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No.: **ICC-01/09-01/11**
Date: **16 January 2015**

TRIAL CHAMBER V(A)

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

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
THE PROSECUTOR v. WILLIAM SAMOEI RUTO and JOSHUA ARAP SANG**

**Public
With Confidential Annexes A-B**

Public Redacted Version of 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"', dated 5 December 2014, ICC-01/09-01/11-1740-Conf

Source: Office of the Prosecutor

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

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Introduction

1. On 1 December 2014, the Ruto Defence requested Trial Chamber V(A) (“Chamber”) to accept and consider a recently disclosed Investigator’s Report containing information received from [REDACTED] in its determination of the “Ruto Defence Request for the Appointment of a Disclosure Officer and/or the Imposition of Other Remedies for Disclosure Breaches”¹ (“Main Request”).²

Confidentiality

2. Pursuant to Regulation 23*bis*(2) of the Regulations of the Court, the Office of the Prosecutor (“Prosecution”) submits this response as confidential, since it responds to a document with the same classification.

Submissions

3. The Prosecution does not object to the Chamber’s acceptance and consideration of the Investigator’s Report in adjudicating the Main Request. However, it submits that even with this additional document, the Ruto Defence has not justified the judicial orders that it seeks in its Main Request.
4. The Prosecution acknowledges that the Investigator’s Report should have been disclosed prior to the appearance of [REDACTED] earlier this year. Regrettably, it was not registered in the Prosecution’s evidence review and management system (Ringtail) at the time it was prepared in February 2014, but only in September this year. Due to this oversight, the document was not reviewed for disclosure prior to the testimony of [REDACTED]. However, when the Prosecution conducted its regular witness-specific review to ensure

¹ ICC-01/09-01/11-1602-Conf-Red.

² ‘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”’, ICC-01/09-01/11-1724-Conf. The Sang Defence supports the Ruto Defence request: 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”, ICC-01/09-01/11-1739-Conf.

that all relevant and disclosable content pertaining to an upcoming witness is provided to the Defence,³ the Investigator's Report was identified as containing relevant and disclosable information in respect of [REDACTED] and thus disclosed. The information contained therein was therefore available to the Defence prior to the testimony of that witness, and they could have used it in their questioning of him, had they so wished.

5. Whilst it is regrettable that the report was not registered in a timely manner and could not therefore have been disclosed prior to [REDACTED] testimony, the Prosecution submits that (i) most of the information contained therein is not in fact disclosable either under Article 67(2) of the Rome Statute or Rule 77 of the Rules of Procedure and Evidence, and (ii) as for the information that is disclosable pursuant to Rule 77, the Defence have not suffered any material prejudice, if any, as a result of its late disclosure in respect of that witness.
6. The Prosecution disputes the Ruto Defence's characterisation that much of the information in the Investigator's Report was "clearly and prima facie disclosable" as evidence which may reveal the real motivations underlying the witnesses' willingness to become Prosecution witnesses".⁴ Most of the information relates to routine administrative witness-management matters concerning [REDACTED]. Regarding monetary requests and other benefits, the Prosecution is obliged to, and does, disclose all payments, benefits and assistance made to witnesses.⁵ However, this decision does not require the Prosecution to disclose every request made by a witness not followed by an actual payment (or to disclose every dispute as to their adequacy). The only

³ One of the ongoing and regular processes of review undertaken to identifying relevant and disclosable information in the Prosecution's evidence collection; see Corrected version of "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"', dated 4 November 2014 ("Prosecution Response to the Main Request"), ICC-01/09-01/11-1630, para.9.

⁴ Main Request, para.7.

⁵ *Per* [REDACTED]. An updated schedule of all payments which the Prosecution has made to this witness was provided to the Defence *via* email on 17 June 2014 and formally disclosed through Ringtail on 27 June 2014.

circumstance where the Prosecution would be required to disclose such a request is where it is tainted by fraud or other irregularity, which is not the case in the present circumstances. Nor, in the Prosecution's assessment, did [REDACTED] enquiry regarding [REDACTED] suggest an improper financial motive or condition precedent to [REDACTED] testifying.

7. Regarding the Rule 77 content ([REDACTED]), the Defence were fully aware – before [REDACTED] testified – that [REDACTED] and [REDACTED] have been in contact over the course of at least the last year and a half. Attached as Confidential Annex A are copies of several documents disclosed to the Defence prior to [REDACTED] appearance, which reveal communication between the two witnesses dating back to May 2013.⁶ Attached at Confidential Annex B is a table setting out the disclosure dates of this information.
8. Despite being in possession of this information, **the Defence did not ask [REDACTED] a single question about [REDACTED] relationship, communication or contact with [REDACTED] during its cross-examination of [REDACTED].** There is no reason to believe that timely disclosure of the report in issue would have changed that position, nor does the Defence even assert that it would have done so. In those circumstances, the Prosecution submits that there has been no real impact occasioned by the late disclosure of this marginal piece of information in the Investigator's Report on the Defence's investigations, preparations and cross-examination.
9. However, if the Chamber considers that the Prosecution has failed in its disclosure obligations in this, or any other instance identified by the Defence in the Main Request, the Chamber has remedies available on a case-by-case basis in order to ensure the fairness of the proceedings other than the drastic relief sought by the Defence.

⁶ For the ease of the Chamber and Defence's reference, the specific information regarding contacts between the two witnesses has been highlighted in yellow.

10. As the Prosecution stated in its response to the Main Request, the relief requested by the Defence is misconceived and disproportionate.⁷ When considered against the background of the thousands of items that the Prosecution has diligently disclosed throughout the proceedings, the few and relatively insignificant examples of late disclosure outlined by the Ruto Defence do not begin to amount to a “catalogue of serious disclosure failures”⁸. Certainly, the late disclosure of this Investigator’s Report, either individually or collectively with the eight alleged disclosure complaints outlined in its Main Request, does not demonstrate that “the Prosecution’s disclosure system is consistently failing and is not fit for purpose”⁹.

Conclusion

11. For the reasons above, the Prosecution does not object to the Chamber’s acceptance and consideration of the Investigator’s Report, but maintains that the Main Request should nevertheless be rejected.



Fatou Bensouda, Prosecutor

Dated this 16th day of January 2015

At The Hague, the Netherlands

⁷ Prosecution Response to the Main Request, paras.4, 16.

⁸ Main Request, para.2.

⁹ Main Request, para.2.