

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/09-01/11
Date: 16 February 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 redacted version of
Decision on Ruto Defence Request for the Appointment of a Disclosure Officer
and/or the Imposition of Other Remedies for Disclosure Breaches of 9 January
2015 (ICC-01/09-01/11-1774-Conf)

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

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Mr Karim Khan

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Detention Section

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Section**

Others

Trial Chamber V(A) (the ‘Chamber’) of the International Criminal Court (the ‘Court’), in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, having regard to Articles 64 and 67 of the Rome Statute (the ‘Statute’), Rules 76, 77 and 81 of the Rules of Procedure and Evidence (the ‘Rules’) and Regulation 23 *bis* of the Regulations of the Court (the ‘Regulations’), issues this ‘Decision on Ruto Defence Request for the Appointment of a Disclosure Officer and/or the Imposition of Other Remedies for Disclosure Breaches’.

I. Procedural history and relief sought

1. On 13 October 2014, the defence for Mr Ruto (the ‘Ruto Defence’) filed the ‘Ruto Defence Request for the Appointment of a Disclosure Officer and/or the Imposition of Other Remedies for Disclosure Breaches’ (the ‘Request’).¹ With reference to a series of eight alleged ‘serious disclosure failures’, the Ruto Defence requests the Chamber to direct the Office of the Prosecutor (the ‘Prosecution’) to:
 - (a) make appropriate changes to its internal disclosure system, including the undertaking of regular reviews of material in its possession and to certify to the Chamber when such changes have been effected;
 - (b) conduct a complete review of its case file and, on completion of said review, to either certify to the Chamber that no disclosable materials remain undisclosed or to explain which materials remain undisclosed, the reason(s) why and to provide a timeframe for disclosure; and
 - (c) going forward, to appoint a disclosure officer who, among other duties, would certify that all disclosable materials have been provided to the Defence and, for future disclosures, to provide reasons why such material was not disclosed previously.²

¹ ICC-01/09-01/11-1602-Conf-Red, with 15 annexes (confidential ex parte version of filing notified same day). The Request was foreshadowed by the Ruto Defence in court. Transcript of Hearing, 25 September 2014, ICC-01/09-01/11-T-144-CONF-ENG, page 15, lines 4-9.

² Request, ICC-01/09-01/11-1602-Conf-Red, paras 19, 31-33, 35.

2. On 4 November 2014, the Prosecution responded to the Request (the 'Response').³
The Prosecution argues that, even if the Chamber were to find that the Prosecution was in breach of its disclosure obligations in one or more of the examples relied upon, these do not begin to justify the 'far-reaching and inappropriate' relief sought by the Ruto Defence. The Prosecution accordingly submits that the relief sought in the Request should be dismissed.⁴
3. The defence team for Mr Sang (the 'Sang Defence') did not file any response to the Request.
4. On 1 December 2014, the Ruto Defence alleged a ninth disclosure failure and requested the Chamber to: (i) accept the submission of a further investigator's report disclosed after the Request was filed and (ii) consider it for the purposes of its final determination on the Request (the 'Supplementary Request').⁵
5. On 5 December 2014,⁶ the Prosecution⁷ and Sang Defence⁸ responded to the Supplementary Request.

II. Alleged disclosure violations

6. As a preliminary matter, the Chamber notes the Prosecution and Sang Defence do not object to the Chamber considering the Supplementary Request and its annex

³ Prosecution Response to 'Confidential Redacted Version of "Ruto Defence Request for the Appointment of a Disclosure Officer and/or the Imposition of Other Remedies for Disclosure Breaches"', 4 November 2014, ICC-01/09-01/11-1630-Conf-Corr, with six annexes (corrected version, with additional annex, notified 5 November 2014).

⁴ Response, ICC-01/09-01/11-1630-Conf-Corr, paras 56-57.

⁵ Ruto Defence request to file supplementary material relevant to the "Ruto Defence Request for the Appointment of a Disclosure Officer and/or the Imposition of Other Remedies for Disclosure Breaches", 1 December 2014, ICC-01/09-01/11-1724-Conf (with annex).

⁶ Pursuant to the Chamber's direction, responses were due by this date, Email Communications from Legal Officer of the Chamber, 3 December 2014, at 15:39 and 15:49.

⁷ Prosecution Response to 'Ruto Defence request to file supplementary material relevant to the "Ruto Defence Request for the Appointment of a Disclosure Officer and/or the Imposition of Other Remedies for Disclosure Breaches"', 5 December 2014, ICC-01/09-01/11-1740-Conf (with two annexes).

