establish a risk emanating from disclosure to the Defence and Mr. Ruto.¹⁹
15. The Prosecution’s claims, at paragraph 13 of the Application, that it “*has on several occasions brought to the attention of the Chamber the unparalleled level of threat*

¹⁶ ICC-01/09-01/11-695-Conf-Red, para. 26.

¹⁷ ICC-01/04-01/07-475, para. 70.

¹⁸ See also Application, para. 11.

¹⁹ The Defence notes that it has received a public redacted version of the Application. That said, the Defence presumes that the Prosecution would not redact important information which makes allegations directly against the Defence and/or Mr Ruto, thus preventing the Defence from being able to duly respond to any allegations impugning their integrity and that of Mr. Ruto. If such allegations were to be made, the correct course would be to file a confidential redacted version of the filing. The Defence concludes that no such averment is contained in the Application because such a contention is baseless.

or interference with witnesses, or suspected witnesses or their families who are living in Kenya” are of no assistance.²⁰ These claims are too general to be meaningful. No information is provided regarding the alleged threats and contended interference, and certainly nothing which implicates the Defence or Mr. Ruto. [REDACTED].

16. The Prosecution also improperly attempts to introduce a proportionality assessment into the test to apply redactions.²¹ Proportionality has no role in the test for sound legal reasons. The proportionality test expounded by the Prosecution involves a qualitative assessment of the value to Defence investigations and trial preparations of the information which is sought to be withheld. Neither the Prosecution, nor even the Trial Chamber at this stage, is in a position to make such an assessment. As Trial Chamber III observed in the *Bemba* case in relation to the Prosecution’s ability to determine material falling with Rule 77, the Prosecution “will seldom know the precise contours of the defence strategy” and, thus, there is “an unacceptable risk that the defence may be deprived of materials to which it is entitled as a result of incorrect judgement calls.”²² The same reasoning applies in this case and extends to assessments made by the Chamber.
17. Instead, the final limb of the established test is relatively straightforward to apply and involves no proportionality assessments. The Chamber simply performs an overall assessment as to whether the requested redactions are prejudicial to or inconsistent with the rights of the accused and the requirements of a fair and impartial trial. This involves a determination as to whether or not the information falls within the scope of Article 67(2) and/or Rule 77, not the degree to which such information will fall within these provisions. Nor is any speculation required regarding the potential impact one piece of information might have on Defence investigations and trial preparations.

²⁰ Application, para. 13 (footnotes omitted).

²¹ *Ibid.*, paras. 6, 7, 12, 16, 20, 23, 25.

²² ICC-01/05-01/08-1594, para. 23.

18. Equally irrelevant to the question of whether or not redactions should be applied is whether or not an individual consents to disclosure.²³ The fact that a witness refuses consent is not a substitute for the Prosecution having to properly satisfy all limbs of the redactions test, including providing sufficient information and evidence to satisfy the Chamber that objective and subjective risks exist to the witnesses' security if disclosure is made to the Defence. As Trial Chamber I observed in the *Lubanga* case, "[i]f the individual's identity is relevant to the case, the unwillingness of a witness to have his identity revealed cannot alone justify non-disclosure."²⁴ Instead, "non-disclosure can only be authorised if a danger or risk to the witness has been established and non-disclosure is necessary and will not cause prejudice to the rights of the accused."²⁵
19. However, missing from the five plus pages the Prosecution devotes to individual security assessments for the twelve non-trial witnesses are any reasons why disclosure of the individuals' identities to the Defence will jeopardise their security.²⁶ Instead, the Prosecution is content, at best, to rely on the statements of anonymous youth and text messages with no link to the Defence or Mr Ruto²⁷ and, at worst, to bare statements that the individual or his/her family members simply reside in Kenya.²⁸ And, to the limited extent that consent may be relevant at all, in several instances, the Prosecution arrived at its conclusion that disclosure would be prejudicial, notwithstanding the fact that some individuals were not even contactable in order for their views to be obtained.²⁹
20. For the avoidance of doubt, the Defence is sensitive to the views and interests of any witness or individual it comes across in the course of its investigations. Any contact will be made with such individuals fully respecting the highest standards

²³ Application, paras. 5, 27, 32, 33, 38, 41, 42, 44, 48, 51, 54, 57 and 59.

²⁴ ICC-01/04-01/06-2209-Red, para. 36.

²⁵ *Ibid.*

²⁶ The Defence's comments at footnote 19 above apply. The Defence presumes that only information which reveals the identity of the non-trial witness has been redacted.

²⁷ Application, para. 29.

²⁸ *Ibid.*, paras. 30, 32, 35, 36, 38, 44, 54.

