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**International
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TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding
Judge Olga Herrera Carbuccia
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 Disclosure of Information related to Prosecution Intermediaries

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 James Stewart
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Counsel for William Samoei Ruto

Mr Karim Khan
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Mr Joseph Kipchumba Kigen-Katwa
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Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

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States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

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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(2), (3)(c) and (6)(d) and 67(2) of the Rome Statute (the ‘Statute’), Rules 77, 81 and 84 of the Rules of Procedure and Evidence (the ‘Rules’) and Regulation 23bis of the Regulations of the Court renders this Decision on Disclosure of Information related to Prosecution Intermediaries.

I. PROCEDURAL HISTORY

1. On 14 August 2013, the defence team for Mr Ruto (‘Ruto Defence’) filed its request for disclosure of information concerning intermediaries including payments made to trial witnesses (‘Request’).¹
2. In its Request the Ruto Defence seeks the disclosure of the identity of all intermediaries who facilitated initial or subsequent contacts with witnesses who are testifying for the Office of the Prosecutor (‘Prosecution’).² Furthermore, it requests additional information comprising: (i) a list indicating all of the witnesses with which each intermediary had contact and the purpose of the contact;³ (ii) a schedule of all contacts between the intermediaries and witnesses including time and place of meetings, others present during the meeting and the topic discussed;⁴ (iii) a schedule of all assistance, financial and otherwise, and security measures provided by the

¹ Defence Application for Disclosure of Information related to Prosecution Intermediaries including Payments and Benefits made by Intermediaries to Prosecution Trial Witnesses, 14 August 2013, ICC-01/09-01/11-855-Conf, available to the Prosecution and Defence only with confidential Annexes A and B, available to the Prosecution, Defence, the Common Legal Representative and the Office of the Public Council for Victims, confidential Annexes C to G, available to the Prosecution and Defence only and confidential *ex parte* Annex H available only to the Ruto Defence. A confidential redacted version was filed on 15 August 2013, ICC-01/09-01/11-855-Conf-Red. A confidential public version was filed on 15 August 2013 and subsequently reclassified as confidential redacted, ICC-01/09-01/11-855-Conf-Red2. A corrigendum to Annex H was filed on 3 September 2013, ICC-01/09-01/11-855-Conf-Exp-AnxH-Corr.

² Request, ICC-01/09-01/11-855-Conf-Red, para. 4.

³ Request, ICC-01/09-01/11-855-Conf-Red, para. 31(b).

⁴ Request, ICC-01/09-01/11-855-Conf-Red, para. 31(c).

intermediaries to Prosecution trial witnesses;⁵ and (iv) copies of all correspondence between the Prosecution and the intermediaries, ⁶ (together the ‘Additional Information’). The Ruto Defence further requests the Prosecution be ordered to procure such information where it is not already in its possession.⁷

3. On 19 August 2013, the Chamber held a status conference (‘Status Conference’) during which the matter was discussed by the parties and participants.⁸
4. On 26 August 2013, the defence team for Mr Sang (‘Sang Defence’) filed its response, joining the Request and additionally requesting further information with respect to payments and assistance made to the Prosecution witnesses.⁹
5. On the same day, the legal representative of victims (the ‘Legal Representative’) filed his response, seeking that the Request be rejected.¹⁰
6. On 27 August 2013, the Prosecution submitted a response, complementing its submissions made during the Status Conference and requesting that the Request be rejected (‘Prosecution Response’).¹¹

II. SUBMISSIONS BY THE PARTIES

Ruto Defence

⁵ Request, ICC-01/09-01/11-855-Conf-Red, para. 31(d).

⁶ Request, ICC-01/09-01/11-855-Conf-Red, para. 31(e).

⁷ Request, ICC-01/09-01/11-855-Conf-Red, para. 32.

⁸ ICC-01/09-01/11-T-24-CONF-ENG.

⁹ Sang Defence Response to the “Confidential Redacted Version of the Ruto Defence Application for Disclosure of Information related to Prosecution Intermediaries including Payments and Benefits made by Intermediaries to Prosecution Trial Witnesses”, 26 August 2013, ICC-01/09-01/11-879-Conf.

¹⁰ Submissions of the Common Legal Representative for Victims on the “Defence Application for Disclosure of information related to Prosecution Intermediaries including Payments and Benefits made by Intermediaries to Prosecution Trial Witnesses”, 26 August 2013, ICC-01/09-01/11-877-Conf.

¹¹ Prosecution’s Response to ‘Defence Application for Disclosure of Information related to Prosecution Intermediaries including Payments and Benefits made by intermediaries to Prosecution Trial Witnesses’, 27 August 2013, ICC-01/09-01/11-885-Conf.

