Cour Pénale Internationale

International Criminal Court

Original: **English**

No.**: ICC-01/09-01/11**
Date: **15 January 2015**

TRIAL CHAMBER V(A)

Before: **Judge Chile Eboe-Osuji, Presiding**
Judge Olga Herrera Carbuccia
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 "Ruto Defence Request for the Appointment of a Disclosure Officer and/or the Imposition of Other Remedies for Disclosure Breaches", 13 October 2014

Sources: **Defence for Mr. William Samoei Ruto**

Document 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 A. A. Khan QC
Mr. David Hooper QC
Mr. Essa Faal
Dato' Shyamala Alagendra
Ms. Leigh Lawrie

Counsel for Joshua Arap Sang
Mr. Joseph Kipchumba Kigen-Katwa
Ms. Caroline Buisman

Legal Representatives of the Victims
Mr. Wilfred Nderitu

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants (Participation/Reparation)

The Office of Public Counsel for Victims
Ms. Paolina Massida

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Mr. Herman von Hebel

Counsel Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I. Introduction

1. Following a request made by the defence team for Mr. Joshua Arap Sang ("Sang Defence")[1] which in turn was triggered by the testimony of the witness [REDACTED][2] the Prosecution disclosed an Investigation Report dated 8 November 2012, on 24 September 2014, at 8.14 pm.[3] This report is and/or contains a statement of the Prosecution trial witness and intermediary [REDACTED],[4] [REDACTED],[5] which should have been disclosed, at the latest, some 21 months ago. Instead, it was disclosed [REDACTED].

2. The Defence for Mr. William Samoei Ruto ("Defence") submits that this disclosure breach is not an isolated occurrence. Instead, it is one of a catalogue of disclosure failures, all of which indicate that the Prosecution's disclosure system is consistently failing and is not fit for purpose.[6] Further, the failure of the Prosecution to recognise that the material at issue is not only a statement but contains information which falls within Article 67(2) of the Rome Statute ("Statute") and Rule 77 of the Rules of Procedure and Evidence ("Rules") is a matter of serious concern.[7]

3. In these circumstances, and in order to safeguard Mr. Ruto's fair trial rights,[8] the Defence submits that it is appropriate for the Trial Chamber to act pursuant to its obligations under Article 64(2) of the Statute to order the Prosecution to: (i) make

[1] *See* email correspondence included in confidential annex A.
[2] [REDACTED]
[3] *See* email correspondence included in confidential annex A.
[4] The Defence is aware that [REDACTED] is the intermediary for at least [REDACTED] Prosecution trial witnesses, [REDACTED], and a non-trial witness referred to as [REDACTED] in the Investigation Report (KEN-OTP-0141-0026).
[5] Investigation Report, KEN-OTP-0141-0026. *See* copy provided in confidential annex B.
[6] *See* the discussion on some of the Prosecution's serious and repeated disclosure failures at paras. 20-26 below.
[7] ICC-01/09-01/11-T-144-CONF-FRA (sic) ET 25-09-2014, p. 11, line 19 to p. 13, line 18.
[8] *Prosecutor v. Kenyatta*, Decision on defence application pursuant to Article 64(4) and related requests, 26 April 2013, ICC-01/09-02/11-728 ("***Kenyatta* Decision**"), para. 89 citing to *Prosecutor v. Lubanga*, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, ICC-01/04-01/06-1401, para. 92 ("disclosure of exculpatory material in the possession of the prosecution is a fundamental aspect of the accused's right to a fair trial").

appropriate changes to its internal disclosure procedures;[9] (ii) report to the Trial Chamber when these changes have been effected; and (iii) review its case file to ensure that all disclosable material has been disclosed. The Defence also submits that the situation is sufficiently serious that the Chamber should order the Prosecution to appoint a disclosure officer who is accountable for ensuring that the Prosecution's disclosure obligations are properly discharged in this case going forward.[10]

II. Applicable Law

4. The Prosecution's disclosure obligations engaged by this request are set out, in relevant part, in the following provisions:

> **Article 67 Rights of the accused**
>
> 2. […] 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. […].
>
> **Rule 76 Pre-trial disclosure relating to prosecution witnesses**
>
> 1. The Prosecutor shall provide the defence with the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses. This shall be done sufficiently in advance to enable the adequate preparation of the defence.
>
> **Rule 77 Inspection of material in possession or control of the defence**
>
> The 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

[9] Indeed, these changes were supposed to have been made over a year ago. *See Kenyatta* Decision, para. 97 ("the Chamber stresses that given that the failure to disclose the Affidavit appears to have resulted from a deficient internal review procedure, the Prosecution can reasonably be expected, if it has not already done so, to make appropriate changes to its internal procedures").

