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TRIAL CHAMBER V(A)

Before: Judge, Chile Eboe-Osuji, Presiding
Judge Olga Herrera Carbuca
Judge Robert Fremr

SITUATION IN THE REPUBLIC OF KENYA

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

Public redacted version of

**Decision on Prosecution's Request for Redaction, Non-disclosure and Delayed
Disclosure of Documents Emanating from the Article 70 Investigation**

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

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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 regard to Articles 64 and 70 of the Rome Statute (the ‘Statute’) and Rules 77 and 81 of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘Decision on Prosecution’s Request for Redaction, Non-disclosure and Delayed Disclosure of Documents Emanating from the Article 70 Investigation’.

I. Procedural history and relief sought

1. On 27 September 2012, the Chamber issued its ‘Decision on the protocol establishing a redaction regime’ (the ‘Redaction Decision’) which annexed a protocol setting out a streamlined procedure for redaction to materials subject to disclosure (‘Redaction Protocol’).¹ The Redaction Protocol pre-approves certain redaction categories and sets out a procedure for case-by-case authorisations that do not fall within such categories.
2. On 28 February 2014, the Chamber rendered an oral decision on a Prosecution application to redact certain statements of two witnesses taken in the context of a broader investigation for offences under Article 70 of the Statute (the ‘Article 70 Investigation’).² The Prosecution had submitted that these statements contain certain disclosable material, but that extensive redaction was necessary pursuant to Rule 81(2) and (4) of the Rules.³ In its decision concerning redaction pursuant to Rule 81(2), the Chamber considered that: (i) the statements at issue may be relevant to the credibility of the two witnesses or to the broader allegations of witness intimidation which had been raised repeatedly by both parties in this

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

² Transcript of Hearing, 28 February 2014, ICC-01/09-01/11-T-97-CONF-ENG, page 2 line 5 to page 4 line 24.

³ See Prosecution’s sixth application pursuant to Regulation 35(2) of the Regulations of the Court and request for redactions, 26 February 2014, ICC-01/09-01/11-1191-Conf-Red (with two confidential *ex parte* annexes; confidential *ex parte* version of main filing notified same day).

trial⁴ and (ii) the narrative explaining the details of the alleged interference was sufficiently important that the only justifiable redaction to these statements would be the identifying and contact information of the persons who are the subjects of the Article 70 Investigation ('Article 70 Information').⁵

3. After the hearing on 28 February 2014, the Prosecution sent the Chamber an email requesting, in relevant part, clarification as to whether 'all statements taken from trial witnesses in relation to security incidents and hence containing a "narrative explaining the details of ... alleged interference" are regarded as disclosable for this reason alone.'⁶ The Chamber responded that '[f]or all other statements of Prosecution witnesses relating to security incidents which have not yet been disclosed, the Prosecution is directed to file an application setting out its position on the disclosability of these documents and, if the documents are deemed disclosable, any requested redactions.'⁷
4. On 9 May 2014, after conducting a review of the materials gathered in the context of the Article 70 Investigation,⁸ the Prosecution filed the 'Prosecution's request for redactions, non-disclosure and delayed disclosure of documents emanating from the Article 70 investigation' (the 'Request').⁹ The Prosecution identifies the information from its witnesses which was obtained in the context of the Article 70

⁴ Transcript of Hearing, ICC-01/09-01/11-T-97-CONF-ENG, page 3 lines 15-18.

⁵ Transcript of Hearing, ICC-01/09-01/11-T-97-CONF-ENG, page 3 lines 19-22. See also Transcript of Hearing, 4 March 2014, ICC-01/09-01/11-T-98-CONF-ENG, page 28 line 3 to page 30 line 9 (ordering that pseudonyms be assigned to correspond to the redacted sources); Transcript of Hearing, 5 March 2014, ICC-01/09-01/11-T-99-CONF-ENG, page 44 line 19 to page 46 line 13 (encouraging the Prosecution to prepare a code sheet which will track the real names to the pseudonyms so that, when testifying, the witness would not reveal the names of redacted persons).

⁶ Email communication from the Prosecution to the Chamber on 28 February 2014 at 14:47 (emphasis removed).

⁷ Email communication from a Legal Officer of the Trial Chamber to the Prosecution on 28 February 2014 at 16:49 (email disclosed to the Ruto Defence and Sang Defence on 31 March 2014).

⁸ For the communications between the Chamber and Prosecution during the course of this review, see Email communication from a Legal Officer of the Trial Chamber to the Parties on 31 March 2014 at 18:17; Email communication from the Prosecution to the Chamber on 1 April 2014 at 12:57; Email communication from a Legal Officer of the Trial Chamber to the Parties on 3 April 2014 at 12:46; Email communication from a Legal Officer of the Trial Chamber to the Parties on 9 April 2014 at 19:15; Transcript of Hearing, 11 April 2014, ICC-01/09-01/11-T-111-CONF-EXP-ENG.

