



Original: English

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

Date: 11 July 2013

TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding Judge
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

Confidential *ex parte* available only to the Prosecution and the VWU

With confidential *ex parte* (Prosecution and VWU Only) Annex A

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)

Source: Office of the Prosecutor

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

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Introduction

1. On 2 April 2013, the Defence filed its Joint Defence Request to Be Provided with Full, Non-Redacted Screening Notes¹ (“Defence request”) wherein it expanded its request, seeking an order to the Prosecution to disclose all screening notes in the Prosecution’s possession (in a full un-redacted format), and not just those screening notes which contain information disclosable either pursuant to Article 67(2) of the Statute (“PEXO”) or Rule 77 of the Rules.

2. In its 11 April 2013, ‘Prosecution Response to Joint Defence Request to Be Provided with Full, Non-Redacted Screening Notes’² the Prosecution undertook to: (i) provide the screening notes or transcripts of screening sessions of all witnesses who the Prosecution intends to call for trial;³ and (ii) provide all disclosable material received from non-trial witnesses in an extract form, together with the appropriate context, in a separate document with the individual’s witness code, but not their identity.⁴

3. On 20 May 2013, Trial Chamber V issued its ‘Decision on Defence request to be provided with screening notes and Prosecution’s corresponding requests for redactions’ (“Decision”) wherein the Chamber, *inter alia*, endorsed the approach of the Prosecution as per paragraph 2(ii) above.⁵

¹ ICC-01/09-01/11-666-Conf-Exp.

² ICC-01/09-01/11-677-Conf-Exp.

³ Responses, paras. 6 and 14. For five Prosecution trial witnesses, no screening session took place and so no screening note was produced: P-0013, P-0032, P-0247, P-0488 and P-0534.

⁴ *Ibid.*, paras. 16 and 19. The Prosecution notes that in addition to the ten screening notes identified at the time of the Response, three further screening notes of non-trial witnesses were assessed as containing [minor and limited] PEXO and are provided to the Defence in a similar manner with the identities withheld; these are P-0227, P-0276 and P-0389. Further, P-0439 had previously consented to disclosure of his identity and so the Defence did receive this PEXO with P-0439’s identity.

⁵ ICC-01/09-01/11-743-Conf, para. 23.

4. Since the issuance of the Decision, the Prosecution has undertaken individual risk assessments for those individuals referred to in paragraph 2(ii) above who were screened during the course of the investigation, and has exhausted all practicable efforts to contact each individual concerned to discuss the potential disclosure of their identities.

5. All individuals that the Prosecution contacted have expressed genuinely held serious concerns for their personal security (or that of their families in Kenya) were their identities to be disclosed to the accused.

6. The Prosecution considers that the potential risks to the relevant individuals justify and are proportionate with the non-disclosure of their identities to the Defence at this time, given the very low probative value, limited scope and marginal nature of the disclosable information contained in their screening note excerpts.

7. Pursuant to Articles 64(6)(e) and 68(1) of the Statute, and Rule 81(4) of the Rules, the Prosecution hereby applies for authorization to continue the non-disclosure of the identities of these individuals. Disclosure of their identities now would expose them to unnecessary risk, which outweighs the low probative value of the disclosable information contained in their screening notes and which in any case has already been disclosed to the Defence. Furthermore, there is no reason to believe that the value of this insignificant information to the Defence will be improved by the disclosure of the identities of the sources.

8. For the Chamber's inspection, the Prosecution appends, as confidential *ex parte* (Prosecution and VWU Only) Annex A, the excerpted screening notes of the individuals in question, as provided to the Defence.

Confidentiality

9. This application and the appended annexes are submitted on a confidential, *ex parte*, Prosecution and VWU only basis, as it contains information of a confidential nature the disclosure of which could pose a risk to witnesses and individuals at risk due to the activities of the Court.

Submissions

There is an objectively justifiable risk to these individuals' safety arising from disclosure of their identities to the accused

10. The fact that the Prosecution has decided not to call these screened individuals for trial does not eradicate the potential risk to them and their families. The individuals are likely to still be perceived as having cooperated with the Court and of having “betrayed” their communities or the accused. Should their identities be disclosed, these individuals are at risk of being approached with retributive actions, either from their communities or by supporters/associates of the accused, both of which stem out of disclosure of the identities of these individuals.

