

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **2 April 2013**

TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding
Judge Christine Van den Wyngaert
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

THE PROSECUTOR v.

WILLIAM SAMOEI RUTO AND JOSHUA ARAP SANG

Confidential – *Ex Parte* – Prosecution and Defence for Mr Ruto and Mr Sang only

Joint Defence Request to Be Provided with Full, Non-Redacted, Screening Notes

Source: Defence for Mr. William Samoei Ruto

Defence for Mr. Joshua Arap Sang

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

The Office of the Prosecutor

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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
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States' Representatives

Amicus Curiae

REGISTRY

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Counsel Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Procedural Background

1. During the status conference of 14 February 2013, the defence for William Samoei Ruto and the defence for Joshua Arap Sang (the “defence”) requested the disclosure of the prosecution screening notes.¹ More precisely, the defence stated that:

‘[...] we should be entitled to all screening notes, and if the Prosecution want to not disclose them to us, or to disclose them to us in a redacted manner, then they should come to you, the Chamber, in order to seek your approval of that.’²
2. The prosecution objected to such a general disclosure obligation of all screening notes on its part.³
3. On 6 March 2013, the defence asked the prosecution by email to indicate whether it had identified further screening notes to be disclosed to the defence.⁴
4. On 8 March 2013, the prosecution replied by email that it was ‘conducting a full review to insure that all Rule 77 and Pexo information have been duly disclosed to the Defence’, and estimated that ‘this review will be completed shortly’.⁵
5. So far, the prosecution has disclosed thirty-four screening notes to the defence, as Rule 77 or PEXO material, the last fifteen having been disclosed on 20 March 2013.⁶ However, all of them were disclosed in a summary form or through excerpts,⁷ except one document, which was disclosed in a full format, but redacted.⁸ An ‘excerpt’ might comprise just one line of text.⁹
6. The defence files the present motion as confidential, *ex parte*, prosecution and defence only, since it refers to several documents disclosed *inter partes*, some of which are annexed to this filing.

Defence Submissions

7. Pursuant to Article 64(2) and 64(6)(e) (Functions and powers of the Trial Chamber), Article 67(2) (Rights of the accused), Rule 77 (Inspection of material in possession or control of the Prosecutor) and Rule 81 of the Rules (Restrictions on disclosure), the

¹ ICC-01/09-01/11-T-19-ENG CT WT 14-02-2013, p. 11, 15-16, 19-20.

² ICC-01/09-01/11-T-19-ENG CT WT 14-02-2013, p. 11, l.17-20.

³ ICC-01/09-01/11-T-19-ENG CT WT 14-02-2013, p. 26, l. 9-18.

⁴ Email from Ms Mionki to Ms Tai, entitled ‘TRIM: Screening Notes. Cf. Annex 1.

⁵ Email from Ms Goh to Ms Mionki, entitled RE: Screening Notes. Cf. Annex 1.

⁶ Cf. Annex 2.

⁷ This can be seen from the title of the documents themselves, usually called ‘Summary of PEXO/Rule 77 material/information in screening note’ or ‘Excerpts of PEXO/Rule 77 in screening note’.

⁸ KEN-OTP-0086-0050_R01, entitled ‘Screening notes’, Annex 3.

⁹ See for instance KEN-OTP-0095-0719, Annex 5.

defence requests the Trial Chamber to order the prosecution to disclose all its screening notes in their original, non-redacted format instead of disclosing merely summaries or excerpts to the defence.

