

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 20 May 2013

**TRIAL CHAMBER V**

**Before:** Judge Kuniko Ozaki, Presiding  
Judge Robert Fremr  
Judge Chile Eboe-Osuji

**SITUATION IN THE REPUBLIC OF KENYA**

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

**Public Redacted Version**

**Decision on Defence request to be provided with screening notes and  
Prosecution's corresponding requests for redactions**

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

**The Office of the Prosecutor**  
Ms Fatou Bensouda

**Counsel for William Samoei Ruto**  
Mr Karim Khan  
Mr Kioko Kilukumi Musau  
Mr David Hooper  
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

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**Registrar**

Mr Herman von Hebel

**Deputy Registrar**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Others**

**Trial Chamber V** (“Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, pursuant to Articles 64(3)(c) and 67(2) of the Rome Statute (“Statute”) and Rules 77 and 81 of the Rules of Procedure and Evidence (“Rules”) and Regulation 23 *bis* of the Regulations of the Court (“Regulations”), issues this Decision on Defence request to be provided with screening notes and Prosecution’s corresponding requests for redactions.

## **I. Procedural Background and Submissions**

### *A. Procedural Background*

1. On 27 September 2012, the Chamber issued its “Decision on the protocol establishing a redaction regime” which annexed a protocol setting out a streamlined procedure for the application of redactions to materials subject to disclosure (“Protocol”).<sup>1</sup> The Protocol pre-approves certain categories of redactions and sets out a procedure for a case-by-case authorisation of redactions that do not fall within such categories. In particular, the Protocol set out the following:

(i) With regard to “leads and sources” (category “A.6”), the Protocol indicates that such redactions are ongoing, but “[i]n case the lead provides material that is disclosed, and provided there are no additional security concerns, the lead will be disclosed as the source in the context of that disclosure”;<sup>2</sup>

(ii) With regard to protection of internal work product (category “D.1”), the Protocol recalled that this information is not subject to disclosure

<sup>1</sup> ICC-01/09-01/11-458 and ICC-01/09-01/11-458-AnxA-Corr.

<sup>2</sup> Protocol, ICC-01/09-01/11-458-AnxA-Corr, para. 42.

and that redactions falling under this category will, in principle, be ongoing;<sup>3</sup>

(iii) With regard to family members of witnesses (category “B.2”), the Protocol provides that redactions to their identifying information made on the basis of their own security (as opposed to the security of the witness) are considered to fall under the B.3 Category and, as such, may be maintained until 60 days prior to the commencement of trial unless otherwise ordered, but that redactions to the contact information of family members of witnesses shall be ongoing;<sup>4</sup>

(iv) With regard to “other persons at risk” on account of the activities of the Court and their family members (category “B.3”), the Protocol prescribes that their identifying information needs to be disclosed 60 days prior to the commencement of the trial “unless otherwise ordered by the Chamber on the basis of exceptional circumstances [...]” but that redactions to their contact information shall be ongoing.<sup>5</sup>

2. On 14 February 2013, the defence teams for Mr Ruto and Mr Sang (together the “Defence”) argued that they were entitled to all “screening notes” taken by the Office of the Prosecutor (“Prosecution”).<sup>6</sup> The Prosecution objected on grounds that it did not have a general obligation to disclose all of its screening notes.<sup>7</sup>

<sup>3</sup> Protocol, ICC-01/09-01/11-458-AnxA-Corr, para. 64.

<sup>4</sup> ICC-01/09-01/11-458, para. 30 and Protocol, ICC-01/09-01/11-458-AnxA-Corr, para. 56.

<sup>5</sup> ICC-01/09-01/11-458, para. 30 and Protocol, ICC-01/09-01/11-458-AnxA-Corr, para. 58.

<sup>6</sup> Transcript of status conference, 14 February 2013, ICC-01/09-01/11-T-19-ENG, pp. 11, 19-20.

<sup>7</sup> Transcript of status conference, 14 February 2013, ICC-01/09-01/11-T-19-ENG, pp. 25-27.

