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Pénale
Internationale**



**International
Criminal
Court**

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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

PUBLIC

Public redacted version of
"Prosecution's Response to 'Joint Defence request under Article 54'",
7 November 2014, ICC-01/09-01/11-1642-Conf

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Introduction

1. Based on sweeping assumptions that [REDACTED] contain potentially exculpatory information, the Ruto and Sang Defence (“the Defence”) request (“Request”) the Trial Chamber to *inter alia*, order the Prosecution to discharge what they claim is the Prosecution’s “obligation under Article 54 [...] to obtain the potentially exculpatory information [...]”¹ Relying on Article 67 of the Rome Statute (“Statute”), the Defence contest the Prosecution’s assessment that the [REDACTED] materials are not exculpatory² and claim that the combined effect of Article 54 and Rule 76 of the Rules of Procedure and Evidence (“Rules”) require the Prosecution to obtain [REDACTED].³

2. The Request is misconceived and should be dismissed. First, it misconstrues the Prosecution’s Article 54(1)(a) obligations. Second, the Request is unsupported by sufficient factual basis and fails to substantiate how the Prosecution’s Article 54(1)(a) obligations were breached. In this respect, the Request’s reliance on Article 67(2) is misplaced, and the *ad hoc* Tribunal case-law cited is inapposite.⁴ Third, its reference to the Prosecution’s duties under Rule 76 is similarly without merit.

3. Finally, the Defence does not explain why the relief sought is necessary, in view of the fact that it can itself approach the Trial Chamber for an order to obtain the [REDACTED] material pursuant to Article 64(6)(b). The Prosecution’s Article 54(1)(a) obligations do not supplant the role of the Defence to investigate and prepare a defence. The Defence can obtain the [REDACTED] that it seeks directly from the Trial Chamber. No reason exists under the Statute or in practice for the Prosecution to obtain this material on the Defence’s behalf.

¹ Request, e.g., paras.2, 34.

² Request, e.g., paras.21-24.

³ Request e.g., para.32.

⁴ Request, e.g., fn.23.

Confidentiality

4. The Prosecution files this confidentially, pursuant to Regulation 23bis(2) of the Regulations of the Court, as it responds to a Defence Request filed with the same classification.

Submissions

(a) The Request misconstrues the Prosecutor's Article 54(1)(a) obligations

5. The Defence's generalised and unsupported claims that the [REDACTED] may contain potentially exculpatory information is insufficient to show that the Prosecution has breached, or must now be ordered to discharge, any obligations under Article 54(1)(a). Article 54(1)(a) does not impose on the Prosecution an infinite duty to investigate, in the abstract, any statement or act by its witnesses, without justifiable basis. Moreover, it does not oblige it to investigate information merely because it might be material to Defence preparations,⁵ given that the Prosecution cannot anticipate every potential theory of a Defence case and its investigations cannot supplant the Defence's duty to investigate to prepare its own defence.

6. From Article 54(1)(a)'s plain terms, the Prosecution's obligation to "investigate incriminating and exonerating circumstances equally," is limited to "cover[ing] all facts and evidence relevant to an assessment of whether there is criminal responsibility under the Statute." This covers exonerating material under Article 67(2). As shown below, the Defence's sweeping and generalised assumptions are insufficient to trigger the Prosecution's obligations under Article 54(1)(a) so as to merit the Defence's requested relief.

⁵ Article 54(1)(a) requires the Prosecution to examine "exonerating" circumstances, but not circumstances that may be material to the preparation of the defence. There is a clear difference between these two types of information.

7. Secondly, while not disputing that the Prosecution's Article 54(1)(a) duties as to "establishing the truth" transcend the confirmation hearing to also cover trials,⁶ the Defence's presumptive claim that the [REDACTED] contain exonerating information support the alleged breach of its Article 54(1)(a) obligations cannot be sustained. To establish this, the Defence must adduce tangible support. They have not done so.

8. Furthermore, the Request does not rebut the margin of deference that must be accorded to the Prosecution in discharging its Article 54(1)(a) obligations. In this respect, Trial Chamber VI in the *Banda* case has held that while it has review powers over the Prosecution's Article 54(1)(a) obligations, "[t]his does not mean that it is appropriate for a Chamber, at either the confirmation of charges or trial stage, to make determinations on each of the Prosecution's investigative choices."⁷

9. The Prosecution's duties under Article 54(1)(a) require that it investigates both incriminating and exonerating circumstances comprehensively, in good faith and with integrity.⁸ In implementing this independent role, the Prosecution is best placed to determine, based on the totality of the circumstances and the larger body of evidence collected in a given case, whether or not to investigate or carry out a further investigation of a witness. The Defence bears a high burden of demonstrating that the Prosecution was obliged to investigate (or had failed to investigate) a particular matter. The Request's broad and generalised assumptions relating to the [REDACTED] fail to meet this burden.

