

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 25 August 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

Public

**Decision on Defence Request for Disclosure of Information Relating to the
Mungiki**

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 Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V(A) (the 'Chamber') of the International Criminal Court, in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, having regard to Articles 64(7) and 67 of the Rome Statute (the 'Statute'), Rules 69, 77 and 81 of the Rules of Procedure and Evidence (the 'Rules') and Regulations 23 *bis* and 31 of the Regulations of the Court, issues this 'Decision on Defence Request for Disclosure of Information Relating to the Mungiki'.

I. Procedural history and submissions

1. On 7 July 2014, the defence team for Mr Ruto (the 'Ruto Defence') filed the 'Defence request for disclosure' (the 'Request').¹ The Ruto Defence requests the Chamber to order the Prosecution to 'disclose any and all information in its possession demonstrating Mungiki support for the Orange Democratic Movement ([the] "ODM") and/or Raila Odinga in the 2007 elections, including any transcripts and/or statements of Prosecution interviews with Mungiki members' (the 'Requested Information').²
2. In justifying why it is entitled to the Requested Information, the Ruto Defence mentions that it is not obligated to reveal its lines of defence to the Prosecution in order to obtain the requested information,³ but, nonetheless, makes the following observations on the Prosecution's case (citations removed):

[...] a cornerstone of the Prosecution's case theory is that William Ruto planned to expel members of, *inter alia*, the Kikuyu ethnic group from the Rift Valley because this group was perceived to support political forces other than the ODM. According to the Document Containing the Charges ("DCC"), Kikuyus, as a group, are synonymous with "[Party of National Unity (the 'PNU')] supporters". The DCC states that William Ruto, together with other co-perpetrators, intended "to attack particular parts of the civilian population due to their perceived political affiliation". The vehicle for carrying out the alleged attacks charged,

¹ ICC-01/09-01/11-1419-Conf-Exp-Red (with one annex; unredacted confidential *ex parte* version of filing notified same day).

² Request, ICC-01/09-01/11-1419-Conf-Exp-Red, paras 1, 21.

³ Request, ICC-01/09-01/11-1419-Conf-Exp-Red, paras 14, 20.

the "Network", consisted, *inter alia*, of pro-ODM political figures, of which William Ruto was one. According to the Prosecution's theory, William Ruto publicly enunciated anti-Kikuyu sentiments at political rallies.

Furthermore, the Prosecution has led evidence through Prosecution trial witnesses that Mr. Ruto publically expressed anti Kikuyu sentiments, including in Kiswahili the official language of Kenya, during heavily attended and publicised political rallies.⁴

3. The Ruto Defence submits that 'it has met the low Rule 77 threshold and has established that the Requested Information is *prima facie* "relevant to the preparation of the defence"'.⁵ If the Chamber finds that the Requested Information is disclosable and the Prosecution makes further submissions on the issue of security or confidentiality, the Ruto Defence requests that it be permitted to make further submissions in response to this specific point.⁶
4. On 9 July 2014, the defence team for Mr Sang (the 'Sang Defence') applied to join the Request.⁷ The Sang Defence argues that the Requested Information is relevant 'given Mr. Sang's alleged support for the expulsion of certain ethnic groups from the Rift Valley who were Party of National Unity supporters and associated desire to cement a pro-Kalenjin/ODM voting block.'⁸ The Sang Defence submits that any information 'that tends to suggest ODM had a broader support base than is alleged' is material to the preparation of Mr Sang's defence.⁹
5. On 24 July 2014, the Prosecution filed a response seeking that the relief sought be denied (the 'Response').¹⁰
6. The Prosecution contends that the Ruto Defence and Sang Defence (collectively, the 'Defence') have not established the Requested Information's *prima facie*

⁴ Request, ICC-01/09-01/11-1419-Conf-Exp-Red, paras 14-15.

⁵ Request, ICC-01/09-01/11-1419-Conf-Exp-Red, para. 18.

⁶ Request, ICC-01/09-01/11-1419-Conf-Exp-Red, para. 19.

⁷ Sang Defence Application to join the "Defence request for disclosure", 9 July 2014, ICC-01/09-01/11-1423-Conf-Exp.