⁸ Sang Defence Observations regarding the Ruto Defence Request to File Supplementary Material Relevant to the "Ruto Defence Request for the Appointment of a Disclosure Officer and/or the Imposition of Other Remedies for Disclosure Breaches", 5 December 2014, ICC-01/09-01/11-1739-Conf.

along with the other alleged disclosure violations.⁹ In view of this, and in the interests of efficiency, the Chamber grants the relief sought in the Supplementary Request.

7. The basic principles concerning the Prosecution's disclosure obligations have been previously set out by the Chamber and are incorporated by reference here.¹⁰ The Chamber also recalls that all disclosure by the Prosecution was to be completed in this case by 9 January 2013.¹¹
8. In order to decide what remedy, if any, would be appropriate in the present circumstances, the Chamber will proceed to analyse each of the Ruto Defence's nine alleged disclosure violations.
9. The Chamber notes the extensive submissions made by the Prosecution that the alleged violations did not prejudice the Ruto Defence and Sang Defence (collectively, the 'Defence'). But, the matter may not be that simple, for the ultimate question engaged is this: what else may have been left undisclosed if the Prosecution's disclosure system is truly unsatisfactory? The Chamber will consider first, in respect of each alleged violation, whether or not the Prosecution acted in full conformity with its disclosure obligations. Second, the Chamber will consider whether the Prosecution's disclosure failures, if any, indicate systematic failures in the Prosecution's disclosure process.

A. Investigation report of 8 November 2012¹²

10. On 24 September 2014, the Prosecution disclosed – to the Defence in the course of the trial - an investigation report dated 8 November 2012.¹³ This report contains an

⁹ ICC-01/09-01/11-1739-Conf, para. 1; ICC-01/09-01/11-1740-Conf, paras 3, 11.

¹⁰ *E.g.* Decision on Defence Request for Disclosure of Information Relating to the Mungiki, 25 August 2014, ICC-01/09-01/11-1465, para. 12.

¹¹ Decision on the schedule leading up to trial, 9 July 2012, ICC-01/09-01/11-440, para. 14.

¹² [REDACTED]. *See also* Annex B of the Request, ICC-01/09-01/11-1602-Conf-AnxB.

[REDACTED] where the witness, *inter alia*, directs the Prosecution to prospective witnesses and requests urgent financial assistance.¹⁴ The report also relates to Witness 516, who testified from 22 to 26 September 2014.

11. The Ruto Defence submits that the disclosure of this investigation report was 'grossly delayed' and that it was 'on any reasonable view' disclosable by 9 January 2013 as a statement under Rule 76 of the Rules, as exculpatory material under Article 67(2) of the Statute and as information material to the preparation of the defence under Rule 77 of the Rules.¹⁵
12. The Prosecution argues that this investigation report only became relevant following the start of Witness 516's testimony.¹⁶ The Prosecution describes [REDACTED] financial assistance request as relating to 'routine witness-management issues', and argues that there is 'no suggestion whatsoever' that [REDACTED] had an imperfect financial motive or was suggesting a *quid pro quo* relationship.¹⁷ The Prosecution indicates that, well before Witness 516's testimony, it disclosed both the financial assistance given to [REDACTED] and the Prosecution witnesses introduced by [REDACTED].¹⁸ The Prosecution contests each of the legal bases for disclosure offered by the Ruto Defence and submits that there was no failure in discharging its disclosure obligations.¹⁹
13. The Chamber is persuaded that this investigation report fell under the Prosecution's disclosure obligations before Witness 516's testimony. That [REDACTED] requested urgent financial assistance, especially in the very

¹³ See Annex A of the Request, ICC-01/09-01/11-1602-Conf-AnxA.

¹⁴ Investigation report of 8 November 2012, [REDACTED].

¹⁵ Request, ICC-01/09-01/11-1602-Conf-Red, paras 9-18.

¹⁶ Response, ICC-01/09-01/11-1630-Conf-Corr, para. 21.

¹⁷ Response, ICC-01/09-01/11-1630-Conf-Corr, para. 22.

¹⁸ Response, ICC-01/09-01/11-1630-Conf-Corr, paras 20, 22; Annex A of the Response, ICC-01/09-01/11-1630-Conf-AnxA; Annex B of the Response, ICC-01/09-01/11-1630-Conf-AnxB; Annex C of the Response, ICC-01/09-01/11-1630-Conf-AnxC.

¹⁹ Response, ICC-01/09-01/11-1630-Conf-Corr, paras 17, 22-28.

message where he connected the Prosecution with two prospective witnesses, may implicate the concerns indicated in Article 67(2). Without prejudice to any future determination on [REDACTED] credibility, the link between the urgent financial request and the prospective witnesses is at least material to the preparation of the defence. This link is apparent in the investigator's report.

