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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 redacted version of

Decision on the Sang Defence Application to Lift B.3 Redactions and for Additional Disclosure

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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Counsel for William Samoei Ruto

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**Unrepresented Applicants for
Participation/Reparation**

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Amicus Curiae

REGISTRY

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Counsel Support Section

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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*, pursuant to Articles 64, 67(1)(d), 67(2) and 68(1) of the Rome Statute (the ‘Statute’), Rules 77 and 81 of the Rules of Procedure and Evidence (the ‘Rules’) and Articles 12, 15 and 16 of the Code of Professional Conduct for Counsel, renders this ‘Decision on the Sang Defence Application to Lift B.3 Redactions and for Additional Disclosure’.

A. Procedural Background

1. On 23 April 2013, the Chamber issued its ‘Decision on the Prosecution’s application for authorisation to maintain certain redactions’.¹
2. On 11 April 2014, the defence team for Mr Ruto (the ‘Ruto Defence’) filed an application seeking the lifting of certain B.3 redactions in an investigator’s report, regarding the identity of the person present when [REDACTED] met with [REDACTED], and any redactions related to this incident in [REDACTED] transcripts of interviews with representatives of the Office of the Prosecutor (the ‘Ruto Request’).²
3. On 29 April 2014, the defence team for Mr Sang (the ‘Sang Defence’) joined the Ruto Request.³
4. On 30 April 2014, the Sang Defence filed a further application (the ‘Sang Request’),⁴ seeking: (i) the lifting of additional B.3 redactions in the same investigator’s report, and related transcripts, as referred to in the Ruto Request (the ‘First Sang Disclosure Request’); and (ii) disclosure of any other material,

¹ ICC-01/09-01/11-695-Conf-Exp. A confidential redacted version was filed on that same date.

² Ruto Defence request for an Order to the Prosecution to lift B3 redactions in Investigator’s Report KEN-OTP-0104-0518_R01 and related transcripts, ICC-01/09-01/11-1267-Conf, 11 April 2014.

³ ICC-01/09-01/11-1279-Conf, 29 April 2014.

⁴ Defence application for lifting of B.3 redactions and request for additional disclosure, ICC-01/09-01/11-1280-Conf.

not previously disclosed, relating to (a) alleged meetings held in 2009 and 2010 discussing witness intimidation and (b) any investigations into Sang Defence Lead Counsel's alleged involvement in witness intimidation (the 'Second Sang Disclosure Request').⁵

5. On 5 May 2014, the Office of the Prosecutor (the 'Prosecution') responded to the Ruto Request (the 'Prosecution Response to Ruto Request').⁶
6. On 14 May 2014, the Prosecution responded to the Sang Request (the 'Response').⁷ The Ruto Defence did not file a response to the Sang Request.
7. On 20 May 2014, the Chamber issued a decision granting the Ruto Request (the 'First Decision').⁸

B. Submissions and Analysis

8. By way of factual background, the Sang Defence notes that it has been alleged by [REDACTED], who also provided certain related material, that a series of 'Friends of Ruto' meetings were allegedly held between November 2009 and January 2010 at which support for Mr Ruto in his candidacy in the (then) upcoming Presidential elections, and with regard to the proceedings before the Court, were discussed (the 'Meetings'). It is alleged that Sang Defence Lead Counsel [REDACTED]. Further allegations by [REDACTED] and [REDACTED] relating to Lead Counsel's [REDACTED].⁹

⁵ Sang Request, ICC-01/09-01/11-1280-Conf, paras 1, 3, 4 and 39.

⁶ Prosecution response to Defence Requests for an Order to the Prosecution to lift B.3 redactions in investigator's Report KEN-OTP-0104-0518_R01 and related transcripts [ICC-01/09-01/11-1267-Conf and ICC-01/09-01/11-1279-Conf], ICC-01/09-01/11-1292-Conf-Exp. A Confidential Redacted version was filed on 7 May 2014.

⁷ Prosecution response to Sang Defence request for lifting of B.3 redactions and request for additional disclosure, ICC-01/09-01/11-1306-Conf.

⁸ ICC-01/09-01/11-1310-Conf-Exp. A confidential redacted version was filed on that same date.

⁹ Sang Request, ICC-01/09-01/11-1280-Conf, paras 6-7.