11. Additionally, in some instances these individuals have provided incriminatory information along with the Article 67(2) or Rule 77 information. This increases the risk profile for those individuals. In many circumstances, the mere fact of having provided incriminatory information to the OTP against the accused may place them in jeopardy.

12. The Prosecution notes that Trial Chamber V has previously ruled in the Kenya II case that it considers “*the security risks identified by the Prosecution to be too generalised*”

to qualify as an “‘objectively justifiable risk’ to the safety of the concerned persons”.⁶ The Prosecution submits, however, that the level of risk necessary to justify the continued non-disclosure of information is inversely proportional to the importance of the disclosure to the Defence. The Prosecution also cautions against the conflation of the concept of a “risk” to security, which implies an assessment of the possibility of the occurrence of an uncertain future event, with a requirement to prove actual threats to security. Clearly it would be unreasonable to require proof of actual interference with witnesses who are unknown to those responsible for the interference. What is required is an assessment of the risk of interference once their identity does become known. If what is required is that the risk effectively materializes into an actual threat, then the Court could end up unwillingly developing a system where any protective action arrives too late to make any meaningful difference.

13. With the exception of P-0087, all the witnesses either live in Kenya, or have relatives living in Kenya. The Prosecution has on several occasions brought to the attention of the Chamber the unparalleled level of threat or interference with witnesses,⁷ or suspected witnesses⁸ or their families⁹ who are living in Kenya.

14. The information assessed by the Prosecution as disclosable in these individuals’ screening notes is, in the Prosecution’s respectful submission, of a limited, marginal and minor nature. It relates to either: (i) very minor inconsistencies as to the dates of attacks as alleged by the Prosecution (which is not a key element of any crime, nor a requirement for demonstrating the individual criminal responsibility of the accused), such as that the attack on a certain location commenced either the day before or the day after the date as confirmed;¹⁰ (ii) the expressing of a personal opinion that the violence was spontaneous and unplanned,

⁶ ICC-01/09-02/11-712-Conf, para. 34.

⁷ [REDACTED].

⁸ [REDACTED].

⁹ [REDACTED].

¹⁰ Witnesses’ recollections of dates are also notoriously fallible, particularly when providing evidence several years after the relevant incident, so the probative value of such discrepancies is negligible.

with no evidential substantiation; or, (iii) that certain Kalenjin assisted Kikuyu victims during the attacks.

15. The Prosecution sought to contact each individual in order to explain the applicability and implications of paragraph 26(iv) of Trial Chamber V's Decision. All persons contacted by the Prosecution conveyed serious and genuine subjective concerns for their personal security, and/or that of their family members, should it be disclosed that they had cooperated, no matter how fleetingly, with the Court's investigation into the PEV. This is especially so as, though they may contain some minor disclosable content, the majority of the content of these screening notes contain incriminatory information which implicates the accused. The Chamber has previously held that subjective concerns, whilst not determinative, may be taken into consideration when determining whether an objectively justifiable risk exists.¹¹

16. Taking into account the low probative value of the contents of the screening notes and the absence of any indication that the identities of these non-witnesses would actually assist the accused in the preparation of their defence, the Prosecution submits that it has demonstrated a sufficient objectively justifiable risk to warrant continued non-disclosure of identifying information. Given the fact that these non-witnesses will play no further part in the trial,¹² the non-disclosure of this information is justified even if this were to result in the fact that their identities are never disclosed.

Less restrictive protective measures are infeasible and insufficient

17. Less restrictive measures are not available. The very act of disclosure of the individuals' identities to the accused gives rise to the risk to these individuals' security and that of their families. The relevant substantive content and context of

¹¹ ICC-01/09-01/11-531-Conf-Exp, para. 30; ICC-01/09-02/11/580-Conf-Red, para. 31

¹² Unless circumstances change, in which case the disclosure of their identities may be reconsidered.

their screenings have already been disclosed to the Defence without their identities. There is no way to provide their identities to the Defence without undertaking possibly lengthy and highly personal and intrusive protective measures, such as relocation of individuals or their family members. Further, the implementation of such protective measures would be highly burdensome on the Court's limited resources available for witness protection, particularly when the individuals concerned are non-witnesses and will not be relied on at trial.

