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Date: 30 July 2015

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

Public redacted version of "Joint Defence request under Article 54", 3 November 2014, ICC-01/09-01/11-1627-Conf

Sources: Defence for Mr. William Samoei Ruto
Defence for Mr. Joshua arap Sang

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

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I. Introduction

1. Article 54 of the Rome Statute (“Statute”) imposes an obligation on the Prosecutor to investigate incriminating and exonerating circumstances equally and to ensure that such investigations are effective.¹ The Prosecution has persistently failed in its obligations to pursue exonerating circumstances and, where it is in receipt of exonerating information, has failed to re-assess its case against such evidence. Furthermore, the Prosecution continues to fail and/or refuses to take the initiative to investigate exonerating circumstances when alerted to these circumstances by the Defence.
2. The defence for Mr. William Samoei Ruto (the “Ruto Defence”) and the defence for Mr. Joshua arap Sang (the “Sang Defence”) (together the “Defence”) respectfully request the Trial Chamber to order the Prosecution to urgently discharge its obligations under Article 54 in order to obtain potentially exculpatory information concerning [REDACTED] by three Prosecution witnesses, namely [REDACTED], [REDACTED] and [REDACTED]. For reasons of efficiency and expediency, the Defence submit that this information should be sought simultaneously by the Prosecution from the witnesses themselves and [REDACTED].
3. [REDACTED].² [REDACTED].

II. Background

[REDACTED]

4. [REDACTED] was admitted into the ICCPP on [REDACTED] 2010 and relocated to [REDACTED].³ On [REDACTED] 2011, after [REDACTED], the then-Registrar ordered his discharge from the Programme. [REDACTED].⁴

¹ This duty arises from the combined effect of Article 54(1)(a) and (b) of the Rome Statute.

² [REDACTED].

³ [REDACTED].

⁴ [REDACTED].

5. Pursuant to the Prosecution's Article 54 obligations, on 27 October 2014, the Ruto Defence requested that the Prosecution contact [REDACTED] to request: (i) all documents in their possession (i.e. applications, statements, affidavits and/or decisions) regarding [REDACTED]; and (ii) information as to whether or not [REDACTED].⁵
6. On 28 October 2014, the Sang Defence sent an email to the Prosecution joining the Ruto Defence's Article 54 request.⁶

[REDACTED] and [REDACTED]

7. In 2011, [REDACTED] and [REDACTED] and their immediate families were admitted into the ICCPP and relocated to [REDACTED] where they resided under the care of the VWU.⁷ Both witnesses [REDACTED].⁸ On [REDACTED] 2014, the Prosecution received information from [REDACTED] that [REDACTED].⁹
8. On 11 October 2014, the Ruto Defence asked the Prosecution for disclosure of: (i) all interview notes, statements, affidavits by [REDACTED] and [REDACTED], requests, decisions and any other information relating to [REDACTED]; and (ii) all discussions between the Prosecution and [REDACTED] and [REDACTED] concerning, [REDACTED].¹⁰
9. The Prosecution responded to the Ruto Defence request on 13 October 2014, advising "that [REDACTED] matters concerning [REDACTED] were handled by

⁵ See email correspondence between the Ruto Defence, the Prosecution and the Sang Defence titled "Art. 54: Request for information related to [REDACTED]", dated 27, 28 and 29 October 2014 and set out in confidential annex A hereto.

⁶ *Ibid.*

⁷ [REDACTED].

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ See email correspondence between the Prosecution and the Ruto Defence titled "[REDACTED]", dated 11 and 13 October 2014 and set out in confidential annex B hereto.