⁸ ICC-01/09-01/11-1423-Conf-Exp, para. 2.

⁹ ICC-01/09-01/11-1423-Conf-Exp, para. 2.

¹⁰ 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, 24 July 2014, ICC-01/09-01/11-1445-Conf.

relevance and submits that 'bald assertions of relevance are insufficient to meet even this low threshold.'¹¹

7. The Prosecution indicates that it has not received any indication as to why the Requested Information may be relevant and submits that it is 'not obliged to speculate as to every possible line of defence that ingenuity may suggest.'¹² The Prosecution comments on how the Defence never explored the Mungiki's alleged ODM support with Witness 464 'despite the fact that the Ruto Defence acknowledged that he was an expert on the Mungiki.'¹³ The Prosecution observes that the Defence's withholding of such information means that all such disclosure requests cannot be determined *inter partes* and will need to be referred to the Chamber for determination as a matter of course.¹⁴
8. The Prosecution also submits that it has never contended that **all** Kikuyus supported the PNU, and if certain Kikuyu supported the ODM this does not 'logically detract from the Prosecution's averments.'¹⁵

II. Discussion

A. Preliminary issue

9. As a preliminary issue, the Chamber notes that the Legal Representative of Victims (the 'LRV') and Office of Public Counsel for Victims (the 'OPCV') are not notified of the submissions in this litigation. The Ruto Defence submits that the Request 'contains information concerning confidential defence trial strategy',¹⁶ but no submission is made as to why the LRV and OPCV could not be notified of

¹¹ Response, ICC-01/09-01/11-1445-Conf, para. 7.

¹² Response, ICC-01/09-01/11-1445-Conf, para. 13 (emphasis removed; see also paras 9-10).

¹³ Response, ICC-01/09-01/11-1445-Conf, para. 13(a); Annex A of the Request, ICC-01/09-01/11-1419-Conf-Exp-AnxA, page 2.

¹⁴ Response, ICC-01/09-01/11-1445-Conf, para. 15.

¹⁵ Response, ICC-01/09-01/11-1445-Conf, para. 18.

¹⁶ Request, ICC-01/09-01/11-1419-Conf-Exp-Red, para. 2.

the redacted version of the Request. The Sang Defence makes no submission either in this regard, and the Prosecution submits that it sees no reason why any of these filings should be withheld from the LRV and OPCV.¹⁷

10. The Chamber is not persuaded that a generic reference to ‘confidential defence trial strategy’ sufficiently justifies withholding the totality of this litigation from the LRV and OPCV. As set out in the disposition, the Chamber reclassifies and notifies the relevant filings accordingly.

11. Further, and bearing in mind the principle of publicity derived from Articles 64(7) and 67(1) of the Statute, the Chamber considers that the present decision can be publicly issued in a manner which does not defeat the confidential classifications used in this litigation.

B. Applicable law

12. Turning to the relief sought in the Request, the Chamber recalls the following regarding disclosure:

- i. The accused is fully entitled to rely upon the right to remain silent and the accused is not required to raise defences at an early stage as a condition of obtaining Prosecution disclosure.¹⁸ Nevertheless, a sensible balance needs to be struck between this cardinal principle of criminal justice and the requirement upon the accused to justify disclosure requests when the relevance of the requested information may not be readily apparent.

¹⁷ Response, ICC-01/09-01/11-1445-Conf, para. 5.

¹⁸ Appeals Chamber, *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, OA 11 (‘Lubanga OA11 Judgment’), para. 55.

- ii. Article 67(2) of the Statute provides that the Prosecution shall disclose evidence in its possession which ‘shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of [P]rosecution evidence.’
- iii. Rule 77 of the Rules also governs Prosecution disclosure¹⁹ and involves a two stage inquiry.²⁰ First, it must be determined whether the ‘books, documents, photographs and other tangible objects’ sought are material to the preparation of the defence.²¹ If the items in question are material to the preparation of the defence, they must be disclosed to the defence subject to the restrictions on disclosure as provided for in the Statute and Rules 81 and 82 of the Rules.²²
- iv. Any assessment of whether the defence has demonstrated that information is material to the preparation of the defence should be made on a *prima facie* basis.²³ The term ‘material to the preparation of the defence’ is to be interpreted broadly, and should be understood as referring to all objects that are relevant for the preparation of the defence.²⁴ Documents which are not directly linked to exonerating or incriminating evidence may nevertheless be material to the defence’s

¹⁹ Rule 77 provides: ‘[t]he Prosecutor shall, subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82, permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person.’