⁹ ICC-01/09-01/11-1299-Conf-Corr-Red2 (with 27 confidential *ex parte* annexes; all confidential *ex parte* and confidential redacted versions of the main filing, including corrigenda, were notified on 12 May 2014).

Investigation and not already disclosed to the defence teams for Mr Ruto and Mr Sang (the 'Ruto Defence' and 'Sang Defence', respectively; collectively, the 'Defence').¹⁰

5. The Prosecution originally requested the Chamber's authorisation to: (i) maintain redaction, pursuant to Rule 81(2) and (4) of the Rules, for passages set out in Annex A of the Request which do not fall under the pre-approved categories of the Redaction Protocol; (ii) not disclose the materials appended in Annex C of the Request pursuant to Rule 81(2) of the Rules, and (iii) disclose certain items at a later stage.¹¹
6. On 28 May 2014, the Prosecution notified the Chamber that it had withdrawn the relief sought in the Request with respect to non-disclosure of materials in Annex C and maintaining the B.3 redaction stipulated in pages 2-4 of Annex B of the Request.¹²
7. On 2 June 2014, the Ruto Defence filed its response to the Request (the 'Ruto Defence Response').¹³ The Ruto Defence requests that: (i) save in respect of the redaction to 'the identity of the subjects of the Article 70 investigation,' the relief sought in the Request should be dismissed¹⁴ and (ii) the Prosecution be ordered to use all efforts to provide the Defence with the items subject to the request for

¹⁰ Annexes A2 to A23 of the Request.

¹¹ Request, ICC-01/09-01/11-1299-Conf-Corr-Red2, para. 29.

¹² Prosecution's withdrawal of request for non-disclosure and notification of disclosure of Witness 534's identity, 28 May 2014, ICC-01/09-01/11-1319-Conf-Red (notified on 30 May 2014; confidential redacted version notified on 18 June 2014).

¹³ Defence response to "Prosecution's request for redactions, non-disclosure and delayed disclosure of documents emanating from the Article 70 investigation", 2 June 2014, ICC-01/09-01/11-1329-Conf (with one confidential annex).

¹⁴ Ruto Defence Response, ICC-01/09-01/11-1329-Conf, para. 21.

delayed disclosure as soon as possible.¹⁵ The Ruto Defence also requests an urgent determination of the Request.¹⁶

8. Also on 2 June 2014, the Sang Defence filed its response to the Request (the ‘Sang Defence Response’).¹⁷ The Sang Defence concludes that the extent and duration of the requested redaction are not tenable, and that much of the information should have been disclosed at a much earlier stage in the trial process.¹⁸ The Sang Defence submits that the Chamber should therefore reject the relief sought in the Request or, alternatively, ensure that any redaction or delayed disclosures be strictly limited so as to lessen the prejudice to the Defence.¹⁹
9. On 13 June 2014, the Chamber issued a decision regarding disclosure of [REDACTED] statements. These statements are covered by the relief sought in the Request. The Chamber decided, *inter alia*, that the only redaction allowed in [REDACTED] statements is for pre-approved categories of the Redaction Protocol and the identity of the subjects of any Article 70 information.²⁰ The Chamber also decided by majority, Judge Eboe-Osuji dissenting, that the Prosecution must

¹⁵ Ruto Defence Response, ICC-01/09-01/11-1329-Conf, para. 21.

¹⁶ Ruto Defence Response, ICC-01/09-01/11-1329-Conf, para. 22.

¹⁷ Sang Defence Response to Prosecution’s Request for Redactions, Non-Disclosure and Delayed Disclosure of Documents Emanating from the Article 70 Investigation, 2 June 2014, ICC-01/09-01/11-1330-Conf.

¹⁸ Sang Defence Response, ICC-01/09-01/11-1330-Conf, para. 27.

¹⁹ Sang Defence Response, ICC-01/09-01/11-1330-Conf, para. 27.

²⁰ Final Direction on the Prosecution’s Request for Guidance on Disclosure Relating to P-0534, 13 June 2014, ICC-01/09-01/11-1364-Conf, para. 2(i), page 7 (with confidential annex). See also Prosecution’s update on P-0534 and request for guidance as to the disclosure of P-0534’s identity, 5 June 2014, ICC-01/09-01/11-1343-Conf-Red (with three confidential ex parte annexes; confidential redacted versions of filing and Annexes A and C notified on 18 June 2014); Provisional Direction on the Prosecution’s Request for Guidance on Disclosure Relating to P-0534, 10 June 2014, ICC-01/09-01/11-1351-Conf (with confidential annex containing partly dissenting opinion of Judge Eboe-Osuji; reclassified from confidential ex parte on 13 June 2014); Victims and Witnesses Unit’s observations pursuant to the “Provisional Direction on the Prosecution’s Request for Guidance on Disclosure Relating to P-0534” (ICC-01/09-01/11-1351-Conf-Exp), 11 June 2014, ICC-01/09-01/11-1357-Conf-Exp (with confidential ex parte annex); Prosecution’s submissions, as directed in Decision ICC-01/09-01-11-1351-Conf-Exp, 12 June 2014, ICC-01/09-01/11-1359-Conf-Exp.