3. On 2 April 2013, the Defence filed the “Joint Defence Request to Be Provided with Full, Non-Redacted, Screening Notes” (“Defence Request”).<sup>8</sup>
4. On 11 April 2013,<sup>9</sup> the Prosecution responded to the Defence Request, agreed to provide screening notes of its trial witnesses and, as detailed below, requested redactions to many of its screening notes (“First Prosecution Request”).<sup>10</sup> Although this filing was made one hour after the 16:00 hour deadline, it is accepted by the Chamber as the delay was caused by a malfunction in the Court’s email system.
5. On 18 April 2013, the Prosecution filed the “Prosecution Application for Redactions to Further Screening Notes of Trial Witnesses to be Disclosed to the Defence” (“Second Prosecution Request”).<sup>11</sup>
6. On 22 April 2013, the Chamber issued an order whereby it: (i) requested the Defence to indicate whether it maintains its request for the relief sought in the Defence Request, given the Prosecution’s willingness to disclose most of their screening notes and (ii) considered the Prosecution’s submissions as additional requests and set 29 April 2013 as the deadline for any Defence response.<sup>12</sup>

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<sup>8</sup> ICC-01/09-01/11-666-Conf-Exp (notified on 3 April 2013; contains five confidential *ex parte*, Prosecution and Defence only, annexes).

<sup>9</sup> The deadline to respond was moved up to this date. See Email communication from a Legal Officer of Trial Chamber V to the parties at 13:30 on 8 April 2013.

<sup>10</sup> Prosecution Response to Joint Defence Request to Be Provided with Full, Non-Redacted Screening Notes, 11 April 2013, ICC-01/09-01/11-677-Conf (with one confidential *ex parte* annex).

<sup>11</sup> ICC-01/09-01/11-688-Conf (with one confidential *ex parte* annex).

<sup>12</sup> Order on Defence response to Prosecution’s submissions regarding screening notes, 22 April 2013, ICC-01/09-01/11-691-Conf.

7. On 29 April 2013, each defence team filed its response to the First and Second Prosecution Requests (“Ruto Response to Prosecution Requests” and “Sang Response to Prosecution Requests”, respectively).<sup>13</sup>
8. On 6 May 2013, the Chamber vacated the 28 May 2013 trial date.<sup>14</sup>
9. On 7 May 2013, an *ex parte* Prosecution-only status conference was held, during which the Prosecution indicated that it had identified and disclosed the “relevant information” from the screening notes of other persons interviewed by the Prosecution but not intended to be called as witnesses (“other persons”) to the Defence.<sup>15</sup>

#### *B. Submissions*

10. In the Defence Request, the Defence explains that it has received disclosure of 34 screening notes to date from the Prosecution, but “all of them were disclosed in a summary form or through excerpts, except one document, which was disclosed in a full format, but redacted”.<sup>16</sup> The Defence argues that this disclosure is inadequate for such important materials and that “the phrase ‘screening note’ disguises the fundamental nature of the record [...] they constitute nothing less than an initial interview with the witness”.<sup>17</sup> The Defence submits that the Prosecution may not disclose only excerpts of screening notes and that “the [P]rosecution should not be in the position effectively to censor

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<sup>13</sup> Defence Submissions on the Disclosure of Screening Notes, 29 April 2013, ICC-01/09-01/11-708-Conf; Sang Defence Submissions in relation to Order on Defence response to Prosecution’s submissions regarding Screening Notes, 29 April 2013, ICC-01/09-01/11-709-Conf.

<sup>14</sup> Order scheduling status conferences and provisionally vacating the trial start date, 6 May 2013, ICC-01/09-01/11-722.

<sup>15</sup> Transcript of Hearing, 7 May 2013, ICC-01/09-01/11-T-20-CONF-EXP-ENG, p. 12.

<sup>16</sup> Defence Request, ICC-01/09-01/11-666-Conf-Exp, para. 5. *See also* Defence Request, ICC-01/09-01/11-666-Conf-Exp-Anx2 (list of the 34 screening notes).

