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TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding
Judge Olga Herrera Carbuca
Judge Robert Fremr

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR v. WILLIAM SAMOEI RUTO and JOSHUA ARAP SANG

Public redacted version of
Decision on the Defence Applications for Disclosure of Materials related to
[REDACTED]

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

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Mr James Stewart
Mr Anton Steynberg

Counsel for William Samoei Ruto

Mr Karim Khan
Mr David Hooper
Mr Essa Faal
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States Representatives

Amicus Curiae

REGISTRY

Registrar

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Victims and Witnesses Unit

Mr Patrick Craig

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V(A) (the ‘Chamber’) of the International Criminal Court (the ‘Court’), in the case of *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, having considered Articles 55 and 67(2) of the Rome Statute (the ‘Statute’) and Rules 76, 77, 111, and 112 of the Rules of Procedure and Evidence (the ‘Rules’), renders its Decision on the Defence Applications for Disclosure of Materials related to [REDACTED].

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 1 July 2013, the defence for Mr Sang (the ‘Sang Defence’) filed a request for disclosure of all audio recordings of prosecution interviews of [REDACTED] (the ‘Audio Disclosure Request’).¹ The interviews in question of [REDACTED] were conducted by the Office of the Prosecutor (the ‘Prosecution’) on [REDACTED], [REDACTED], and [REDACTED].² Transcripts of the interviews were first disclosed to the Defence in redacted form, and subsequently in lesser redacted form on 18 February 2013.³ The Sang Defence requested that, in addition to the transcripts, the audio recordings of the interviews of [REDACTED] be disclosed by the Prosecution, on the basis that such recordings are ‘necessary to the defence for preparation of the trial and/or contain potentially exculpatory (“PEXO”) material’.⁴
2. On 8 July 2013, the defence for Mr Ruto (the ‘Ruto Defence’) filed a separate application, in which it joined the Sang Defence’s Audio Disclosure Request, but in

¹ Sang Defence Application for Disclosure of All Audio Recordings of Prosecution Interviews with [REDACTED], ICC-01/09-01/11-793-Conf. The Sang Defence also requested that the time for responses be shortened. On 3 July 2013, the Chamber by means of an e-mail sent to the parties at 12.06, shortened the deadline for responses to the Audio Disclosure Request to 10 July 2013.

² Prosecution’s response to “Sang Defence Application for Disclosure of All Audio-Recordings of Prosecution Interviews with [REDACTED]”, ICC-01/09-01/11-808-Conf, para. 2.

³ ICC-01/09-01/11-808-Conf, para. 2.

⁴ ICC-01/09-01/11-793-Conf, para. 1.

addition requested the disclosure of information relating to the mental health of [REDACTED] (the 'Medical Information Request').⁵

3. On 10 July 2013 and 30 July 2013, respectively, the Prosecution filed responses to the Audio Disclosure Request and Mental Health Request.⁶
4. In this decision, the Chamber will deal with both the initial Audio Disclosure Request, as well as the Mental Health Request, as both relate to the same witness. It will first set out the submissions by the parties on the disclosure of audio recordings, followed by the submissions on the request to disclose information on the mental health of [REDACTED].

i) Audio Disclosure Request

5. The Sang Defence submits that on 24 May 2013, [REDACTED] calling into question the credibility of [REDACTED]'s testimony.⁷ The [REDACTED] alleged, amongst other things, that the evidence given by [REDACTED] was scripted, and that the recorded interviews consisted of [REDACTED] reading scripted answers rather than speaking freely.⁸ In light of such allegations, the Sang Defence requests that the Prosecution disclose the audio recordings of the interviews of [REDACTED] 'for verification and comparison' to the previously disclosed transcripts.⁹ The Sang Defence submits that its request should be granted on three grounds:

⁵ Defence Request for Disclosure of Missing Evidence and Information relating to the Mental Health of [REDACTED], ICC-01/09-01/11-804-Conf.

⁶ ICC-01/09-01/11-808-Conf; Prosecution response to 'Defence Request for Disclosure of Missing Evidence and Information relating to the Mental Health of [REDACTED]', ICC-01/09-01/11-833-Conf.

⁷ ICC-01/09-01/11-793-Conf, para. 10.

⁸ ICC-01/09-01/11-793-Conf, para. 10.

⁹ ICC-01/09-01/11-793-Conf, paras 15-16.