14. The Prosecution should have foreseen that the investigation report was disclosable at an earlier point in the case. The Chamber concludes that the Prosecution did not act in full conformity with its disclosure obligations and will consider this failure in Section III below in the context of the remedies sought.

B. Witness [REDACTED]²⁰

15. On 23 January 2014, the Prosecution disclosed copies of [REDACTED] Witness [REDACTED] provided [REDACTED].²¹ Materials in the evidentiary record suggest that the Prosecution was aware of the potentially [REDACTED] as early as 9 October 2012.²² Witness [REDACTED] also had a [REDACTED] with further information, but Prosecution staff did not take possession of this item from the witness.²³

16. The Ruto Defence submits that the [REDACTED] should have been disclosed pursuant to Article 67(2) of the Statute and Rule 77 of the Rules.²⁴ The Ruto Defence also argues that the failure to obtain the [REDACTED] from the witness is 'a concern in and of itself'.²⁵

²⁰ [REDACTED].

²¹ [REDACTED].

²² Investigation Report of 9 October 2012, [REDACTED].

²³ Annex D of the Request, ICC-01/09-01/11-1602-Conf-AnxD, page 2.

²⁴ Request, ICC-01/09-01/11-1602-Conf-Red, para. 20.

²⁵ Request, ICC-01/09-01/11-1602-Conf-Red, para. 20.

17. The Prosecution responds that it disclosed a report to the Defence on 9 January 2013 which fully detailed the nature of Witness [REDACTED]. The report was re-disclosed in a lesser redacted form, [REDACTED], on 11 February 2013.²⁶ The Prosecution argues that '[c]ome January 2014, if the Defence had felt it necessary to [REDACTED], it had ample time in which to request these items for the purpose of its preparations.'²⁷ The Prosecution also submitted that, once it had collected all the [REDACTED], there was no need to additionally collect the [REDACTED].²⁸
18. The Chamber notes that the Ruto Defence fails to mention that the Prosecution actually did inform it of the [REDACTED] well before their disclosure on 23 January 2014. This fact should have been mentioned in the Request.
19. Nevertheless, the Chamber does consider that the [REDACTED] referenced in the report fell under the Prosecution's disclosure obligations for the same reasons as the report. As such, they should have been disclosed in early 2013.
20. The Chamber emphasises that it is immaterial that the Ruto Defence did not request the [REDACTED] until January 2014. Unlike the corresponding provisions at other international tribunals, which only require the Prosecution to allow the Defence to inspect information material to the preparation of the defence 'on request',²⁹ Rule 77 of the Rules contains no such limitation. It is therefore no excuse that the Prosecution promptly disclosed the [REDACTED] upon request; the disclosure should have happened at an earlier point.

²⁶ Response, ICC-01/09-01/11-1630-Conf-Corr, para. 32.

²⁷ Response, ICC-01/09-01/11-1630-Conf-Corr, para. 32.

²⁸ Response, ICC-01/09-01/11-1630-Conf-Corr, para. 33.

²⁹ Rule 66(B) of the ICTY Rules; Rule 66(B) of the ICTR Rules; Rule 110(B) of the STL Rules; Rule 71(B) of the MICT Rules.

21. And, with respect to the [REDACTED], the Prosecution had an obligation to request this item from the witness, though it was not in the Prosecution's possession. Whether or not such a request would produce the requested information is a different matter.

22. The Chamber concludes that the Prosecution did not disclose [REDACTED] in full conformity with its disclosure obligations. However, this failure is mitigated by the fact that the key facts relating to [REDACTED] were disclosed in early 2013. Hence, this failure is of such a *de minimis* nature that it will not be further considered in the context of the remedies sought.

C. Information concerning Witness 15's [REDACTED]³⁰

23. Between February and June 2013, the Prosecution disclosed certain information regarding Witness 15's [REDACTED].³¹ The Prosecution appears to have acquired much of this information in mid-2011.³²

24. The Ruto Defence submits that there is no cogent explanation for why the Prosecution did not disclose this information earlier.³³ The Ruto Defence also observes that the Prosecution has never explained why these matters related to Witness 15 were not brought to the attention of the Pre-Trial Chamber.³⁴

25. The Prosecution responds that the information referenced by the Ruto Defence was found through the Prosecution's internal review procedures.³⁵ The

³⁰ Annex F of the Request, ICC-01/09-01/11-1602-Conf-AnxF (KEN-OTP-0090-1099); Annex G of the Request, ICC-01/09-01/11-1602-Conf-AnxG (KEN-OTP-0106-0727).