7. The Ruto Defence asserts that the identities of all intermediaries who had contact with Prosecution trial witnesses are subject to disclosure.¹² Although the Prosecution has, upon request of the Ruto Defence, provided a list of persons who were the initial point of contact for more than one witness,¹³ the Ruto Defence avers that it needs to be provided with identities of all intermediaries. In support it cites the 'Protocol establishing a redaction regime',¹⁴ and the jurisprudence of Trial Chamber II,¹⁵ which stated that the defence has a general interest in knowing the names of the Prosecution's intermediaries.¹⁶
8. In its Request, the Ruto Defence also propose a definition of the term 'intermediary', as discussed in further detail below.¹⁷
9. In addition to the general disclosure obligation, the Ruto Defence submits that there are specific facts in this case, which show the materiality of the identity of the intermediaries and the Additional Information for the preparation of the defence.¹⁸ According to the Defence, third parties provided assistance and/or protective measures to Prosecution trial witnesses.¹⁹ This allegation is supported by: (i) information contained in the confidential *ex parte* Annex H to the Request, available to the Ruto Defence only; (ii) testimony of [REDACTED]; and (iii) [REDACTED].²⁰ With regard to the second reason, the Defence states that the witness [REDACTED].²¹

¹² Request, ICC-01/09-01/11-855-Conf-Red, paras 22, 31(a) and 33.

¹³ Request, ICC-01/09-01/11-855-Conf-Red, para.25.

¹⁴ Annex to Decision on the Protocol establishing a redaction regime, 5 October 2012, ICC-01/09-01/11-458-AnxA-Corr, ('Redaction Protocol'); Request, ICC-01/09-01/11-855-Conf-Red, para.17.

¹⁵ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Order in relation to the disclosure of the identity of P-143, 1 February 2010, ICC-01/04-01/07-1817, para.16.

¹⁶ Request, ICC-01/09-01/11-855-Conf-Red, para.18.

¹⁷ Request, ICC-01/09-01/11-855-Conf-Red, para.30.

¹⁸ Request, ICC-01/09-01/11-855-Conf-Red, para.19.

¹⁹ Request, ICC-01/09-01/11-855-Conf, para. 34.

²⁰ Request, ICC-01/09-01/11-855-Conf, para. 35.

²¹ Request, ICC-01/09-01/11-855-Conf, para. 35.

10. The Ruto Defence avers that information about such benefits and assistance and who is providing them is relevant to the credibility of the Prosecution trial witnesses and necessary in order to prepare an adequate cross-examination.²² Further, it purports that it is entitled to know the partners and third persons who assist in the provision of protective measures in order to determine 'what role, precisely, they played'.²³
11. The Ruto Defence contends that there are no security issues which would prevent the disclosure. All the witnesses are known to the defence at this stage of the trial, therefore the disclosure of the identity of the intermediaries cannot put them at risk. Further, according to the Ruto Defence, there are no objectively justifiable security risks for the intermediaries themselves.²⁴
12. In oral submissions during the Status Conference the Ruto Defence repeated the arguments made in the Request and reiterated that, if the Prosecution has no information about the care and benefits provided by intermediaries to its witnesses, it should make enquiries with these intermediaries to obtain the relevant information.²⁵

Sang Defence

13. In its oral submissions the Sang Defence submitted that it should be provided with the same documents as disclosed to the Ruto Defence by the Prosecution.²⁶ Further, it argued that the resistance alone by the Prosecution to disclosure should be interpreted by the Chamber in favour of materiality.²⁷

²² Request, ICC-01/09-01/11-855-Conf-Red, para. 36.

²³ Request, ICC-01/09-01/11-855-Conf-Red, para. 35.

²⁴ Request, ICC-01/09-01/11-855-Conf-Red, para. 38.

²⁵ ICC-01/09-01/11-T-24-CONF-ENG, page 71, line 24 to page 72 line 10.

²⁶ ICC-01/09-01/11-T-24-CONF-ENG, page 78, line 11-20.

²⁷ ICC-01/09-01/11-T-24-CONF-ENG, page 79, line 9-12.

14. In its written response, and following receipt of payment information for the first ten Prosecution witnesses, the Sang Defence additionally requested: (i) the name of the individual or organisation who disbursed the money; (ii) information regarding any assistance or protection by a third party at the request of the Prosecution; and (iii) copies of receipts for monies paid. Additionally, it requests the Chamber to order the Prosecution to provide updates on any money or benefits ‘which have been promised to or will be paid to witnesses following the conclusion of their testimony’.²⁸

Prosecution

15. In its oral submissions, the Prosecution stated that it does not consider that there is a general right of disclosure of the identities of intermediaries to the defence.²⁹ The Prosecution set out its understanding of Rule 77 of the Rules, emphasising that only materiality for defence preparations triggers a disclosure obligation and that the determination of this materiality ‘primarily rests upon the shoulders of the Prosecution’.³⁰ Therefore, the Prosecution is of the view that the Defence cannot assess what is material and a mere assertion of materiality does not trigger the disclosure obligations under Rule 77 of the Rules.³¹ The Defence must provide an objectively credible basis for this assertion.³²

16. The Prosecution avers that the Request is unfounded as the three reasons relied on by the Ruto Defence each fail to prove the required materiality.³³ With regard to the *ex parte* annex to the Request, the Prosecution points out that it is unable to include it in its assessment of materiality, having no access to the supporting document. In the

²⁸ ICC-01/09-01/11-879-Conf, paras 10 and 12.

²⁹ ICC-01/09-01/11-T-24-CONF-ENG, page 57, line 3-4.

³⁰ ICC-01/09-01/11-T-24-CONF-ENG, page 57, line 23 to page 58 line 5.