disclose the identity of former Prosecution Witness 534 ('Former Witness 534').²¹

This person is [REDACTED].²²

II. Analysis

10. The Chamber recalls and incorporates by reference the requirements for restrictions to disclosure set out in the Redaction Decision.²³ The Chamber also recalls, pursuant to the Redaction Protocol, that the identifying information of persons covered by B.3 redaction was to be lifted 60 days before trial unless an altered disclosure deadline is justified by 'exceptional circumstances'.²⁴

11. The Chamber notes that the Prosecution is no longer seeking non-disclosure of any of the materials identified in the Request.²⁵ Accordingly, the Chamber will only consider the Prosecution's outstanding requests for redaction and delayed disclosure.

A. Redaction

1. *Submissions on the requested redaction*

12. The Prosecution seeks redaction of the Article 70 Information contained in the annexes to the Request, as well as some limited redaction of the identifying information of third parties where the Prosecution has deemed there to be no other alternative but redaction in order to alleviate risk to the safety and security

²¹ ICC-01/09-01/11-1364-Conf, para. 2(i), page 7.

²² See ICC-01/09-01/11-1364-Conf, para. 2(i), para. 1.

²³ Redaction Decision, ICC-01/09-01/11-458, para. 11.

²⁴ Redaction Decision, ICC-01/09-01/11-458, para. 30.

²⁵ ICC-01/09-01/11-1319-Conf-Red. See also Annex A of the Prosecution's Communication of the Disclosure of Evidence, 3 June 2014, ICC-01/09-01/11-1336-Conf-AnxA.

of those persons.²⁶ As regards the B.3 redaction requested, the Prosecution submits that it justifies this redaction in Annex B of the Request.²⁷

13. The Ruto Defence does not oppose the application of redaction to Article 70 Information, while reserving the right to apply to lift redaction in the future.²⁸
14. The Ruto Defence opposes the Prosecution's request to redact information of third parties contained in the materials.²⁹ Relying on the Redaction Protocol, it submits that the 'general approach' to such information is that it should be disclosed before the start of trial.³⁰ The Ruto Defence challenges whether the Prosecution has satisfied the requirements in the Redaction Decision with respect to this information.³¹
15. The Sang Defence argues that the Chamber should not grant the relief sought by the Prosecution, but should instead order the complete disclosure of all disclosable materials.³²
16. As regards Article 70 Information, the Sang Defence submits that redaction should not be applied for anyone whose name has already been disclosed to the Defence as having been implicated in the Article 70 Investigation.³³ The Sang Defence argues that the stated purpose for confidentiality of this sub-set of Article 70 Information 'no longer exists.'³⁴ The Sang Defence also argues that, to the extent that the Prosecution's own trial witnesses are the targets of Article 70

²⁶ Request, ICC-01/09-01/11-1299-Conf-Corr-Red2, para. 3.

²⁷ Request, ICC-01/09-01/11-1299-Conf-Corr-Red2, para. 3; Annex B of the Request, ICC-01/09-01/11-1299-Conf-Exp-AnxB.

²⁸ Ruto Defence Response, ICC-01/09-01/11-1329-Conf, paras 3-4.

²⁹ Ruto Defence Response, ICC-01/09-01/11-1329-Conf, paras 2, 5-11.

³⁰ Ruto Defence Response, ICC-01/09-01/11-1329-Conf, para. 5.

³¹ Ruto Defence Response, ICC-01/09-01/11-1329-Conf, paras 9-10 (no objectively justifiable risk arising from disclosure to Defence), 11 (non-disclosure would be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial and no less restrictive protective measures can mitigate this prejudice).

³² Sang Defence Response, ICC-01/09-01/11-1330-Conf, para. 2.

³³ Sang Defence Response, ICC-01/09-01/11-1330-Conf, paras 15-16.

³⁴ Sang Defence Response, ICC-01/09-01/11-1330-Conf, para. 16.

investigations, the significance of this information necessitates a finding that the prejudice of non-disclosure to the Defence outweighs the Prosecution's need to protect its ongoing investigations.³⁵

17. As regards the requested B.3 redaction, the Sang Defence argues that the Prosecution is seeking to maintain redaction 'well beyond the prescribed period' and relies on the Chamber to ensure that the criteria in the Redaction Decision are met.³⁶

18. Though not in its relief sought, the Sang Defence also requests that, where redaction to the names of individuals are authorised or ordered by the Chamber, the Prosecution should be required to include consistent pseudonyms throughout the statements to assist the Defence in understanding the information provided.³⁷

2. General considerations related to the requested redaction

19. Before commencing with the individualised assessments of the requested redaction, the Chamber provides some general considerations which underlie its reasoning.

a) First general consideration

20. First, the Chamber has not ruled upon any redaction to information which is subject to ongoing redaction in the Redaction Protocol. The Chamber notes that both the Ruto and Sang Defence contest the Prosecution's proposed B.3 redaction on grounds that this redaction should have been lifted before the start of trial. However, the B.3 redaction lifted before the start of trial only concerns the

³⁵ Sang Defence Response, ICC-01/09-01/11-1330-Conf, para. 17.