[10] In the *Kenyatta* case, it was recognised that, in respect of disclosure failings, a Chamber has the power to issue a reprimand and also to impose "more stringent sanctions or remedies". *See Kenyatta* Decision, para. 90. *See also infra*, paras. 31-33 for a fuller discussion on the proposed role and duties of the disclosure officer.

> control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence […] at trial, […].

5. In respect of Rule 77, in order to trigger the Prosecution's disclosure obligations under this provision, the Appeals Chamber has held that the Defence must satisfy a two-stage test.[11] First, it must be determined that the requested information is material to the preparation of the defence. When assessing materiality, "the term 'material to the preparation of the defence' must be interpreted broadly".[12] Thus, information which is disclosable under Rule 77 need not be "directly linked to exonerating or incriminating evidence".[13]

6. Indeed, the Appeals Chamber has found that the defence need only establish *prima facie* relevance. Specifically, the Appeals Chamber has found that

> *[…] a low burden [is placed] on the defence. It is emphasised that rule 77 concerns material that the defence is entitled to have disclosed to it in order to prepare its defence. It may be that information that is material to the preparation of the defence is ultimately not used as evidence at the trial or may not turn out to be relevant to it. Yet, the defence is still entitled to this information on the basis of a prima facie assessment.*[14]

7. Second, once the Rule 77 threshold is satisfied, the Chamber must consider "whether any restrictions on the right of disclosure should be imposed pursuant to the Statute and rules 81 and 82".[15]

8. In addition to the primary responsibility on the Prosecution to comply with its Article 67(2) and Rule 77 obligations, Article 64(2) of the Statute mandates that: "[t]he Trial Chamber shall ensure that a trial is fair and expeditious and is

[11] *Prosecutor v. Abdallah Banda and Saleh Jerbo*, 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 ("Rule 77 Disclosure Decision"), para. 35.
[12] Rule 77 Disclosure Decision, para. 38 citing to *Prosecutor v. Lubanga*, Judgement on the appeal of Mr. Lubanga Dylio against the Oral Decision of Trial Chamber I of 18 January 208, 1 July 208, ICC-01/04-01/06-143 ("*Lubanga* OA1 Judgement"), para. 78.
[13] Rule 77 Disclosure Decision, para. 38, citing to *Lubanga* OA1 Judgement, para. 77.
[14] *Ibid*, para. 42.
[15] *Ibid*, para. 35.

conducted with full respect for the rights of the accused […]."

III. Submissions

General

9. The starting point for this request is the Trial Chamber's order that "all incriminatory material in the form of witness statements and any other material to be relied on at trial, as well as disclosure of all Article 67(2) material and provision of all Rule 77 material for inspection to the defence should be completed by **9 January 2013**."[16] The Defence submits that this clear order has been repeatedly breached by the Prosecution to the prejudice of the Defence throughout these proceedings,[17] the latest example being the grossly delayed disclosure of the Investigation Report relating to [REDACTED].

10. This most recent failure highlights the serious problems affecting the Prosecution's disclosure system which leads the Defence to file this request. The Investigation Report was, on any reasonable view, disclosable on three legal bases, yet has remained undisclosed for nearly 2 years. Not only does there appear to be no effective system of regular review of disclosable material within the Prosecution's possession but, when failures are brought to the Prosecution's attention, there appears to be a worrying inability to recognise the disclosable nature of the material.[18] This inability was thrown into sharp relief by the Prosecution's oral submissions on 25 September 2014, which were characterised by a misplaced focus on the fact that [REDACTED]'s status as an intermediary had been disclosed and a failure to grasp the real crux of the problem until directed by the learned Presiding Judge – "[f]rom what I understand, their