³¹ Prosecution Response, ICC-01/09-01/11-885-Conf, para. 16.

³² Prosecution Response, ICC-01/09-01/11-885-Conf, para. 17.

³³ ICC-01/09-01/11-T-24-CONF-ENG, page 59, line 1 to page 60, line 2.

Prosecution's view, the Ruto Defence should either disclose the document or not be allowed to rely on it to argue the materiality of the information.³⁴ As discussed in further detail below, the Prosecution also submits that the matter is not yet ripe for hearing before the Chamber³⁵ and that any decision based on information to which it is not privy would be unfair to the Prosecution since it might have been able to advance evidence that could challenge the allegations contained in the annex.³⁶

17. In respect of the information provided by [REDACTED], the Prosecution submits that this information is known to the Defence and that it is not sufficient to warrant the disclosure of the identity of all intermediaries.³⁷ Relying on jurisprudence of Trial Chamber I in *The Prosecutor v. Thomas Lubanga Dyilo* ('Lubanga Case'), the Prosecution avers that even if evidence of misconduct on the part of [REDACTED] was to be advanced, this would not justify the disclosure of the identities of all the intermediaries. It stresses the necessity of a case-by-case assessment.³⁸
18. With regard to [REDACTED].³⁹ Finally, it submits that 'the evidence in the Prosecution's possession does not indicate that there has been any malfeasance on behalf of intermediaries to the extent alleged by the Defence that they have somehow been involved in securing perjured evidence implicating the accused before [this] Court.'⁴⁰

³⁴ ICC-01/09-01/11-T-24-CONF-ENG, page 59, line 3-7.

³⁵ Prosecution Response, ICC-01/09-01/11-885-Conf, para. 22.

³⁶ Prosecution Response, ICC-01/09-01/11-885-Conf, para. 23.

³⁷ ICC-01/09-01/11-T-24-CONF-ENG, page 60, line 11-16.

³⁸ Prosecution Response, ICC-01/09-01/11-885-Conf, para. 28.

³⁹ ICC-01/09-01/11-T-24-CONF-ENG, page 59, line 17-25; see also Prosecution Response, ICC-01/09-01/11-885-Conf, para.29.

⁴⁰ ICC-01/09-01/11-T-24-CONF-ENG, page 59, line 22-25; see also Prosecution Response, ICC-01/09-01/11-885-Conf, para.29.

19. In respect of the security situation of intermediaries the Prosecution relies on submissions it made in the *Lubanga Case*,⁴¹ reiterating that intermediaries operate in an environment which is dangerous for both the witnesses and the intermediary him- or herself.⁴²
20. The Prosecution filed its response in the same classification as the Request, confidential, available to the Prosecution and Defence only. However, it does not consider such classification necessary. First, the Prosecution Response does not repeat the redacted information from the Request. Second, the information redacted in the version provided to the Office of Public Counsel for Victims ('OPCV') and the Legal Representative was also discussed at the Status Conference, with a member of the OPCV being present throughout. Therefore, the Prosecution requests the reclassification of its filing as 'confidential', available to all parties and participants.⁴³
21. As discussed in further detail below, the Prosecution also contested, in part, the definition of the term 'intermediary' as presented in the Request.⁴⁴
22. Responding to the request for disclosure of information regarding benefits and assistance provided by third parties to Prosecution witnesses, the Prosecution avers that this would have an effect on the witnesses' safety since it touches upon matters such as the details of relocation. Further, the Prosecution points out that the collection of this data would be very onerous and submits that it is for the defence to show the necessity of specific enquiries first, before the Prosecution is to act.⁴⁵

⁴¹ *Lubanga Case*, Prosecution's Submissions in Response to Trial Chamber's Oral Request of 10 February 2010, 25 February 2010, ICC-01/04-01/06-2310-Red.

⁴² ICC-01/09-01/11-T-24-CONF-ENG, page 74, line 13 to page 75, line 4.

⁴³ Prosecution Response, ICC-01/09-01/11-885-Conf, para.2.

⁴⁴ Prosecution Response, ICC-01/09-01/11-885-Conf, paras 7-8.

⁴⁵ Prosecution Response, ICC-01/09-01/11-885-Conf, para.33.

23. The Prosecution submits that the requests for additional relief submitted by the Sang Defence should also be rejected.⁴⁶
24. It avers that the identification of the person making the payment would not materially assist the defence in its preparation.⁴⁷ In respect of the request to be provided with receipts, the Prosecution submits that this too is not material to the preparation of the defence. The Prosecution states that it has determined that the payments were genuine leaving no reason for the defence, absent any specific indication, to be provided with copies. Further, it argues that the receipts contain information which not only could put the witnesses concerned at risk (by revealing in which hotel they stayed, for instance) but also information about the Prosecution's protection strategies, which might jeopardise ongoing investigations in this case and others.⁴⁸

Legal Representative

25. In its oral submissions, a member of the OPCV, acting on behalf of the Legal Representative, submitted that the Request should be rejected. The information in question constitutes internal documents which is exempt from disclosure according to Rule 81(1) of the Rules.⁴⁹ It is further argued that the disclosure of the information might be prejudicial to the interest of certain victims.⁵⁰ In its written submission, the Legal Representative submits that the disclosure of the identity of intermediaries would put the intermediaries at risk, that the disclosure of their working methods would impede their future work which is not necessarily related to the activities of the Prosecution or the Court, that these security risks do not subside with the beginning of

⁴⁶ Prosecution Response, ICC-01/09-01/11-885-Conf, paras 34-38.