First Sang Disclosure Request

9. The Sang Defence seeks lifting of the B.3 redactions: (i) in KEN-OTP-0104-0518_R01 (the 'Investigator's Report') relating to the name of the person who provided [REDACTED] with copies of minutes of the Meetings and (ii) between pages 0028-1557 – 0028-1563 of Prosecution interview transcript KEN-OTP-0028-1532_R04 (the 'Transcript'), which similarly relates to the Meetings.¹⁰
10. The Sang Defence submits that redactions should be considered to be an exception to the norm of full disclosure.¹¹ Relying on prior jurisprudence of the Court, the Sang Defence further submits that changed circumstances may justify the lifting of previously authorised redactions.¹² It presents three factors which it submits amount to changed circumstances in this case:¹³ (i) the fact that [REDACTED] potential testimony is now more imminent;¹⁴ (ii) that Sang Defence investigations into the Meetings 'provide a real basis' for challenging whether they ever took place and therefore whether the minutes are fabricated;¹⁵ and (iii) that the Meetings, and associated threats, have now become 'directly related to the case' as a result of the Prosecution's reliance on them in its protective measures request in respect of [REDACTED].¹⁶
11. The Sang Defence further submits that the identity of the provider of the minutes is relevant to the credibility of [REDACTED] and is therefore material to the preparation of the defence.¹⁷

¹⁰ Sang Request, ICC-01/09-01/11-1280-Conf, para. 3.

¹¹ Sang Request, ICC-01/09-01/11-1280-Conf, para. 18.

¹² Sang Request, ICC-01/09-01/11-1280-Conf, para. 21 (citing to *The Prosecutor v Katanga*, Judgment on the Appeal of the Prosecutor Against the Decision of Pre-Trial Chamber I Entitled 'First Decision on the Prosecution Request for Authorization to Redact Witness Statements', ICC-01/04-01/07-475, 13 May 2008, para. 73(c); ICC-01/09-01/11-458, para. 11; and ICC-01/09-01/11-695, para. 26).

¹³ Sang Request, ICC-01/09-01/11-1280-Conf, para. 26.

¹⁴ Sang Request, ICC-01/09-01/11-1280-Conf, para. 27.

¹⁵ Sang Request, ICC-01/09-01/11-1280-Conf, para. 28.

¹⁶ Sang Request, ICC-01/09-01/11-1280-Conf, para. 29.

¹⁷ Sang Request, ICC-01/09-01/11-1280-Conf, paras 24-25.

12. In the Response, the Prosecution stated that it agrees to lift the B.3 redactions in the Investigator's Report and will disclose a lesser redacted version forthwith.¹⁸ The Chamber consequently considers this portion of the First Sang Disclosure Request to be moot.

13. In respect of the B.3 redactions in the Transcript the Prosecution relied on its submissions in the Prosecution Response to Ruto Request.¹⁹ Those submissions were summarised in the First Decision²⁰ and are incorporated by reference here. However, the Chamber notes that in those submissions the Prosecution advised that there was 'little to no objective risk' from disclosure of the relevant individual's identity 'in the specific context of' the Ruto Request.²¹ The Chamber notes that the context in the First Sang Disclosure Request, regarding being the source of minutes of the Meetings, is different to that in the Ruto Request, where the individual in question was named only in the context of being present when [REDACTED] met two other persons. Nonetheless, given the Prosecution's agreement to lifting of equivalent B.3 redactions from the Investigator's Report and reliance on its earlier submissions, it appears that the Prosecution equally does not consider any objective risk to arise in the present context.

14. Consequently, the Chamber adopts the finding made in the First Decision that there is currently no objectively justifiable risk to the individual concerned, or the individual's extended family, arising from disclosure to the accused.²² Therefore, the Chamber finds that the relevant B.3 redactions in the Transcript should be lifted. Finally, the Chamber notes that this decision is without prejudice to the obligation of the Prosecution, pursuant to the First Decision, to review any other previously authorised B.3 redactions relating to the same

¹⁸ Response, ICC-01/09-01/11-1306-Conf, para. 5.

¹⁹ Response, ICC-01/09-01/11-1306-Conf, para. 4.

²⁰ First Decision, ICC-01/09-01/11-1310-Conf-Red, paras 8-9.

²¹ See First Decision, ICC-01/09-01/11-1310-Conf-Red, para. 8 (citing Prosecution Response to Ruto Request, ICC 01/09-01/11-1292-Conf-Exp, para. 11).

²² First Decision, ICC-01/09-01/11-1310-Conf-Red, paras 13-14.

individual and to submit any requests it deemed necessary for lifting such redactions.