³⁶ Sang Defence Response, ICC-01/09-01/11-1330-Conf, paras 18-20.

³⁷ Sang Defence Response, ICC-01/09-01/11-1330-Conf, para. 13.

identifying information of the persons concerned.³⁸ The *contact* information of the persons concerned is also coded as B.3 redaction under the Redaction Protocol, but this redaction would ordinarily be ongoing.³⁹

21. The Chamber therefore understands the Defence to only be contesting the information covered by redaction which they would ordinarily have received before the start of trial. Should the Defence wish to contest any ongoing redaction, they are to clearly set out their prayer for relief in a separate application.
22. Relatedly, the Chamber notes that the Prosecution has also applied some B.1 redaction in their annexes. The general rule is that identifying information in this redaction is to be lifted in accordance with the procedure provided for in the Redaction Protocol.⁴⁰ However, in the present case, the Chamber considers that B.1 redaction related to recent contact information may be considered as ongoing. This information is generally irrelevant to the Defence because they are not allowed to directly contact Prosecution witnesses.⁴¹ The Chamber emphasises that this consideration applies to information which is *only* relevant to the witness's recent whereabouts and contacts.

b) Second general consideration

23. Second, the Chamber will, in principle, allow the Prosecution to redact Article 70 Information so long as the Article 70 Investigation can reasonably be said to be ongoing. The Chamber has authorised redaction to similar information in previous decisions.⁴² On the basis of the information provided, the Chamber is

³⁸ Redaction Protocol, ICC-01/09-01/11-458-AnxA-Corr, para. 58.

³⁹ Redaction Protocol, ICC-01/09-01/11-458-AnxA-Corr, para. 58.

⁴⁰ Redaction Protocol, ICC-01/09-01/11-458-AnxA-Corr, paras 50-54.

⁴¹ See Annex to Decision on the protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call, 24 August 2012, ICC-01/09-01/11-449-Anx.

⁴² ICC-01/09-01/11-1364-Conf, para. 2(i), page 7; Transcript of Hearing, ICC-01/09-01/11-T-97-CONF-ENG, page 3 lines 19-22.

satisfied, at least at this time, that: (i) disclosing Article 70 Information may prejudice further or ongoing investigations; (ii) this risk arises from disclosing the particular information to the Defence and (iii) no measures short of redaction can feasibly address this risk. As such, the Chamber will only order disclosure of Article 70 Information when its redaction would be 'prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial'.

24. The Chamber is only partially persuaded by the Sang Defence's arguments regarding redaction to Article 70 Information of certain persons already known to the Defence. Even if the Prosecution seeks to redact identifying information of persons who the Defence knows are implicated in the Article 70 Investigation, the Prosecution's ongoing investigations may still be significantly prejudiced if it is required to reveal further or other particulars otherwise deserving of non-disclosure. Such information should remain redacted, until otherwise ordered.
25. Although the same prejudice applies to investigations into the Prosecution's own witnesses, information on Prosecution witnesses committing offences under Article 70 of the Statute ('Article 70 Offences') may affect the credibility of Prosecution evidence. Such information potentially falls under Article 67(2) of the Statute,⁴³ and redaction to this information may be more prejudicial.
26. In order to balance the effective Article 70 investigation of Prosecution witnesses with the rights of the accused, the Chamber adopts the following procedure. If the Prosecution witness in question has not yet testified, the Prosecution is directed to lift this redaction 45 days before the anticipated start of the witness's testimony. If the Prosecution witness in question has already testified, or is anticipated to start testifying in less than 45 days, then the Prosecution is to immediately make a

⁴³ Article 67(2) provides, in relevant part: 'In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which [...] may affect the credibility of prosecution evidence.'

filing isolating the Article 70 Information at issue and seeking a specific ruling from the Chamber.

c) Third general consideration

27. Third, and as the Chamber has ordered previously,⁴⁴ the Prosecution is directed to assign pseudonyms and prepare an accompanying code sheet for the redacted Article 70 Information.

d) Fourth general consideration - obligation to review redacted material

28. Fourth, the Prosecution shall review authorised redaction on an on-going basis to see if and when they can be lifted and the material fully disclosed to the Defence.⁴⁵ The Defence retains the right to contest specific redaction in the usual manner based on information available to them.⁴⁶

3. Assessment of the requested redaction

29. Bearing these general considerations in mind, the Chamber now turns to the redaction at issue in the Request. The Chamber notes that, as regards [REDACTED], it has already ruled on the redaction contained in [REDACTED] statements.⁴⁷ The Chamber's ruling is limited to the remaining statements.