⁴⁷ Prosecution Response, ICC-01/09-01/11-885-Conf, para.37.

⁴⁸ Prosecution Response, ICC-01/09-01/11-885-Conf, para.37.

⁴⁹ ICC-01/09-01/11-T-24-CONF-ENG, page 79, line 17-21.

⁵⁰ ICC-01/09-01/11-T-24-CONF-ENG, page 79, line 21-22, ICC-01/09-01/11877-Conf, para. 7.

the trial and that intermediaries do not normally benefit from protective measures.⁵¹ The Legal Representative submits that intermediaries should be asked for their consent prior to any disclosure of their identity, as is done in the case of victims and witnesses.⁵²

III. ANALYSIS BY THE CHAMBER

i) Legal Framework and Principles

26. The Chamber recalls the jurisprudence of the Appeals Chamber. Rule 77 of the Rules requires a two-step analysis: first, to determine whether the objects requested are ‘material to the preparation of the defence’ and, secondly, if they have been found to be so material, whether they fall within one of the exceptions to disclosure provided for in the Statute or in Rules 81 and 82 of the Rules.⁵³
27. For the purposes of the first step of the analysis, the Appeals Chamber has held that materiality is to be ‘interpreted broadly’ and may include objects ‘not directly linked to exonerating or incriminating evidence’.⁵⁴ The assessment of materiality is to be conducted on a *prima facie* basis which, as the Appeals Chamber has noted, places ‘a low burden on the defence’.⁵⁵ However, the determination of what is ‘material’ will depend upon the specific circumstances of each case.⁵⁶ Moreover, where appropriate and having due regard to the general right to disclosure of all information material to the preparation of the defence, the Chamber may consider the fact that the Prosecution

⁵¹ ICC-01/09-01/11-877-Conf, para.9.

⁵² ICC-01/09-01/11-877-Conf, para.10.

⁵³ *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, (the ‘Banda & Jerbo AC Judgment’), para.35.

⁵⁴ Banda & Jerbo AC Judgment, ICC-02/05-03/09-501, para.38; *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1433, paras 77 and 78.

⁵⁵ Banda & Jerbo AC Judgment, ICC-02/05-03/09-501, para.42.

⁵⁶ Banda & Jerbo AC Judgment, ICC-02/05-03/09-501, para.39.

has already provided relevant documents on the point at issue to the defence when determining the question of materiality.⁵⁷

28. Notwithstanding a determination of materiality under Rule 77 of the Rules, where the requested object consists of information falling within one, or more, of the restrictions on disclosure provided for in the Statute or Rules 81 and 82 of the Rules it shall not be disclosed, save in accordance with any applicable provision(s) of the relevant article(s).⁵⁸ This may, for example, include measures taken for the confidentiality of information or the safety and security of individuals.⁵⁹ In the latter case, it has been held that such measures may be extended not only to victims and witness but also to any other 'persons at risk on account of the activities of the Court'.⁶⁰
29. The Chamber notes that the Request is made pursuant to Rule 77 of the Rules, however it is recalled that disclosure of the identity of intermediaries is currently also addressed in this case by the Redaction Protocol⁶¹ to the extent that the information falls within a document which is anyway subject to a disclosure obligation, such as, for example, a witness statement. Under the Redaction Protocol, the identity of Prosecution intermediaries is currently subject to ongoing redaction on the basis that disclosure 'may put the persons and/or the ongoing investigation at risk'.⁶²

ii) Ripeness for hearing

⁵⁷ Banda & Jerbo AC Judgment, ICC-02/05-03/09-501, para.40.

⁵⁸ Rule 81(3) of the Rules; Banda & Jerbo AC Judgment, ICC-02/05-03/09-501, para.35.

⁵⁹ Rule 81(3) of the Rules.

⁶⁰ *The Prosecutor v. Germain Katanga*, Appeals Chamber, 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, paras 1,42-47.

⁶¹ Redaction Protocol, ICC-01/09-01/11-458-AnxA-Corr.

⁶² Redaction Protocol, ICC-01/09-01/11-458-AnxA-Corr, para.38.

30. As a preliminary matter it is necessary to consider the Prosecution's submission that the Request is not yet ripe for hearing by the Chamber. It is argued that: (i) the Chamber should only intervene where there is doubt about whether the Prosecution has fulfilled its disclosure obligations and, the Prosecution submits, it has not been in a position to make an informed decision on disclosure in the absence of access to the information contained in confidential and *ex parte* Annex H to the Request;⁶³ and (ii) it would be unfair for the Chamber to take a decision – which the Prosecution submits will cause real prejudice to it in this and other cases and may have severe security implications for individuals - on the basis of evidence to which the Prosecution is not privy.⁶⁴
31. The Chamber notes that, in the normal course, disclosure will be conducted on an *inter partes* basis and responsibility, in the first instance, is on the Prosecution to make the assessment of what material falls within their disclosure obligations. The Chamber notes that the Prosecution can only be expected to make such an assessment of materiality based on the information available to it. Where there is doubt, or disagreement arises in relation to the materiality of certain information, the matter must come before the Court for determination. The Chamber considers that such a case has arisen in this instance.
32. The only information before the Chamber to which the Prosecution is not privy in relation to this matter is the confidential and *ex parte* Annex H to the Request. The Prosecution is otherwise on an equal footing for the purposes of arguing the materiality of each of the categories of information at issue. It is emphasised that *ex parte* Annex H formed only part of the basis upon which the Request is made. The

⁶³ Prosecution Response, ICC-01/09-01/11-885-Conf, para. 22.