[16] Decision on the schedule leading up to trial, 9 July 2012, ICC-01/09-01/11-440, para. 14 (emphasis in original).
[17] *See infra*, paras. 20-26.
[18] *See*, *e.g.*, ICC-01/09-01/11-T-144-CONF-FRA (sic) ET 25-09-2014, p. 13, lines 10-15 ("In my submission, your Honours, the critical information contained in this document, the fact that these witnesses were introduced by [REDACTED], has been disclosed. In addition, all payments made by the Prosecution to [REDACTED] have been disclosed. The details that [REDACTED] gave regarding these witnesses were assessed and, in the assessment of the Prosecution, there was nothing there which was required for the preparation of Defence, certainly nothing that was exculpatory.").

complaint is that this is something that should have been disclosed to begin with, before - as part of the regular disclosure obligations of the OTP."[19]

The Investigation Report is a statement for the purposes of Rule 76

11. The Investigation Report dated 8 November 2012, is a statement of Prosecution trial witness [REDACTED] which should have been disclosed under Rule 76 of the Rules, at the latest, by 9 January 2013. This conclusion is supported by the jurisprudence of the Appeals Chamber, which in turn is in accordance with the broad approach taken to the prosecution's disclosure obligations in the wider international jurisprudence.

12. In the *Banda and Jerbo* case, the Appeals Chamber confirmed the submissions of both the Prosecution and the defence that "the ordinary meaning of the term 'statement' as used in rule 76 is broad and requires the Prosecutor to disclose any prior statements, irrespective of the form in which they are recorded."[20] This Trial Chamber has also endorsed a broad approach to Rule 76 disclosure, observing that "[t]he Court's statutory scheme and jurisprudence take particular care to ensure that prior remarks of witnesses the Prosecution intend to call to *(sic)* trial are disclosed to the defence".[21] The breadth of the Prosecutor's disclosure obligations vis-à-vis statements is underlined by the persuasive jurisprudence of the other international criminal tribunals. This jurisprudence shows that disclosure obligations extend, for example, to statements given to sources other than the Prosecution[22] and interview notes.[23] At the Special Court

[19] ICC-01/09-01/11-T-144-CONF-FRA (sic) ET 25-09-2014, p. 13, lines 3-5.
[20] *Prosecutor v. Banda and Jerbo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled "Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation", 17 February 2012, ICC-02/05-03/09-295, para. 23.
[21] Decision on Defence request to be provided with screening notes and Prosecution's corresponding requests for redactions, 20 May 2013, ICC-01/09-01/11-743-Red, para. 20.
[22] *See, e.g., Prosecutor v. Nyiramasuhuko et al.*, Decision on the Defence Motion for Disclosure of the Declarations of the Prosecutor's Witnesses Detained in Rwanda and All Other Documents and Information Pertaining to the Judicial Proceedings in their Respect, 18 September 2001, paras. 6 and 8.
[23] *See, e.g., Prosecutor v. Milutinović et al.,* Decision on Prosecution Motion for Leave to Amend its Rule 65*ter* Witness List to Add Michael Phillips and Shaun Byrnes, 15 January 2007, para. 12; *Prosecutor v. Norman et*

for Sierra Leone, the term "statement" for the purposes of Rule 66(A)(i), the equivalent rule to Rule 76 at this Court, is "any statement or declaration made by a witness in relation to an event he or she witnessed and recorded in any form by an official in the course of an investigation."[24]

13. Based on the foregoing, the Investigation Report should have been disclosed under Rule 76 for two reasons. First, the email sent by [REDACTED] which is copied in the Investigation Report is a statement of a Prosecution witness "recorded…by an [OTP] official [REDACTED] in the course of an investigation." Secondly, the email itself contains the "prior remarks" of [REDACTED] and is a statement of the witness, albeit in the form of an email. The email was sent by a Prosecution witness to the Prosecution for the purposes of the investigation and contains information relevant to the substantive case – noting that meetings occurred before and after the violence, identifying purported [REDACTED] reports provided to the Prosecution by [REDACTED][25] and stating that one such [REDACTED].[26] The Defence acknowledges that the information contained in the statement regarding the main case is not extensive but neither quantity nor quality of information plays any role when assessing the disclosable nature of information provided by a Prosecution trial witness. Therefore, this report and/or the underlying email should have been disclosed alongside the other statements and materials relating to [REDACTED] by 9 January 2013. No cogent reason has been advanced by the Prosecution as to why this was not done – the Prosecution's oral submissions about keeping communication strategies confidential are, with respect, irrelevant to the matter at issue.[27] In addition, any concerns (whether valid or not) about protecting the mode of communication