30. The Chamber considers that much of the Prosecution's proposed redaction is acceptable. This redaction falls within the general considerations identified

⁴⁴ ICC-01/09-01/11-1364-Conf, para. 9.

⁴⁵ Redaction Protocol, ICC-01/09-01/11-458-AnxA-Corr, para. 14.

⁴⁶ Redaction Decision, ICC-01/09-01/11-458, para. 15.

⁴⁷ See ICC-01/09-01/11-1364-Conf. [REDACTED] statements annexed to the Request can be found at ICC-01/09-01/11-1299-Conf-Exp-AnxA10 (KEN-OTP-0102-0178, KEN-OTP-0106-0248, KEN-OTP-0106-0910, KEN-OTP-0106-0922, KEN-OTP-0107-0288, KEN-OTP-0111-0162, KEN-OTP-0111-0557, KEN-OTP-0115-0218, KEN-OTP-0117-0897, KEN-OTP-0117-0901, KEN-OTP-0117-0903, KEN-OTP-0117-0905, KEN-OTP-0117-0908, KEN-OTP-0117-0915, KEN-OTP-0117-0918, KEN-OTP-0117-0930, KEN-OTP-0117-0931, KEN-OTP-0118-0137, KEN-OTP-0124-0007, KEN-OTP-0124-0394, KEN-OTP-0129-0294, KEN-OTP-0129-0297, KEN-OTP-0129-0299) and ICC-01/09-01/11-1299-Conf-Exp-AnxC1.

above⁴⁸ and is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. The Chamber accepts the Prosecution's redaction proposed in the annexes related to: (i) Witness 15;⁴⁹ (ii) Witness 19;⁵⁰ (iii) Witness 24;⁵¹ (iv) Witness 25;⁵² (v) Witness 128;⁵³ (vi) Witness 376;⁵⁴ (vii) Witness 405;⁵⁵ (viii) Witness 423;⁵⁶ (ix) Witness 495;⁵⁷ (x) Witness 508;⁵⁸ (xi) Witness 516⁵⁹ and (xii) Witness 604.⁶⁰

31. For the remaining redaction in the annexes, the Chamber accepts most of them as proposed on the same basis. However, certain redaction was not accepted as proposed for the reasons outlined below:

- (i) Witness 16.⁶¹ There is a B.3 redaction on page 10 of the annex⁶² which is not justified in Annex B of the Request. However, the Chamber considers that this same redaction would be justifiable as a redaction to Article 70 Information, as this B.3 redaction is inextricably linked to this information. As such, the Prosecution may maintain this redaction on this basis.

⁴⁸ Supra, paras 19-28.

⁴⁹ Annex A2 of the Request, ICC-01/09-01/11-1299-Conf-Exp-AnxA2 (KEN-OTP-0129-0564).

⁵⁰ Annex A4 of the Request, ICC-01/09-01/11-1299-Conf-Exp-AnxA4 (KEN-OTP-0129-0346).

⁵¹ Annex A5 of the Request, ICC-01/09-01/11-1299-Conf-Exp-AnxA5 (KEN-OTP-0129-0581; KEN-OTP-0130-0143).

⁵² Annex A6 of the Request, ICC-01/09-01/11-1299-Conf-Exp-AnxA6 (KEN-OTP-0129-0605, KEN-OTP-0129-0695, KEN-OTP-0130-0441).

⁵³ Annex A8 of the Request, ICC-01/09-01/11-1299-Conf-Exp-AnxA8 (KEN-OTP-0111-0583).

⁵⁴ Annex A14 of the Request, ICC-01/09-01/11-1299-Conf-Exp-AnxA14 (KEN-OTP-0123-0304; KEN-OTP-0130-0021).

⁵⁵ Annex A15 of the Request, ICC-01/09-01/11-1299-Conf-Exp-AnxA15 (KEN-OTP-0129-0518).

⁵⁶ Annex A17 of the Request, ICC-01/09-01/11-1299-Conf-Exp-AnxA17 (KEN-OTP-0114-0080).

⁵⁷ Annex A20 of the Request, ICC-01/09-01/11-1299-Conf-Exp-AnxA20 (KEN-OTP-0116-0706).

⁵⁸ Annex A21 of the Request, ICC-01/09-01/11-1299-Conf-Exp-AnxA21 (KEN-OTP-0088-0568).

⁵⁹ Annex A22 of the Request, ICC-01/09-01/11-1299-Conf-Exp-AnxA22 (KEN-OTP-0117-0905, KEN-OTP-0129-0324).

⁶⁰ Annex A23 of the Request, ICC-01/09-01/11-1299-Conf-Exp-AnxA23 (KEN-OTP-0117-1019, KEN-OTP-0117-1059, KEN-OTP-0117-1060, KEN-OTP-0117-1062, KEN-OTP-0119-0386, KEN-OTP-0129-0326, KEN-OTP-0129-0328, KEN-OTP-0129-0414).