²⁹ *Ibid.*, paras. 27, 33, 42, 44, 48.

of professional ethics expected by members of the Bar. Recent filings help demonstrate that the Defence endeavours to comply with such standards.³⁰

21. In the final analysis, however, the screening notes of these individuals remain important to Defence investigations, and the Defence submits, fall to be disclosed. The limited information contained in the excerpts of the screening notes disclosed, demonstrate that many of these witnesses appear to have been present at the locations of alleged crimes and their account of what they may have observed prior to, during and in the aftermath of the alleged crimes is information which is relevant to Defence inquiries, and the Defence is also entitled to contact these witnesses without reference to the Prosecution.
22. The Defence observes that the Prosecution makes the astonishing claim that it can assess whether information is material to the preparation of the defence by reference to the time estimates the Defence has proposed for the cross-examination of Prosecution witnesses.³¹ The Prosecution's submission in this regard appears to be deliberately misleading. An attempt to extrapolate a legal argument relevant to its Application from the "Defence's Submissions on the Conduct of Proceedings"³² is obviously arduous – but the difficulty of constructing a legal argument does not provide a licence to a party to misquote and mischaracterise what is actually said.
23. Contrary to what the Prosecution contends, the Defence never said that "*cross examination of crime-base witnesses would be 'considerably shorter' than the Prosecution's examination in chief*".³³ The words supplanted by the Prosecution, and attributed to the Defence, are simply wrong. It is astonishing that the Prosecution sought to construct the legal argument which is attempted at paragraph 22 of its Application. For the sake of clarity, what the Defence actually

³⁰ See, e.g., ICC-01/09-01/11-776-Conf-Exp; ICC01/09-01/11-751-Conf-Exp.

³¹ Application, para. 22.

³² ICC-01/09-01/11-795.

³³ Application, para. 22.

stated on this issue is set out below. It does not support the what Prosecution contends:

Notwithstanding the above, the Defence recognises that for trial management purposes, the Chamber may be assisted with an indication as to the time the defence may provisionally require for cross-examination. At this stage, much OTP evidence has not been reviewed or investigated by the Defence to the extent necessary to make fully informed submissions on this issue. Suffice to say that the Defence will attempt to take no longer in cross-examination than the time spent by the calling party ,in-chief. On many occasions, especially with some crime base witnesses, the Defence anticipates it may be considerably shorter than the OTP. Sometimes – especially for key OTP witnesses that the Defence will contend are part of a conspiracy to pervert the course of justice and deliberately lie to the Chamber – the Defence may require considerably longer. At this stage of proceedings, however, the Defence requests that the Chamber plan for the same allotment of time to each cross-examining party as granted to the party calling the witness. The Defence will endeavour to give best estimates during trial and prior to the witness being cross-examined.”³⁴

24. The argument canvassed by the Prosecution is factually inaccurate and legally erroneous and, the Defence submits, ought to be rejected.

The Prosecution’s claims that “[t]he very act of disclosure...gives rise to...risk” is proven to be baseless

25. The Prosecution’s claims that “the very act of disclosure of the individuals’ identities to the accused gives rise to the risk to these individuals’ security and that of their families [sic].”³⁵ [REDACTED].

26. [REDACTED].³⁶ [REDACTED].

³⁴ ICC-01/09-01/11-795, para. 9 (emphasis added).

³⁵ Application, para.17 (emphasis added).

³⁶ See, e.g., ICC-01/09-01/11-776-Conf-Exp; ICC01/09-01/11-751-Conf-Exp.

27. [REDACTED].³⁷ [REDACTED].

28. [REDACTED] the Prosecution is apparently operating its own protection programme for some of its witnesses and other individuals and is not entrusting witness protection solely to the unit which was specifically set up to provide same, namely the Victims and Witnesses Unit. The probity of this enterprise is a matter that may be determined by the Trial Chamber in due course. Suffice to say, it is submitted that the provision of a parallel witness protection programme by the Prosecution is contrary to the jurisprudence of this Court.³⁸ [REDACTED].

29. [REDACTED].³⁹ Such assertions are exaggerated and without foundation.

30. Contrary to the submissions of the Prosecution, the Defence does not advocate “a system where any protective action arrives too late to make any meaningful difference.”⁴⁰ Instead, the Defence submits that it is in the interests of justice in general – and for the accused and those witnesses and other individuals genuinely placed at risk on account of the Court’s activities, in particular – if the current legal test is properly substantiated and applied. This requires, *inter alia*, that a moving party provides the Chamber with reasons – objective and subjective – as to why disclosure to the other party will result in a person’s security being jeopardised. The Prosecution has failed to provide such a factual and legal basis and, accordingly, the Defence submits that the Prosecution Application should be rejected.

III. Confidentiality

31. At this juncture, the Defence submits this response as “confidential” [REDACTED]. However, the Defence has no objections at all if the Chamber decides to reclassify this response as “public” given that a public redacted

³⁷ See ICC-01/09-01/11-799-Conf; ICC-01/09-01/11-805-Conf.

³⁸ ICC-01/09-01/11-766-Conf.

³⁹ Application, para. 17.

⁴⁰ *Ibid.*, para. 12.

version of the Application itself was filed and is the document to which the Defence is responding.

IV. Relief Requested

32. For the reasons set out above, the Defence respectfully requests that the Trial Chamber dismiss the Application [REDACTED].
33. The Defence also requests that the Prosecution be ordered to disclose the full screening notes of the twelve witnesses detailed in its Application without delay.
34. [REDACTED].

Respectfully submitted,



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Lead Counsel for Mr. William Samoei Ruto

Dated this 16th Day of July 2013
At Nairobi, Kenya