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**International
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Court**

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

Date: **24 July 2014**

TRIAL CHAMBER V(A)

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

SITUATION IN THE REPUBLIC OF KENYA

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

Confidential

**Prosecution's consolidated response to Defence requests for disclosure
ICC-01/09-01/11-1419-Conf-Exp-Red and ICC-01/09-01/11-1423-Conf-Exp**

Source: Office of the Prosecutor

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

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Introduction

1. On 7 July 2014, the Defence team of Mr. William Ruto ("Ruto Defence") filed the "Confidential Redacted version of "Defence request for disclosure"¹ ("Ruto Defence Request"). The Ruto Defence requests the Trial Chamber to order the Prosecution to disclose "any and all information in its possession demonstrating Mungiki support for the Orange Democratic Movement ("ODM") and/or Raila Odinga in the 2007 elections, including any transcripts and/or statements of Prosecution interviews with Mungiki members".
2. As indicated in the Prosecution *inter partes* communications on 26 June 2014 and 2 July 2014, in response to the Ruto Defence e-mails of 25 June 2014 and 27 June 2014² respectively, the Prosecution maintains that the Defence have failed to establish that the requested material is disclosable under either Article 67(2) of the Rome Statute ("Statute") or Rule 77 of the Rules and Procedure of Evidence ("Rules"). They have not established any further basis for the requested disclosure in the present filing, even on a *prima facie* basis, and the request should thus be rejected.
3. The Defence team of Mr. Joshua Sang on 9 July 2014 filed its application, "Sang Defence Application to join the 'Defence request for disclosure'³ ("Sang Defence Request") and have claimed the same relief as sought by the Ruto Defence Request, but add nothing of substance to the Ruto Defence request. This request should likewise be dismissed.

¹ ICC-01/09-01/11-1419-Conf-Exp-Red.

² ICC-01/09-01/11-1419-Conf-Exp-Red-AnxA.

³ ICC-01/09-01/11-1423-Conf-Exp.

Confidentiality

4. Pursuant to Regulation 23*bis*(2) of the Regulations of the Court, the Prosecution submits this response on a confidential basis, since it responds to a document with the same classification.
5. The Prosecution notes that the Common Legal Representative for the Victims ("CLR") and the OPCV have not been notified in the Ruto Defence Request and hence the Prosecution has followed suit. However, the Prosecution sees no reason why these filings should be withheld from the CLR and the OPCV and requests that they be notified accordingly.

Submissions

6. The Prosecution is cognisant of its obligations under Article 67(2) and Rule 77 and has in good faith disclosed all information falling within these provisions, subject to the necessary protective measures under the Statute and Rules.
7. The Ruto Defence relies on the decisions of the Appeals Chamber in the *Lubanga*⁴ and *Banda and Jerbo*⁵ cases in support of its request.⁶ This jurisprudence establishes that there is a burden upon the Defence to establish at least a *prima facie* relevance of the requested material. Thus, while the burden on the Defence may be a low one,⁷ it is nevertheless a burden that must be met.⁸ The Prosecution submits that bald assertions of relevance are insufficient to meet even this low threshold. What is clear from the statutory disclosure regime and from the applicable jurisprudence is that disclosure is not simply for the asking.⁹

⁴ ICC-01/04-01/06-1433.

⁵ ICC-02/05-03/09-501.

⁶ Ruto Defence Request, paras.10-11.

⁷ ICC-02/05-03/09-501, para.42.

⁸ *Ibid.*, para 39: "However, the right to disclosure is not unlimited and which objects are "material to the preparation of the defence" will depend upon the specific circumstances of the case".

⁹ ICC-01/05-01/08-3070-Conf, para.23.

