

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 20 May 2014

TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding
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

Redacted Confidential version of

Decision on the Defence applications to lift B3 redactions

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Mr Anton Steynberg

Counsel for William Samoei Ruto

Mr Karim Khan

Mr David Hooper

Mr Essa Faal

Ms Shyamala Alagendra

Counsel for Joshua Arap Sang

Mr Joseph Kipchumba Kigen-Katwa

Ms Caroline Buisman

Legal Representatives of Victims

Mr Wilfred Nderitu

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

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*, pursuant to Articles 64, 67(1)(b), 67(2) and 68(1) of the Rome Statute ('Statute'), and Rule 77 of the Rules of Procedure and Evidence ('Rules'), renders this 'Decision on the Defence applications to lift B3 redactions'.

A. Procedural Background

1. On 23 April 2013, the Chamber issued its 'Decision on the Prosecution's application for authorisation to maintain certain redactions' ('Decision authorising redactions').¹
2. On 11 April 2014, the Defence for Mr Ruto ('Ruto Defence') filed the 'Defence request for an Order to the Prosecution to lift B3 redactions in Investigator's Report KEN-OTP-0104-0518_R01 and related transcripts' ('Ruto Defence Request').²
3. On 29 April 2014, the Defence for Mr Sang ('Sang Defence') filed an application to join the Ruto Defence Request (together, 'Joint Defence Requests').³
4. On 5 May 2014, the Prosecution responded to the 'Joint Defence Requests' ('Response').⁴

¹ ICC-01/09-01/11-695-Conf-Exp. A confidential redacted version was filed on that same date.

² ICC-01/09-01/11-1267-Conf.

³ ICC-01/09-01/11-1279-Conf.

⁴ Prosecution response to Defence Requests for an Order to the Prosecution to lift B.3 redactions in investigator's Report KEN-OTP-0104-0518_R01 and related transcripts [ICC-01/09-01/11-1267-Conf and ICC-01/09-01/11-1279-Conf], ICC-01/09-01/11-1292-Conf-Exp. A Confidential Redacted version was filed on 7 May 2014.

B. Submissions

5. The Ruto Defence requests that the redactions applied to an investigator's report and transcripts related to Witness 28 be lifted. The Ruto Defence argues that the Chamber's 'Decision on the protocol establishing a redaction regime' ('Redaction Protocol')⁵ does not apply and therefore, the redactions are not authorised.⁶ Alternatively, the Ruto Defence submits that, if the Redaction Protocol does apply, these redactions should be lifted. The Ruto Defence argues that new facts and circumstances have arisen that influence the Decision authorising redactions, namely because the Chamber did not have the views of the Ruto Defence as to the relevance and potential importance of the information contained therein at the time the Chamber issued its decision, as the relevant investigator's report was only disclosed to the Ruto Defence afterwards. The Ruto Defence further submits that the information is *prima facie* relevant to the credibility of Witness 28, which is an issue of central importance for the Ruto Defence. Accordingly, it is their view that the requirements under Rule 77 of the Rules are satisfied.⁷

6. Furthermore, the Ruto Defence submits that no security concerns are implicated by lifting the relevant redactions, as counsel are bound by confidentiality and the identities of all trial witnesses have now been disclosed to the Defence and the accused. Notwithstanding this argument, the Ruto Defence submits that, even if the Chamber finds that there is some risk present, withholding this information 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.⁸

⁵ 27 September 2012, ICC-01/09-01/11-458.

⁶ ICC-01/09-01/11-1267-Conf, para. 13.

⁷ ICC-01/09-01/11-1267-Conf, paras 25-27.

⁸ ICC-01/09-01/11-1267-Conf, paras 28-30.

7. The Sang Defence joins the Ruto Defence Request. It submits that the testimony of Witness 28 implicates Mr Sang, and consequently, it has a legitimate interest in receiving any information relevant to the credibility and veracity of this witness.⁹
8. In its Response, the Prosecution confirms that the person whose name is redacted in the investigator's report is the same individual whose name is redacted in the relevant transcript related to Witness 28. On that basis, the Prosecution confirms that the redactions to the investigator's report were made pursuant to the Chamber's Decision authorising redactions, which referred to the same name in the aforesaid transcript.¹⁰ The Prosecution confirms that the individual concerned, [REDACTED]. The Prosecution submits that at the time of its original request for redactions to the transcripts of Witness 28, it had 'assessed that an objective risk to the security of [REDACTED].¹¹ The Prosecution submits, however, that the security-related circumstances of the individual have changed, [REDACTED] and therefore it now assesses 'that there remain little to no objective risk to the disclosure of [REDACTED] identity, in the specific context of the Defence Requests'.¹² However, the Prosecution informs that the individual has clearly and repeatedly expressed concerns that such disclosure could pose risks to his [REDACTED].¹³
9. As regards the Joint Defence Requests, the Prosecution was able to contact the witness, and he has clearly expressed resistance to having his name disclosed to the Defence.¹⁴ Consequently, although the Prosecution has no objection to disclosing the name of the relevant person, pursuant to Regulation 42 of the Regulations of the Court and in light of the witness's views, it submits that it

⁹ ICC-01/09-01/11-1279-Conf, paras 1-3.

¹⁰ ICC-01/09-01/11-1292-Conf-Exp, para. 8.