³¹ Annex E of the Request, ICC-01/09-01/11-1602-Conf-AnxE, page 3; Annex H of the Request, ICC-01/09-01/11-1602-Conf-AnxH.

³² See Annex E of the Request, ICC-01/09-01/11-1602-Conf-AnxE; Annex H of the Request, ICC-01/09-01/11-1602-Conf-AnxH.

³³ Request, ICC-01/09-01/11-1602-Conf-Red, para. 21.

³⁴ Request, ICC-01/09-01/11-1602-Conf-Red, para. 21. See also Annex H of the Request, ICC-01/09-01/11-1602-Conf-AnxH, page 4.

³⁵ Response, ICC-01/09-01/11-1630-Conf-Corr, para. 34.

Prosecution classifies the late disclosure as an ‘oversight’ and mentions that the Defence has now been in possession of this information for over 20 months.³⁶

26. The Chamber notes the Prosecution’s concession that this information concerning Witness 15 should have been discovered and disclosed earlier. The Chamber concludes that the Prosecution did not act in full conformity with its disclosure obligations and will consider this failure in Section III below in the context of the remedies sought.

D. Evidence obtained during the Commission of Inquiry into the Post-Election Violence (the ‘Waki Commission’)

27. On 28 March 2014, the Prosecution disclosed statements and testimony of certain Waki Commission witnesses.³⁷ On 11 June 2014, the Prosecution disclosed complete investigation reports it prepared regarding certain Waki Commission personnel which had been disclosed previously only in summary form.³⁸ The Ruto Defence asserts that the Prosecution has been in possession of this information since 2010;³⁹ this assertion is unchallenged in the Response.
28. The Ruto Defence submits that the lateness of these disclosures is also in breach of the Prosecution’s disclosure obligations. As regards the investigation reports regarding Waki Commission personnel, the Ruto Defence further argues that the full versions of these reports should have been disclosed earlier pursuant to Rule 77 of the Rules and in accordance with the Appeals Chamber jurisprudence.⁴⁰

³⁶ Response, ICC-01/09-01/11-1630-Conf-Corr, paras 34-35.

³⁷ See Annex I of the Request, ICC-01/09-01/11-1602-Conf-AnxI.

³⁸ See Annex J of the Request, ICC-01/09-01/11-1602-Conf-AnxJ.

³⁹ Request, ICC-01/09-01/11-1602-Conf-Red, para. 22. See also Annex J of the Request, ICC-01/09-01/11-1602-Conf-AnxJ.

⁴⁰ Request, ICC-01/09-01/11-1602-Conf-Red, para. 22, citing to Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor’s request for non-disclosure in relation to document “OTP/DRC/COD-190/JCCD-pt”, 27 May 2013, ICC-01/04-01/06-3031, A5 A6, para. 12.

29. The Prosecution submits that it has complied with its disclosure obligations.⁴¹ The Prosecution argues that '[i]t is as much incumbent upon the Defence to keep the Prosecution reasonably informed on an ongoing basis of what matters they would consider to be material to their preparations - [REDACTED] - as it is for the Prosecution to anticipate what may or may not be material to the Defence.'⁴²
30. The Chamber is not persuaded by the Prosecution's arguments. First, the Prosecution's arguments about not understanding the relevant lines of defence could only be applicable to the investigation reports disclosed on 11 June 2014. The statements of Waki Commission witnesses, disclosed only on 28 March 2014, would certainly qualify as part of the [REDACTED]. Why these statements were not disclosed earlier is not addressed by the Prosecution. Second, the Prosecution's own argument that it did not see the relevance of the investigative reports until they were requested by the Ruto Defence is undercut by the fact that the Prosecution had already decided to provide summaries of these reports. This disclosure of the summaries suggests that the Prosecution did understand the potential relevance of the Waki Commission's [REDACTED] earlier than it claims.
31. The Chamber concludes that the Prosecution did not act in full conformity with its disclosure obligations and will consider this failure in Section III below in the context of the remedies sought.

E. Forensic report related to [REDACTED]⁴³

32. On 3 January 2014, the Prosecution disclosed a forensic report related to [REDACTED] which contained substantive information relating to certain alleged

⁴¹ Response, ICC-01/09-01/11-1630-Conf-Corr, para. 36.

⁴² Response, ICC-01/09-01/11-1630-Conf-Corr, para. 36 (emphasis in original).