[REDACTED], and not the Prosecution.”¹¹ The Prosecution directed the Ruto Defence to [REDACTED].¹²

10. On 14 October 2014, the Ruto Defence requested clarification of the Prosecution’s 13 October response. Specifically, the Ruto Defence asked the Prosecution to confirm that it: (a) is not in possession of any of the information requested in the email of 11 October 2014; and (b) does not have any information concerning [REDACTED].¹³
11. The Prosecution responded on 16 October 2014 advising that it was “in the process of reviewing [its] material regarding the [REDACTED] witnesses including [REDACTED]” and would “revert...as soon as possible with a response”.¹⁴
12. On 17 October 2014, the Sang Defence made a disclosure request of the same materials sought from the Prosecution directly to [REDACTED]. On 23 October 2014, [REDACTED] responded that [REDACTED] was unable to provide the requested materials for reasons of confidentiality.¹⁵
13. A reminder email regarding its 14 October request for clarification was sent by the Ruto Defence to the Prosecution on 27 October 2014.¹⁶
14. As part of the Defence’s 27 October 2014 request made under Article 54,¹⁷ the Ruto Defence requested that the Prosecution also contact [REDACTED] to

¹¹ *Ibid.*

¹² *Ibid.* As explained by the Sang Defence in the email of 28 October 2014, [REDACTED] has declined to provide the information requested to the defence. The Defence, therefore, do not consider [REDACTED] to be a viable source of the requested information (see confidential annex A).

¹³ See email correspondence between the Ruto Defence and the Prosecution titled “RE: Information concerning an individual covered by Protocol # 449” dated 14, 16, 27 and 29 October 2014 and set out in confidential annex C hereto.

¹⁴ *Ibid.*

¹⁵ See email correspondence between the Sang Defence and [REDACTED] entitled “Witnesses in Kenya I” dated 17 and 23 October 2014 and set out in confidential annex D hereto.

¹⁶ See email correspondence between the Ruto Defence and the Prosecution titled “RE: Information concerning an individual covered by Protocol # 449” dated 14, 16, 27 and 29 October 2014 and set out in confidential annex C hereto.

request: (i) all documents in their possession (i.e. applications, statements, affidavits and/or decisions) regarding [REDACTED]; and (ii) [REDACTED].¹⁸ As noted above, this request was joined by the Sang Defence on 29 October 2014.¹⁹

15. On 29 October 2014, the Prosecution advised by email that it did not consider the Defence request made under Article 54 to be “well-founded”.²⁰ Specifically, the Senior Prosecution Trial Attorney stated:

1. *Art 67(2) only applies to material in the possession or control of the Prosecution. The Prosecution has already disclosed the information that it has in respect of [REDACTED]. The Prosecution is not in possession of the further material which you request.*

2. *I observe that Art 54 enjoins the Prosecution to “...cover all facts and evidence relevant to an assessment of whether there is criminal liability under this Statute and, in so doing, to investigate all incriminating and exculpatory circumstances equally” (emphasis added). While the fact of [REDACTED] may be considered potentially exonerating, beyond mere speculation the Prosecution has no reason to believe that the contents thereof would be. There certainly do not appear to be any reasonable grounds to believe that the material would contain any information relevant to the criminal liability of the Accused under this Statute. In my view, therefore, Art 54 is not engaged.*

3. *I have nevertheless considered making the request to [REDACTED] on the Defence’s behalf as a matter of professional courtesy, rather than Statutory obligation. However, to paraphrase Dr Buisman below, [REDACTED] has no obligation to the Prosecution to provide such information either. I can see no prospect of [REDACTED] voluntarily surrendering to the Prosecution, for the Defence’s benefit, confidential [REDACTED] material relating [REDACTED] that [REDACTED] has already refused to divulge to the Defence. In my view, therefore, this would be futile.*

4. *While I acknowledge that the material which you seek may be relevant to the preparation of your clients’ defence, it is not the function of the Prosecution to act as a proxy for the Defence in such circumstances to request the material from [REDACTED]. In this respect, the Statute provides for appropriate relief, namely to*

¹⁷ *Supra*, para. 5.

¹⁸ See email correspondence between the Ruto Defence, the Prosecution and the Sang Defence titled “Art. 54: Request for information related to [REDACTED]”, dated 27, 28 and 29 October 2014 and set out in confidential annex A hereto.