18. Given the low probative value and the fact that the disclosable information is canvassed by other witnesses (in particular, the dates of the alleged attacks and the spontaneity of the violence) prejudice to the Defence is minimal indeed. Should the Chamber be minded not to grant this application, the Prosecution will be required to commence consultations with the Victims and Witnesses Unit as to what protective measures, if any, can be implemented for these individuals and their families.

The proposed continued withholding of the identities of these individuals will not unduly prejudice the accused's fair trial rights

19. Non-disclosure of the identities of these individuals appropriately balances the Chamber's duty under Article 64(2) of the Statute, the accused's rights under Article 67, and the Court's Article 68(1) obligation to "take appropriate measures to protect...victims and witnesses".

20. Not only is the information contained in these screening notes of a very low probative value; it is also well-covered in the screening notes and statements of other witnesses whose identities have already been disclosed to the Defence. The Prosecution submits that, to the extent that such discrepancies are relevant at all, they can be adequately canvassed with these witnesses. In these circumstances, the

additional disclosure of the identities of further, non-trial witnesses would not materially advance the fair-trial rights of the accused.

21. With one exception, all of the information these individuals provided to the Prosecution in their screenings relates to crime-base evidence.¹³ Their knowledge extends no further than speaking about violence taking place on the ground and none of them implicate the accused in person. Further, in the majority of cases, these individuals are still living amongst their communities in Kenya, [REDACTED]. Those individuals who have left Kenya (such as P-0199 and P-0276 [REDACTED], see below), still have numerous family members in the country.

22. The Prosecution recalls that, in its recent ‘Defence Submissions on the Conduct of Proceedings’, the Defence for RUTO confirmed that it does not anticipate requiring extensive time for the cross-examination of crime-base witnesses as it would for other “key OTP witnesses”.¹⁴ The Defence for RUTO expressed that cross-examination of crime-base witnesses would be “considerably shorter” than the Prosecution’s examination-in-chief. This demonstrates that the core issues which the Defence anticipates addressing during the trial are not widely canvassed by crime-base witnesses, and that continued non-disclosure of the identities of these additional individuals would have no detrimental impact on the Defence’s preparations of its case before trial.

23. Given the minimal nature of the PEXO or Rule 77 information contained in the screening notes in question, not having the identity of the individual concerned does not deprive the Defence of understanding the context of the screening notes nor does it prevent the Defence from addressing those issues in its preparations for trial. As

¹³ P-0450 did not provide crime-base evidence but rather more contextual information regarding the PEV. The ongoing non-disclosure of his identity to the Defence has been specifically authorized by the Chamber previously, see paras. 53 to 55 of this filing.

¹⁴ ICC-01/09-01/11/795, para. 9.

such, the risk to these individuals in disclosing their identities is not outweighed by the [low] probative value of the disclosable material contained in their screening notes, nor by any prejudice to the accused as this is minimal.

The non-disclosure of the identities of the individuals is subject to periodic review

24. The Prosecution submits that if the security situation changes and the identities of the relevant persons can safely be disclosed to the Defence, the Prosecution will do so.

25. Taking all of the above into consideration, the Prosecution submits that given the limited, marginal and minor nature of the PEXO information contained in the screening notes of these individuals (which the Defence is already in possession of), ongoing non-disclosure of their identities would strike an appropriate balance between the obligations of the Prosecution under both Article 67(2) and Rule 77, and the Court's obligations under Article 68(1) to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.

26. The individual security assessments below demonstrate that the risks to each of these individuals and their families are objectively justifiable and entirely capable of being mitigated through the ongoing non-disclosure of their identities.

Individual Security Assessments

P-0087

27. The Prosecution undertook several unsuccessful attempts to telephone witness P-0087 to seek his consent for disclosure of his identity. Despite all practicable efforts, as it was not possible to reach him, his consent has not been obtained.