<sup>17</sup> Defence Request, ICC-01/09-01/11-666-Conf-Exp, paras 9-10.

these notes”.<sup>18</sup> The Defence notes that the Prosecution’s practice in the *Katanga* and *Bemba* cases has been to disclose full screening notes to the Defence and to request leave of the Chamber to obtain authorisation for any necessary redactions.<sup>19</sup> The Defence argues that excerpts are difficult to evaluate out of context and that the way the excerpts are organised can create a misleading impression of events or the chronology in which they are discussed.<sup>20</sup> The Defence stresses that “it is interested in knowing the points on which a witness is consistent as well as the points where he contradicts himself” and that the Defence “is not asking for the disclosure of the opinion or subjective comments of the [P]rosecution on its own witnesses”.<sup>21</sup>

11. Ultimately, the Defence requests the Chamber to order the Prosecution: (i) to (re)disclose its screening notes in a full, non-redacted format and (ii) in particular, to disclose all the screening notes in its possession relative to Prosecution’s incriminating witnesses.<sup>22</sup>

12. In the First Prosecution Request, the Prosecution submits that it has “no objection to providing the Defence with the full original screening notes of trial witnesses (though with limited and strictly necessary redactions)”.<sup>23</sup> The requested redactions are limited to B.2 and B.3 redactions, as the Prosecution notes that all other redactions in the screening notes may be redacted without Chamber authorisation as specified in the Protocol.<sup>24</sup> It is the Prosecution’s position that screening notes of trial witnesses are not “prior statements” within

<sup>18</sup> Defence Request, ICC-01/09-01/11-666-Conf-Exp, para. 12.

<sup>19</sup> Defence Request, ICC-01/09-01/11-666-Conf-Exp, paras 13-14 (further citations therein).

<sup>20</sup> Defence Request, ICC-01/09-01/11-666-Conf-Exp, paras 16-17. *See also* Defence Request, ICC-01/09-01/11-666-Conf-Exp-Anx4.

<sup>21</sup> Defence Request, ICC-01/09-01/11-666-Conf-Exp, para. 23.

<sup>22</sup> Defence Request, ICC-01/09-01/11-666-Conf-Exp, para. 25.

<sup>23</sup> First Prosecution Request, ICC-01/09-01/11-677-Conf, para. 4.

<sup>24</sup> First Prosecution Request, ICC-01/09-01/11-677-Conf, paras 9-11.

the meaning of Rule 76(1) of the Rules.<sup>25</sup> With respect to other persons, the Prosecution argues that: (i) it is obliged only to disclose information covered by Article 67(2) of the Statute and Rule 77 of the Rules (“Disclosable Information”) and (ii) it may provide the Disclosable Information “by extracting it from the screening note (with the context of the information so that it makes sense) and disclosing it in a separate document”.<sup>26</sup> The Prosecution contends that it is not able to disclose the identities of its other persons “at this time” because it has yet to assess the risk to these individuals in the event that their identities are disclosed to the Defence.<sup>27</sup>

13. In the Second Prosecution Request, the Prosecution requests additional B.2 and B.3 redactions to screening notes of its trial witnesses.<sup>28</sup> While the First Prosecution Request covered screening notes which had been identified by the Prosecution to contain Disclosable Information, the Second Prosecution Request concerns screening notes of trial witnesses for which no Disclosable Information has been identified.<sup>29</sup>

14. In the Ruto Response to Prosecution Requests, the Ruto Defence notes that it has received courtesy copies of 36 of 41 trial witness screening notes.<sup>30</sup> The Ruto Defence notes that with regard to the screening notes of the 10 other persons, neither the witnesses’ identities nor their screening note excerpts have been disclosed, and emphasises that “the identities of such witnesses can constitute exculpatory material and are necessary also to a proper understanding of the disclosed material”.<sup>31</sup> The Ruto Defence notes that it has not been provided with

<sup>25</sup> First Prosecution Request, ICC-01/09-01/11-677-Conf, para. 7.

<sup>26</sup> First Prosecution Request, ICC-01/09-01/11-677-Conf, para. 4.

<sup>27</sup> First Prosecution Request, ICC-01/09-01/11-677-Conf, para. 20.

<sup>28</sup> Second Prosecution Request, ICC-01/09-01/11-688-Conf, para. 8.

<sup>29</sup> See Second Prosecution Request, ICC-01/09-01/11-688-Conf, para. 5.

<sup>30</sup> Ruto Response to Prosecution Requests, ICC-01/09-01/11-708-Conf, para. 3.