al., SCSL-2004-14-PT, Decision on Disclosure of Witness Statements and Cross-examination, 16 July 2004, paras. 7 and 16.
[24] *Prosecutor v. Norman et al.*, Decision on Disclosure of Witness Statements and Cross-Examination, 16 July 2004, para. 10.
[25] [REDACTED]
[26] *See* the copy of the Investigation Report provided in confidential annex B.
[27] ICC-01/09-01/11-T-144-CONF-FRA (sic) ET 25-09-2014, p. 12, line 1 to p. 13, line 1.

could have been addressed by other measures less extreme than non-disclosure of the entirety of the information contained in the email.

The Investigation Report contains exculpatory material for the purposes of Article 67(2)

14. Even if either the Prosecution failed for whatever reason to recognise the report as a statement or if, *arguendo*, the Chamber finds the report is not a statement, it clearly contains information which "may affect the credibility of prosecution evidence" and, thus, should have been disclosed under Article 67(2) of the Statute on 9 January 2013.

15. In assessing the exculpatory nature of the report, the Defence submits that one reasonable interpretation of the information provided therein is that [REDACTED] is improperly using [REDACTED] status as a witness for financial gain and, indeed, is sending other individuals to the Prosecution in order to become a valuable Prosecution "asset". The report clearly reveals that [REDACTED] has put the Prosecution in contact with at least [REDACTED] individuals, [REDACTED] of whom are now Prosecution witnesses [REDACTED]. In the same report, [REDACTED] then asks the Prosecution for assistance, complaining that [REDACTED] has "lots of debts" but that [REDACTED] "emediate *(sic)* problem is the 12000 ksh" and closes the communication by stating that [REDACTED] "strongly believe[s] in [REDACTED] kindly do something". It is certainly arguable that, at least from [REDACTED]'s perspective, there is a *quid pro quo* relationship in place. Accordingly, not only "may" the information in the report affect the credibility of [REDACTED] but, given the connection between the witnesses, also the credibility of [REDACTED].

16. The Defence submits that the foregoing interpretation is *prima facie* evident from the report. The interpretation advanced by the Defence is also not novel but is regularly encountered at the international level and is one of the reasons why

financial payments made to witnesses by the Prosecution are disclosed in advance of trial. The Prosecution's assessment that there "certainly [was] nothing that was exculpatory" in the report, therefore, beggars belief.[28]

The Investigation Report contains Rule 77 information

17. The Investigation Report also contains information which is *prima facie* "material to the preparation of the defence". This is the third base on which the report should have been disclosed to the Defence at a far earlier stage and at least by 9 January 2013.[29]

18. Contrary to the Prosecution's assertion, the bare fact that [REDACTED] introduced [REDACTED] to the Prosecution is not the only critical information contained in the document.[30] To find otherwise, is to ignore a considerable chunk of the information contained in the report. Further, it is not the simple fact that the introduction was made by email, a fact which was only revealed during [REDACTED], which made the report disclosable pursuant to Rule 77.[31] Rather, it is the content of [REDACTED]'s email – revealing various lines of defence enquiry such as the possible improper financial motivation behind the witness' cooperation and the suggestion of a *quid pro quo* relationship – which made it material to the preparation of the defence. Again, an assessment that the Investigation Report contains Rule 77 information is apparent from the face of the document.

[28] ICC-01/09-01/11-T-144-CONF-FRA (sic) ET 25-09-2014, p. 13, line 15.
[29] The Defence also recalls the Appeals Chamber jurisprudence that "once it is established that a document is material to the preparation of the defence...the disclosure obligation extends to the entire document and not only to the 'relevant' portions of information contained within such a document". *See Prosecutor v. Lubanga*, 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, para. 12.
[30] ICC-01/09-01/11-T-144-CONF-FRA (sic) ET 25-09-2014, p. 13, lines 10-11.
[31] [REDACTED]

Other disclosure failures

19. As stated above, the late disclosure of the Investigation Report is the latest in a series of serious disclosure failures by the Prosecution in this case. In the following paragraphs, the Defence highlights a further seven failures. These examples demonstrate the need for an effective mechanism to be put in place in order to ensure the proper discharge of the Prosecution's statutory obligations, safeguard Mr. Ruto's fair trial rights and reduce the burden on the Defence.