⁶⁴ Prosecution Response, ICC-01/09-01/11-885-Conf, para. 23.

Ruto Defence supports the Request with two other sources of information – the [REDACTED] and the [REDACTED] – both of which are available to the Prosecution.

33. However, the Chamber notes that the only justifications provided by the Ruto Defence for the *ex parte* status of Annex H are that the information is not subject to any disclosure obligation and, given that it relates to the evidence of Defence witnesses, disclosure at this stage of the proceedings would cause severe prejudice.⁶⁵ But these reasons do not necessarily justify a privileged party's positive use of *ex parte* material as a basis for a relief that affects the opposing party. It is the difference between a shield and a sword.
34. In the circumstance, the Chamber has chosen not to rely on *ex parte* Annex H in rendering this decision. Consequently, the Chamber finds no prejudice to occur and considers itself to be properly seized of the matter.

iii) Definition of 'Intermediary'

35. In the Request, the Ruto Defence propose a broad definition of the term 'intermediary' as follows:

'any individual (whether acting in an individual capacity or on behalf of an organisation, agency or State) other than VWU staff members: (a) through whom initial contact was made on behalf of the Prosecution with any Prosecution trial witness; (b) who has had any contact (directly or indirectly) with any Prosecution trial witness at the request of the Prosecution; (c) who has provided any form of assistance (whether financial or otherwise) and/or protective

⁶⁵ Request, ICC-01/09-01/11-855-Conf, para. 5.

measure to any Prosecution trial witness either at the request of or following a referral by the Prosecution; and/or (d) who has provided benefits, support, or assistance to a Prosecution trial witness at any time – knowing or believing such individual to be either a Prosecution trial witness for the Kenya Situation [REDACTED].⁶⁶

36. The Prosecution submits that it agrees with the first three sub-sections of the definition presented by the Ruto Defence (i.e. sub-sections (a)-(c)). However, it rejects sub-section (d), submitting that a person who is not acting as an agent for the Prosecution cannot be considered as an intermediary. If, however, a person described in this category was requested to act by the Prosecution, he or she would already fall under one of the previous three subsections. Accordingly, the Prosecution is prepared to accept the definition proposed in the Request under the first three sub-sections only.⁶⁷
37. The Chamber notes that, for the purposes of this Request, the parties are in agreement that the persons and entities proposed in paragraph 30 (a)-(c) of the Request should be considered to fall within the definition of an ‘intermediary’. Therefore, the Chamber will confine its consideration of the question to the proposal at paragraph 30 (d) of the Request , upon which the parties differ.
38. The Chamber finds this proposed fourth element of the definition to be overly broad and problematic in a number of respects. In particular, it requires no nexus between the provision of the benefit and the status of the beneficiary as a witness, other than the fact that the benefactor knew or believed the beneficiary to have such status. Hence, it would encompass a potentially vast number of ordinary course payments with no relevance to the case at hand or the status of the witness as such. For example,

⁶⁶ Request, ICC-01/09-01/11-855-Conf-Red, para.30.

⁶⁷ Prosecution Response, ICC-01/09-01/11-885-Conf, paras 7-8.

should a father be considered to be a Prosecution intermediary merely because he paid his son's school fees while knowing that son to be a witness? Moreover, the proposed definition would require the Prosecution to fulfil the impossible task of determining the state of knowledge of every individual who provided any form of benefit to one of the Prosecution trial witness over the past six years. In the Chamber's view, any disclosure order made on such a basis would be neither within the scope of the issues at hand nor fully implementable.

39. It is also noted that the proposed fourth element of the definition would potentially encompass a large number of individuals with whom the Prosecution would have had no relationship or contact and of whose existence it is likely to even be unaware. As the Prosecution noted,⁶⁸ that would bring the definition far beyond any ordinary meaning of the term 'intermediary'.
40. The Chamber considers that the Ruto Defence's submissions provide no sufficient justification or rationale for such a broad definition. In fact the arguments of the Ruto Defence in paragraph 29 of the Request appear to themselves presuppose at least some form of relationship or contact between the individual classed as an 'intermediary' and the Prosecution.
41. In light of each of the factors discussed above, the Chamber finds that for the purposes of the Request and present decision the terms 'intermediary' or 'intermediaries' should be ascribed only the meaning attributed in paragraph 30 (a)-(c) of the Request, as also set out in paragraph 35 above.

iv) Consideration of the requested categories of information

⁶⁸ Prosecution Response, ICC-01/09-01/11-885-Conf, para. 8.