<sup>31</sup> Ruto Response to Prosecution Requests, ICC-01/09-01/11-708-Conf, para. 4.



the justifications for the Prosecution's requested redactions, but urges the Chamber to carefully consider the B.2 and B.3 redactions requested by the Prosecution.<sup>32</sup> The Ruto Defence also specifically requests that all redactions to information in screening notes which cover "information related to the Prosecution's objectives and techniques of investigation" be rejected.<sup>33</sup> Ultimately, the Ruto Defence: (i) requests disclosure as soon as possible of the screening notes for the remaining five trial witnesses and disclosure of the disclosable excerpts from the screening notes of identified other persons and (ii) "anticipates" that many of the proposed redactions to the screening notes are not objectively justified.<sup>34</sup>

15. In the Sang Response to Prosecution Requests, the Sang Defence: (i) "maintains, in principle, its request [...] that the prosecution be ordered to disclose all screening notes in their original, non-redacted format, instead of as merely summaries or excerpts",<sup>35</sup> (ii) emphasises that the Prosecution has a duty to disclose screening notes and that it is not enough to rely on a "temporary assurance from the Prosecution" that it will disclose relevant screening notes despite its position that it is not obligated to do so<sup>36</sup> and (iii) objects to the Prosecution's automatic application of redactions to the identifying information of leads and sources, arguing that this is contrary to the Protocol and that these individuals are "critical" to Defence investigations.<sup>37</sup>

## II. Analysis and Conclusions

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<sup>32</sup> Ruto Response to Prosecution Requests, ICC-01/09-01/11-708-Conf, para. 6, *referencing* Confidential redacted version of the "Decision on the Prosecution's application for authorisation to maintain certain redactions", 23 April 2013, ICC-01/09-01/11-695-Conf-Red.

<sup>33</sup> Ruto Response to Prosecution Requests, ICC-01/09-01/11-708-Conf, para. 7.

<sup>34</sup> Ruto Response to Prosecution Requests, ICC-01/09-01/11-708-Conf, para. 10.

<sup>35</sup> Sang Response to Prosecution Requests, ICC-01/09-01/11-709-Conf, para. 2.

<sup>36</sup> Sang Response to Prosecution Requests, ICC-01/09-01/11-709-Conf, para. 3.

<sup>37</sup> Sang Response to Prosecution Requests, ICC-01/09-01/11-709-Conf, para. 4.

*A. Prosecution's Disclosure Obligations Regarding its Screening Notes*

16. The first issue to be resolved in the present decision is the scope of the Prosecution's obligations to disclose its screening notes. 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. The Prosecution's position is that it is only required to disclose excerpts of the Disclosable Information in its screening notes, but that it has no objection to providing full screening notes of its trial witnesses so long as redactions are allowed. By contrast, both Defence teams are of the view that the Prosecution is required to disclose the screening notes of its trial witnesses, and the Sang Defence's requested relief extends to full disclosure of all screening notes of all persons interviewed by the Prosecution.
17. Article 67(2) of the Statute requires the Prosecution to disclose any evidence which "shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence".
18. Rule 77 of the Rules requires the Prosecution, subject to the restrictions on disclosure provided for in Rules 81 and 82 of the Rules, to permit the Defence to inspect any documents in the possession or control of the Prosecution which are "material to the preparation of the defence".
19. Having regard to the above, the Chamber makes the following three findings on the scope of the Prosecution's screening note disclosure obligations.
20. First, the Chamber rejects the Prosecution's argument that it is not obligated to disclose full screening notes of all its trial witnesses. The Court's statutory

scheme and jurisprudence take particular care to ensure that prior remarks of witnesses the Prosecution intends to call to trial are disclosed to the defence. Rule 76(1) of the Rules requires the Prosecution to disclose “any prior statements made by those witnesses [whom the Prosecution intends to call]” (“Rule 76 Statements”). Rule 76 of the Rules is not qualified in the same way as Rule 77 of the Rules, meaning that Rule 76 Statements must be disclosed even if they are not deemed by the Prosecution to be “material to the preparation of the defence”. The Appeals Chamber has also reasoned that “the ordinary meaning of the term ‘statement’ as used in Rule 76 of the Rules is broad and requires the Prosecutor to disclose any prior statements, irrespective of the form in which they are recorded”.<sup>38</sup> This indication is sufficiently broad, for purposes of disclosure, to include records of information provided by a trial witness during an interview, regardless of the question whether such a record would technically qualify as a “statement” of the witness for purposes of impeachment on the stand or submission under Rule 68 of the Rules.