20. *First*, the Prosecution failed to disclose [REDACTED].[32] It was only following a request by the Defence on 22 January 2014, by which time [REDACTED] were eventually provided on 23 January 2014.[33] Not only were the [REDACTED] by the witness but they also provided information about [REDACTED]. [REDACTED]. This omission is a concern in and of itself. Had the proper steps been taken by the Prosecution at all stages of the process, the [REDACTED] should have been disclosed at the earliest opportunity as material falling within the Prosecution's Article 67(2) and Rule 77 disclosure obligations.

21. *Second*, the Prosecution has repeatedly failed to disclose significant potentially exculpatory information regarding the [REDACTED] of Prosecution trial witness P-0015.[34] In one instance, information which became known to the Prosecution prior to the Confirmation of Charges hearing in June 2011,[35] was not disclosed to the Defence until 18 February 2013[36] and, thus, after both the confirmation hearing and decision thereon. On another occasion, information dating from June 2011 regarding P-0015's: (i) [REDACTED]; and (ii) need to stop an

[32] [REDACTED]
[33] [REDACTED]
[34] This witness was also relied upon at the confirmation stage of these proceedings as witness [REDACTED].
[35] *See* email correspondence titled "Request for Disclosure of information concerning KEN-OTP-0090-1099" between the Defence and the Prosecution dated 26 April and 10 June 2013, respectively, provided in confidential annex E hereto.
[36] The information was provided in "SUMMARY OF PEXO IN ICC INVESTIGATOR NOTES/REPORT/CORRESPONDENCE" (KEN-OTP-0090-1099) provided in confidential annex F hereto.

interview because of his request for [REDACTED],[37] was not provided until June 2013, and following a Defence disclosure request.[38] No cogent explanation as to why any of this information was not provided to the Defence earlier has been provided by the Prosecution. Nor has any explanation as to why these matters were not brought to the attention of the Pre-Trial Chamber been provided by the Prosecution.

22. *Third*, as the Chamber is aware, the Prosecution has placed great store on the evidence obtained during the Commission of Inquiry into the Post-Election Violence (aka the Waki Commission). However, the Prosecution has repeatedly failed to discharge its disclosure obligations in respect of this particular tranche of evidence which was provided to the Prosecution. Despite being in possession of the material since the start of the investigation into the Kenya Situation in 2010, it was only on 28 March 2014 and in response to a disclosure request submitted by the Defence, that certain statements and testimony of key Waki witnesses were disclosed to the Defence.[39] In addition, on 11 June 2014, and following an email request submitted by the Sang Defence, the Prosecution disclosed the complete investigator's reports for various [REDACTED].[40] Prior to 11 June 2014, the defence teams had only been in possession of summaries of the information contained in these reports. However, it is submitted that the full reports should have been disclosed at a much earlier stage in proceedings pursuant to Rule 77 and in accordance with the Appeals Chamber's jurisprudence. As the Sang Defence noted, "given the anticipated content of the testimony of P-13 and P-247, any information as to the inner workings of the

[37] The information was provided in an Investigator's Report dated 10 June 2013 (KEN-OTP-0106-0727) a copy of which is provided in confidential annex G hereto.
[38] *See* email correspondence titled "Request for Disclosure: [REDACTED] of PW15" between the Defence and the Prosecution dated 22 April, 2 May, 21 June and 24 June 2013, respectively, provided in confidential annex H hereto.
[39] *See* email correspondence titled "Disclosure request - CIPEV and [REDACTED]" between the Defence and the Prosecution dated 23, 27 and 28 March 2014, provided in confidential annex I hereto.
[40] *See* email correspondence titled "Request for Additional Disclosure re CIPEV [REDACTED]" between the Defence and the Prosecution dated 11 June 2014, provided in confidential annex J hereto.