⁶¹ Annex A3 of the Request, ICC-01/09-01/11-1299-Conf-Exp-AnxA3 (KEN-OTP-0087-0098, KEN-OTP-0103-3412, KEN-OTP-0129-0524, KEN-OTP-0129-0525).

⁶² KEN-OTP-0129-0525.

- (ii) Witness 28.⁶³ There are two B.3 redacted passages on page 4 of the annex⁶⁴ which are not justified in Annex B of the Request. The Chamber does not consider there to be any objectively justified risk to revealing the identity of this person to the Defence and rejects this redaction.⁶⁵
- (iii) Witness 189.⁶⁶ There are several B.3 redacted passages on page 10 of the annex⁶⁷ which the Chamber considers to include both identifying and contact information. Redaction to the identifying information on this page is not justified in Annex B of the Request, and the Chamber does not consider there to be any objectively justified risk to revealing this identifying information to the Defence. The Prosecution is directed to prepare a lesser redacted version of this document, lifting all identifying information covered by this B.3 redaction on page 10, and disclose it to the Defence.
- (iv) Witness 268.⁶⁸ There are several B.1 redacted passages on pages 7 and 10 of the annex⁶⁹ which are not justified by the Prosecution in the Request. The Chamber does not consider there to be any objectively justified risk to revealing this information and rejects this redaction.
- (v) Witness 336:⁷⁰

⁶³ Annex A7 of the Request, ICC-01/09-01/11-1299-Conf-Exp-AnxA7 (KEN-OTP-0105-0088).

⁶⁴ KEN-OTP-0105-0088, 0090.

⁶⁵ Since the date of the Request, the redacted person's name has in fact already been provided to the Defence in other contexts. See Decision on the Sang Defence Application to Lift B.3 Redactions and for Additional Disclosure, 7 July 2014, ICC-01/09-01/11-1421-Conf; Decision on the Defence applications to lift B3 redactions, 20 May 2014, ICC-01/09-01/11-1310-Conf-Red (confidential *ex parte* version filed same day).

⁶⁶ Annex A9 of the Request, ICC-01/09-01/11-1299-Conf-Exp-AnxA9 (KEN-OTP-0111-0214, KEN-OTP-0129-0374, KEN-OTP-0129-0379, KEN-OTP-0129-0383).

⁶⁷ KEN-OTP-0129-0379, 0380.

⁶⁸ Annex A11 of the Request, ICC-01/09-01/11-1299-Conf-Exp-AnxA11 (KEN-OTP-0129-0310, KEN-OTP-0129-0312, KEN-OTP-0129-0314, KEN-OTP-0129-0317).

⁶⁹ KEN-OTP-0129-0314, 0315; KEN-OTP-0129-0317, 0318.

⁷⁰ Annex A12 of the Request, ICC-01/09-01/11-1299-Conf-Exp-AnxA12 (KEN-OTP-0100-0339, KEN-OTP-0102-0205, KEN-OTP-0102-0217, KEN-OTP-0103-2473, KEN-OTP-0103-3498, KEN-OTP-0106-0388, KEN-OTP-0109-

- The B.3 redacted passages in page 12 of this annex relate to Former Witness 534.⁷¹ In view of the Chamber's previous decision,⁷² such redaction no longer serves any purpose and must be lifted.
 - There are two B.3 redacted passages concerning a name on page 20 of the annex⁷³ which are not justified in Annex B of the Request. The Chamber does not consider there to be any objectively justified risk to revealing the identity of this person and rejects this redaction.
 - There are two B.3 redacted passages on page 62 of the annex⁷⁴ which are not justified in Annex B of the Request. The Chamber does not consider there to be any objectively justified risk to revealing the identity of this person and rejects this redaction.
- (vi) Witness 356.⁷⁵ There are B.3 redacted passages to a person identified on pages 5 and 7 of the annex.⁷⁶ The Prosecution justifies this redaction on grounds that this person would be at risk if it were disclosed to the Defence that he had assisted the witness in the manner described.⁷⁷ The Chamber does not consider such generalised assistance to a Prosecution witness, without more, to constitute an 'objectively justified risk' which arises from disclosure to the Defence. This redaction is rejected, though the Prosecution is not required to reveal the internal work product surrounding the B.3 redaction on page 7 of the annex.

0002, KEN-OTP-0111-0140, KEN-OTP-0116-0479, KEN-OTP-0116-0482, KEN-OTP-0116-0489, KEN-OTP-0116-0495, KEN-OTP-0129-0573, KEN-OTP-0129-0698, KEN-OTP-0129-0699, KEN-OTP-0129-0701, KEN-OTP-0129-0702).

⁷¹ KEN-OTP-0102-0205, 0213.

⁷² ICC-01/09-01/11-1364-Conf.

⁷³ KEN-OTP-0103-2473, 2476.