⁴³ Annex K of the Request, ICC-01/09-01/11-1602-Conf-AnxK ([REDACTED]).

crimes in this case.⁴⁴ This report was prepared by the Prosecution and is dated 4 May 2013.

33. The Ruto Defence also describes this delay as a disclosure breach and argues that this report was disclosable pursuant to Rules 76 and 77 of the Rules.⁴⁵

34. The Prosecution acknowledges that it would have been preferable for this report to have been disclosed at an earlier date and regrets that it was provided to the Defence 10 days prior to the originally scheduled testimony of [REDACTED].⁴⁶ The Prosecution indicates that this delay was due to a delay by the Prosecution's Scientific Response Unit (the authors of the report), in registering the report in the Prosecution's evidence review and management system (Ringtail).⁴⁷ The Prosecution argues that '[w]hile this does not excuse the delayed disclosure, it is significant in that this sort of human error would not necessarily be prevented by the remedies proposed by the Defence'.⁴⁸

35. The Chamber notes the Prosecution's concession that it would have been 'preferable' to have disclosed this report earlier. The Chamber concludes that the Prosecution did not act in full conformity with its disclosure obligations and will consider this failure in Section III below in the context of the remedies sought.

F. Information concerning [REDACTED]

36. On 5 June 2014, the Prosecution sought the Chamber's guidance regarding the disclosure of [REDACTED] identity and certain attendant information.⁴⁹ This

⁴⁴ Annex L of the Request, ICC-01/09-01/11-1602-Conf-AnxL.

⁴⁵ Request, ICC-01/09-01/11-1602-Conf-Red, para. 23.

⁴⁶ Response, ICC-01/09-01/11-1630-Conf-Corr, para. 39.

⁴⁷ Response, ICC-01/09-01/11-1630-Conf-Corr, para. 39.

⁴⁸ Response, ICC-01/09-01/11-1630-Conf-Corr, para. 39.

⁴⁹ [REDACTED].

information was relevant to [REDACTED], who testified [REDACTED], and was in the Prosecution's possession by 13 November 2013 at the latest.

37. The Ruto Defence submits that this disclosure was 'of significant exculpatory and Rule 77 information' and that disclosure was 'grossly delayed'.⁵⁰ The Ruto Defence argues that, in so far as the delay in disclosure was due to security issues, these issues should have been addressed and resolved at a much earlier stage in proceedings.⁵¹

38. The Prosecution argues that the delay in disclosing this information relating to former [REDACTED] was due to a conflict between its disclosure obligations and its obligations to protect [REDACTED].⁵² The Prosecution acknowledges that, in hindsight, it should have brought its concerns about [REDACTED] to the Chamber's attention earlier.⁵³

39. The Chamber notes the Prosecution's concession that it should have brought its disclosure conflict regarding [REDACTED] to the Chamber earlier than it did. The Chamber concludes that the Prosecution did not act in full conformity with its disclosure obligations and will consider this failure in Section III below in the context of the remedies sought.

G. Two paragraphs in Witness 516's statement⁵⁴

40. On 16 September 2014, the Prosecution lifted redactions to two paragraphs in Witness 516's statement of 20-23 November 2012.⁵⁵ This information pertains to Witness 516, [REDACTED].

⁵⁰ Request, ICC-01/09-01/11-1602-Conf-Red, para. 24.

⁵¹ Request, ICC-01/09-01/11-1602-Conf-Red, para. 24.

⁵² Response, ICC-01/09-01/11-1630-Conf-Corr, para. 43.

⁵³ Response, ICC-01/09-01/11-1630-Conf-Corr, para. 44.

⁵⁴ Witness 516 Statement, KEN-OTP-0087-0031_R06.

41. The Ruto Defence submits these paragraphs contained incriminating and exculpatory information and should have been disclosed earlier.⁵⁶ The Ruto Defence acknowledges that the Prosecution undertook not to rely on this information, but that this assurance 'does not detract from the fact that it is information to which the Defence were entitled and it should have been disclosed at a far earlier stage in proceedings'.⁵⁷

42. The Prosecution acknowledges that the redactions to the two paragraphs should have been lifted and re-disclosed to the Defence earlier.⁵⁸

43. The Chamber concludes that the Prosecution did not act in full conformity with its disclosure obligations and will consider this failure in Section III below in the context of the remedies sought.

H. Information showing Mungiki support for the Orange Democratic Movement and/or Raila Odinga in the 2007 elections

44. On 25 August 2014, the Chamber granted a Ruto Defence request and, subject to limited exceptions, ordered 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.'⁵⁹ This information was originally requested by the Ruto Defence on 25 June 2014.⁶⁰

45. The Ruto Defence observes that 701 items were disclosed following this Chamber decision, and argues that the Defence's assertions about the disclosability of these materials are 'not based on an abstract theory'. The Ruto Defence provides

⁵⁵ Witness 516 Statement, KEN-OTP-0087-0031_R05 (EVD-T-OTP-00174), para. 124.