Second Sang Disclosure Request

15. The Sang Defence submits that the information sought in the Second Sang Disclosure Request is material to the preparation of the defence within the meaning of Rule 77 of the Rules.²³ Relying on the jurisprudence of the Appeals Chamber, the Sang Defence submits that materiality for the purposes of Rule 77 of the Rules must be 'interpreted broadly', and that the assessment should be done on a *prima facie* basis which places 'a low burden on the defence'.²⁴
16. The Sang Defence argues that the fact the Prosecution has already disclosed, pursuant to Rule 77 of the Rules, certain documents connected to the Meetings demonstrates acceptance of them being 'in some way material' to the preparations of the defence.²⁵ In particular, the Defence submits that the information sought is relevant to the assessment of the credibility of [REDACTED] and to the ability of the defence to 'challenge the veracity and credibility' of [REDACTED] testimony.²⁶ Further, it is submitted that the Prosecution's reliance on information concerning the Meetings for the purpose of its protective measures request in respect of [REDACTED] necessitates the Defence seeking the intervention of the Chamber.²⁷
17. The Sang Defence additionally submits that materiality can be established from the fact that Mr Sang is alleged to have attended certain of the Meetings. It is

²³ Sang Request, ICC-01/09-01/11-1280-Conf, para. 2.

²⁴ Request, ICC-01/09-01/11-1280-Conf, paras 14-16 (relying on *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled 'Decision on the Defence's Request for Disclosure of Documents in the possession of the Office of the Prosecutor', 28 August 2013, ICC-02/05-03/09-501).

²⁵ Request, ICC-01/09-01/11-1280-Conf, para. 23.

²⁶ Request, ICC-01/09-01/11-1280-Conf, paras 24-25.

²⁷ Request, ICC-01/09-01/11-1280-Conf, para. 31.

submitted that the Sang Defence has a 'legitimate interest' in countering any inference therefrom that Mr Sang 'has a guilty conscience' and is 'continuing his criminal support of the first accused'.²⁸ Relatedly, the Sang Defence submits that *prima facie* materiality can be established from an interest in preventing any allegations against Mr Sang's Lead Counsel from later being 'imputed' to Mr Sang.²⁹

18. Furthermore, the Sang Defence submits that the additional information is relevant to advancing its general line of defence, according to which the allegations against Mr Sang were invented by his opponents, and 'fabrication' of the minutes of the Meetings is part of this scheme.³⁰ The Sang Defence also argues that withholding information relating to Lead Counsel would impact Mr Sang's right to effective representation by counsel of his choosing. It is submitted that enabling the Sang Defence to undertake further investigations in relation to this matter would prevent a 'conflict of interest' from occurring.³¹
19. Finally the Sang Defence submits that 'no genuine exceptions' to disclosure apply³² and that in assessing any risk arising from disclosure to the accused and his defence team, the professional obligations borne by the Sang Defence 'are persuasive'.³³
20. The Prosecution submits that the Second Sang Disclosure Request should be rejected.³⁴ It contends that the argument that Lead Counsel's acts could be imputed to Mr Sang does not find support in the jurisprudence relied upon by the Sang Defence. Moreover, the Prosecution states that Lead Counsel's conduct is not at issue in the case nor has the Prosecution suggested that it should be

²⁸ Request, ICC-01/09-01/11-1280-Conf, para. 32.

²⁹ Request, ICC-01/09-01/11-1280-Conf, para. 32.

³⁰ Request, ICC-01/09-01/11-1280-Conf, para. 33.

³¹ Request, ICC-01/09-01/11-1280-Conf, para. 34.

³² Request, ICC-01/09-01/11-1280-Conf, para. 2.

³³ Request, ICC-01/09-01/11-1280-Conf, paras 36-38.

³⁴ Response, ICC-01/09-01/11-1306-Conf, paras 2 and 17.

considered in determining the merits of the charges.³⁵ The Prosecution submits that there is no basis for believing that information relating to the alleged conduct of Lead Counsel would assist in establishing that the charges against Mr Sang are a 'fabrication'.³⁶ In particular, the Prosecution submits that [REDACTED] accounts of the Meetings and involvement of the Lead Counsel are based on hearsay, so that even if proven to be false or inaccurate, it would not impact the credibility of the witness or otherwise exculpate Mr Sang.³⁷