- (i) The Prosecution's disclosure obligations with respect to 'statements' in Rule 76(1) of the Rules¹⁰ are broad and not restricted by the form of witness statements.¹¹ The Prosecution has an obligation under Rule 76 of the Rules to disclose the audio recordings, which are 'required for a different purpose and [therefore] not duplicative of the statements already disclosed'.¹²
- (ii) Rule 77 of the Rules,¹³ which according to the Sang Defence, citing the Trial Chamber in *Katanga and Ngudjolo*, is to be construed broadly so as to permit the defence access to audio recordings and without imposing a burden on the defence to prove allegations of discrepancies in witness statements to demonstrate a need to be granted access to the audio records.¹⁴ Therefore, the Sang Defence submits that it seeks disclosure of the audio recordings under Rule 77 of the Rules 'on the basis that the allegations attributed to [REDACTED] in the newspaper article have opened a further investigative avenue, which the defence needs to explore as part of its preparations for trial'.¹⁵
- (iii) The Sang Defence submits that the disclosure of PEXO material is 'a fundamental aspect of the accused's right to fair trial' and is to be interpreted broadly.¹⁶ Since the recordings potentially can confirm the allegations made

¹⁰ Rule 76(1) of the Rules provides that "the Prosecutor shall provide the defence with the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses".

¹¹ ICC-01/09-01/11-793-Conf, paras 25-26.

¹² ICC-01/09-01/11-793-Conf, para. 27.

¹³ Rule 77 of the Rules provides, in relevant parts, that the Prosecution 'shall [...] permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence ...'.

¹⁴ ICC-01/09-01/11-793-Conf, paras 28-34, citing *Prosecutor v. Katanga and Ngudjolo*, Decision on Application by the Defence for Germain Katanga for Disclosure of Audio Records of Interview of Witness P-219, ICC-01/04-01/07-2309-Red.

¹⁵ ICC-01/09-01/11-793-Conf, para. 36.

¹⁶ ICC-01/09-01/11-793-Conf, para. 38.

in the newspaper article, the Sang Defence sees disclosure as PEXO warranted under Article 67(2) of the Statute.¹⁷

6. The Ruto Defence joined the Sang Defence's request.¹⁸
7. The Prosecution submits that the Audio Disclosure Request should be denied, as there is no legal basis for requiring disclosure of the recordings.¹⁹ It submits that Rule 76 of the Rules requires the Prosecution only to provide 'copies of any prior statement', which, it argues, it has done when disclosing the transcripts of the interviews held with [REDACTED].²⁰ Pointing to a decision by Pre-Trial Chamber I in *Mbarushimana*, it further submits that 'there is no general rule requiring the disclosure of audio-recordings of interviews in addition to the full transcripts' and that the disclosure of complete transcripts provided adequate information to the accused, leaving no need for additional disclosure of the audio recordings.²¹
8. The Prosecution submits that in order to justify the additional disclosure of audio recordings, the Sang Defence 'must demonstrate that in the specific or exceptional circumstances at hand: (i) the transcript of the interview is insufficient to prepare their defence; and (ii) there are cogent reasons to believe that the audio-recordings will cure this deficiency'.²² According to the Prosecution, the Sang Defence has not demonstrated such circumstances.²³

¹⁷ ICC-01/09-01/11-793-Conf, paras 40-41.

¹⁸ ICC-01/09-01/11-804-Conf, para. 2.

¹⁹ ICC-01/09-01/11-808-Conf, para. 1.

²⁰ ICC-01/09-01/11-808-Conf, para. 4.

²¹ ICC-01/09-01/11-808-Conf, paras 6-7, citing *Prosecutor v. Callixte Mbarushimana*, Decision on "Defence request to deny the use of certain incriminating evidence at the confirmation hearing" and postponement of confirmation hearing, 16 August 2011, ICC-01/04-01/10-378, para. 24.

²² ICC-01/09-01/11-808-Conf, para. 8.

²³ ICC-01/09-01/11-808-Conf, para. 8.

9. The Prosecution contends that unverified media reports are an inappropriate basis for imposing disclosure obligations on the Prosecution, as such reports could easily be triggered by any party at will by leaking a story to the press.²⁴ Even if the newspaper article concerned was to be used as a basis for triggering disclosure obligations, the Prosecution submits that the transcripts of the interviews sufficiently demonstrate that the interviews were conducted freely ‘in a question-and answer type format’ and that they were not scripted, and that the Sang Defence has failed to explain how listening to already transcribed interviews will assist it.²⁵ In addition to it being ‘highly improbable and likely impossible’ that the audio recordings would sufficiently ascertain whether [REDACTED] was reading off a script as it was not a visual recording, the Prosecution submits that it would be ‘dangerous’ to draw conclusions from the Witness’s tone of voice in the audio recordings.²⁶
10. The Prosecution disputes that the audio recordings contain any PEXO material and does not see how the addition disclosure of the audio recordings would be material to the preparation of the defence. It submits, however, that if the Chamber were to doubt whether this is indeed the case, it can provide the Chamber with copies of the audio recordings in order for the Chamber to decide whether they fall under Article 67(2) of the Statute or Rule 77 of the Rules.²⁷
11. Finally, the Prosecution contends that ‘cogent reasons’ mitigate against ordering disclosure of the audio recordings as it would place an undue and unnecessary burden on the Prosecution.²⁸ It further submits that disclosure of audio recordings would require that redactions be applied to the audio recordings, particularly at early stages