⁵⁶ Request, ICC-01/09-01/11-1602-Conf-Red, para. 25.

⁵⁷ Request, ICC-01/09-01/11-1602-Conf-Red, para. 25.

⁵⁸ Response, ICC-01/09-01/11-1630-Conf-Corr, para. 47.

⁵⁹ ICC-01/09-01/11-1465.

⁶⁰ Annex C1 of the Request, ICC-01/09-01/11-1602-Conf-Exp-AnxC1. See also Annex C2 of the Request, ICC-01/09-01/11-1602-Conf-Exp-AnxC2 (further inter-partes correspondence).

excerpts of the disclosed materials which it asserts 'seriously undermine [the Prosecution's] theory in this case'.⁶¹

46. The Prosecution indicates that it disputed the relevance of these materials, but promptly disclosed them following the Chamber's decision ordering disclosure.⁶² The Prosecution observes that the Chamber did not conclude that the Prosecution had breached its disclosure obligations in this decision.⁶³

47. The Chamber agrees with the Prosecution that no disclosure breach occurred. Reasonable people could disagree on whether the Mungiki-related material was disclosable in this case, and not every adverse ruling from a Chamber can be equated with the Prosecution having not diligently discharged its disclosure obligations. Further, as noted by the Chamber in its decision of 25 August 2014, the Prosecution 'was not given much information from the Ruto Defence regarding the alleged relevance of the Requested Information before the Request was filed. The Chamber considers that the Ruto Defence could have been more forthcoming with the Prosecution without compromising its Defence strategy.'⁶⁴

48. The Chamber therefore concludes that, for this alleged violation, there is no evidence that the Prosecution failed to appropriately discharge its disclosure obligations.

⁶¹ Annex C3 of the Request, ICC-01/09-01/11-1602-Conf-Exp-AnxC3.

⁶² Response, ICC-01/09-01/11-1630-Conf-Corr, para. 51. *See also* Annex D of the Response, ICC-01/09-01/11-1630-Conf-AnxD; Annex E of the Response, ICC-01/09-01/11-1630-Conf-AnxE; Annex F of the Response, ICC-01/09-01/11-1630-Conf-AnxF.

⁶³ Response, ICC-01/09-01/11-1630-Conf-Corr, para. 52.

⁶⁴ ICC-01/09-01/11-1465, para. 13, *quoted in* Response, ICC-01/09-01/11-1630-Conf-Corr, para. 52.

I. Investigative report related to Witness 613⁶⁵

49. On 14 November 2014, the Prosecution disclosed, *inter alia*, a 13 February 2014 investigator's report concerning Witness 613.⁶⁶ This report also relates to [REDACTED].

50. The Ruto Defence submits that this late disclosure is another example of a 'serious disclosure breach'.⁶⁷ The Ruto Defence argues that this report 'may reveal the real motivations underlying these individuals' willingness to become Prosecution witnesses. Further, its disclosable nature is not contingent on any inside knowledge of the Defence case'.⁶⁸

51. The Prosecution acknowledges that this report should have been disclosed prior to the appearance of Witness 613 earlier this year.⁶⁹ The Prosecution explains that, 'regrettably, it was not registered in the Prosecution's evidence review and management system (Ringtail) at the time it was prepared [...]'.⁷⁰ The Prosecution submits that the most of the information in this report is not disclosable and, for the information which is disclosable, the Defence have not suffered any material prejudice.⁷¹

52. The Chamber notes the Prosecution's concession that this information should have been disclosed earlier. The Chamber concludes that the Prosecution did not act in full conformity with its disclosure obligations and will consider this failure in Section III below in the context of the remedies sought.

⁶⁵ Annex A of the Supplementary Request, ICC-01/09-01/11-1724-Conf-AnxA (KEN-OTP-0140-0363).

⁶⁶ Supplementary Request, ICC-01/09-01/11-1724-Conf, para. 2. *See also* Annex A: Prosecution's Communication of the Disclosure of Evidence, 19 November 2014, ICC-01/09-01/11-1665-Conf-AnxA.

⁶⁷ Supplementary Request, ICC-01/09-01/11-1724-Conf, paras 2, 8.

⁶⁸ Supplementary Request, ICC-01/09-01/11-1724-Conf, para. 7.