10. Similarly, the Prosecution's duties under Article 54(1)(a) to investigate exonerating circumstances are not without limits. The principle essentially bans a partisan or completely one-sided investigation that does not pursue the establishment of the truth as its main objective. It does not mean that while investigating the Prosecution must follow any speculative lead with no tangible

⁶ Request, para.26.

⁷ ICC-02/05-03/09-535-Red, para.50.

⁸ ICC-01/09-01/11-373, Dissenting Opinion of Judge Hans-Peter Kaul, paras.44, 48.

prospective of obtaining information that will contribute to the establishment of the truth. In fact, in discharging its Article 54(1)(a) obligations, the Prosecution does not investigate infinitely, or in the abstract or in isolation, any statement or act by its witnesses, without a reasonable or justifiable basis to do so. Its obligation to investigate does not extend to an unguided fishing expedition. Rather, its investigations, grounded in a good-faith approach, are holistic and premised on concrete evaluations of the totality of the circumstances and the larger body of evidence collected. Moreover, the Prosecution recognises the need to flexibly respond to any changes or developments, including following up on issues, assessed in good faith to be relevant. The mere fact that the Prosecution takes a view different from the Defence on whether a circumstance is worth investigating or following-up on, or the mere fact that some exonerating circumstances are claimed or subsequently confirmed, does not by itself mean the Prosecution has violated its obligations.

(b) The Request is unsupported by sufficient factual basis

11. The Request is based on unsubstantiated claims, incapable of demonstrating that the Prosecution breached its Article 54(1)(a) obligations or should be ordered to obtain the [REDACTED].

12. At the outset, the Prosecution notes that both the Request and the Defence's *inter partes* communications are characterised by the conflation of two separate issues: (i) the request for the Prosecution to disclose, and subsequently to obtain for the Defence under Article 54, information pertaining to the [REDACTED]; and (ii) the request for details relating to [REDACTED]. Thus, the implied criticism in the Request⁹ that the Prosecution did not respond specifically to the Defence's query regarding [REDACTED] is unfounded. Although it did not deal with this issue in the 29 October 2014 response cited in Annex C [REDACTED], it did specifically indicate

⁹ Request, para. 16.

in its reply of the same date on the issue of [REDACTED] that it was not in possession of the material requested.¹⁰

13. Beyond these general assumptions the Defence have not adduced any tangible support to trigger the Prosecution's further Article 54(1)(a) investigations. In this regard, the Prosecution observes that it pointed the Defence to the existence of [REDACTED].¹¹ The Prosecution notes that it appears that the Defence has not even bothered to consult [REDACTED] in order to see whether there is any indication as to the existence of exonerating material, preferring instead to speculate as to the possible [REDACTED].

14. The question of whether the Prosecution should follow-up or carry out further action in relation to a matter pursuant to Article 54(1)(a) is a matter for case-by-case determination. A claim that the Prosecution has failed in that regard must be supported by tangible evidence. In the *Kenyatta* case, the Trial Chamber held that the Prosecution's notice as to potential serious challenges to the credibility of certain key witnesses was a sufficient basis to prompt the Prosecution's thorough review of the consistency and reliability of these witnesses, in furtherance of its Article 54(1)(a) duties.¹² In the *Banda* case, the fact that during the Prosecution's screening exercise, two individuals provided evidence relevant to a contested issue, justified further investigations by the Prosecution.¹³ The Defence has not demonstrated that similar or related exceptional circumstances exist in this case to justify redress under Article 54(1)(a).

15. To the contrary, the Defence have adduced no tangible evidence beyond unfounded assumptions. Firstly, the Defence's own case-theory that "[t]hese [are] false witnesses [...] motivated by benefits (financial and other wise) [...]"¹⁴ are bald

¹⁰ Request, Annex A, email of 29 October 2014, para. 1.

¹¹ Request, Annex A. The Prosecution notes that the Defence omitted to quote this portion of the Prosecution response in its filing; See Request para. 15.

¹² ICC-01/09-02/11-908, paras. 87-88.

¹³ ICC-02/05-03/09-535-Red, para. 51.

¹⁴ Request, para. 25.

and unsubstantiated claims that cannot provide the basis for showing that the Prosecution has breached its Article 54(1)(a) obligations, or must be ordered to carry out further investigations relating to [REDACTED], pursuant to Article 54(1)(a).

