

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/09-01/20**
Date: **4 February 2022**

TRIAL CHAMBER III

Before: Judge Miatta Maria Samba

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

THE PROSECUTOR v. PAUL GICHERU

Public Redacted

**Decision on the Request for Disclosure of Video-Recording of P-0800's Witness
Preparation Session in the *Ruto and Sang* Case**

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

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TRIAL CHAMBER III of the International Criminal Court, in the case of *The Prosecutor v. Paul Gicheru*, having regard to Articles 67(1)(e) and 67(2) of the Rome Statute (the ‘Statute’), and Rules 77 and 81 of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘Decision on the Request for Disclosure of Video-Recording of P-0800’s Witness Preparation Session in the *Ruto and Sang* Case’.

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 26 January 2022, the Defence filed a request seeking disclosure of the video-recording of P-0800’s preparation session in the case of *Prosecutor v. William Samoei Ruto and Joshua Arap Sang* (the ‘Request’ and the ‘*Ruto and Sang* Case’, respectively).¹ The Defence notes that ‘[REDACTED].’² The Defence notes that it originally requested the Prosecution to disclose the video-recording ‘considering that it is both disclosable and material to the preparation of the Defence since it concerns [REDACTED].’³ This request was declined by the Prosecution.⁴

2. The Defence submits that without the video-recording it is ‘unable to determine: (a) how this new information came about; (b) the extent to which P-0800 explained himself; and (c) any contradictions P-0800 may have made in explaining the [REDACTED] to [Prosecution] investigators.’⁵ Furthermore, the Defence avers that ‘[t]here is no legal or rational reason why the video recording should not be disclosed.’⁶

3. On 2 February 2022, the Prosecution responded to the Request (the ‘Response’).⁷ The Prosecution submits that the Request should be rejected. It argues that the Defence ‘fails to demonstrate that access to the video-recording in question [...] is warranted for the stated purpose’,⁸ noting that ‘[t]he Defence is already in possession of all evidence accounting for P-0800’s [REDACTED], such as (i) P-0800’s witness preparation log;

¹ Request for disclosure of video recordings of P-0800’s [REDACTED], 26 January 2022, ICC-01/09-01/20-267-Conf with Confidential Annex A (the ‘Request’). A public redacted version was filed on 28 January 2022 ([ICC-01/09-01/20-267-Red](#)).

² Request, para. 1.

³ Request, para. 3.

⁴ Request, para. 3.

⁵ Request, para. 4.

⁶ Request, para. 6.

⁷ Prosecution response to the Defence “Request for disclosure of video recording of P-0800’s [REDACTED], 1 February 2022, ICC-01/09-01/20-271-Conf (the ‘Response’).

⁸ Response, para. 2.

(ii) the transcripts of his testimony in the *Ruto and Sang* Case; and (iii) the transcripts of his re-interview with the [Prosecution].⁹

4. The Prosecution recounts the relevant background to P-0800's witness preparation in the *Ruto and Sang* Case, as well as his recent additional interview as part of the Prosecution's investigative activities in the present case.¹⁰ The Prosecution submits that during his witness preparation session in the *Ruto and Sang* Case, P-0800 noted that [REDACTED] '[REDACTED]'.¹¹ During his re-interview between [REDACTED], P-0800 noted that he '[REDACTED]' [REDACTED] '[REDACTED]' '[REDACTED]' [REDACTED].¹²

5. The Prosecution submits that '[v]ideo recordings of witness preparation sessions are kept as safeguards in the event of allegations of coaching of witnesses or other improper interference'¹³ and should not 'be revealed simply to verify the content of the preparation note.'¹⁴ Furthermore, while the Prosecution acknowledges that video-recordings may be subject to disclosure 'if it contains information, in addition to the information recorded and disclosed after the preparation session', in the Prosecution's assessment the recording in question 'does not'.¹⁵

II. ANALYSIS

6. At the outset, the Chamber notes that the video-recording which the Defence seeks disclosure of relates to P-0800's witness preparation session in the *Ruto and Sang* Case and that both parties make reference to witness preparation protocols when arguing about the disclosability of the video-recording. However, the Chamber notes that the present request for disclosure is made in respect of a witness preparation session conducted in different proceedings. Accordingly, the Chamber is of the view that it is not a question of whether any protocol related to witness preparation permits the video-

⁹ Response, para. 3.