21. The Prosecution contests the Sang Defence assertion that withholding information concerning Lead Counsel's alleged involvement in witness interference would lead to a conflict of interests. However, it is submitted by the Prosecution that a conflict of interests might arise if Lead Counsel were to use these proceedings as a means of defending his own, rather than his client's, alleged conduct.³⁸ The Prosecution refers to Article 16 of the Code of Professional Conduct which contains the obligation for counsel to place a client's interests before counsel's own and prescribes a mandatory course of action should a conflict of interest arise.³⁹
22. The Prosecution also notes that it is cognisant of its on-going statutory disclosure obligations, as well as of the disclosure to be made pursuant to the order of the Chamber dated 28 February 2014.⁴⁰
23. The Chamber has previously considered the applicable law relating to disclosure under Rule 77 of the Rules⁴¹ and will apply those principles in the present case. The Chamber notes that there appear to be two components to the Second Sang Disclosure Request: any material, not previously disclosed, relating to (i) the

³⁵ Response, ICC-01/09-01/11-1306-Conf, paras 9-11.

³⁶ Response, ICC-01/09-01/11-1306-Conf, para. 12.

³⁷ Response, ICC-01/09-01/11-1306-Conf, para. 12.

³⁸ Response, ICC-01/09-01/11-1306-Conf, para. 13.

³⁹ Response, ICC-01/09-01/11-1306-Conf, para. 14.

⁴⁰ Response, ICC-01/09-01/11-1306-Conf, para. 7.

⁴¹ Decision on Disclosure of Information related to Prosecution Intermediaries, ICC-01/09-01/11-904-Conf, paras 26-28.

Meetings ('First Component') and (ii) any investigations into Sang Defence Lead Counsel's involvement in witness intimidation ('Second Component'). Although largely amalgamated in the submissions of the parties, the Chamber considers that the *prima facie* materiality of these two components warrant separate consideration.

24. In respect of the First Component, the Chamber considers that certain information relating to the Meetings may be material to the preparation of the Defence, primarily where it could impact on the credibility of [REDACTED], or other witnesses who have provided evidence relating to the Meetings. However, based on the information before it, the materiality of *all* information relating to the Meetings, as requested by the Sang Defence, is not apparent to the Chamber, even on a *prima facie* basis and mindful of the importance of interpreting materiality broadly for the purposes of Rule 77 of the Rules.
25. Moreover, it is not apparent to the Chamber that the materiality of certain information relating to the Meetings is actually in dispute between the parties and that a ruling is therefore necessitated. First, as noted in the Sang Request, the Prosecution has already disclosed some information relating to the Meeting to the Defence pursuant to Rule 77 of the Rules.⁴² The Prosecution also expressly noted that it is cognisant of its on-going disclosure obligations in this case. The Chamber observes, in particular, that the Prosecution is in the process of actively reviewing and disclosing material pursuant to the Chamber's order of 28 February 2014.⁴³ Additionally, although submitting that the Second Sang Disclosure Request should be rejected, the Prosecution's submissions were solely directed towards the Second Component of that request.

⁴² See e.g. materials relating to the alleged meetings which have already been disclosed pursuant to Rule 77 of the Rules, as cited to in paragraph 23 of the Sang Request.

⁴³ See ICC-01/09-01/11-1299-Conf-Corr-Red2.

26. In light of each these factors the Chamber does not consider it appropriate to make a ruling on the matter at this time and instead directs the parties to attempt to resolve it on an *inter partes* basis. In the event of uncertainty, or dispute, in respect of any specific items of information the Prosecution should submit the material in question to the Chamber for review and determination.
27. Regarding the Second Component, the Chamber considers that the Prosecutor's need to investigate a different case (for possible future prosecution) must be balanced with the requirements of a related trial currently underway. Defence counsel in an on-going trial are professionally obligated to be resolute in their defence of their clients. [REDACTED] That is to say, any such investigation, where undertaken, should be conducted as quickly as possible and disclosed to the Defence without delay, as soon as any such investigation is speedily concluded.

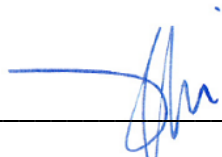
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

PARTIALLY GRANTS the First Sang Disclosure Request and directs the Prosecution to disclose a lesser redacted version of the Transcript forthwith, the remainder of the First Sang Disclosure Request being moot;

DIRECTS the parties to address the First Component of the Second Sang Disclosure Request on an *inter partes* basis and, in the event of uncertainty or dispute, for the Prosecution to submit the specific material to the Chamber for determination; and

REJECTS all other requests.

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



Judge Chile Eboe-Osuji
(Presiding)

Judge Olga Herrera Carbuccion

Judge Robert Fremr

Dated 7 July 2014
At The Hague, The Netherlands