⁶⁹ ICC-01/09-01/11-1740-Conf, para. 4.

⁷⁰ ICC-01/09-01/11-1740-Conf, para. 4.

⁷¹ ICC-01/09-01/11-1740-Conf, paras 5-6. *See also* ICC-01/09-01/11-1740-Conf-AnxA; ICC-01/09-01/11-1740-Conf-AnxB.

III. Conclusions on remedies sought

53. The Ruto Defence argues that the cumulative effect of the disclosure violations justify its relief sought.⁷² The Ruto Defence also directs the Chamber to England and Wales and ICTY practice in support of its request for the appointment of a disclosure officer.⁷³
54. The Prosecution responds that: (i) none of the alleged disclosure violations relate to critical documents; (ii) those complaints that are grounded in fact, while regrettable, must be seen against the background of the thousands of documents that the Prosecution has diligently disclosed over the same 18 month period in which the alleged violations occurred and (iii) the Defence has failed to demonstrate any real prejudice to its ability to present its case.⁷⁴ The Prosecution argues that appointing a disclosure officer would encroach upon the Prosecution's 'independent function in the administration of justice through micro-management'.⁷⁵ The Prosecution argues that none of the alleged disclosure violations, individually or cumulatively, warrant granting the relief sought.⁷⁶
55. The Chamber recalls its findings in the previous section that, for seven of the nine alleged disclosure violations, the Prosecution did not act in full conformity with its disclosure obligations in a manner relevant to the relief sought.⁷⁷ Of these

⁷² Request, ICC-01/09-01/11-1602-Conf-Red, para. 28.

⁷³ Request, ICC-01/09-01/11-1602-Conf-Red, paras 31-33; Annex M of the Request, ICC-01/09-01/11-1602-Conf-Exp-AnxM.

⁷⁴ Response, ICC-01/09-01/11-1630-Conf-Corr, para. 3.

⁷⁵ Response, ICC-01/09-01/11-1630-Conf-Corr, para. 11.

⁷⁶ Response, ICC-01/09-01/11-1630-Conf-Corr, para. 16; ICC-01/09-01/11-1740-Conf, para. 10.

⁷⁷ Namely, the: (i) investigation report of 8 November 2012; (ii) information concerning Witness 15's [REDACTED]; (iii) evidence obtained during the Waki Commission; (iv) forensic report related to [REDACTED]; (v) information concerning [REDACTED]; (vi) two paragraphs in Witness 516's statement and (vii) investigative report related to Witness 613. The Prosecution did not act in full conformity with its disclosure obligations for an eighth alleged violation (Witness [REDACTED]), but only to a *de minimis* degree.

seven failures, five relate to human error⁷⁸ and two stem from the Chamber's overruling the Prosecution position on the disclosability of certain materials.⁷⁹ The Chamber has also taken into consideration that, in comparison to these seven failures, the Prosecution has disclosed 6,300 items and almost 51,000 pages of material in the past three and a half years.⁸⁰ On these facts, the Chamber considers that the Prosecution's disclosure failures reveal imperfections in the Prosecution's disclosure system rather than systematic failures indicating lack of fitness for purpose.

56. The Chamber will now turn to the specific relief sought by the Ruto Defence.

57. First, the Ruto Defence requests the Chamber to order the Prosecution to 'make appropriate changes to its internal disclosure system, including the undertaking of regular reviews of material in its possession and to certify to the Chamber when such changes have been effected'.⁸¹ This request is not specific, beyond the undertaking of regular reviews which the Prosecution submits it already does.⁸² The Chamber does not consider that a generic direction to 'make appropriate changes' would serve any purpose, nor do the arguments presented by the Ruto Defence reveal the specific systemic problems which would justify significant Chamber intervention into the Prosecution's disclosure process. What is more important in the circumstances is to require the Prosecution to ensure against failings in its disclosure obligations and to hold it accountable to the necessary extent for any such failing. Accordingly, this request is rejected.

⁷⁸ Namely, the: (i) information concerning Witness 15's [REDACTED]; (ii) forensic report related to [REDACTED]; (iii) information concerning [REDACTED]; (iv) two paragraphs in Witness 516's statement and (v) investigative report related to Witness 613.

⁷⁹ Namely, the: (i) investigation report of 8 November 2012 and (ii) evidence obtained during the Waki Commission.

⁸⁰ Response, ICC-01/09-01/11-1630-Conf-Corr, para. 29.

⁸¹ Request, ICC-01/09-01/11-1602-Conf-Red, para. 35(a).