²⁴ ICC-01/09-01/11-808-Conf, para. 10.

²⁵ ICC-01/09-01/11-808-Conf, paras 11-12.

²⁶ ICC-01/09-01/11-808-Conf, para. 13.

²⁷ ICC-01/09-01/11-808-Conf, para. 15.

²⁸ ICC-01/09-01/11-808-Conf, para. 16.

before lesser redacted versions are disclosed, which would be a difficult and time consuming process²⁹ that would lead to the '[a]lready stretched OTP resources' being 'unnecessarily diverted to conducting an exercise which merely duplicates information already disclosed'.³⁰

ii) Mental Health Request

12. In addition to joining the Audio Disclosure Request, the Ruto Defence also made submissions to support their request for disclosure of additional materials related to [REDACTED]. It requests that the Prosecution be ordered to: i) provide information as to whether issues pertaining to [REDACTED] mental health were brought to the attention of the Pre-Trial Chamber prior to the confirmation hearing; ii) explain why the information on the Witness's mental health was not disclosed before; iii) disclose interview transcripts and audio recordings of the portions of the [REDACTED] interviews relating to investigator's report KEN-OTP-0106-0727 (the 'Investigator's Report'), or if these do not exist, an explanation as to why this is the case; and iii) information on any financial payments made to [REDACTED].³¹

13. The Ruto Defence submits that, following an email disclosure from the Prosecution on 2 May 2013 containing information on [REDACTED] mental state, it has been requesting the Prosecution, *inter partes*, to disclose additional information in its possession regarding [REDACTED] mental state, as well as an explanation as to why such information was not disclosed to the defence sooner.³² Since the Prosecution has

²⁹ ICC-01/09-01/11-808-Conf, para. 17.

³⁰ ICC-01/09-01/11-808-Conf, para. 17.

³¹ ICC-01/09-01/11-804-Conf, paras 3 and 21.

³² ICC-01/09-01/11-804-Conf, para. 8.

thus far declined to accede to the Ruto Defence's requests for additional disclosure, the Ruto Defence requests that the Chamber order disclosure of the additional information on the grounds that it falls within the scope of Article 67(2) of the Statute and Rule 77 of the Rules as it is potentially relevant to the credibility and reliability of [REDACTED].³³

14. The Prosecution submits that the Mental Health Request should be rejected in its entirety.³⁴ It submits that the health and medical condition of [REDACTED] 'was not specifically put before the Pre-Trial Chamber' before or during the confirmation hearing.³⁵
15. The Prosecution observes that any information pertaining to a witness's medical condition is '*prima facie* confidential' and therefore not subject to disclosure.³⁶ It further argues that it had 'provided the Defence on 2 May 2013 with all the information that it assessed to be both relevant and disclosable in the circumstance' in response to the Ruto Defence's specific request for information regarding the condition of [REDACTED].³⁷ The Prosecution submits that the Ruto Defence's demand for an explanation as to why information regarding [REDACTED] mental state was not disclosed earlier lacks any sort of statutory basis and does not stand to 'benefit either of the parties in the absence of any tangible relief sought'.³⁸ Therefore, the Prosecution considers that it has 'acted in good faith and in accordance with its disclosure obligations' with respect to information pertaining to [REDACTED] medical condition,

³³ ICC-01/09-01/11-804-Conf, para. 17.

³⁴ ICC-01/09-01/11-833-Conf, para. 2.

³⁵ ICC-01/09-01/11-833-Conf, para. 6.

³⁶ ICC-01/09-01/11-833-Conf, para. 9.

³⁷ ICC-01/09-01/11-833-Conf, para. 10.