Identities and affiliations of all intermediaries:⁶⁹

42. The Chamber emphasises that, as held by the Appeals Chamber, a determination of materiality under Rule 77 of the Rules depends upon the specific circumstances of each case.⁷⁰ Categories of information which may have been found relevant in one particular set of circumstances will not automatically be relevant in other cases. Therefore, in making its determination the Chamber has focused upon the questions at issue, and evidence before it, in this case.
43. The identities and affiliations of intermediaries, whether as a category in themselves or on an individual basis, are required to be disclosed only to the extent that they fall within one of the established disclosure obligations in the Statute and Rules. For present purposes, the relevant inquiry pursuant to Rule 77 of the Rules is whether such information is *prima facie* material to the preparation of the defence in this case.
44. The Chamber notes that the Ruto Defence asserts a 'clear interest' in knowing the identity of all intermediaries.⁷¹ However, the Chamber does not find that this assertion has been supported by the submissions made. It is noted that, in the *inter partes* correspondence of the Sang Defence with the Prosecution, the identity of intermediaries appears to have been requested only where an intermediary happens to be the person disbursing money to a witness.⁷² In the Ruto Defence's *inter partes* correspondence with the Prosecution, annexed to the Request, it is expressly stated that '[a]t this stage the Defence is not requesting disclosure of the identities of any of your intermediaries'.⁷³ The Chamber does not consider that the information before it at this stage is sufficient to render the identity of all intermediaries, in and of themselves,

⁶⁹ Request, ICC-01/09-01/11-855-Conf-Red, para.31(a).

⁷⁰ Banda & Jerbo AC Judgment, ICC-02/05-03/09-501, para.39.

⁷¹ Request, ICC-01/09-01/11-855-Conf-Red, para.23.

⁷² ICC-01/09-01/11-879-Conf, paras 8 and 10.

⁷³ Request, ICC-01/09-01/11-855-Conf-AnxC, p.3.

material, even on a *prima facie* assessment. It is nonetheless recognised that the identity of one or more Prosecution intermediaries may be, or become, material as a consequence of additional factors. These may potentially include, amongst other things, the provision of payments or benefits to a witness, or doubt being cast on the veracity of the testimony of one or more witnesses with whom an intermediary had significant contact. In such circumstances, determinations of materiality should normally be made on a case by case basis.

45. In the specific case of [REDACTED], where the Chamber finds that a *prima facie* case of materiality sufficient to warrant disclosure of identity may have been made, it is noted that the identity of this witness is already known to the Defence and therefore this category of the Request is moot in respect of him. However, in finding that a case of *prima facie* materiality has been established, the Chamber has noted the important role which this individual appears to have played [REDACTED].⁷⁴
46. In respect of the Ruto Defence's contention that the Redaction Protocol has already determined identifying information of Prosecution intermediaries to be *prima facie* material through requiring a pseudonym for the intermediaries,⁷⁵ the Chamber finds that there is a distinction to be made between having knowledge of (i) the existence or involvement of different intermediaries and their status as intermediaries – through, for example, the assignment of a specific redaction code and individual pseudonyms as provided for in the Redaction Protocol – and (ii) the *identity* of those intermediaries. Therefore, to the extent that this submission was made in support of disclosure of the identities of the intermediaries, the Chamber rejects it.

⁷⁴ Request, ICC-01/09-01/11-855-Conf-Red, Anx G.

⁷⁵ Request, ICC-01/09-01/11-855-Conf-Red, para.17.

47. Consequently, the Chamber finds the identity and affiliation of all Prosecution intermediaries not to be *prima facie* material to the preparation of the defence in this case at this time. Having so concluded, the Chamber does not need to proceed to the second step of the Rule 77 of the Rules analysis to determine whether the identity and affiliation of intermediaries falls within one, or more, of the restrictions on disclosure provided for in the Statute or Rules 81 and 82 of the Rules.

List of witnesses with whom each intermediary has had contact and for what purpose:⁷⁶

48. As discussed at paragraph 46 above, the existence of Prosecution intermediaries, and their status as such, warrants separate consideration from the question of their identity. As recognised by the Redaction Protocol,⁷⁷ knowledge of the existence of an intermediary, and their status as such, may in fact be material to defence investigations. For example, in combination with other information, knowledge of the involvement of an intermediary provides a context which could be used to guide certain lines of defence investigation. Similarly, the Chamber finds that knowing the number of witnesses with whom an intermediary had contact may provide an important context to the assessment of the testimony of those witnesses.

49. Therefore, the Chamber finds that a list of all Prosecution intermediaries, to be identified by pseudonym, who had contact with trial witnesses in this case and indicating for each intermediary the trial witness(es) with whom they had contact, is of *prima facie* materiality to the preparation of the defence in this case.

⁷⁶ Request, ICC-01/09-01/11-855-Conf-Red, para.31 (b).

⁷⁷ ICC-01/09-01/11-458-AnxA-Corr, para.40.

50. Furthermore, in respect of the request for information concerning the purpose of the contact between the intermediary and the witness, the Chamber finds that an understanding of the general purpose, or purposes, for which such contact was made – whether in order to facilitate an introduction, obtain information, provide protective assistance or otherwise – is similarly material to the preparation of the defence. In particular, such information could significantly assist in narrowing down the lines of inquiry to be pursued.