¹⁹ *Ibid.*

²⁰ *Ibid.*

*approach the Chamber for assistance under Art 57(3)(b), read with Arts 61(11) and 64(6)(b).*²¹

16. On 29 October 2014, the Prosecution purported to respond to the Ruto Defence's 14 October request for clarification. The Prosecution did not specifically respond to the questions posed by the Ruto Defence regarding [REDACTED] but stated "that the Prosecution has conducted further reviews of its interactions with witness [REDACTED]" and would "disclose...certain additional Investigation Reports pertaining to contacts with the witness in regard to his willingness to testify and concerns which he raised in this regard."²²
17. In light of the foregoing, and the approach taken by the Prosecution, the Defence submit that the Trial Chamber's intervention is required.

III. Applicable Law

18. Article 54(1)(a) of the Statute provides:

The Prosecutor shall:

(a) In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally;

19. Article 67(2) of the Statute provides that:

the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes 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 prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

²¹ *Ibid.* The Defence advise that the Prosecution also provided a link to [REDACTED]. However, [REDACTED] does not provide the information sought by the Defence.

²² See email correspondence between the Ruto Defence and the Prosecution titled "RE: Information concerning an individual covered by Protocol # 449" dated 14, 16, 27 and 29 October 2014 and set out in confidential annex C hereto.

IV. Submissions

20. Prosecution witnesses, [REDACTED], [REDACTED] and [REDACTED], have all [REDACTED]. The Defence seek the disclosure of all documents related to these [REDACTED] (i.e. applications, statements and/or affidavits and all relevant decisions).
21. Information concerning [REDACTED] by Prosecution witnesses is clearly relevant to their credibility. This is well established in the jurisprudence of the *ad hoc* tribunals.²³ In the circumstances of this case, the information may be relevant to a witness' motivation to become a Prosecution witness. In this regard, where [REDACTED] then this is relevant and potentially exculpatory information.
22. The Prosecution's assessment that the information requested is not exculpatory is erroneous and concerning. Not only does it ignore the above jurisprudence, but also the plain wording of Article 67(2) which provides that information which "may affect the credibility of prosecution evidence" should be disclosed.
23. [REDACTED]'s argument that the materials sought are confidential does not undermine the exonerating nature of the requested [REDACTED] documents. Whilst [REDACTED] has no obligation to disclose the materials sought to the Defence and understandably refused to provide them given [REDACTED], the Prosecution does have an obligation to obtain and disclose the said materials and cannot use the confidentiality argument to escape its disclosure and Article 54 obligations. In other tribunals, the Prosecution has obtained and used [REDACTED]. Confidentiality arguments against their use were rejected.²⁴ Similarly, in the case of *Muthaura and Kenyatta*, it was recognised that disclosure of a statement made by a key witness in [REDACTED] should have been

²³ See, e.g., *Prosecutor v. Haradinaj et al.*, IT-04-84bis-T, [REDACTED].

²⁴ *Prosecutor v Bagosora et al*, ICTR-98-41-T, [REDACTED]; *Prosecutor v Bagosora et al*, ICTR-98-41-T, [REDACTED].

disclosed to the Defence. Significantly, the failure of the Prosecutor to disclose this document [REDACTED].²⁵

24. The Defence acknowledge that the potentially exculpatory information sought is not in the possession of the Prosecution.²⁶ Nevertheless, and contrary to the Prosecution's position, the Defence submit that the Prosecution's Article 54 obligations are engaged.
25. *First*, a central tenet of the defence case is that certain Prosecution witnesses have deliberately provided false evidence implicating Mr. Ruto and Mr. Sang to the Prosecution (and previously to the KNCHR and WAKI Commissions).²⁷ These false witnesses were motivated by the benefits (financial and otherwise) various "witness protection schemes" offered and, thus, agreed to appear before the WAKI Commission, the Kenya National Commission on Human Rights and, ultimately, this Court. [REDACTED].²⁸ The Defence submit that, [REDACTED]. If the foundations of the Prosecution's case are built on false testimony, then this is evidently "relevant to the criminal liability of the Accused".²⁹
26. *Second*, the Prosecution's Article 54 obligation to "investigate...exonerating circumstances equally" extends into the trial phase of the proceedings. Article 54(1)(a) expressly refers to the Prosecutor's duty "to establish the truth". As the Appeals Chamber observed in *Lubanga*, "[t]he duty to establish the truth is not limited to the time before the confirmation hearing" and so "the Prosecutor must be allowed to continue his investigation beyond the confirmation hearing, if this

²⁵ *Prosecutor v. Kenyatta*, [REDACTED]. [REDACTED]. See *Prosecutor v. Muthaura and Kenyatta*, [REDACTED].