21. At any rate, to the extent that screening notes of witnesses that the Prosecution *intends to call at trial* constitute records of information provided by the witness during an interview, they will most certainly qualify as “documents material to the preparation of the defence” within the meaning of Rule 77.
22. Second, the Chamber emphasises that even though the screening notes of trial witnesses are necessarily material to the preparation of the Defence, it does not follow that they must always be disclosed in full. The Prosecution is entitled to redact its work product and any other information falling within the scope of the Protocol, and the Defence itself acknowledges that the Prosecution is entitled

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<sup>38</sup> 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 (OA 2), para. 23.

to such redactions when justified in compliance with the Protocol.<sup>39</sup> The redactions proposed by the Prosecution in the present case will be evaluated in the next section of this decision.

23. Third, the Chamber rejects the argument of the Sang Defence that the Prosecution's disclosure obligations require disclosure of the full version of every screening note taken in investigating this case. There is no indication that every screening note taken by the Prosecution in relation to other persons contains Disclosable Information. The Chamber notes that the Prosecution has identified a number of screening notes of other persons with Disclosable Information and has informed the Chamber that the relevant excerpts of these screening notes have now been disclosed.<sup>40</sup> The Chamber is of the view that Disclosable Information of the screening notes of other persons may be excerpted out, mindful of the need to include sufficient context to allow for the Defence to understand the excerpts. In this regard, the Chamber notes that Trial Chamber III has previously considered that disclosing relevant excerpts of screening notes may be sufficient disclosure in some circumstances.<sup>41</sup> That said, and 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.

24. To conclude, the Chamber finds that: (i) the Prosecution has an obligation to disclose the full screening notes of its trial witnesses, (ii) these screening notes may contain redacted passages when justified and (iii) the Prosecution only has an obligation to disclose screening notes from other persons which contain

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<sup>39</sup> See Sang Response to Prosecution Requests, ICC-01/09-01/11-709-Conf, para. 2. See also Ruto Response to Prosecution Requests, ICC-01/09-01/11-708-Conf, para. 6.

<sup>40</sup> See Transcript of Hearing, 7 May 2013, ICC-01/09-01/11-T-20-CONF-EXP-ENG, p. 12.

<sup>41</sup> Public Redacted version of "Decision on the Defence Request for disclosure of pre-interview assessments and the consequences of non-disclosure" ICC-01/05-01/08-750-Conf), ICC-01/05-01/08-750-Red, para. 33.

Disclosable Information and may disclose this information by providing excerpts from its screening notes, mindful of the need to include sufficient context to allow for the Defence to understand the excerpts.

*B. The Prosecution's Proposed Redactions to its Screening Notes*

*(i) Prosecution's B.2 and B.3 Category Redactions*

25. After determining above that the full screening notes of trial witnesses are subject to disclosure, the Chamber now turns to whether the Prosecution's redactions requested in the First and Second Prosecution Requests are justified. The Chamber will also address the Defence objections to other redactions the Prosecution has applied pursuant to the Protocol. The requirements for justifying redactions to Disclosable Information were set out in the decision on the Protocol and are incorporated by reference in the present decision.<sup>42</sup>

26. As to the Prosecution's requests for category B.2 and B.3 redactions, the Chamber recalls its recent findings on a similar Prosecution redaction request that: (i) it was generally not convinced by standardised justifications that a person is a family member of a witness was sufficient, without more, to demonstrate the existence of an objectively justifiable risk and (ii) general references to security concerns were insufficient to establish an objectively justifiable risk to a person's security.<sup>43</sup> The Chamber notes up front that the Prosecution's argumentation in the present case is similarly problematic, as the Prosecution makes widespread use of standardised justifications and generalised security concerns. The Chamber's analysis of the Prosecution's redactions sought in the First and Second Prosecution Requests is as follows:

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<sup>42</sup> Decision on the protocol establishing a redaction regime, 27 September 2012, ICC-01/09-01/11-458, paras 10-11.

<sup>43</sup> Confidential redacted version of the "Decision on the Prosecution's application for authorisation to maintain certain redactions", 23 April 2013, ICC-01/09-01/11-695-Conf-Red, paras 33-36.