⁷⁴ KEN-OTP-0116-0489.

⁷⁵ Annex A13 of the Request, ICC-01/09-01/11-1299-Conf-Exp-AnxA13 (KEN-OTP-0087-1239, KEN-OTP-0087-1249, KEN-OTP-0087-1251, KEN-OTP-0129-0357).

⁷⁶ KEN-OTP-0087-1249, KEN-OTP-0087-1251.

⁷⁷ Annex B of the Request, ICC-01/09-01/11-1299-Conf-Exp-AnxB, page 5.

(vii) Witness 409.⁷⁸ The Chamber considers that some of the B.3 redaction in this annex relates to contact information, and therefore may be made without the Chamber's authorisation. The Chamber notes that the Prosecution also justifies the B.3 redaction of the identity of a person who let Witness 409 live with him for a period in 2013.⁷⁹ The Chamber does not consider there to be any objectively justifiable risk to disclosing this person's identity to the Defence, but this same information can be considered as an ongoing B.1 redaction to contact information. As such, the Prosecution may maintain this redaction on this basis.

(viii) Witness 452.⁸⁰ There are several B.1 redacted passages on pages 7-8 of the annex⁸¹ which the Chamber considers to include both identifying and contact information. Redaction to the identifying information on these pages is not justified in Annex B of the Request, and the Chamber does not consider there to be any objectively justified risk to revealing this identifying information to the Defence. The Prosecution is directed to prepare a lesser redacted version of this document, lifting all identifying information covered by this B.1 redaction on pages 7-8, and disclose it to the Defence.

(ix) Witness 487.⁸²

⁷⁸ Annex A16 of the Request, ICC-01/09-01/11-1299-Conf-Exp-AnxA16 (KEN-OTP-0125-0788, KEN-OTP-0125-0801, KEN-OTP-0125-0802, KEN-OTP-0125-0805, KEN-OTP-0125-0806, KEN-OTP-0126-0149, KEN-OTP-0126-0156, KEN-OTP-0129-0386, KEN-OTP-0129-0388, KEN-OTP-0129-0390, KEN-OTP-0129-0392, KEN-OTP-0129-0401, KEN-OTP-0129-0402).

⁷⁹ Annex B of the Request, ICC-01/09-01/11-1299-Conf-Exp-AnxB, page 6 (KEN-OTP-0129-0390, KEN-OTP-0129-0392, KEN-OTP-0129-0393).

⁸⁰ Annex A18 of the Request, ICC-01/09-01/11-1299-Conf-Exp-AnxA18 (KEN-OTP-0111-0442, KEN-OTP-0130-0004).

⁸¹ KEN-OTP-0130-0004, 0006-0007.

⁸² Annex A19 of the Request, ICC-01/09-01/11-1299-Conf-Exp-AnxA19 (KEN-OTP-0103-3490, KEN-OTP-0130-0012, KEN-OTP-0130-0013, KEN-OTP-0130-0015, KEN-OTP-0130-0016).

- The Prosecution justifies the redaction of a doctor who gave medical assistance to the witness at a particular location; this name appears on page 3 of the annex.⁸³ The Chamber does not consider there to be any objectively justifiable risk to disclosing this person's identity to the Defence, but notes that this same information qualifies as an ongoing B.1 redaction to contact information. As such, the Prosecution may maintain this redaction.
- There are two B.3 redacted passages to a different person identified on page 3 of the annex.⁸⁴ The Prosecution justifies this redaction on grounds that this person would be at risk if it were disclosed to the defence that he had assisted the witness him.⁸⁵ The Chamber does not consider such generalised assistance to a Prosecution witness, without more, to constitute an 'objectively justified risk' to the person's security. This redaction is rejected.

32. There is also another person's statement annexed along with [REDACTED] statements.⁸⁶ This person is not a witness, and the Chamber does not consider that this statement contains any information which is material to the preparation of the defence. It is therefore not subject to disclosure and, as such, the Prosecution does not require the Chamber's authorisation to redact specific passages of this statement.

B. Delayed disclosure

1. Submissions on delayed disclosure

⁸³ KEN-OTP-0103-3490, 3491 (at para. 7).

⁸⁴ KEN-OTP-0103-3490, 3491 (at para. 8).

⁸⁵ Annex B of the Request, ICC-01/09-01/11-1299-Conf-Exp-AnxB, page 7.

⁸⁶ Annex A10 of the Request, ICC-01/09-01/11-1299-Conf-Exp-AnxA10, pages 125-26 (KEN-OTP-0129-0302).