²⁰ Appeals Chamber, *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, OA4 (‘Banda & Jerbo OA4 Judgment’), para. 35.

²¹ Banda & Jerbo OA4 Judgment, ICC-02/05-03/09-501, para. 35.

²² Banda & Jerbo OA4 Judgment, ICC-02/05-03/09-501, para. 35.

²³ Banda & Jerbo OA4 Judgment, ICC-02/05-03/09-501, para. 42.

²⁴ Banda & Jerbo OA4 Judgment, ICC-02/05-03/09-501, para. 38; Lubanga OA11 Judgment, ICC-01/04-01/06-1433, paras 77-78.

preparation.²⁵ And in certain cases, the defence may need to explain such links.

- v. 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.²⁶ This is all the more the reason that the defence may have to explain the materiality of the request in the particular circumstances.

C. Whether the Requested Information is material to the preparation of the defence

13. The Chamber notes that the Prosecution was not given much information from the Ruto Defence regarding the alleged relevance of the Requested Information before the Request was filed.²⁷ The Chamber considers that the Ruto Defence could have been more forthcoming with the Prosecution without compromising its defence strategy,²⁸ as is evidenced by the additional argument provided in paragraphs 14-15 of the redacted version of the Request. Bearing in mind the notion that disclosure is intended primarily to be an *inter partes* process, the Ruto Defence should endeavour to communicate more openly with the Prosecution when making future disclosure requests. Doing so will expedite the disclosure process and limit Chamber intervention only to when it is strictly necessary. Despite this consideration, on this occasion the Chamber will nevertheless proceed to rule on the merits of the Request.

²⁵ Banda & Jerbo OA4 Judgment, ICC-02/05-03/09-501, para. 38, quoting Lubanga OA11 Judgment, ICC-01/04-01/06-1433, paras 77-81.

²⁶ Banda & Jerbo OA4 Judgment, ICC-02/05-03/09-501, para. 39.

²⁷ See Annex A of the Request, ICC-01/09-01/11-1419-Conf-Exp-AnxA.

²⁸ In this regard, see Lubanga OA11 Judgment, ICC-01/04-01/06-1433, para. 54.

14. As noted by the Defence, the Prosecution's Updated Document Containing the Charges alleges that: (i) the accused planned and/or supported an effort to expel Kikuyus from the Rift Valley because this group was perceived to be a PNU voting block²⁹ and (ii) both accused made anti-Kikuyu statements, or participated in meetings where such statements were made, in the time period leading up to the violence.³⁰

15. The Defence have made it sufficiently clear in the unredacted portions of their filings that they seek the Requested Information for the purpose of exploring whether the predominantly-Kikuyu Mungiki organisation constituted an ODM support base, which it suggests may undercut the Prosecution allegations noted above.³¹ Although the Chamber emphasises that it does not pronounce at this time on the merits of any arguments supported by the Requested Information, it does not consider the Defence's arguments to be 'bald assertions of relevance'³² which do not 'logically detract from the Prosecution's averments'.³³ The Chamber also considers that the Requested Information is sufficiently specific - the Defence do not request evidence of any Kikuyu support for the ODM in the 2007 elections, but only for the support of the Mungiki.

16. The fact that the Defence could have inquired about the Mungiki's ODM support during Witness 464's testimony also does not change the Chamber's assessment. That such questions were not asked may explain why the Prosecution did not know earlier that the Requested Information was relevant to the Defence, but, as

²⁹ Corrigendum to Annex A to the Prosecution's Submission of Updated Document Containing the Charges pursuant to the Decision on the content of the updated document containing the charges (ICC-01/09-01/11-522), 7 January 2013, ICC-01/09-01/11-533-AnxA-Corr, para. 20.