28. P-0087 provided the Prosecution during his screening with incriminatory information about the Eldoret attacks and the Kiambaa church. This information included a minor discrepancy about the date of the attack on Eldoret as opposed to Pre-Trial Chamber II's findings on the temporal scope of the attacks. P-0087 describes the attack taking place on 30 December 2007, while the PTC's findings refer to the locations: Kiambaa, Yamumbi, Huruma, Kimumu and Langas in greater Eldoret area being attacked on or from 1 January 2008 onwards.

29. P-0087 was approached by Kalenjin youths in September 2007 who said that they had heard about him and warned him to "be careful". Further, after the PEV at the end of February 2008, while taking refuge [REDACTED] [REDACTED], P-0087 received a text message stating "[REDACTED]. We will do all to find you and kill you." To the best of the Prosecution's knowledge, [REDACTED].

P-0199

30. P-0199 lives [REDACTED] with his immediate family, but still has several family members in Kenya [REDACTED]. The assessment of the Prosecution is that these family members may be placed at risk were his identity to be disclosed to the Defence.

31. The minor PEXO information contained in P-0199's screening note concerns his stating, that according to his father (see P-0276 below), the violence in Eldoret began around 29 or 30 December 2007, which does not accord with the dates as confirmed by the PTC.

32. When contacted relating to potential disclosure of his identity to the Defence, P-0199 expressed concerns for the personal security of his family in Kenya, and opposed disclosure of his identity.

P-0227

33. The Prosecution undertook several unsuccessful attempts to contact P-0227 to seek his consent for disclosure of his identity, however, despite all practicable efforts, it has not possible to reach him and his final consent has not been obtained.

34. The minor PEXO information contained in P-0227's screening note relates to his stating that the violence in Eldoret began just before the announcement of the election result (as opposed to commencing once KIBAKI was declared the winner, as alleged) and lasted until mid-February 2008.

35. P-0227 still lives in Kenya. [REDACTED]. P-0227 also used to work for [REDACTED].

P-0276

36. P-0276 is the [REDACTED] of P-0199 and also lives [REDACTED] with his immediate family, and also still has several family members in Kenya in [REDACTED]. It has been assessed that these family members may be placed at risk were his identity to be disclosed to the Defence.

37. The minor PEXO information contained in P-0276's screening note relates to his describing that the violence in Eldoret began around 29 or 30 December 2007, which does not accord with the dates as confirmed by the PTC.

38. Asked whether he would consent to the disclosure of his identity to the Defence, P-0276 expressed concerns for the personal security of his family members who remain in Kenya (the same family members as P-0199 above) and opposed disclosure of his identity.

P-0304

39. P-0304 lives [REDACTED].

40. P-0304's screening contained very minor PEXO information relating to the violence in Eldoret, stating it started the day after the election, and, he provides

information that some Kalenjin had been willing to help Kikuyu refugees reach safety in Eldoret.

41. When P-0304 was contacted by the Prosecution to seek his consent for disclosure of his identity, the individual opposed disclosure of his identity, stating that it would be very dangerous for him and his family if his name was disclosed.

P-0389

42. The Prosecution undertook several unsuccessful attempts to contact P-0389 to seek his consent for disclosure of his identity. However, despite all practicable efforts it was not possible to reach him and his final consent has not been obtained.

43. P-0389 has [REDACTED]. In his screening P-0389 provided incriminatory information to the Prosecution about the attack on Langas. The minor PEXO information in his screening note relates to Langas being burnt on 31 December 2007, which does not accord with the dates as confirmed by the PTC.

P-0411

44. P-0411 lives [REDACTED], in Kenya. The Prosecution attempted to contact P-0411 through the Common Legal Representative for Victims ("CLR") to seek consent for his identity being disclosed. The Legal Representative agreed to make contact with P-0411 and report back to the Prosecution. However, the CLR reported that despite several attempts and best efforts, he was unable to establish contact with P-0411 in order to discuss disclosure of his identity to the Defence.