¹¹ ICC-01/09-01/11-1292-Conf-Exp, paras 9-10.

¹² ICC-01/09-01/11-1292-Conf-Exp, para. 11.

¹³ ICC-01/09-01/11-1292-Conf-Exp, paras 11-12.

¹⁴ ICC-01/09-01/11-1292-Conf-Exp, para. 13 and Annex B.

requires a ruling from the Chamber in order to lift these previously authorised redactions.¹⁵ The Prosecution nonetheless also states that the individual's name has already been inadvertently disclosed to the Defence and that the individual was informed about this incident in July 2013.¹⁶

C. Analysis

10. The Chamber recalls the previous jurisprudence of this and other Chambers of this Court stating that 'the requirements for redactions are: (i) the existence of an objectively justifiable risk to the safety of the person concerned in case of disclosure, (ii) the risk must emanate from the disclosure to the accused in particular and not the public in general, (iii) the infeasibility of less restrictive measures and (iv) an overall assessment as to whether the requested redactions are prejudicial to or inconsistent with the rights of the accused and the requirements of a fair and impartial trial. Further, there is the need to periodically review the decision authorising the redactions should the circumstances change'.¹⁷
11. Regarding the particular redactions authorised by the Chamber in relation to the individual referenced in the transcript of an interview with Witness 28,¹⁸ the Chamber notes its Decision authorising redactions:¹⁹

In annex 7 of the Application the Prosecution requests the redaction from a Prosecution witness's statement of the name and identifying information of a third person [REDACTED], the Chamber is of the view that revealing this information would put the person at risk. [REDACTED] and thus is only indirectly related to the

¹⁵ ICC-01/09-01/11-1292-Conf-Exp, paras 14-15.

¹⁶ ICC-01/09-01/11-1292-Conf-Exp, para. 12.

¹⁷ ICC-01/09-01/11-695-Conf-Red, para. 26. Citing: ICC-01/09-01/11-458, para. 11; *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence', 13 October 2006, ICC-01/04-01/06-568, paras 36 and 39; *The Prosecutor v. Germain Katanga*, 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 71-73, 97; *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Version publique expurgée de «la Décision relative à la levée, au maintien et au prononcé de mesures d'expurgation» du 22 Octobre 2009 (ICC-01/04-01/07-1551-Conf-Exp), 28 October 2009, ICC-01/04-01/07-1551-Red2, para. 4.

¹⁸ KEN OTP-0028-0556.

¹⁹ ICC-01/09-01/11-695-Conf-Exp, para. 39.

case, the Chamber is of the view that the non-disclosure of information does not unduly prejudice the Defence [footnotes omitted].

12. The Chamber agrees with the Prosecution that the Prosecution requires a ruling from the Chamber in order to lift these previously authorised redactions. However, the Chamber reiterates that the Prosecution has the on-going obligation to review whether there has been a change in the circumstances which originally justified a redaction and to notify the Chamber accordingly.²⁰
13. As regards the Joint Defence Requests, and given the information provided by the Prosecution, the Chamber considers that there is no objectively justifiable risk to the safety of the individual concerned [REDACTED] emanating from disclosure to the accused. This is so since the individual's name was already been inadvertently disclosed to the Defence in another context and this did not result in any increased for the witness or his family. Moreover, this individual's [REDACTED] has significantly changed the situation of the witness [REDACTED] in a manner that makes it unlikely that disclosure to the Defence would have an effect on [REDACTED] safety, well-being, dignity or privacy.
14. The Chamber notes this individual's concerns about his identity being revealed to the Defence, these views are not dispositive when varying protective measures. It is ultimately the Chamber's decision, based on assessment of relevant information, and, for the reasons above, the Chamber concludes that non-disclosure is not justified in this instance.

²⁰ ICC-01/09-01/11-695-Red-Conf, para. 42. The Chamber observes with uneasiness that upon an *inter partes* request from the Ruto Defence on 27 March 2014, the Prosecution stated at the time that 'the redaction of the identity of the person concerned is still necessary' (ICC-01/09-01/11-1267-Conf-AnxB, page 2; ICC-01/09-01/11-1292-Conf-Red, para. 8). Conversely, in their Response, the Prosecution indicates that it was aware (since February 2014) that the 'personal and security-related circumstances' of the individual had changed and the 'Prosecution therefore assesses that there remains little to no objective risk to the disclosure of P-0450's identity, in the specific context of the Defence Requests at this time' (ICC-01/09-01/11-1292-Conf-Exp, paras 11 and 12(c)).

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

ORDERS the Prosecution to lift the abovementioned B3 redactions to the investigator's note and transcripts related to Witness 28;

ORDERS the Prosecution to review any other previously authorised B3 redactions concerning the same individual and submit any request it considers necessary; and

ORDERS the Prosecution to file a lesser redacted version of its Response in light of the aforesaid lifting of redactions no later than 2 days after notification of this Decision.

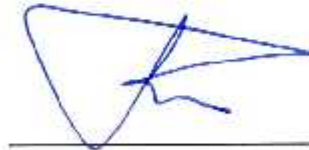
Done in both English and French, the English version being authoritative.



Judge Chile Eboe-Osuji
(Presiding)



Judge Olga Herrera Carbuccion



Judge Robert Fremr

Dated 20 May 2014

At The Hague, The Netherlands