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

**TRIAL CHAMBER V(A)**

**Before:** Judge Chile Eboe-Osuji, Presiding  
Judge Olga Herrera Carbuccion  
Judge Robert Fremr

**SITUATION IN THE REPUBLIC OF KENYA**

**IN THE CASE OF**

***THE PROSECUTOR v.  
WILLIAM SAMOEI RUTO AND JOSHUA ARAP SANG***

**Public**

**Public redacted version of "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**

**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**

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**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. On 13 October 2014, the defence for Mr. William Samoei Ruto (the "Defence") filed the *Ruto Defence Request for the Appointment of a Disclosure Officer and/or the Imposition of Other Remedies for Disclosure Breaches* ("Request").<sup>1</sup> The Request concerns a catalogue of serious disclosure failures all of which indicate that the Prosecution's disclosure system is consistently failing and is not fit for purpose. The Defence submits that the failures warrant the relief sought in the Request.
2. On 14 November 2014, as part of Rule 77 disclosure package 83, the Prosecution disclosed, *inter alia*, an investigator's report dated 13 February 2014 concerning P-0613 (the "Investigator's Report").<sup>2</sup> The Defence submits that this is another example of a serious disclosure breach and, thus, is relevant to the Request.
3. The Defence respectfully requests the Trial Chamber to accept the submission of the Investigator's Report annexed to this filing and to consider it for the purposes of its final determination on the Request.

## II. Applicable Law

4. Article 64(6)(f) of the Rome Statute ("Statute") provides in part that:

*In performing its functions prior to trial or during the course of trial, the Trial Chamber may, as necessary:*

[...]

(f) *Rule on any other relevant matters.*

5. In the *Banda and Jerbo* case, Trial Chamber IV held that it could accept the submission of supplementary material relevant to, but received after, the filing of a defence request under Article 64(6)(f).<sup>3</sup> As part of Trial Chamber IV's

<sup>1</sup> ICC-01/09-01/11-1602-Conf-Exp and ICC-01/09-01/11-1602-Conf-Red.

<sup>2</sup> See the investigator's report KEN-OTP-0140-0363\_R01 provided in confidential annex A hereto.

<sup>3</sup> *Prosecutor v. Banda and Jerbo*, Decision on the "Defence Application to File Supplementary Material", 9 March 2012, ICC-02/05-03/09-307, para. 8.

reasoning, the Chamber noted that the supplementary material did not raise any new facts or arguments, nor was it prejudicial to the Prosecution.<sup>4</sup>

### III. Submissions

6. The Defence submits that the Investigator's Report is relevant to the Request because it is yet another example of a serious disclosure failure by the Prosecution. However, at the time of filing the Request, the report had not been disclosed and, thus, could not be relied upon by the Defence. In these circumstances, the Defence submits that the Trial Chamber should act pursuant to Article 64(6)(f) of the Statute to accept the Investigator's Report as part of the original request.
  
7. The Defence submits that the Investigator's Report should have been disclosed as soon as it was filed in February 2014. As acknowledged by the fact that the report was contained in a Rule 77 disclosure package, the report contains information material to the preparation of the defence. Specifically, the report refers to: (i) two important Prosecution witnesses, P-0613 [REDACTED]; (ii) monetary requests and issues raised by P-0613 including an outstanding loan balance in respect of which the Prosecution "had concerns...regarding the circumstances surrounding the loan and how [P-0613] had spent the money"; (iii) enquiries regarding possible educational benefits to be provided to P-0613; and (iv) a communication between [REDACTED] and P-0613 in which [REDACTED].<sup>5</sup> All of this information is clearly and *prima facie* disclosable because it is evidence which may reveal the real motivations [REDACTED]. Further, its disclosable nature is not contingent on any inside knowledge of the Defence case.<sup>6</sup>

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<sup>4</sup> *Ibid.*

<sup>5</sup> See confidential annex A.

<sup>6</sup> *Contra* 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, para. 10.

8. However, instead of being disclosed as soon as it was filed, the report was disclosed some 9 months later. Crucially, it was also disclosed nearly 5 months after the completion of P-0613's testimony [REDACTED]. In these circumstances, the late disclosure is clearly prejudicial. The information could not be investigated and, if considered necessary, put to P-0613 in cross-examination. Additionally, the report was disclosed [REDACTED]. The Prosecution has offered no explanation for the late disclosure of the Investigator's Report.
9. Given the relevance of the Investigator's Report to the Request, the Defence submits that it can be accepted by the Trial Chamber under Article 64(6)(f). The Defence acknowledges that, while the report does not raise any new legal argument, it does raise a new factual argument. If the Chamber is minded to consider the Investigator's Report as part of the Request, the Defence submits that fairness to the Prosecution can be ensured by receiving discrete submissions from the Prosecution on the late disclosure of the report.<sup>7</sup>

#### **IV. Classification**

10. This request is filed confidentially pursuant to Regulation 23*bis*(2) of the Regulations of the Court.

#### **V. Requested Relief**

11. For the reasons set out above, the Defence respectfully requests the Trial Chamber to exercise its powers under Article 64(6)(f) of the Statute in order to accept the submission of the Investigator's Report and to consider it for the purposes of its final determination on the Request.

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<sup>7</sup> See, e.g., the Prosecution's Response to "Joint Defence request to file supplementary material relevant to "Joint Defence request under Article 54", 12 November 2014, ICC-01/09-01/11-1649-Conf, which were filed by the Prosecution in similar circumstances.

Respectfully submitted,



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

Dated this 15<sup>th</sup> Day of January 2015  
At The Hague, Netherlands