²⁶ Although it is noted that a clear and definitive answer to the Ruto Defence's 14 October request for clarification has not been received.

²⁷ ICC-01/09-01/11-818.

²⁸ See, e.g., the testimony of [REDACTED].

²⁹ See the Prosecution's statement in the email dated 29 October 2014 that "[w]hile the fact of the witnesses' [REDACTED] may be considered potentially exonerating, beyond mere speculation the Prosecution has no reason to believe that the contents thereof would be. There certainly do not appear to be any reasonable grounds to believe that the material would contain any information relevant to the criminal liability of the Accused under this Statute" (confidential annex A).

is necessary in order to establish the truth.” The Defence submit that the information concerning [REDACTED] submitted by [REDACTED], [REDACTED] and [REDACTED] is potentially exonerating information necessary to establish the truth.

27. *Third*, bearing in mind the foregoing, the Defence submit the Prosecution ought to have sought *proprio motu* and in discharge of its Article 54 obligation all the requested information regarding [REDACTED] made by [REDACTED], [REDACTED] and [REDACTED] from the relevant sources – the witnesses themselves and [REDACTED] – as soon as it became aware that [REDACTED]. In this regard, the Prosecution’s complaint that it is being required “to act as a proxy for the Defence” is without merit. Indeed, further assurance that the Defence were making legitimate recourse to Article 54 and not seeking to improperly off-load defence investigations onto the Prosecution was provided by the Sang Defence. Citing to ICTR case law,³⁰ the Sang Defence advised that “[REDACTED] has a policy not to grant any request for cooperation from the Defence unless backed up by a Trial Chamber’s order. Any request from the Prosecution is, however, granted without the need for a judicial order”.³¹

28. The plain fact is that the Prosecution has a privileged status which, in contrast to the Defence, permits it direct access to avenues of information.³² The unequal position between the parties in obtaining [REDACTED] has been acknowledged by the *ad hoc* tribunals. To remedy this inequality, various Chambers at the ICTR have ordered the Prosecution to obtain documents from [REDACTED] sought by the Defence.³³ In doing so, these Chambers relied on Rule 98 of the ICTR

³⁰ [REDACTED].

³¹ See email correspondence in confidential annex A.

³² The Prosecutor’s role is to be contrasted with that of her other international counterparts. The drafters of the Rome Statute deliberately imposed the obligation to investigate exonerating circumstances in order to redress the imbalance in power and resources which is often experienced by the Defence (see M. Bergsmo P. Krueger, “Duties and Powers of the Prosecutor” pp. 715-725 in *Commentary on the Rome Statute of the International Criminal Court* (O. Triffterer ed. 1999) Nomos Verlagsgesellschaft, p. 716, para. 2).

³³ [REDACTED].

Rules of Procedure and Evidence, allowing Chambers to “order either party to produce additional evidence”. They issued such orders to the Prosecution notwithstanding the fact that, unlike the position at the ICC, no explicit obligation on the Prosecution exists at the *ad hoc* tribunals to investigate incriminating and exonerating circumstances equally.

29. Similarly, and even more persuasively in light of Article 54 of the Statute, this Trial Chamber may rely on Article 64(6)(d) of the Statute to order the Prosecutor to obtain the [REDACTED] documents sought by the Defence from [REDACTED]. Article 64(6)(d) closely resembles Rule 98 of the ICTR Rules of Procedure and Evidence in that it authorises the Chamber, as necessary, to “[o]rder the production of evidence in addition to that already collected prior to the trial or presented during the trial by the parties”.
30. In the present circumstances, [REDACTED], obtaining the requested information via the Prosecution is the most efficient and expeditious route available to the Defence. The addition of the intermediate stage – a request by the Defence to [REDACTED] – will simply delay matters [REDACTED]. Accordingly, in order to progress the request in the time available, the Defence submit the present request but asks that the Chamber order the Prosecution to request the information of [REDACTED] according to established investigative channels.³⁴ As regards making the request of the witnesses themselves, the Defence note that such a request would have to be made through the Prosecution.³⁵
31. Separate to the Prosecution’s obligations under Article 54, persuasive support for the Defence position that the Prosecution is a legitimate source of investigative assistance is provided in the *Banda and Jerbo* case where the Prosecution contacted various entities where “[t]he stated purpose of the request

³⁴ See, e.g., [REDACTED].

