

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/11
Date: 28 August 2013

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

**Decision on Response to Prosecution Application Regarding the Disclosure of
the Identities of Certain Individuals Who Will not Appear as Trial Witnesses**

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr Anton Steynberg

Counsel for William Samoei Ruto

Mr Karim Khan
Mr David Hooper
Mr Essa Faal
Ms Shyamala Alagendra

Counsel for Joshua Arap Sang

Mr Joseph Kipchumba Kigen-Katwa
Mr Silas Chekera

Legal Representatives of Victims

Mr Wilfred Nderitu

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Deputy Registrar

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 64(3)(c) and 67(2) of the Rome Statute (the ‘Statute’) and Rules 77 and 81 of the Rules of Procedure and Evidence (the ‘Rules’), renders its Decision on Prosecution application regarding the disclosure of the identities of certain individuals who will not appear as trial witnesses.

1. On 11 July 2013, the Office of the Prosecutor (the ‘Prosecution’) filed the public redacted version of the ‘Prosecution’s application regarding the disclosure of the identities of certain individuals who will not appear as trial witnesses’ (the ‘Application’).¹ In the Application, the Prosecution requests the Chamber to authorise the continuing non-disclosure of the identities of twelve persons who, though interviewed, will not be called as Prosecution witnesses during trial (the ‘Twelve Persons’).²
2. On 15 July 2013, the defence team for Mr Ruto (the ‘Ruto Defence’) responded to the Application (the ‘Response’).³ In the Response, the Ruto Defence asks for the Application to be dismissed and also requests that the Prosecution be ordered to disclose the full screening notes of the Twelve Persons without delay.⁴
3. On 2 August 2013, the Chamber sought further submissions from the Prosecution regarding its Application.⁵

¹ ICC-01/09-01/11-810-Red (with one confidential *ex parte*, Prosecution and VWU only, annex).

² Application, ICC-01/09-01/11-810-Red, para. 60.

³ 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, 16 July 2013, ICC-01/09-01/11-813-Red (confidential version filed 15 July 2013 with six confidential *ex parte*, Prosecution and Defence only, annexes).

⁴ Response, ICC-01/09-01/11-813-Red, paras 33-34.

⁵ Public Redacted Version of Order for additional submission relating to Prosecution application regarding the disclosure of the identities of certain individuals who will not appear as trial witnesses, 2 August 2013, ICC-01/09-01/11-838-Red (notified on 5 August 2013).

4. On 6 August 2013, the Prosecution filed these further submissions,⁶ withdrawing the Application and submitting that the additional relief sought by the Ruto Defence should be rejected because all material falling under the Prosecution's disclosure obligations has been disclosed in the excerpted screening notes provided to the defence teams for Mr Ruto and Mr Sang (the 'Defence').⁷
5. The defence team for Mr Sang did not respond to the Application.
6. With regard to the Application, the Chamber notes that the Prosecution has withdrawn its requested relief and, accordingly, no ruling on it is required.
7. With regard to the Ruto Defence request to be provided with the full screening notes of the Twelve Persons, the Chamber recalls its finding in the 'Decision on Defence request to be provided with screening notes and Prosecution's corresponding requests for redactions' (the 'Screening Notes Decision')⁸ that information in screening notes⁹ of persons who will not be called as witnesses must be disclosed by the Prosecution when the information is covered by Article 67(2) of the Statute and Rule 77 of the Rules.¹⁰
8. The Chamber also recalls its finding in the Screening Notes Decision that only relevant information in screening notes of persons who are not intended to be called as witnesses may be disclosed as excerpts, insofar as sufficient context is included to allow the Defence to reasonably understand the excerpts.¹¹ However, in a subsequent decision in another case, the Appeals Chamber held that a document

⁶ ICC-01/09-01/11-842-Conf-Red.

⁷ ICC-01/09-01/11-842-Conf-Red, paras 12, 14.

⁸ Public redacted Version - Decision on Defence request to be provided with screening notes and Prosecution's corresponding requests for redactions, 20 May 2013, ICC-01/09-01/11-743-Red.

⁹ For purposes of the present decision, the Chamber understands 'screening notes' to be notes prepared by the Prosecution on the basis of an initial contact or an interview with a person in connection with its investigation.