51. Having found the requested information to be *prima facie* material to the preparation of the defence, it is necessary to proceed to the second step of the Rule 77 of the Rules analysis as set out by the Appeals Chamber. The Chamber notes that the Prosecution made general arguments regarding the security and operational risks surrounding disclosure of the identity and *activities* of intermediaries.⁷⁸ However, the Chamber notes that the Prosecution has already disclosed certain information of a similar nature to the information sought in this part of the Request.⁷⁹ The Chamber considers that the information as specified in the preceding paragraphs should be disclosed. Nonetheless, if the Prosecution believes that the requested information cannot be safely disclosed without protective measures it is invited to present any specific request it deems necessary in that regard.

Schedule of intermediary/witness contacts (including date, location, persons present, topics discussed):⁸⁰

52. The Chamber considers that, in respect of the date of contacts between Prosecution intermediaries and witnesses, similar considerations apply as were discussed in relation to the immediately preceding category of requested information. For example,

⁷⁸ Prosecution Response, ICC-01/09-01/11-885-Conf, para.12.

⁷⁹ Prosecution Response, ICC-01/09-01/11-885-Conf, para.14.

⁸⁰ Request, ICC-01/09-01/11-855-Conf-Red, para.31 (c).

the dates of contact - particularly where an intermediary has had contact with more than one witness - may reveal a pattern which would prompt certain lines of defence inquiry. The Chamber therefore finds that, to the extent that such information is in the possession or control of the Prosecution, it is *prima facie* material to the preparation of the defence.

53. Having made this finding, it is necessary to proceed to the second step of the analysis under Rule 77 of the Rules as set out by the Appeals Chamber. On the basis of the information before it, the Chamber does not see obvious grounds for the granting of such protection under the relevant provisions. However, if, for some reason, the Prosecution believes that any of the requested information cannot be safely disclosed without protective measures it is invited to present any specific request it deems necessary in that regard.
54. The Ruto Defence further requested details of the location of meetings between intermediaries and witnesses and of any other individuals present. To the extent such request is made in respect of all Prosecution intermediaries, the Chamber is unable to see the materiality on the information before it at this stage of the case and notes neither the Ruto Defence nor the Sang Defence provided any explanation in their submissions sufficient to justify such a request. However, there may be instances in which such information becomes material in relation to individual intermediaries upon some further showing.
55. In respect of [REDACTED], as discussed above, *prima facie* materiality of his identity has been established. The Chamber considers that the same reasons as discussed in paragraph 45 above also establish sufficient materiality to justify disclosure of the location of [REDACTED] meetings with all other Prosecution trial witnesses and the names of other persons present at such meetings.

56. Having made this finding it is necessary to turn to the second step of the analysis under Rule 77 of the Rules as set out by the Appeals Chamber. Accordingly, the Prosecution is invited to submit any request for protective measures it deems necessary in respect of the information to be disclosed.

57. In relation to the request for information regarding the topic discussed between the intermediary and the witness, the Chamber considers this to be duplicative with the request for the purpose of contact between an intermediary and witness as discussed above.

Schedule of assistance (financial or otherwise) and/or protective measures provided, directly or indirectly, to any witness by an intermediary:⁸¹

58. The Chamber notes the extensive submissions made by each party on this issue. In particular, that the Prosecution (i) provides an explanation which confirms that [REDACTED] was requested to take certain preventative protective measures to ensure the safety of certain other witnesses; and (ii) acknowledges [REDACTED], while neither confirming nor denying whether they have been utilised in this case.

59. The Chamber finds it pertinent to recall that only *prima facie* materiality is required to be shown by the Defence. The Chamber considers that it is not necessary for any showing of malfeasance in order to make a determination of materiality in respect of payments and benefits paid to witnesses. In the Chamber's view, benefits, payments or other assistance provided to a witness, in connection with their status as such, are *prima facie* material to preparation of the defence case as they could, amongst other things, go to the credibility of the witness.

⁸¹ Request, ICC-01/09-01/11-855-Conf-Red, para.31(d).

60. Furthermore, the Chamber considers that the materiality of the information occurs whether the benefit or assistance was provided by or on behalf of the Prosecution, an intermediary or any other third party. The Chamber recalls that practical or logistical burdens in reviewing databases to extract such information have no bearing upon the determination of the materiality of the information for the purposes of a Rule 77 of the Rules.⁸²
61. Accordingly, the Chamber finds that the payment or provision of any assistance - financial or otherwise, including protective measures –to a witness in connection with his/her status as such, whether before the Court or in a related investigatory proceeding or before a domestic judicial body, falls within the disclosure obligations of the Prosecution under Rule 77 of the Rules, where such information is in the possession or control of the Prosecution. The general type of the benefit or assistance, together with its approximate value, where calculable, should also be provided. In confining disclosure to that information which is within the possession or control of the Prosecution, the Chamber recalls the ongoing obligations of the Prosecution under Article 54(1)(a) of the Statute with respect to the equal investigation of incriminating and exonerating circumstances.
62. The Sang Defence requested additional related information, specifically the identity of the disbursing individual/entity and copies of receipts.⁸³ In respect of the receipts, and flowing from the finding above of the materiality of payments, the Chamber considers that *prima facie* materiality has been established. For example, the mere presence or absence of a receipt may, in certain circumstances, aid in evaluating whether there was any irregularity in respect of a particular payment.