- (i) Since the Protocol already provides for the ongoing redaction of contact information for family members of witnesses or other persons at risk as a pre-approved category,<sup>44</sup> all redactions to contact information may be retained without requiring permission from the Chamber.<sup>45</sup>
- (ii) As to identifying information, the Chamber is satisfied that the proposed redactions are justified in two circumstances.<sup>46</sup> The Chamber is of the view that the redacted information is not related to the case and is therefore, in principle, of minimal value to the Defence. Consequently, the non-disclosure of this information does not unduly prejudice the Defence. Importantly, despite standardised justifications advanced by the Prosecution, the Chamber is able to determine from the context of the screening notes themselves that there is an objectively justifiable risk to the safety of these persons which would result from any further dissemination of their identities.
- (iii) All remaining requests to redact identifying information across the First and Second Prosecution Requests are rejected. The general rule articulated in the Protocol is that identities are subject to disclosure unless there is an objectively justifiable risk to the safety of the concerned persons. The Chamber considers the security risks identified by the Prosecution to be too generalised to qualify as such an objectively justifiable risk. In addition, if the Chamber accepted that the Prosecution's general assertions in this regard justified indefinite redactions, then the inevitable result would be that the identities of all such persons would never be disclosed.

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<sup>44</sup> Protocol, ICC-01/09-01/11-458-AnxA-Corr, paras 56 and 58.

<sup>45</sup> [REDACTED].

<sup>46</sup> [REDACTED].

(iv) As to the identifying information of other persons whose screening notes contain disclosable information, the Prosecution has indicated that it needs additional time to properly assess the risks to these witnesses. As described above, the Chamber considers such identities to be material to the preparation of the Defence in enabling them to adequately evaluate the Prosecution's excerpts. These persons are effectively persons "at risk on account of the activities of the Court" within the meaning of the B.3 Category of redactions. The identities of these persons should have been disclosed 60 days before the commencement of trial.<sup>47</sup> The Chamber acknowledges that this disclosure deadline has been altered in view of its recent decision vacating the trial date, but stresses that the Prosecution must endeavour to complete its assessments as soon as possible.

27. On the basis of this analysis, the First Prosecution Request is granted in part, and the remaining redaction requests contained in the First and Second Prosecution Requests are rejected. Except for the persons in relation to whom redactions are granted, and pursuant to the Protocol, the Prosecution must disclose the identifying information of all other persons currently covered by B.2 and B.3 category designations 60 days before the new commencement date of the trial.

*(ii) Defence Objections to Other Redactions*

28. As to the Ruto Defence's request to disclose "information related to the Prosecution's objectives and techniques of investigation"<sup>48</sup> and the Sang Defence's related objection to redaction of the Prosecution's leads and sources,<sup>49</sup>

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<sup>47</sup> Protocol, ICC-01/09-01/11-458-AnxA-Corr, para. 58.

<sup>48</sup> Ruto Response to Prosecution Requests, ICC-01/09-01/11-708-Conf, para. 7.

<sup>49</sup> Sang Response to Prosecution Requests, ICC-01/09-01/11-709-Conf, para. 4.

the Chamber does not consider these objections to be warranted at this time for the reasons below.

29. To the extent that the Defence is requesting disclosure of information related to the Prosecution's strategy as regards how and why it contacts the persons covered by its screening notes, such information is not to be disclosed pursuant to Rule 81(1) of the Rules and category D.1 of the Protocol. In this regard, the Chamber also notes the holding of Trial Chamber I, which specifically found that "information related to the prosecution's objectives and techniques of investigation" can be considered part of the Prosecution's internal work product.<sup>50</sup>
30. To the extent the Defence is seeking disclosure of the Prosecution's leads and sources, redaction of such persons under the Protocol is, in principle, ongoing. In accordance with paragraph 42 of the Protocol, leads and sources may be revealed only if they provide "material which is disclosed",<sup>51</sup> but there is no information that any of the persons covered by A.6 category redactions provided materials which have since been disclosed to the Defence. At the present time the Chamber has no reason to believe that the Prosecution has mislabelled any of its A.6 redactions or is wrongly withholding disclosure.
31. To the extent that the Defence is asking for disclosure of the identities of Prosecution intermediaries, the Chamber notes that none of the redactions in the First and Second Prosecution Requests categorise any persons as intermediaries with a separate designation apart from leads and sources.<sup>52</sup> There is no reason at this time for the Chamber to question that the Prosecution's assertion that

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<sup>50</sup> Redacted Decision on the prosecution's disclosure obligations arising out of an issue concerning witness DRC-OTP-WWWW-0031, 20 January 2011, ICC-01/04-01/06-2656-Red, para. 17(iii).