16. Secondly, the Defence's claim that "information concerning [REDACTED] Prosecution witnesses is clearly relevant to their credibility,"¹⁵ is unsubstantiated. The *ad hoc* Tribunal case-law cited does not support such a far-reaching proposition.¹⁶ In *Haradinaj*, the Chamber found that [REDACTED] *already in the possession of the Prosecution* was clearly relevant (and thus subject to disclosure as potentially exculpatory evidence) [REDACTED].¹⁷ [REDACTED],

"[REDACTED]"¹⁸

17. It follows that whether [REDACTED] are exculpatory and/or relevant thus triggering disclosure obligations (or further Article 54(1)(a) investigations) is a case-by-case determination. Certainly, the *Haradinaj* decision does not stand for the Defence's general proposition that the Prosecution is obliged to seek out [REDACTED] that are not in its possession, absent information that [REDACTED] in fact contain exonerating material.

18. Further, even if [REDACTED] have a policy to cooperate directly with the Prosecution (but not with the Defence), or if supported by a Court order,¹⁹ this does not demonstrate that the Prosecution is legally obliged under Article 54(1)(a) to obtain the [REDACTED]. In any case, the Defence's submission is contradictory: if [REDACTED] cooperate when supported by a Court order, then it is equally open for the Defence to approach the Chamber for such an order. The Prosecution does not oppose such an approach; rather, as a matter of principle, it objects to the Defence's claim that it was, or is, obliged to obtain [REDACTED] as part of its Article

¹⁵ Request, para.21.

¹⁶ Request, fn.23.

¹⁷ *Prosecutor v. Haradinaj et al*, [REDACTED].

¹⁸ *Haradinaj et al*, [REDACTED].

¹⁹ Request, paras.27-31.

54(1)(a) obligations. The Defence cannot use Article 54(1)(a) as a surrogate for their investigations.

(c) Reliance on Article 67(2), or Rule 76 is unmeritorious

19. Firstly, based on the plain terms of Article 67(2), the Prosecution's disclosure obligations pursuant to this article relate only to material in its possession or control. The [REDACTED] are not in the Prosecution's possession or control.²⁰

20. Moreover, the ICC's case law underscores the importance of respecting the Prosecution's independent role in the disclosure of evidence, while also emphasising that the Prosecution should act in good faith. Chambers will not lightly intervene to review how the Prosecution discharges its obligations, absent tangible support that it has failed to do so. As underscored by Trial Chamber III in the *Bemba* case, the Prosecutor's Article 67(2) disclosure duties (like those under Rule 77), "rest with the Prosecution and the Chamber will not routinely oversee or review decisions taken by the Office of the Prosecutor in fulfilment of them. They are important prosecutorial obligations, which must be discharged scrupulously and fairly. The Chamber will only intervene if there are other good reasons for doubting that the duty has been properly fulfilled."²¹

21. The Defence's generalised claims that the [REDACTED] contain potentially exculpatory material lack tangible substantiation. Therefore, the Defence's "coupling" of Article 54(1)(a) with Article 67(2), is of no utility and does not justify their requested relief.

22. Equally unmeritorious is the Defence's "coupling" of Rule 76 with Article 54(1)(a) to assert that the Prosecution is required to obtain the [REDACTED] "prior recorded statements."²² Instead of demonstrating that the requested materials are "prior recorded statements" within the meaning of Rule 76, the Defence merely

²⁰ Request, Annex A.

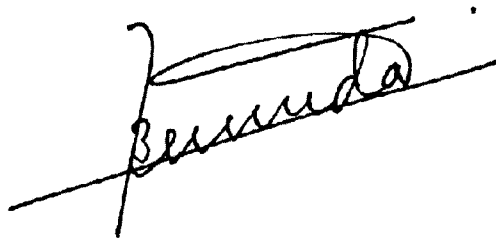
²¹ ICC-01/05-01/08-632, para.20.

²² Request, para.32.

assumes in general terms that [REDACTED].²³ Not every recorded utterance of a witness to a third party qualifies as a “prior recorded statement”. To fall within Rule 76, a prior recorded statement must relate to the subject matter of the case before the Court. In addition, the Appeals Chamber of the ICTR has found that a prior recorded statement must follow the question-answers model.²⁴ Indeed, in all previous ICC cases dealing with “prior statement” issues, a statement has been found to exist (or not to exist) where this precondition has been met (or not met).²⁵ Based, among others, on the Defence’s failure to establish that the requested material taken by other entities were “prior recorded statements,” the *Lubanga Decision* cited by the Defence to support their reliance on Rule 76,²⁶ did not order the Prosecution to obtain the requested materials.²⁷

Relief

23. For the reasons above, the Defence Request should be dismissed.



Fatou Bensouda, Prosecutor

Dated this 23rd day of July 2015
At The Hague, The Netherlands

²³ Request, para.32.

²⁴ *Niyitegeka v. Prosecutor*, ICTR-96-14-A, Judgement, 9 July 2004, paras.31-34.

²⁵ See e.g., ICC-02/05-03/09-295, paras. 22-23; ICC-01/09-01/11-743, paras.16, 20.

²⁶ Request, para.32.

²⁷ ICC-01/04-01/06-718, p.4.