³⁰ ICC-01/09-01/11-533-AnxA-Corr, paras 22, 127, pages 40-41.

³¹ Request, ICC-01/09-01/11-1419-Conf-Exp-Red, paras 14-15; ICC-01/09-01/11-1423-Conf-Exp, para. 2.

³² As argued in Response, ICC-01/09-01/11-1445-Conf, para. 7.

³³ Response, ICC-01/09-01/11-1445-Conf, para. 18.

noted above, raising defences at an early stage is not a condition to obtaining disclosure.³⁴

17. From the information supplied in the Request, the Chamber finds that the Requested Information is material to the preparation of the defence within the meaning of Rule of the 77 of the Rules.

18. As a final consideration in this section, the Chamber recalls that Rule 69 of the Rules governs agreements as to evidence.³⁵ The parties are invited to see if any Rule 69 agreements can be reached in lieu of disclosure of the Requested Information, in view of the Chamber's findings in the present decision. In order to ensure these discussions occur expeditiously, the Chamber directs that any Rule 69 agreement related to the Requested Information must be concluded within two weeks of the present decision.

D. Restrictions on disclosure

19. If no Rule 69 agreements are made, the Prosecution is to disclose, subject to any applicable restrictions, the Requested Information in its possession or control reasonably suggestive of Mungiki support for the ODM or for Mr Odinga in the 2007 elections, including any transcripts or statements.

20. When applying any applicable redactions to the Requested Information, the Chamber considers that an individualised assessment by the Chamber is not mandatory when: (i) the reasons justifying the implemented redactions have been

³⁴ Lubanga OA11 Judgment, ICC-01/04-01/06-1433, para. 55. In this regard, see also Decision No. 2 on the Conduct of Trial Proceedings (General Directions), 3 September 2013, ICC-01/09-01/11-900, para. 20 ('[t]he Chamber is of the view that it is within the cross-examining party's discretion to determine whether a given issue should, or need not be explored with the witness').

³⁵ Rule 69 provides: '[t]he Prosecutor and the defence may agree that an alleged fact, which is contained in the charges, the contents of a document, the expected testimony of a witness or other evidence is not contested and, accordingly, a Chamber may consider such alleged fact as being proven, unless the Chamber is of the opinion that a more complete presentation of the alleged facts is required in the interests of justice, in particular the interests of the victims.'

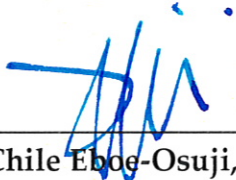
made available to the Defence and (ii) the parties are satisfied that an individualised assessment is unnecessary and do not request any review of the implemented redactions.³⁶ The Chamber notes the Ruto Defence's request to make additional submissions on security and confidentiality,³⁷ and considers that the Defence may file any further submissions in accordance with this procedure.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

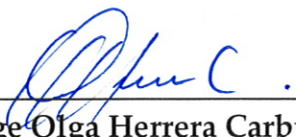
ORDERS the Registry to reclassify ICC-01/09-01/11-1419-Conf-Exp-Red, ICC-01/09-01/11-1419-Conf-Exp-AnxA and ICC-01/09-01/11-1423-Conf-Exp as 'confidential';³⁸ and

GRANTS the relief sought in the Request and orders the Prosecution to disclose any and all information in its possession which is reasonably suggestive of Mungiki support for the ODM or for Mr Odinga in the 2007 elections, subject to paragraphs 18-20 of the present decision.

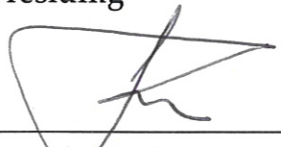
Done in both English and French, the English version being authoritative.



Judge Chile Eboe-Osuji, Presiding



Judge Olga Herrera Carbuca



Judge Robert Fremr

Dated 25 August 2014

At The Hague, The Netherlands

³⁶ See Decision on the protocol establishing a redaction regime, 27 September 2012, ICC-01/09-01/11-458, paras 14-15.

³⁷ Request, ICC-01/09-01/11-1419-Conf-Exp-Red, para. 19.

³⁸ ICC-01/09-01/11-1419-Conf-Exp maintains its existing classification level.