8. The defence stresses that the prosecution has an ongoing duty to investigate potentially exculpatory material and to disclose exculpatory as well as Rule 77 material.¹⁰ This Chamber has emphasised 'the overriding principle that the presumption is that disclosable material will be served in full, while redactions need to be justified and authorised individually under the provisions of the Rome Statute framework.'¹¹ Indeed, as noted by Trial Chamber II, 'redactions should be exceptional. Quite clearly redactions should only be used as an absolute last resort.'¹² The defence is entitled to full disclosure, redactions being the exception.¹³
9. The phrase 'screening note' disguises the fundamental nature of the record. It is apparent from the material provided, and from defence experience in other cases at the ICC, that the 'screening notes' contain the initial account of a witness of events that will later form the significant part of his evidence. The relevance of the screening notes to the defence lies in the fact that they constitute nothing less than an initial interview with the witness. This is evident in the present case from the nature of the material served by the prosecution in lieu of the original material.
10. In addition to the factual narrative, the screening notes contain details of the person (name / age / occupation, etc.) which can be at variance with later evidence and only detectable to the defence if the complete record is provided. The screening note may also contain, as has been found in other cases with which the defence has been involved, comments and assessments of a witness made by the investigator or other relevant party that may be relevant to issues of credibility and the like.
11. The screening notes appear, in the present case, to have resulted in large part from telephone interviews with the witness by investigators and OTP prosecuting staff. It is

¹⁰ ICC-01/04-01/07-259, Decision Establishing a Calendar in the Case against Germain KATANGA and Mathieu NGUDJOLO CHUI, 10 March 2008, p. 12; ICC/01/04-01/07-T-125-ENG ET WT, 8 December 2010, p. 4; ICC-01/04-01/07-1336, Decision on the "Prosecution's Urgent Application to Be Permitted to Present as Incriminating Evidence Transcripts and translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", 27 July 2009, paras 28-29.

¹¹ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-458, Decision on the protocol establishing a Redaction regime, 27 September 2012, para. 9.

¹² ICC-01/04-01/07-T-52-ENG ET WT, 27 November 2008, p. 60.

¹³ Appeals Chamber, *Prosecutor v. Katanga and Ngudjolo*, Judgment on the Appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements', 13 May 2008, ICC-01/04-01/07-475, para. 70; Appeals Chamber, *The Prosecutor v. Katanga and Ngudjolo*, Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements', 13 May 2008, ICC01/04-01/07-476, para. 64.

also apparent from the later interviews and statements provided by the witness that significant factual discrepancies can be exposed between the initial account in the screening note and those later accounts. Indeed, in the present case several of the witnesses in later interviews are 'confronted' by prosecution investigators with some of these discrepancies between their initial account and the later interview. It was this that alerted the defence to their existence in this case. The screening notes are therefore of great relevance to the defence.

12. By providing only excerpts of the 'screening notes' the prosecution are taking it upon themselves to judge what is and what is not relevant for the defence. The defence submits that the prosecution should not be in the position effectively to censor these notes. It should be for the defence to assess them on the basis of the full content of the material they contain. It is for the defence to assess whether the successive stories told by the witnesses in the screening notes, transcripts of interview and statements are coherent, and not for the prosecution to make this assessment for the defence.
13. The prosecution practice in the *Katanga* case was to disclose the complete screening notes and not summaries or excerpts. Indeed, in the *Katanga* case the notes were used to considerable effect in challenging the credibility of prosecution witnesses.
14. Where exceptional circumstances arose that justified redaction of material in screening notes then that was done. The prosecution would request leave of the Chamber to disclose screening notes in a redacted format when justified.¹⁴ The defence understands that the same practice was adopted in the *Bemba* case, with the defence receiving disclosure of full screening notes for most of the witnesses, subject to any necessary

¹⁴ See, *inter alia*, ICC-01/04-01/07-221, Public Note of Document ICC-01/04-01/07-190-Conf-Exp, Amended Submission of Prosecution's Application Pursuant to Rules 81(1), 81(2) and 81(4) for Redactions to Screening Notes and Transcripts of Witnesses 7, 8, 9 and 12 as Requested by the Single Judge, 21 February 2008, by which the prosecution applied for redactions to the screening notes and transcripts of Witnesses on which it intended to rely for the purpose of the confirmation hearing;

ICC-01/04-01/07-240, Amended Submission of Prosecution's Application Pursuant to Rules 81(1), 81(2) and 81(4) for Redactions to Screening Notes and Transcripts of Witnesses 2,5,6,10, 0163, 0238, 0287,0233, 0267, 0271 and 0132, 27 February 2008;