⁸² Response, ICC-01/09-01/11-1630-Conf-Corr, para. 9 ('[t]he Prosecution has appropriate internal procedures in place to ensure that its statutory obligations are met through an ongoing and regular process of review of the Prosecution collection').

58. Second, the Ruto Defence requests the Chamber to order the Prosecution to 'conduct a complete review of its case file and, on completion of said review, to either certify to the Chamber that no disclosable materials remain undisclosed or to explain which materials remain undisclosed, the reason(s) why and to provide a timeframe for disclosure.'⁸³

59. Irrespective of whether the established disclosure shortcomings caused any prejudice to the Defence, even when considered collectively, the Chamber is concerned that disclosure failures are arising after the commencement of the trial. In order to ensure that the Prosecution is acting in full conformity with its disclosure obligations, this Chamber will order for the Prosecution to certify no later than the end of its case that no disclosable materials remain undisclosed.⁸⁴ The Prosecution may conduct this work as it sees fit in the context of its regular disclosure reviews, so long as these reviews are sufficiently thorough to allow for a meaningful certification. The Chamber does not consider it worthwhile to ask for 'explanations' for why materials remain undisclosed – if the Prosecution discovers further disclosable material, it is to immediately disclose it to the Defence subject to any applicable restrictions on disclosure.

60. Therefore, to the extent indicated, this Ruto Defence request is granted.

61. Third, the Ruto Defence requests the Chamber to order the Prosecution to 'going forward, to appoint a disclosure officer who, among other duties, would certify

⁸³ Request, ICC-01/09-01/11-1602-Conf-Red, para. 35(b).

⁸⁴ Trial Chamber V(B) ordered a similar review. *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on defence application pursuant to Article 64(4) and related requests, 26 April 2013, ICC-01/09-02/11-728, para. 97. The record was certified on 21 May 2013. Prosecution certification of review of its case file pursuant to Trial Chamber V's 26 April 2013 order (ICC-01/09-02/11-728), 21 May 2013, ICC-01/09-01/11-740.

that all disclosable materials have been provided to the Defence and, for future disclosures, to provide reasons why such material was not disclosed previously'.⁸⁵

62. The Chamber does not consider such an appointment to be necessary. To the extent that such an officer would review the Prosecution's case file for disclosable material, this is already being accomplished by the portion of the Ruto Defence request which is being granted. The Chamber rejects this portion of the relief sought.

63. As a final matter, and in accordance with the principle of publicity of Court proceedings,⁸⁶ the Chamber considers that much of the present litigation can be made available to the public. Accordingly, public redacted versions of the relevant filings, excluding annexes, are to be prepared by the Ruto Defence⁸⁷ and Prosecution,⁸⁸ respectively. Sang Defence filing ICC-01/09-01/11-1739-Conf does not require redactions and, pursuant to Regulation 23 *bis* of the Regulations, can be made public in its entirety. Following these public submissions, a public redacted version of the present decision will be issued.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the relief sought in the Supplementary Request;

PARTIALLY GRANTS the relief sought in the Request;

DIRECTS the Prosecution, in accordance with paragraph 59 of the present decision, to conduct a review of its case file and certify before the end of its case that no disclosable materials remain undisclosed;

⁸⁵ Request, ICC-01/09-01/11-1602-Conf-Red, para. 35(c).

⁸⁶ Article 64(7) of the Statute; Article 67(1) of the Statute.

⁸⁷ Request, ICC-01/09-01/11-1602-Conf-Red; Supplementary Request, ICC-01/09-01/11-1724-Conf.

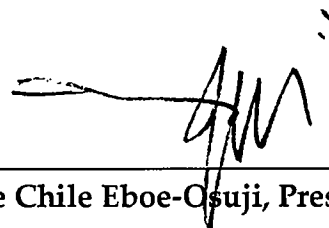
⁸⁸ Response, ICC-01/09-01/11-1630-Conf-Corr; ICC-01/09-01/11-1740-Conf.

REJECTS the remaining relief sought;

DIRECTS the parties, in accordance with paragraph 63 of the present decision, to ensure that public versions of the relevant filings are filed by 16 January 2015; and

ORDERS the Registry to reclassify ICC-01/09-01/11-1739-Conf as public.

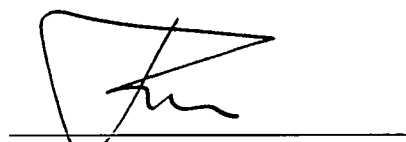
Done in both English and French, the English version being authoritative.



Judge Chile Eboe-Osuji, Presiding



Judge Olga Herrera Carbuca



Judge Robert Fremr

Dated 16 February 2015

At The Hague, The Netherlands