³⁸ ICC-01/09-01/11-833-Conf, para. 8.

and that there is no legal basis for ordering the disclosure of any additional information on the matter.³⁹

16. With regard to the Ruto Defence's request that information regarding any funds paid to [REDACTED] to be disclosed, the Prosecution submits that it has already disclosed to the Defence 'spreadsheets detailing financial payments made by the Prosecution to the first ten trial witnesses, as well as [REDACTED]' on 16 July 2013.⁴⁰ The Prosecution submits that the disclosed spreadsheets, appended to the Prosecution's response for the Chamber's reference, consist of all relevant financial information that was requested by the Ruto Defence in the Additional Request.⁴¹

II. ANALYSIS BY THE CHAMBER

i) Audio Recordings Request

17. The Chamber recalls the Appeals Chamber's ruling in *Banda and Jerbo* that 'the audio or video-record of the questioning of a person in accordance with rule 112 of the Rules of Procedure and Evidence and the transcript thereof are records of statements that are *potentially* subject to disclosure pursuant to rule 76 of the Rules of Procedure and Evidence where the Prosecutor intends to call the person to testify as a witness'.⁴² It considers that when audio recordings have been transcribed and such transcripts have subsequently been disclosed to the Defence, in principle, the audio recording need not be disclosed as both the tape and the transcript contain the same record of the words

³⁹ ICC-01/09-01/11-833-Conf, paras 11-13.

⁴⁰ ICC-01/09-01/11-833-Conf, para. 18.

⁴¹ ICC-01/09-01/11-833-Conf, paras 19-20.

⁴² *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled "Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation", 17 February 2012, ICC-02/05-03/09-295, para. 23.

used by the witness. The Prosecution is thus not under a general obligation to disclose all audio recordings of its witness interviews. However, such audio recordings may be subject to disclosure pursuant to, *inter alia*, Rule 77 of the Rules if they are deemed material to the preparation of the Defence.

18. Pointing to a decision by the Trial Chamber in *Katanga and Ngudjolo*, the Sang Defence has submitted that it does not need to provide concrete examples why the audio recordings need to be disclosed.⁴³ However, that decision pertained to recordings of witness interviews for which only a signed statement, and no word-by-word, was made. Nonetheless, the Chamber notes that the Sang Defence did specify various reasons why it considers the audio recordings relevant to its preparation.
19. Moreover, whilst the transcripts and the audio recordings relate to the same interviews of [REDACTED], disclosure of both is not – as argued by the Prosecution – duplicative, as the Sang Defence has requested disclosure of the audio recordings not for the word-by-word content, but for ‘a different purpose’, namely to verify whether [REDACTED]’s evidence ‘was rehearsed’.⁴⁴ Listening to the audio recordings could assist the Sang Defence in the said verification, and as such the recordings can be considered material to its preparation.
20. Furthermore, the Chamber notes that the Prosecution, as reported by the Sang Defence and not contested by the Prosecution, previously disclosed recordings of the interviews conducted pursuant to Article 55(2) of the Statute and Rule 112 of the Rules.⁴⁵ It further notes that the Prosecution stated in an e-mail to the Defence that performing redactions to would be ‘extremely onerous and time-consuming. If,

⁴³ ICC-01/09-01/11-793-Conf, para, 33, quoting *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on Application by the Defence for Germain Katanga for Disclosure of Audio Records of Interview of Witness P-129, 30 August 2010, ICC-01/04-01/07-2309-Red, para. 4.

⁴⁴ ICC-01/09-01/11-793-Conf, paras 15, 27 and 36.

⁴⁵ ICC-01/09-01/11-793-Conf, para. 6.

however, the Defence has a need for particular tapes of interviews or particular portions of those interviews, provision of these can be arranged'.⁴⁶ It is unclear why the Prosecution reconsidered its offer to provide audio recordings when specific requests are made.

21. Whereas Rule 77 of the Rules, in principle, allows the Prosecution to merely 'permit the defence to inspect' the audio recordings, the Chamber considers that in these particular circumstances copies of the relevant recordings should be disclosed to the Defence. The Prosecution has made a general comment about redactions that would need to be applied to audio tapes in the early stages of proceedings when the identity of certain witnesses are not yet known to the defence. The Chamber notes that the Defence knows the identity of [REDACTED], and the Prosecution has not advanced any specific submissions on the need for redactions to the audio recordings of the interviews with [REDACTED]. However, the transcripts of the interviews have until this moment only been disclosed in lesser redacted form. Therefore, and in light of the considerations above, the Chamber will grant the Sang Defence's request and will order the full disclosure of the audio recordings of the interviews with [REDACTED], subject to any submission by the Prosecution on the need to redact the audio tapes to reflect the redactions contained in the lesser redacted transcripts of the interviews with [REDACTED].