ICC-01/04-01/07-985-Corr, Corrigendum to Prosecution's Application for Protective Measures for Witness 243, Witness 288, Witness 169, Witness 178 - also known as witness 253 -, Witness 179, Witness 337, Witness 271, Witness 292, Witness 175, Witness 270, Witness 282 and Witness 90 pursuant to Article 54(3)(f), Article 64(2) and 64(6)(e), and Article 68(1) of the Statute and Rule 81(4) of the Rules, 26 March 2009, by which the prosecution requested leave to: a. apply permanent redactions to the identities of witnesses, by redacting such identifying information as contained in their relevant statements, transcripts, or screening notes; and b. disclose their Statements or screening notes to the Defence in either redacted version or narrative summary form;

ICC-01/04-01/07-1259, Prosecution's Submission of Proposed Redactions and Provision of a Summary, 2 July 2009, by which the prosecution proposed redactions to the screening of Witnesses;

ICC-01/04-01/07-1844, Prosecution's Urgent Request to Disclose a Redacted Version of a Screening Note of P-296, 5 February 2010, by which it requested the Chamber's authorisation to disclose the Screening Note with redactions.

redactions. A narrative summary was only exceptionally provided when the witness's identity had not been disclosed, the witness was not incriminatory, and where the witness was so highly identifiable that providing their statement in redacted form would be an insufficient protection measure.¹⁵

15. The defence wonders why the prosecution in the present case has altered its practice in respect of such relevant material. The defence submits that the prosecution should follow the same approach in the current case as it did in *Katanga*, since it is not prejudicial to the prosecution and benefits the defence.
16. Further, the summaries or excerpts – made without judicial overview - are inadequate in themselves. They may refer to events – for instance a meeting or an attack - without necessarily dating them or organising them in a chronological order, even if the witness has provided such a date or chronology. They contain information taken out of the context of the complete document or material. They may give a misleading impression of events. For example, the prosecution disclosed the same two excerpts regarding P-25, in two different screening notes, dated both of 11 May 2010 – so *a priori* concerning the same meeting with P-25,¹⁶ - but the excerpts are organised in a different order, which gives them a different meaning, or chronology.
17. It is difficult for the defence to extract any useful information from these summaries or excerpts which are all too succinct and removed from their general context. It would be difficult to use such information to prepare a cross-examination or otherwise to assist the defence in preparing its case. The defence maintains that the disclosure of summaries or excerpts of screening notes is clearly insufficient, only the disclosure of full screening notes, eventually redacted, being satisfactory.
18. Any redactions to the screening notes can be justified either pursuant to the Protocol establishing a redaction regime in the case of *The Prosecutor v. William Samoet Ruto and Joshua Arap Sang*,¹⁷ or on a case-by-case basis, following the approval of the Trial Chamber. Thus, if the prosecution considers that some parts of these screening notes must be redacted, it should first determine whether the information are protected pursuant to the Protocol and/or request leave before the Trial Chamber to disclose them in a redacted format.

¹⁵ ICC-01/04-01/07-985-Corr, Corrigendum to Prosecution's Application for Protective Measures for Witness 243, Witness 288, Witness 169, Witness 178 - also known as witness 253 -, Witness 179, Witness 337, Witness 271, Witness 292, Witness 175, Witness 270, Witness 282 and Witness 90 pursuant to Article 54(3)(f), Article 64(2) and 64(6)(e), and Article 68(1) of the Statute and Rule 81(4) of the Rules, 26 March 2009, para. 24 (b).

¹⁶ KEN-OTP-0093-0429 and KEN-OTP-0095-0688, Annex 4.