¹⁰ See Response, paras 6-13.

¹¹ Response, para. 7.

¹² Response, para. 10.

¹³ Response, para. 15.

¹⁴ Response, para. 16.

¹⁵ Response, para. 17.

recording's disclosure but rather whether the item is disclosable pursuant to any disclosure obligation such as Article 67(2) of the Statute or Rule 77 of the Rules.

7. Article 67(2) of the Statute provides, in relevant part, that the Prosecution shall disclose evidence in its possession which 'may affect the credibility of [P]rosecution evidence.' Rule 77 of the Rules governs Prosecution disclosure and involves a two stage inquiry.¹⁶ First, it must be determined whether the 'books, documents, photographs and other tangible objects' sought are material to the preparation of the defence.¹⁷ 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.¹⁸

8. The Chamber recalls that 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.¹⁹ 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 to the preparation of the defence.²⁰ Similarly, the Chamber notes that items which are not directly linked to exonerating or incriminating evidence may nevertheless be material to the defence's preparation.²¹

9. First, the Chamber disagrees with the Prosecution that the Defence 'is already in possession of all the evidence accounting for P-0800's [REDACTED]'. Indeed while the Defence does have transcripts of P-0800's re-interview, it does not have transcripts of the witness preparation session carried out in *Ruto and Sang* Case. Second, the

¹⁶ 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; Trial Chamber VI, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, [Decision on Defence Request for Disclosure of Information Relating to the Mungiki](#), 25 August 2014, ICC-01/09-01/11-1465 ('*Ruto and Sang* Disclosure Decision'), para. 12(iii).

¹⁷ [Banda & Jerbo OA4 Judgment](#), para. 35; [Ruto and Sang Disclosure Decision](#), para. 12(iii).

¹⁸ [Banda & Jerbo OA4 Judgment](#), para. 35; [Ruto and Sang Disclosure Decision](#), para. 12(iii).

¹⁹ [Banda & Jerbo OA4 Judgment](#), para. 42; [Ruto and Sang Disclosure Decision](#), para. 12(iv).

²⁰ [Banda & Jerbo OA4 Judgment](#), para. 38; Appeals Chamber, *The 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'), paras 77-78; [Ruto and Sang Disclosure Decision](#), para. 12(iv).

²¹ [Banda & Jerbo OA4 Judgment](#), para. 38, [Lubanga OA11 Judgment](#), paras 77-81; [Ruto and Sang Disclosure Decision](#), para. 12(iv).

Chamber notes that a key matter in issue between the Parties is [REDACTED] ‘[REDACTED]’.²² To this end, having regard to the Accused’s rights under Article 67(1)(e) of the Statute, the Defence must be able to present evidence in support of its case in this respect. As a result, the Chamber is of the view that the video-recording may affect the credibility of the Prosecution’s evidence insofar as it pertains to the question of [REDACTED] ‘[REDACTED]’.²³ Accordingly, the Chamber finds that a portion of the video-recording is disclosable under Article 67(2) of the Statute.

10. In respect of the modalities of disclosure of the video-recording, the Chamber is mindful that the video-recording spans five days. In this regard, the Chamber acknowledges the requirements of Rule 81(4) of the Rules and the Prosecution’s submission to the effect that if disclosure is ordered that it ‘will need to review for possible redactions many hours of video material’ and the burden that will place on the Prosecution.²⁴

11. To this end, the Chamber orders the Prosecution to identify the portions of the video-recording that pertain to [REDACTED]. It is then ordered to disclose those portions to the Defence, with redactions as may be necessary, as soon as possible, and, in any event, no later than 14 February 2022.

²² See Request, paras 1, 3; Response, para. 21.

²³ Request, para. 1.

²⁴ Response, para. 23.

FOR THESE REASONS, THE CHAMBER HEREBY

GRANTS the Request; and

ORDERS the Prosecution to identify the relevant portions of the video-recording in accordance with paragraph 11 above and disclose those relevant portions to the Defence, with redactions as may be necessary, as soon as possible and, in any event, no later than 14 February 2022.

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

A handwritten signature in blue ink, appearing to read 'Miatta Maria Samba', is written above a horizontal line.

Judge Miatta Maria Samba

Dated 4 February 2022

At The Hague, The Netherlands