⁸² Banda & Jerbo AC Judgment, ICC-02/05-03/09-501, para.37.

⁸³ ICC-01/09-01/11-879-Conf, para.10.

63. However, in respect of the identity of the disbursing individual/entity, the Chamber considers that although the category of the entity/individual making the disbursement (i.e. Prosecution, intermediary, third party) is of *prima facie* materiality in all cases, the assessment of materiality in respect of their specific identity should only be made on a case by case basis. In that regard, in relation to [REDACTED], and relying on the reasoning provided at paragraph 45 above, the Chamber finds that *prima facie* materiality has been established and therefore orders the disclosure of the identity of [REDACTED] in respect of his involvement in the provision of any payments or benefits to witnesses.

64. Having found certain of the requested information to be of *prima facie* materiality to the preparation of the defence, the Chamber must now proceed to the second step of the analysis of Rule 77 of the Rules as set out by the Appeals Chamber. The Chamber notes the Prosecution's submission that certain of the information may have a 'direct bearing' on the safety of witnesses.⁸⁴ However, this does not provide sufficient information for the Chamber to make an informed decision. The Prosecution is therefore invited to submit any requests for protection it deems necessary in this regard.

Copies of all correspondence between the Prosecution and any intermediaries:⁸⁵

65. The Chamber does not consider that materiality has been established for this category of information and that, in fact, neither Defence submission addressed the category in any specific detail. The Chamber sees no reason, even at the low threshold of materiality, why such information consisting of correspondence between the

⁸⁴ Prosecution Response, ICC-01/09-01/11-885-Conf, para.33.

⁸⁵ Request, ICC-01/09-01/11-855-Conf-Red, para.31(e).

Prosecution and the intermediaries, and to which the witnesses would not have been party, would fall within Rule 77 of the Rules in this case.

66. However, to the extent that such correspondence relates to the provision of payments or benefits to a Prosecution trial witness, the Chamber finds such material to be *prima facie* material and consequently orders its disclosure.
67. In respect of [REDACTED], and for the same reasons as discussed at paragraph 45 above, the Chamber finds that a *prima facie* case of materiality has been established and consequently orders disclosure of copies of all correspondence between the Prosecution and [REDACTED].
68. Having made such findings it is necessary to proceed to the second step of the analysis under Rule 77 of the Rules as set out by the Appeals Chamber and consider whether the information falls within one of the restrictions on disclosure provided for in the Statute or Rules 81 or 82 of the Rules. Accordingly, the Prosecution is invited to make any request for protective measures which it deems necessary in respect of the information to be disclosed.

v) Reclassification Request

69. Pursuant to Regulation 23bis of the Regulations of the Court, the Chamber, noting that none of the information which was subject to redaction in the original Request is repeated in the Prosecution's response,⁸⁶ save for a reference to a confidential Defence and Prosecution only filing, considers that no confidential information would be endangered by the reclassification of the Prosecution's response as requested.⁸⁷

⁸⁶ Prosecution Response, ICC-01/09-01/11-885-Conf.

⁸⁷ Prosecution Response, ICC-01/09-01/11-885-Conf, para.2.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

ORDERS the Prosecution, pursuant to Rule 77 of the Rules to disclose confidentially to both the Ruto Defence and Sang Defence the following information to the extent it is within the possession or control of the Prosecution:

- (a) a list of all Prosecution intermediaries, to be identified only by way of a pseudonym, who had contact with any Prosecution trial witness in this case, showing each of the witnesses with whom the intermediary had contact, the date of each contact and a brief description of the general purpose, or purposes, of the contact;
- (b) a schedule of all payments, benefits or assistance – financial or otherwise, including protective measures – provided to a witness in connection with his/her status as such, whether before the Court or a related investigation/domestic judicial procedure, together with a categorisation of the general type of benefit provided, its approximate value, where calculable, a copy of the receipt, where available, and a categorisation as to whether it was made by or on behalf of the Prosecution, an intermediary or some other third party;
- (c) in respect of [REDACTED], his identity should be specified when providing any information relating to him pursuant to (a) or (b) above, together with the location of any meeting between [REDACTED] and other Prosecution trial witnesses and the identity of any other person(s) present at such meetings;
- (d) copies of all correspondence between the Prosecution and an intermediary relating to the provision of any payment or benefit to a Prosecution trial witness; and
- (e) copies of all correspondence between the Prosecution and [REDACTED].


DISMISSES the remainder of the Request;

ORDERS the Prosecution to file, in consultation with the VWU, any requests for protective measures in respect of the information to be disclosed pursuant to this decision within 14 days of the date of this decision;

ORDERS the Registry to reclassify the Prosecution Response as 'confidential', available to all parties and participants; and

DISMISSES all other requests.


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



Judge Chile Eboe-Osuji
(Presiding)



Judge Olga Herrera Carbuca



Judge Robert Fremr

Dated 4 September 2013

At The Hague, The Netherlands