Commission or any commentary as to the success or failure of its investigations and final report are necessary for the preparation of the Defence under Rule 77, and may constitute pexo material."[41] Further, since May 2013, Rule 77 disclosure should be undertaken in accordance with the statement of the Appeals Chamber that, "once it is established that a document is material to the preparation of the defence...the disclosure obligation extends to the entire document and not only to the 'relevant' portions of information contained within such a document".[42] At the very least, regular disclosure reviews should be undertaken of material already disclosed to give effect to this jurisprudence.

23. *Fourth*, the Prosecution failed to disclose until 3 January 2014, a [REDACTED] report dated 4 May 2013, [REDACTED] which contained substantive information regarding the events at Kiambaa church on 1 January 2008.[43] On receiving the report, the Defence contacted the Prosecution about the disclosure breach, noting that the report should have been disclosed under Rules 76 and 77.[44] Tellingly, the Prosecution responded that "[w]hile [it] does not concede the correctness of the Defence's position, it confirms that it will conduct a further review of its evidence collection for any similar material and proceed accordingly."[45]

24. *Fifth,* the disclosure of significant exculpatory and Rule 77 information concerning [REDACTED] was grossly delayed. This information was intimately connected to the incriminatory testimony provided by [REDACTED]. Despite knowing since December 2012, that the source of [REDACTED]'s hearsay evidence was [REDACTED], an application to disclose [REDACTED]'s identity

[41] *Ibid.*
[42] *Prosecutor v. Lubanga*, 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, para. 12.
[43] [REDACTED]
[44] [REDACTED]
[45] *Ibid*.

was not made until 5 June 2014, [REDACTED].[46] Further, it was not until 5 June 2014, that the Prosecution also sought the Chamber's guidance on the disclosure of an important interview conducted in [REDACTED] 2013 with [REDACTED] containing significant exculpatory evidence.[47] The Defence submits that, in so far as the reason behind the delay in disclosure was due to any purported security issues, these issues should have been addressed and resolved at a much earlier stage in proceedings and not [REDACTED]. Similarly, [REDACTED]'s refusal to consent to the disclosure of [REDACTED] identity to the Defence should not have delayed matters to such an extent.[48] As Trial Chamber I observed in *Lubanga*, "[i]f the individual's identity is relevant to the case, the unwillingness of a witness to have his identity revealed cannot alone justify non-disclosure."[49] Instead, "non-disclosure can only be authorised if a danger or risk to the witness has been established and non-disclosure is necessary and will not cause prejudice to the rights of the accused."[50] In this regard, the Defence notes that it appears to have been the Prosecution's view in [REDACTED] 2013 that [REDACTED] was not in any risk of danger.[51] In any event, when the Trial Chamber was eventually seized of the matter, the Prosecution was ordered to disclose the witness' identity and [REDACTED] prior interview transcripts, including those conducted in [REDACTED] 2013.[52] The nub of the issue is that the Chamber should have been seized of the matter at a much earlier stage in proceedings in order that disclosure could be ordered. The Prosecution's tardiness and deference to the witness' consent are all serious failures.

25. *Sixth*, the Prosecution failed to disclose two key paragraphs containing incriminatory and exculpatory evidence in the statement of P-0516. It was only

[46] [REDACTED]
[47] *Ibid*.
[48] *Ibid*, para. 2.
[49] Redacted Decision on the variation of protective measures under Regulation 42 on referral from Trial Chamber II on 22 July 2009, 16 March 2010, ICC-01/04-01/06-2209-Red, para. 36.
[50] *Ibid*.
[51] [REDACTED]
[52] [REDACTED]

as a result of a Defence request for disclosure made on 15 September 2014 – days before P-0516 was due to take the stand – that the information was provided on 16 September 2014. This non-disclosure was brought to the Chamber's attention on 22 September 2014.[53] Even more importantly, the information contained in the two paragraphs directly contradicted the testimony of P-0613, [REDACTED], in certain material particulars.[54] While the Prosecution undertook to the Chamber not to rely on this late disclosed incriminatory evidence, this 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 and certainly not days before P-0516 was due to testify. Further, given the nature of the contradictory evidence, the Defence submits that this information ought to have been disclosed long before P-0613 testified. Indeed, the source referred to in the redacted paragraphs was [REDACTED]. Clearly, the link between [REDACTED] P-0516 was information material to the preparation of the defence, especially when the connections between a certain group of Prosecution witnesses is currently of particular focus and importance in the case.[55]