³⁵ See the witness contact protocol (ICC-01/09-01/11-449-Anx).

was to identify materials of potentially exculpatory nature or information that would be material to the preparation of the defence.”³⁶

32. Finally, the Defence submit that it is arguable that the combined effect of the Prosecution’s Article 54 and Rule 76 duties requires the Prosecution to obtain the requested information from the witnesses and [REDACTED]. In this regard, the Single Judge of the Pre-Trial Chamber in *Lubanga* held that the duty of the Prosecutor to disclose the prior statements of Prosecution witnesses under Rule 76 was not limited to prior statements “in the possession or control of the Prosecutor”.³⁷ Instead, the Single Judge found that the Prosecution is under an obligation “to make its utmost effort to obtain the prior statements of those witnesses on whom [it] intends to rely at the confirmation hearing which have been taken by other entities.”³⁸ Accordingly, in line with this approach, the Defence submit that where the Prosecution is alerted to the fact that a certain category of documents may be exculpatory, the Prosecution is under a positive duty to “make its utmost effort” to obtain such information, even if it is within the control of another entity. In this particular instance, the Prosecution is in agreement that the information sought is material to Defence preparation.³⁹ Such a course gives proper effect to the Prosecution’s Article 54 duty and would ensure it is not rendered nugatory. In the present case, it is reasonable to assume that Prosecution witnesses have [REDACTED]. Accordingly, the Prosecution, in discharge of its obligations under Article 54 and Rule 76, should use all reasonable efforts to obtain these statements and disclose them to the Defence.

³⁶ *Prosecutor v. Banda and Jerbo*, Public Redacted Version of “Prosecution’s Update on Cooperation Issues”, filed on 27 August 2012, 31 August 2012, ICC-02/05-03/09-388-Red, para.7. *See also Prosecutor v. Banda and Jerbo*, Decision on Protection Measures Requested in Prosecution’s Update on Cooperation Issues, 28 August 2013, ICC-02/05-03/09-500-Red, para. 8 (“the Chamber reminds the prosecution of its duties under Article 54(1) of the Statute to establish the truth and take appropriate measures to ensure effective investigation. As such, the Chamber expects the prosecution to continue making reasonable efforts to seek the Information Provider’s consent for the full versions of the documents to be disclosed to the prosecution and defence.”)

³⁷ *Prosecutor v. Lubanga*, Decision on Defence Requests for Disclosure of Materials, 17 November 2006, ICC-01/04-01/06-718, p. 4.

³⁸ *Ibid.*

³⁹ See email from the Prosecution dated 29 October 2014 provided in confidential annex A.

V. Classification

33. This request is filed confidentially because it concerns confidential Defence investigations and strategy.

VI. Requested Relief

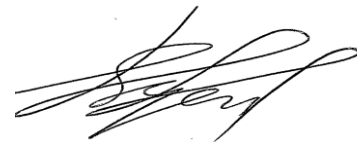
34. For the reasons set out above, the Defence respectfully request the Trial Chamber to:

- (i) order the Prosecution to urgently discharge its obligations under Article 54 of the Statute in order to obtain the potentially exculpatory information described in paragraph 20 above concerning [REDACTED];
- (ii) order the Prosecution to make the necessary requests of the witnesses themselves and [REDACTED] simultaneously and as soon as possible; and
- (iii) shorten the timeframe for the filing of any response by the Prosecution.

Respectfully submitted,



Mr. Karim A. A. Khan QC
Lead Counsel for William Samoei Ruto
Dated this 30th Day of July 2015
At The Hague, Netherlands



Mr. Joseph Kipchumba Kigen-Katwa
Lead Counsel for Joshua Arap Sang
Dated this 30th Day of July 2015
At Nairobi, Kenya