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Original: **English**

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

TRIAL CHAMBER V(A)

Before: **Judge Chile Eboe-Osuji, Presiding Judge**
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
With Confidential Annexes A-F

Public Redacted Version of 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 5 November 2014, ICC-01/09-01/11-1630-Conf-Corr

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. The Ruto Defence's ("the Defence"), "Confidential Redacted Version of "Ruto Defence Request for the Appointment of a Disclosure Officer and/or the Imposition of Other Remedies for Disclosure Breaches"[1] ("Request") should be rejected.

2. The Prosecution is fully cognisant of the scope of its statutory disclosure obligations and has discharged its obligations throughout the entirety of the proceedings on a good faith basis and in accordance with the law.

3. In support of the relief sought, the Defence relies on eight alleged disclosure failures dating back some 18 months. Many of these are disputed. None relate to critical documents. 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 to the Defence over the same period. Additionally, the Defence has failed to demonstrate any real prejudice to its ability to present its case.

4. The relief requested by the Defence is misconceived and disproportionate. The Defence is in effect requesting the Chamber to "micro-manage" the Prosecution's fulfilment of its statutory disclosure obligations, including its internal structures and procedures, notwithstanding the statutory mandate of the Prosecutor to manage these matters. The Prosecution has adequate internal procedures in place to ensure the fulfilment of its disclosure obligations.

Confidentiality

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

[1] ICC-01/09-01/11-1602-Conf-Red.

Statement of facts

6. P-0516 was an initially cooperative Prosecution witness who, having provided a statement and agreed to testify, subsequently withdrew his cooperation and ceased all contact with the Prosecution.[2] The witness' testimony was only secured through the issuance by the Chamber of a summons to appear.[3] The witness refused to meet with the Prosecution prior to his testimony in order to undergo witness preparation. During examination-in-chief, the witness disavowed the original statement he had provided the Prosecution, claiming for the first time that he had conspired [REDACTED][4] to provide a false account to the Prosecution. An application to declare the witness hostile was granted.[5]

7. It was only during P-0516's testimony in court that he first asserted that he had been present when [REDACTED]. As a result, [REDACTED] were promptly disclosed to the Defence. However, the fact [REDACTED] had been previously disclosed to the Defence.

Submissions

8. At the outset, the Prosecution reiterates that it is fully cognisant of its statutory disclosure obligations; it approaches these obligations with the utmost seriousness and acts at all times in good faith.

9. The 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. These include (but are not limited to), conducting complete disclosure reviews at critical junctures of the case, reviewing all new evidence as and when it is received and conducting complete witness-specific reviews prior to each witness testifying to ensure that all relevant and disclosable

[2] ICC-01/09-01/11-1120-Red2, paras.44-48.
[3] ICC-01/09-01/11-1274-Corr2.
[4] [REDACTED].
[5] ICC-01/09-01/11-T-144-ENG ET, p.32, ln.7 to p.33, ln.8.

content pertaining to each witness is provided to the Defence in advance of their testimony.

10. Additionally, the Prosecution has received scores of *inter partes* requests from the Defence. Where requests for disclosure are deemed to be well-founded, the Prosecution strives to provide disclosure to the fullest extent possible, without troubling the Chamber. The fact that the Prosecution provides the Defence with requested information and documents does not, however, imply that it was remiss in not disclosing the requested material *proprio motu*. The Prosecution is not privy to the Defence's trial strategies and cannot reasonably be expected to anticipate every line of defence that ingenuity may suggest. This is particularly difficult where, as in this case, the Defence has been so reticent to disclose information regarding their case that might inform disclosure decisions.

11. The Defence's request that the Chamber order the Prosecutor to appoint a "disclosure officer" is also misconceived. This is not envisaged by the ICC's legal framework, and would encroach upon the Prosecutor's independent function in the administration of justice through micro-management. The Statute and Rules specifically provide that disclosure obligations fall on the Prosecutor. In terms of Article 42(2), the Prosecutor has full authority over the management and administration of her Office, including her staff. Accordingly, it is the Prosecutor's responsibility to appoint staff to perform various functions within her Office and to hold them personally accountable should they fail to discharge these functions properly. In the exceptional circumstance where a Chamber considers that a violation rises to the level of deliberate misconduct, the Chamber is already equipped to take the necessary action under the ordinary provisions of Article 71 of the Statute and Rule 171 of the Rules. Therefore, the Defence's request for the Chamber to usurp the statutory duties and authorities conferred upon the Prosecutor is inappropriate and finds no support in the statutory framework.