ii) Mental Health Request

22. The Chamber notes that as part of the relief requested in the Mental Health Request, the Ruto Defence requested the Chamber to order the Prosecution to disclose to it 'information as to whether [REDACTED] mental health, suicidal tendencies and severe alcoholism were brought to the attention of the Pre-Trial Chamber prior to the

⁴⁶ ICC-01/09-01/11-793-Conf, para. 7.

confirmation hearing'.⁴⁷ In its response to the Mental Health Request, the Prosecution unambiguously stated that this was not the case.⁴⁸ The Ruto Defence's request for an explanation by the Prosecution as to why the information concerning the mental state of [REDACTED] was 'withheld from the Defence for almost 2 years',⁴⁹ was also given by the Prosecution; albeit by disputing that the information was withheld, because the Prosecution submits that it 'acted in good faith and in accordance with its disclosure obligations'.⁵⁰ Both these relief requests are therefore moot.

23. The Ruto Defence also requests to be provided with information on payments made to [REDACTED], specifying that such information 'should be provided regardless of whether or not such money was provided by the Prosecution, the Victims and Witnesses Unit ['VWU'] or any NGO or other third party'.⁵¹ The Chamber observes that on 16 July 2013, after the Mental Health Request was filed, the Prosecution disclosed to the Defence a spreadsheet that listed the payments made to [REDACTED].⁵² The Prosecution explained in an accompanying e-mail to the Defence that it is 'only responsible for reconciling and accounting for payments effected by the Prosecution, either from its own funds, or on behalf of the VWU' and that it 'cannot account for any payment made directly to witnesses by other parties, including the VWU'.⁵³ Based on the information before the Chamber, this explanation was not contested by the Ruto Defence. The Chamber, therefore, consider that the Prosecution has provided the requested information and that the relief requested on this point has thus become moot.

⁴⁷ ICC-01/09-01/11-804-Conf, para. 21, at (a).

⁴⁸ ICC-01/09-01/11-833-Conf, para. 8.

⁴⁹ ICC-01/09-01/11-804-Conf, para. 21, at (b).

⁵⁰ ICC-01/09-01/11-833-Conf, paras 8-13.

⁵¹ ICC-01/09-01/11-804-Conf, para. 21, at (d).

⁵² ICC-01/09-01/11-833-Conf, Confidential Annex A.

⁵³ ICC-01/09-01/11-833-Conf, Confidential Annex B.

24. The remaining relief requested concerns the request for disclosure of the portions of audio recordings and transcripts of the interviews held on [REDACTED] with [REDACTED] that relate to the information contained in the Investigator's Report, and the related request for an explanation by the Prosecution if such recordings or transcripts would not exist.⁵⁴ In its response, the Prosecution clarified that [REDACTED] made the comments captured in the Investigator's Report immediately prior the commencement of the [REDACTED] interview, and during a separate questioning on the Witness's security situation.⁵⁵ As such, it explains, the information does not form part of the interview record, but is contained in the Investigator's Report.⁵⁶ Since the Prosecution, as a result of Audio Disclosure Request, will be ordered to disclose the full audio recordings of the interviews with [REDACTED], including those held on [REDACTED], and the Prosecution has provided an explanation about the moment that [REDACTED] made the relevant comments, the Chamber considers the remaining request to also be moot.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the Audio Recordings Request; and

INSTRUCTS the Prosecution that if it wishes to request authorisation to redact the audio recordings of the interviews with [REDACTED] held on [REDACTED], [REDACTED], and [REDACTED], to reflect to the redactions of lesser redacted versions of these interviews, it shall do so by 2 September 2013;

⁵⁴ ICC-01/09-01/11-804-Conf, para. 21, at (c).

⁵⁵ ICC-01/09-01/11-833-Conf, para. 15.

⁵⁶ ICC-01/09-01/11-833-Conf, para. 15.

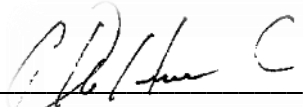
ORDERS the Prosecution to disclose to the Defence the full audio recordings of the interviews with [REDACTED] held on [REDACTED], [REDACTED], and [REDACTED] by 2 September 2013, if no redactions are requested; or, pending approval by the Chamber, to disclose redacted versions of the audio recordings by that same date;

DISMISSES all other requests as moot.

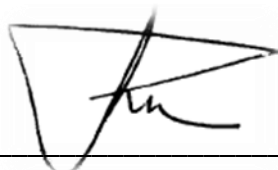
Done in both English and French, the English version being authoritative.



Judge Chile Eboe-Osuji
(Presiding)



Judge Olga Herrera Carbuca



Judge Robert Fremr

Dated 29 August 2013

At The Hague, The Netherlands