26. *Seventh,* and finally, the Defence refers the Chamber to its request for disclosure of information showing Mungiki support for the Orange Democratic Movement and/or Raila Odinga in the 2007 elections. Following the Chamber's intervention, the Prosecution was ordered to disclose the requested information.[56] The Defence recalls that the Prosecution's original opposition to disclosure was because it could not "conceive of any reasonable interpretation of the requested information which could either establish the innocence of the accused, mitigate

[53] ICC-01/09-01/11-T-141-CONF-ENG ET 22-09-2014, p.38, line 10 to p. 41, line 11.
[54] *See* ICC-01/09-01/11-T-119-CONF-ENG ET 19-06-2014, p. 51, line 22 to p. 52, line 19. *See also* ICC-01/09-01/11-T-141-CONF-ENG ET 22-09-2014, p. 39, lines 22-25.
[55] [REDACTED]
[56] Decision on Defence Request for Disclosure of Information Relating to the Mungiki, 25 August 2014, ICC-01/09-01/11-1465.

their guilt, or affect the credibility of Prosecution evidence."[57] Moreover, Lead Prosecution Counsel, Mr. Steynberg, stated that "the witnesses *(sic)* response confirms my understanding that the Mungiki were supporting the PNU at the time of the 2007 elections."[58] Notwithstanding these statements, and pursuant to the Chamber's order, the Prosecution proceeded to disclose 701 items. The disclosure included evidence from 15 key Prosecution witnesses, [REDACTED], that the Mungiki leader and the group supported the ODM and/or Raila Odinga at the time of the 2007 elections. Extracts of the evidence of these Prosecution witnesses are provided in confidential and *ex parte* annex C.[59] These extracts underline the extent of the information on this issue in the Prosecution's possession and show that the Defence's assertion that this material falls within the scope of Rule 77 and/or Article 67(2) is not based on an abstract theory. Rather, it is based on a large, clear and unequivocal body of evidence of which the Prosecution is aware and which seriously undermines its theory in this case 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. Evidently, a disclosure officer who will have the dedicated time to understand what is contained within the Prosecution's evidence collection and to appreciate its link to this case is required.

Appropriate remedies

27. Fundamental to a fair trial and the integrity of proceedings is that the defence be provided with full, complete and timely disclosure of all the material to which it is entitled. It goes without saying that underlying this right is the need for the defence to be permitted adequate time and resources to conduct proper investigations and trial preparations.

[57] *See* email correspondence titled "Request for disclosure of PEXO information in the possession of the OTP" between the Defence and the Prosecution dated 25, 26, 27 June and 2 July 2014 provided in confidential annex C (Part 1) hereto.
[58] *See* email titled "RE: URGENT REQUESTS FOR DISCLOSURE RELATED TO P-13" from the Prosecution dated 10 July 2014 at 08:56 provided in confidential annex C (Part 2).
[59] *See* the table provided in confidential annex C (Part 3) hereto.

28. As outlined above, it is the Defence's very real concern that the Prosecution continues to fail in the proper discharge of its disclosure obligations, despite previous judicial admonishment, and that this is prejudicing the Defence's ability to properly investigate and challenge prosecution evidence. Indeed, it is submitted that the unfortunate reality is that the Defence is repeatedly required to make requests to the Prosecution for material and evidence which should have been disclosed much earlier and in many cases by 9 January 2013.[60] This burden should not fall on the Defence.

29. The serious deficiencies in the Prosecution's disclosure system plaguing this case are not new. The Defence observes that in the *Kenyatta* case the Prosecution was reprimanded for its conduct, required to conduct a complete review of its case file and ordered to certify to the Trial Chamber that it had done so in order to ensure that no other materials to which the defence were entitled in that case remained undisclosed.[61] It is of concern that, notwithstanding the *Kenyatta* experience and reprimand, the disclosure problems plaguing the Office of the Prosecutor persist. The disclosure failures complained of in this case are serious, repeated and, in so far as they primarily affect Rule 77 and PEXO material, could be construed as tactical to the prejudice of the fair trial rights of the accused. The Defence submits that the Chamber's urgent intervention is, thus, required, and that the Chamber's Article 64(2) responsibilities compel action being taken.