8. A comparison of basis for disclosure in the *Lubanga* case and that advanced in the present request demonstrates how far short of the required standard the present request falls. In the *Lubanga* case, the issue of the materiality of the disclosure in that case was clearly defined by the Defence.¹⁰ The appeal concerned whether the Prosecution should disclose information which showed that, during the period under charge, groups other than the Accused's also conscripted child soldiers. The Appeals Chamber found that the Defence had demonstrated the materiality of the information to their defence in a status conference on 10 January 2008 and in their submissions to the Appeals Chamber.¹¹ It is within these parameters that the Appeals Chamber ruled that "the term 'material to the preparation of the defence' must be interpreted broadly,"¹² in circumstances where the Defence has outlined a clear narrative indicating the relevance of the information to them.
9. The facts above stand in stark contrast to the basis (or lack thereof) for disclosure relied upon by the Defence in the present matter. In light of these decisions, which establish that the 'materiality' of the information sought by the Defence must be *prima facie* established, the Prosecution found the first *inter partes* Defence request of 25 June 2014 manifestly lacking:

*"We hereby request disclosure of any and all information in the possession of the OTP which demonstrates that the mungiki were supporting the ODM and/or Mr. Raila during the 2007 election campaigns. We request confirmation of whether the OTP has met and obtained information from Mr. Maina Njenga and other Mungiki members which confirms that they individually and/or as a group supported the ODM and Mr. Raila's election as President in 2007. If so, we request disclosure without delay. This evidence is obviously PEXO."*¹³

¹⁰ ICC-01/04-01/06, para.82.

¹¹ *Ibid.*

¹² *Ibid.*, para.78.

¹³ Annex A, Ruto Defence email of 25 June 2014.

10. A subsequent email sent on 27 June 2014 in reply to a Prosecution communication questioning, *inter alia*, the exculpatory nature of the material requested,¹⁴ did not cure, clarify or in any other way address the issue of 'materiality' of the information:

*"The information we request is additionally relevant and material to defence preparation and we hope you will agree that it's information that is disclosable at least pursuant to Rule 77."*¹⁵

11. Consequently, the Prosecution was constrained to advise the Defence¹⁶ that, in the absence of any information demonstrating the relevance of the requested information to the preparation of the Defence, it would be unable to agree to disclose this material under Rule 77. However, the Prosecution indicated that it might nevertheless be inclined to assist the Defence if they provided a more focussed request. This response did not rule out reconsideration of the request if the necessary information was provided. Rather than following this route, the Defence has chosen to approach the Chamber for relief.

12. Whilst the Appeals Chamber in *Lubanga* notes that provisions of the Statute and Rules do not link the Defence's entitlement to disclosure to a requirement that the Defence reveal their defence(s) in advance,¹⁷ a proper reading of the decision reveals that the Appeals Chamber found it unnecessary to rule on the appellant's submission that an obligation on the accused to disclose defences does not exist, since

*"[t]he precise scope of defence disclosure obligations is not the subject of this appeal. The Appeals Chamber is currently concerned only with **the extent to***

¹⁴ *Ibid.*, Prosecution email dated 28 June 2014.

¹⁵ *Ibid.*, Ruto Defence email of 27 June 2014

¹⁶ *Ibid.*, Prosecution email dated 2 July 2014 [Emphasis added].

¹⁷ ICC-01/04-01/06-1433, para.50.

which disclosure of defences, if made, might affect or connect to the disclosure obligations of the Prosecutor.”¹⁸

13. In the absence of any indication why particular material may be relevant to the preparation of certain line of defence, the Prosecution submits that it is not obliged to speculate as to every possible line of defence that ingenuity may suggest. Rather, the Prosecution is constrained to determine disclosability based on the limited information at its disposal.¹⁹ In the instant case, the information available included the following:

- a. As pointed out in the Prosecution’s email of 2 July, the proposition that Mungiki leaders or members supported the ODM during the 2007 elections was never raised by the Defence during their cross examination of Prosecution expert P-0464, despite the fact that the Ruto Defence acknowledged that he was an expert on the Mungiki. This was despite his uncontested evidence that the Mungiki were a “spent force” by 2007 who were “not really in a position one would conclude to conduct attacks of any size”.²⁰
- b. This proposition also appears to fly in the face of the Defence theory, put to various Prosecution crime base witnesses, that non-Kikuyu residents of the Rift Valley were fearful of the Mungiki coming to the North Rift to defend the Kikuyu population;²¹ that the Mungiki were responsible for the beheading of certain Luos in Langas, in the context of a Kikuyu-Luo clash in that area;²² and that they fought alongside the Kikuyu.²³

¹⁸ *Ibid.*, para.51.