12. This position is supported by both the jurisprudence of this Court and the *ad hoc* Tribunals. Trial Chamber III in the *Bemba* case, when faced with a Defence

request for disclosure alleging similar disclosure shortcomings of the Prosecution, affirmed that the management of the Prosecution's disclosure obligations is primarily vested with the Prosecution itself.[6]

13. Under rules equivalent to the ICC's Article 67(2), or Rule 77, the *ad hoc* Tribunals have underscored the importance of respecting the Prosecutor's independent role, and responsibility for disclosure, while calling on the Prosecutor to always act in good faith. Thus, the Tribunals have held that "*a determination of what materials are the subject to disclosure is a fact-based inquiry undertaken by the Prosecutor, who in making that determination is not bound to consult anyone, not even the accused*."[7] Moreover, the *ad hoc* Tribunals' practice "*is to respect the Prosecution's function in the administration of justice, and the Prosecution's execution of that function in good faith*."[8] Of course, in case of a dispute as to whether specific material is the subject of disclosure, a Trial Chamber has the duty to decide. But this is different from asking a Trial Chamber to delve into the internal organisation of the Office of the Prosecutor and structure it in a way that the Defence presumes may better facilitate the fulfilment of disclosure obligations.

14. On the basis of the above, the Tribunals have thus rejected imposing restrictions on the Prosecutor, similar to those sought by the Defence in its Request, unless expressly provided for in the Tribunals' legal relevant framework.[9]

15. In *Karadzic*, the Defence repeatedly applied for the Trial Chamber to appoint a judicial "special master" to oversee the disclosure practices of the Prosecution and to certify that all exculpatory material was in fact disclosed to the Accused. The Trial Chamber rejected these requests, preferring to recognise the Prosecution's

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[6] "*[I]t needs to be emphasised that the twin duties of disclosure [Article 67(2) and Rule 77]...rest with the Prosecution, and the Chamber will not routinely oversee or review the decisions taken by the Office of the Prosecutor in fulfilment of them. They are important prosecutorial obligations, which must be discharged scrupulously and fairly. The Chamber will only intervene if there are other good reasons for doubting that the duty has been properly fulfilled*." ICC-01/05-01/08-632, para.20; As discussed further below, such "*good reasons*" have not been established in the Request.

[7] *Prosecutor v. Kordic and Cerkez*, Judgement, IT-95-14/2-A, 17 December 2004 ("*Kordic* Appeal"), para.183.

[8] *Ibid.;* See also: ICTR, *Prosecutor v. Bagosora et al*, ICTR-98-41-AR73 & ICTR-98-41-AR73(B), Decision on Interlocutory Appeals of Decision on Witness Protection Orders, 6 October 2005, para.43.

[9] *Kordic* Appeal, paras.182-183.

autonomous responsibility for its disclosure, and to hold it accountable, by ordering it to furnish a detailed report addressing the Chamber's concerns.[10]

16. In sum, the Prosecution is the entity with the statutory responsibility to manage and implement its own disclosure obligations. If the Prosecution fails in its disclosure obligations, the Chamber has remedies available on a case-by-case basis in order to ensure the fairness of the proceedings, such as postponing the evidence of witnesses affected by late disclosure, or recalling them. However, none of the Defence's alleged disclosure violations in its Request are sufficient (individually or cumulatively) to warrant granting the relief requested.

The [REDACTED]

17. The Prosecution submits that there was no failure of its disclosure obligations in not providing in advance the document contained in Annex B of the Request; namely, [REDACTED].

18. The [REDACTED] was not disclosable pursuant to either Article 67(2) or Rule 76. The only content relevant and disclosable under Rule 77 [REDACTED] was already disclosed to the Defence in December 2013.

19. Regarding the Rule 77 content, the Defence were fully aware that [REDACTED][11] [REDACTED][12]

20. Pursuant to this order, the Prosecution prepared and disclosed a schedule which clearly states [REDACTED][13] This information was in the Defence's possession for over nine months prior to P-0516's testimony. A similar schedule was disclosed in respect of [REDACTED].[14]

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[10] *See e.g. Prosecutor v. Karadzic*, IT-95-5/18-T, Decision on Accused's Forty-Ninth and Fiftieth Disclosure Violation Motions, 30 June 2011, paras.29, 52; *Prosecutor v. Karadzic*, IT-95-5/18-T, Decision on Accused's Fifty-Third and Fifty-Fourth Disclosure Violation Motions, 22 July 2011, para.16; *Prosecutor v. Karadzic*, IT-95-5/18-T, Decision on Accused's Fifty-Fifth Disclosure Violation Motion, 19 August 2011, para.13.