<sup>51</sup> Protocol, ICC-01/09-01/11-458-AnxA-Corr, para. 42.

<sup>52</sup> See Protocol, ICC-01/09-01/11-458-AnxA-Corr, paras 38-40 (category "A.5").



persons referenced in the Prosecution's screening notes are indeed leads and sources and not intermediaries.

32. Ultimately, the Chamber dismisses the Defence's objections at this time in so far as the Defence seeks disclosure of material in the screening notes currently justified under categories A.6 and D.1 of the Protocol. Should the Defence provide information in the future which suggests that these redactions are no longer justifiable, then this issue may be revisited.

### *C. The Classification Level of the Present Litigation*

33. As a final matter, the Chamber notes that the Defence justifies its confidential, *ex parte* classification for the Defence Request solely because "it refers to several documents disclosed *inter partes*, some of which are annexed to this filing".<sup>53</sup> The Chamber recalls the general principle of publicity in this Court's proceedings, which can be derived from Articles 67(1) and 64(7) of the Statute,<sup>54</sup> and sees no reason why public redacted versions of the Defence Request, First and Second Prosecution Requests and Ruto and Sang Responses to Prosecution Requests (excluding any annexes) could not be prepared to protect any information covered by the confidential classifications proposed by the parties. Pursuant to Regulation 23*bis*(3) of the Regulations, the parties are ordered to prepare and file public redacted versions of these documents. As public versions of these filings make it unnecessary for the Chamber's order of 22 April 2013 to remain confidential, the Registry is ordered to reclassify this filing as public as well.

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<sup>53</sup> Defence Request, ICC-01/09-01/11-666-Conf-Exp, para. 6.

<sup>54</sup> Article 67(1) of the Statute provides that "[i]n the determination of any charge, the accused shall be entitled to a public hearing [...]". Article 64(7) of the Statute provides that "The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence".

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

**PARTIALLY GRANTS** the relief sought in the Defence Request, as specified in paragraph 24 of the present decision;

**PARTIALLY GRANTS** the relief sought in the First Prosecution Request, as specified in paragraph 27 of the present decision;

**REJECTS** the remainder of the relief sought in the Defence Request and First Prosecution Request;

**REJECTS** the relief sought in the Second Prosecution Request;

**ORDERS** the Prosecution to disclose forthwith any remaining screening notes of witnesses whom it intends to call for trial;

**ORDERS** the Prosecution to disclose the identities of all persons covered by B.2 and B.3 category redactions in its screening notes 60 days before the new date set for the commencement of trial, subject to paragraphs 26(ii) and 27 of the present decision;

**ORDERS** the Defence to file, within 7 days of notification of the present decision, public redacted versions of the Defence Request (ICC-01/09-01/11-666-Conf-Exp), Ruto Response to Prosecution Requests (ICC-01/09-01/11-708-Conf) and Sang Response to Prosecution Requests (ICC-01/09-01/11-709-Conf), excluding annexes;

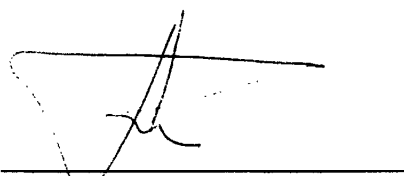
**ORDERS** the Prosecution to file, within 7 days of notification of the present decision, public redacted versions of the First Prosecution Request (ICC-01/09-01/11-677-Conf) and Second Prosecution Request (ICC-01/09-01/11-688-Conf), excluding annexes; and

**ORDERS** the Registry to reclassify the Chamber's order of 22 April 2013 (ICC-01/09-01/11-691-Conf) as public.

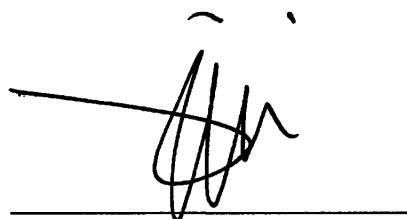
Done in both English and French, the English version being authoritative.



**Judge Kuniko Ozaki, Presiding Judge**



**Judge Robert Fremr**



**Judge Chile Eboe-Osuji**

Dated this 20 May 2013

At The Hague, The Netherlands