45. The minor PEXO information contained in P-0411's screening note concerns his seeing Kalenjin attackers in Maillinne on 31 December 2007, which constitutes a minor discrepancy relating to the dates as they were confirmed by the PTC for the Greater Eldoret area.

46. P-0411 has previously raised personal security concerns with the Prosecution, stating that were his identity to be known to the Defence, [REDACTED].

P-0412

47. In her screening on 10 August 2012 P-0412 gave incriminatory information to the Prosecution, also including minor PEXO information about the violence in Turbo starting on 29 December 2007.

48. P-0412 [REDACTED]. She lives with her family in [REDACTED]. The Prosecution tried to contact P-0412 through the Legal Representative for Victims to seek consent for her identity being disclosed. The Legal Representative agreed to make contact with P-0412 and report back to the Prosecution. However, the CLR reported that despite several attempts and best efforts, he was unable to establish contact with P-0412 in order to discuss disclosure of her identity to the Defence.

P-0441

49. The minor PEXO information contained in P-0441's screening note concerns his comments related to the area of Kapsabet, namely that the atmosphere before the election was fine, which appears¹⁵ to contradict the Prosecution's allegations that ethnic tensions in the area had been severely stoked by the accused in the build-up to the election, (the population having been warned to be on guard for the elections to be rigged) and thus the crimes were incited.

50. P-0441 lives [REDACTED].

51. When contacted by the Prosecution, P-0441 opposed disclosure of his identity and stated that it will cause him and his family a lot of problems if this would happen.

P-0450

52. In his screening note, P-0450 provided PEXO information relating to a minor discrepancy in the dates of the attack on Eldoret, stating that it commenced on 30

¹⁵ To the extent that the witness is referring to the actual voting and not the entire election process, including the election campaigns.

December 2007, which is slightly before the dates as confirmed by the PTC for this attack.

53. P-0450 was formerly on the Prosecution's List of Witnesses but subsequently withdrew as a witness.¹⁶ P-0450 has already been the subject of a Prosecution application not to disclose his identity to the Defence ("delayed disclosure application").¹⁷ In the delayed disclosure application the Prosecution detailed a number of security incidents and interferences regarding this individual which demonstrated that he was at risk due to his cooperation with the Prosecution.¹⁸ As such, Trial Chamber V has already made a finding that there existed in P-0450's case an objectively justifiable risk to his personal security and well-being were his identity to be disclosed to the Defence, and authorized the non-disclosure of P-0450's identity on an ongoing basis, regardless of his withdrawal as a trial witness.¹⁹

54. In addition, P-0450 has repeatedly advised the Prosecution that he would not consent to disclosure of his identity as he vehemently feels it would place him (as well as members of his family in Kenya) at direct and significant risk were his cooperation to be revealed to the accused.

P-0459

55. In his screening note P-0459 provides incriminatory information regarding the attack on Kimumu, as well as very minor PEXO information stating that the attack on this location took place on 31 December, and hearsay about the attack on Eldoret starting on 30 December 2007, both of which do not accord with the dates as confirmed by the PTC.

56. P-0459 lives [REDACTED].

¹⁶ ICC-01/09-01/11-597-Conf.

¹⁷ [REDACTED].

¹⁸ See in particular, [REDACTED].

¹⁹ [REDACTED].

57. When contacted by the Prosecution to seek his consent for disclosure he strongly opposed his identity being disclosed and was very upset about such a possibility.

P-0489

58. P-0489's screening note contains very minor PEXO information describing the attack on Kiambaa church as taking place on the day after the announcement of the election results, which does not accord with the date as confirmed by the PTC.

59. P-0489 [REDACTED]. Upon contact with the Prosecution to seek consent for disclosure of his identity to the Defence, P-0489 expressed concerns for his and his family's personal security and opposed disclosure of his identity.

Relief Requested

60. For the foregoing reasons, the Prosecution respectfully requests the Chamber to authorize the continuing non-disclosure of the identities of the above individuals on an ongoing basis.



Fatou Bensouda, Prosecutor

Dated this 11th July 2013

At The Hague, the Netherlands