30. As a necessary first step and to ensure a clean slate, the Defence requests that the Prosecution be ordered to conduct a complete review of its case file and to certify to the Chamber when this review is complete and that no disclosable

[60] *See* Lead Defence counsel's submissions that "[t]wo years almost have gone by since this has been in the custody of the Prosecution and we get it [REDACTED] and only when we asked for it, and it shouldn't require the Defence on every issue to look at the omissions, failings and gaps in the Prosecution for them to discharge what are after all statutory obligations that are incumbent upon them as public servants and ministers of justice" (ICC-01/09-01/11-T-144-CONF-FRA (sic) ET 25-09-2014, p. 9, lines 15-21).
[61] *Kenyatta* Decision, para. 97.

material remains undisclosed. If any such material does remain undisclosed, bearing in mind the substantial information which has been generated as a result of the Prosecution's [REDACTED],[62] to provide reasons for the non-disclosure and timeframes for effecting complete disclosure. The Prosecution should also be ordered to make all necessary changes to its disclosure system, such changes to include the undertaking of regular reviews of material in its possession, and again to certify to the Chamber when such changes have been effected.

31. Finally, the Defence submits that the additional remedy of the appointment of a disclosure officer is required to ensure accountability and the effectiveness of the disclosure system going forward. The duties of this individual would be, *inter alia*, to 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. Requiring an individual within the Prosecution to take responsibility for disclosure is a mechanism which has been used previously at the international level and is used at the domestic level to ensure compliance.

32. In the *Krnojelac* case, to ensure compliance with the Prosecution's Rule 68 obligations, the Trial Chamber required a signed report from a representative of the Prosecution team certifying from his personal knowledge that a full search for the existence of Rule 68 material had been conducted of all the materials in the possession of the Prosecution or otherwise within its knowledge.[63] This measure was imposed in part because assurances of counsel charged with responsibility for conducting the trial had in the past proved insufficient.[64]

33. Similarly, in England and Wales, best practice in the discharge of the prosecution's disclosure obligations is ensured through the requirement that a

[62] [REDACTED]
[63] *Prosecutor v. Krnojelac*, Decision on Motion by Prosecution to Modify Order for Compliance with Rule 68, 1 November 1999.
[64] *Ibid*, para. 7.

disclosure officer is appointed in each case.[65] Disclosure officers "must inspect, view, listen to or search all relevant material that has been retained by the investigator and […] provide a personal declaration to the effect that this task has been undertaken".[66] Further, prosecutors are expected not only to review the work of the disclosure officer but to place themselves in a fully informed position to enable them to make decisions on disclosure.[67]

IV. Classification

34. This request and annex C hereto are submitted on a confidential and *ex parte* basis available to the Prosecution, Sang Defence and Ruto Defence only because they refer to confidential Prosecution witness material which was not disclosed to the common legal representative. A confidential redacted version will be filed in due course.

V. Requested Relief

35. For the reasons set out above, the Defence respectfully requests that the Trial Chamber act pursuant to its Article 64(2) authority to order 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

[65] *See* Crown Prosecution, Disclosure Manual, Chapter 3: Roles and Responsibilities, para. 3.2 ("[t]he chief officer of police for each police force is responsible for putting in place arrangements to ensure that in every investigation the identity of the officer in charge of an investigation and that of the disclosure officer is recorded") (available at http://www.cps.gov.uk/legal/d_to_g/disclosure_manual/disclosure_manual_chapter_3/).
[66] *See* Attorney General's Office, Attorney General's Guidelines on Disclosure, December 2013, para. 21. (available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/262994/AG_Disclosure_Guidelines_-_December_2013.pdf and a copy is provided in confidential annex M hereto).
[67] *Ibid*, paras. 29 and 35.

c. going forward, to appoint a disclosure officer responsible for, at the very least, the duties set out at paragraphs 31 to 33 above.

Respectfully submitted,

Karim A.A. Khan QC
Lead Counsel for Mr. William Samoei Ruto

Dated this 15th Day of January 2015
At The Hague, Netherlands