¹⁹ *Ibid.*, para.55: “[T]he Defence is entitled to full disclosure in relation to the case as a whole **as known by the Prosecutor**”

²⁰ ICC-01/09-01/11-T-90-ENG ET, 19-02-2014, p.5. See also ICC-01/09-01/11-T-89-ENG ET, 18-02-2014, p.55, l.12 - p.56, l.5.

²¹ ICC-01/09-01/11-T-71-CONF-ENG ET, 22-11-2013, p.110, ll. 21-24; ICC-01/09-01/11-T-63-CONF-ENG ET, 31-10-2013, pp.68-70 ; ICC-01/09-01/11-T-89-ENG ET, 18-02-2014, p.54, l.20-25.

²² ICC-01/09-01/11-T-49-CONF-ENG CT, 15-10-2013, p.96, l.1 to p.97, l.22.

²³ ICC-01/09-01/11-T-105-CONF-ENG ET, 01-04-2014, p.69.

14. The Prosecution also notes that a request to disclose “any and all information in its possession” on a particular subject without being advised as to the relevance thereof to the preparation of the Defence makes it difficult, if not impossible, to properly assess the materiality of individual items of evidence in abstract and therefore places an unnecessary and unfair burden on the Prosecution.
15. In support of their Request, the Ruto Defence sets out various allegations in the Prosecution’s charging document, but fails to establish how the information requested relates to those allegations. In the result, the Prosecution is still left to speculate as to the relevance of the information. The Prosecution notes that certain portions of the Ruto Defence Request have been redacted and can therefore not respond to any explanations that may have been provided to the Chamber therein. However, the Prosecution observes that the inevitable result of the Defence’s withholding information upon which the relevance of the information might be established is that all such requests cannot be determined *inter partes* and will need to be referred to the Chamber for determination as a matter of course.
16. In the result, on the strength of the incomplete, ambiguous and contradictory evidence at its disposal, the Prosecution is constrained to submit that the Ruto Defence have not established the relevance of this material, even at a *prima facie* level, and that their request to disclose, “any and all information in [the Prosecution’s] possession” in respect of the Mungiki’s support for the ODM and/or Raila Odinga should be dismissed.
17. The Sang Defence did not engage the Prosecution through *inter partes* communication on the contested issue and have instead directly petitioned the Chamber seeking relief, as a result it is now a matter to be determined on its merit by the Chamber.

18. The Sang Defence Request argues that the requested information is relevant to its defence, since Mr. Sang stands accused of supporting the expulsion of certain ethnic groups from the Rift Valley. Therefore, so the argument goes, any information which establishes that the ODM had support across these groups would be material. The Prosecution observes that it does not contend, and has never contended, that all Kikuyu supported the PNU, although the evidence to date has established that the majority of the Kikuyu in the relevant areas did support the PNU and, more importantly, were perceived to support the PNU. This evidence has not been seriously challenged and certainly not by the Sang Defence. Therefore, the fact (if true) that certain Kikuyu, or a certain Kikuyu group/sect, in fact supported the ODM does not logically detract from the Prosecution's averments. Therefore the Prosecution is again constrained to submit that the Sang Defence has also not met the *prima facie* relevance standard and, accordingly, that the Sang Defence Request should also be dismissed.

Relief requested

19. For the above reasons, the Prosecution respectfully requests that the Chamber deny the Defence motions.



Fatou Bensouda, Prosecutor

Dated this 24th day of July 2014

At The Hague, the Netherlands