¹⁷ ICC-01/09-01/11-458-AnxA

19. During the status conference of 14 February 2013, the Prosecution referred to decision 2585 in the *Lubanga* case to challenge any prosecution general obligation to disclose all its screening notes. It argued that screening notes are unsworn statements, a kind of internal work product, which becomes relevant for the Defence only when it contains something which is contradictory to the full statement, which could be termed as Rule 77 or PEXO, given that normally the statement of the witness covers everything.
20. The Defence disagrees. First, the Trial Chamber in *Lubanga* did not issue a general ruling on the principles of disclosure of screening notes, but issued a *sui generis* decision. Indeed, the Lubanga defence limited its requests to the disclosure of the full non-redacted screening notes relating to four intermediaries, highlighting that although the reports or summaries of the investigators' notes may give some clues as to the activities of the prosecution, they only provided partial information.¹⁸ The Trial Chamber simply accepted the assurance of the prosecution that the Investigator's Notes had been disclosed and decided not to issue further order with regard to these Investigator's Notes.¹⁹ However, it emphasised that under Rule 77 of the Rules, disclosure of information is not a matter of courtesy but an obligation under the Rome Statute framework and ordered the prosecution to disclose further details on these intermediaries, in the format of specific tables in lieu of redacted excerpts of the prosecution database.²⁰ The defence underlines that the Chamber did not approve the disclosure of excerpts but ordered the disclosure of a meaningful table.
21. In any events, the *Lubanga* example is inappropriate to the current case. The defence requests the disclosure of the full, non-redacted, screening notes of witnesses, especially incriminating witnesses, and not of intermediaries. Intermediaries, as previous trials have demonstrated, fall within a particularly protected class; they do not have the same significance for the defence, they do not have the same impact on the case and they are not deemed to incriminate the accused.
22. Besides, that *Lubanga* Trial Chamber had already stressed, in discussing potentially exculpatory evidence, that it: "has grave reservations as to whether serving other, similar evidence can ever provide an adequate substitute for disclosing a particular piece of exculpatory evidence [...]."²¹ While that decision relates specifically to the non

¹⁸ ICC-01/04-01/06-2585, (TCI) Decision on the defence request for disclosure of screening notes, 13 October 2010, para. 1.

¹⁹ ICC-01/04-01/06-2585, para. 18.

²⁰ ICC-01/04-01/06-2585, paras 19, 22.

²¹ ICC-01/04-01/06-1401, (TCI) Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with

disclosure of exculpatory materials covered by Article 54(3)(e) agreements and to the disclosure of alternative material, the defence submits that it supports the general defence point that disclosure of the original material is to be favoured, rather than disclosure of it in an alternative format, and particularly so when that format is dictated by the other party in the case.

23. The defence stresses that it is interested in knowing the points on which a witness is consistent as well as the points on which he contradicts himself. The absence of an event or named person in an initial account may be as relevant for the defence as the mentioning of an event or describing it in a different manner. The defence is not asking for the disclosure of the opinion or subjective comments of the prosecution on its own witnesses, but for the disclosure of all the information relative to their testimony, *ie*, their full description of the events, contained in the screening notes, and not only the contradictions raised.
24. The defence notes that most of the summaries or excerpts of screening notes disclosed are based upon a 'reference' document, whose 'document reference number' is indicated in the summary or excerpt.²² Therefore, the defence requests disclosure of these 'reference' documents.

Relief sought

25. For these reasons, the defence respectfully asks the Trial Chamber to order the prosecution:
 - to (re)disclose its screening notes in a full, non-redacted, format, and;
 - in particular, to disclose all the screening notes in its possession relative to prosecution incriminating witnesses.

certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, para. 60. See also ICC-01/04-01/07-621, (PTCI) Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing, 20 June 2008, para. 6.

²² See, for instance, KEN-OTP-0093-0429 and KEN-OTP-0095-0688, 'Excerpts of PEXO in Screening Note of P-0025', referring to the 'reference' document KEN-OTP-0086-0058, not disclosed to the defence, in Annex 4.



David Hooper, QC
On behalf of William Samoei Ruto
Dated this 2nd day of April 2013
In London



Joseph Kipchumba Kigen-Katwa
On behalf of Joshua Arap Sang
Dated this 2nd day of April 2013
In Nairobi