33. The Prosecution requests delayed disclosure of two documents: (i) Annex C2 of the Request⁸⁷ and (ii) a two-page report (the 'Report') contained in Annex D of the Request.⁸⁸ The Prosecution had also requested delayed disclosure of several other items, but indicated that these remaining documents would be disclosed to the defence teams before 13 June 2014.⁸⁹

34. The Ruto Defence comments that it is unable to meaningfully respond to the Prosecution's delayed disclosure requests due to the redaction which has been applied,⁹⁰ but submits that: (i) these requests must be carefully scrutinised⁹¹ and (ii) the Prosecution's approach to redaction in other contexts is 'arbitrary and overly cautious.'⁹²

35. The Sang Defence submits that the Prosecution is in technical breach of its disclosure obligations, and that such disclosure should have been made much earlier.⁹³ Other than this submission, the Sang Defence 'awaits the imminent disclosure of these materials.'⁹⁴

2. Assessment of the requested delayed disclosure

36. The Chamber notes that the Prosecution's proposed 13 June 2014 deadline for most of its requested delayed disclosure has passed. As such, the only part of the relief sought which still requires a ruling concerns the two aforementioned items.

37. With respect to Annex C2 of the Request, the Prosecution acknowledges that the content of the transcripts of conversations in this annex 'may be necessary for

⁸⁷ Annex C2 of the Request, ICC-01/09-01/11-1299-Conf-Exp-AnxC2; ICC-01/09-01/11-1319-Conf-Exp, para. 10.

⁸⁸ Annex D of the Request, ICC-01/09-01/11-1299-Conf-Exp-AnxD, pages 6-7.

⁸⁹ See Annex D of the Request, ICC-01/09-01/11-1299-Conf-Exp-AnxD.

⁹⁰ Ruto Defence Response, ICC-01/09-01/11-1329-Conf, para. 12.

⁹¹ Ruto Defence Response, ICC-01/09-01/11-1329-Conf, para. 13.

⁹² Ruto Defence Response, ICC-01/09-01/11-1329-Conf, para. 14.

⁹³ Sang Defence Response, ICC-01/09-01/11-1330-Conf, paras 11-12, 25-26.

⁹⁴ Sang Defence Response, ICC-01/09-01/11-1330-Conf, para. 26.

Defence preparation before the appearance of P-0336 at trial.⁹⁵ The Prosecution's justifies delayed disclosure by noting that 'P-0336 is also subject to Summons and it is unlikely that he will be testifying in the near future and thus [the Prosecution] proposes to disclose the recordings related to P-0336 at a time closer to his testimony.'⁹⁶

38. The Chamber does not consider there to be an objective risk to Witness 336's security which arises from disclosure of these transcripts to the Defence, and notes that the Prosecution makes no submission that such a risk exists. The Chamber notes the Prosecution's concerns about not revealing certain details of its investigation.⁹⁷ However, these concerns can be addressed by alternative and less prejudicial measures, such as by redacting selected information from these transcripts.

39. The Chamber is therefore not satisfied that such justification warrants delayed disclosure of Annex C2 of the Request. The Prosecution's request in this respect is rejected, but, when disclosing this annex to the Defence, the Prosecution may apply redaction in line with the Redaction Protocol and the general considerations outlined in paragraphs 19-28 of the present decision.

40. With respect to the Report,⁹⁸ the Chamber considers that the threats identified in the Report are recent, specific and serious. The Chamber considers that there is an objectively justifiable risk to the safety of the witness concerned and that no measure short of delayed disclosure to the Defence sufficiently addresses this risk. The Chamber considers that the information contained in the Report is not relevant to the main issues in the present proceedings, meaning that delayed

⁹⁵ ICC-01/09-01/11-1319-Conf-Exp, para. 10.

⁹⁶ ICC-01/09-01/11-1319-Conf-Exp, para. 10.

⁹⁷ ICC-01/09-01/11-1319-Conf-Exp, para. 10.

⁹⁸ Annex D of the Request, ICC-01/09-01/11-1299-Conf-Exp-AnxD, pages 6-7.

disclosure will not cause undue prejudice to the rights of the accused or a fair and impartial trial.

41. Accordingly, the Prosecution is directed to disclose the Report 45 days before commencement of the testimony of the witness concerned.

42. As a result of its assessment, the Chamber partially grants the delayed disclosure sought in the Request. The Prosecution is to disclose the information referred to in paragraph 39 of the present decision forthwith, subject to the redaction indicated.

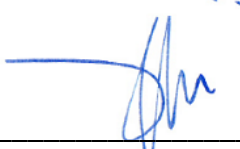
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

DIRECTS the Prosecution to follow the procedures set out in paragraphs 26 and 27 of the present decision for the approved redaction of Article 70 Information;

PARTIALLY GRANTS the relief sought in the Request, as set out in paragraphs 30-31 and 41 of the present decision; and

DISMISSES the remainder of the relief sought in the Request, as set out in paragraphs 31,⁹⁹ 36 and 39 of the present decision.

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



Judge Chile Eboe-Osuji, Presiding


Judge Olga Herrera Carbuccion


Judge Robert Fremr

Dated 17 July 2014
 At The Hague, The Netherlands

⁹⁹ Paragraph 31 parts (ii)-(vi), (viii) and (ix) (second bullet point only).