¹⁰ Screening Notes Decision, ICC-01/09-01/11-743-Red, paras 23-24.

¹¹ See Screening Notes Decision, ICC-01/09-01/11-743-Red, para. 23.

must be disclosed in full if found in any respect to be a relevant document for purposes of Rule 77 of the Rules,¹² subject to good cause being shown to redact the document in any given respect. Accordingly, the Chamber considers that the screening notes of persons who are not intended to be called as trial witnesses must be disclosed in full when any disclosable information is contained within them, subject to the same redaction regime and justifications that would apply to the screening notes of trial witnesses.

9. In the present case; the Chamber notes that: (i) the Ruto Defence confirms it has received the Twelve Persons' screening note excerpts;¹³ (ii) the Prosecution has withdrawn its request to withhold disclosure of the Twelve Persons' identities to the Defence;¹⁴ (iii) the Prosecution submits that it has provided all disclosable information pursuant to Article 67(2) of the Statute and Rule 77 of the Rules;¹⁵ and (iv) the Ruto Defence has not substantiated any position to the effect that there are additional information in the screening notes of those twelve persons that should be disclosed. However, the Chamber notes that the Prosecution has indicated that the screening notes at issue contain incriminating information that is not included in the excerpts and that disclosure of that information is 'unnecessary', citing security risks for the persons concerned as a reason not to disclose the full screening notes.¹⁶
10. The Appeals Chamber's recent decision considers that the entirety of documents containing disclosable information do fall under the Prosecution's disclosure

¹² Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor's request for non-disclosure in relation to document "OTP/DRC/COD-190/JCCD-pt", 27 May 2013, ICC-01/04-01/06-3031 (A5, A6), para. 12 ('once it is established that a document is material to the preparation of the defence, pursuant to rule 77 of the Rules of Procedure and Evidence, the disclosure obligation extends to the entire document and not only to the "relevant" portions of information contained within such a document.').

¹³ Response, ICC-01/09-01/11-813-Red, para. 7.

¹⁴ ICC-01/09-01/11-842-Conf-Red, para. 14.

¹⁵ ICC-01/09-01/11-842-Conf-Red, para. 12.

¹⁶ ICC-01/09-01/11-842-Conf-Exp, para. 13.

obligations,¹⁷ and it is not to be presumed that security risks alone make ‘unnecessary’ the disclosure of items that are otherwise disclosable.¹⁸ The Prosecution does not explain why the disclosure of the incriminating information is ‘unnecessary’, beyond the reference to security risks. When disputes arise involving claims that the Prosecution has not complied with their disclosure obligations, it is not open to the Prosecution to simply respond without *clear* explanation that it was ‘unnecessary’ to make the disclosure to the Defence. In light of the foregoing and with due regard to the approaching commencement of the trial proceedings, the Chamber requires the Prosecution to disclose the full screening notes of the Twelve Persons to the Defence and does not invite further, remedial submissions from the Prosecution to explain its earlier assertion that the disclosure was unnecessary. The Prosecution may redact certain parts of the screening notes in line with the Decision on the protocol establishing a redaction regime of 27 September 2012.¹⁹

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the Ruto Defence’s request to be provided with the full screening notes of the Twelve Persons; and

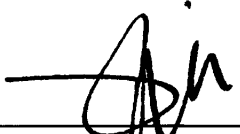
ORDERS the Prosecution to disclose these screening notes forthwith, in accordance with paragraph 10 of the present decision.

¹⁷ ICC-01/04-01/06-3031 (A5, A6), para. 12.

¹⁸ In this regard, Rule 81(4) of the Rules allows for security risks to justify restricting disclosure of information. However, Rule 81(4) of the Rules does not make information with attendant security risks ‘unnecessary’ to disclose. Such information still falls under the Prosecution’s disclosure obligations; Rule 81(4) of the Rules merely provides for an exception to this general rule of disclosure.

¹⁹ Decision on the protocol establishing a redaction regime, 27 September 2012, ICC-01/09-01/11-458 (with annex).


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



Judge Chile Eboe-Osuji
(Presiding)



Judge Olga Herrera Carbuccion



Judge Robert Fremr

Dated 28 August 2013

At The Hague, The Netherlands