[11] [REDACTED].

[12] [REDACTED].

[13] Annex A.

[14] Annex B.

21. [REDACTED] only became a matter in issue on 23 September 2014, when P-0516 asserted *for the first time* that he had colluded with [REDACTED]. The Prosecution immediately provided [REDACTED] to the Defence, further to an *inter partes* request.[15] In any case, the Defence experienced no prejudice, as they were not limited in their ability to subsequently question the witness regarding [REDACTED] and the circumstances of its origin.[16] [REDACTED].

22. [REDACTED]; the Prosecution constantly liaises with all its witnesses regarding their personal and living conditions in order to discharge its obligations, including entertaining and accepting or rejecting requests for assistance, depending on their merits. All payments which the Prosecution has made to this witness were disclosed to the Defence in the form of a financial schedule on 13 December 2013.[17]

23. Importantly, and contrary to the Defence allegations, there is no suggestion whatsoever that [REDACTED] in describing his personal situation acted with an improper financial motive nor that he suggested a *quid pro quo* relationship.[18] Tellingly, [REDACTED]. Rather, this information is provided upfront and unconditionally, [REDACTED]. The Prosecution is obliged to, and does, disclose all payments made to witnesses, [REDACTED]. However, this decision does not require the Prosecution to disclose every <u>request</u> for payment, or dispute as to the adequacy of payments. The only circumstance where the Prosecution would be required to disclose such a request is where it is tainted by fraud or other irregularity,[19] which is not the case in the present circumstances.

24. The [REDACTED] was not disclosable under Article 67(2) either.[20] As stated above, the assertions that [REDACTED] is acting pursuant to improper financial motive or a *quid pro quo*, or is seeking to become a "valuable Prosecution 'asset'" are pure conjecture, simply not sustained by a plain reading of the text [REDACTED].

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[15] Defence Annex A.
[16] See ICC-01/09-01/11-T-145-CONF-ENG-ET, p.41, ln.22 to p.45, ln.8.
[17] [REDACTED].
[18] Request, para.18.
[19] [REDACTED].
[20] Request, paras.14-16.

25. Finally, the [REDACTED] does not constitute a prior statement of [REDACTED]. An unsolicited [REDACTED], that is not responsive to any questions or inquiries from the Prosecution concerning the investigation, is not a prior witness "statement" [REDACTED].

26. In construing a "statement," [REDACTED], the Appeals Chamber (such as in the *Banda and Jerbo* case[21]) adopts a "broad" approach in the sense that even "statements" not meeting what is described as the "ideal format" of a statement (i.e. as that prescribed in Rule 111[22]) may be categorised as a prior witness "statement" [REDACTED]. Nevertheless, the ICC case-law, like that of the *ad hoc* Tribunals, does establish certain boundaries – i.e. not every "document" or "communication" [REDACTED] falls within the scope of a prior "statement" within the meaning of Rule 76. To the contrary, the case-law identifies certain pre-conditions. For instance, it is a "statement" if it meets the "question-answer" requirement, namely: the Prosecutor (for instance, in an interview), puts questions to a witness, who in turn, provides a response related to the investigation or case. In a similar fashion, a previous in-court testimony of a witness – again premised on question-to-answer requirement can qualify as a "statement".[23]

27. Indeed, in all previous ICC cases where the issue has arisen, including those cited by the Defence, a statement has been found to exist (or not to exist) where the above preconditions are met (or not). To start with the cases cited by the Defence: the "screening notes" previously requested by the Defence in this case, involved notes taken by the Prosecution on the basis of an initial contact or interview with the person in connection with the investigation.[24] Moreover, in the *Banda and Jerbo* case, the Appeals Chamber was also dealing with statements or records of the questioning of persons the Prosecution intended to call as witnesses.[25] In the words of the ICTR's Appeals Chamber, "records of questions put to witnesses by the Prosecution and the

[21] *Prosecutor v. Banda and Jerbo*, ICC-02/05-03/09OA2, ("*Banda* Appeal").
[22] *Banda* Appeal, paras.22-23.
[23] *Niyitegeka v. Prosecutor*, ICTR-96-14-A, Judgement, 9 July 2004, para.34 ("*Niyitegeka* Appeal").
[24] ICC-01/09-01/11-743-Conf., paras.16, 20.
[25] *Banda* Appeal, paras.22-23.

answers given constitute statements pursuant to Rule 66(A)(ii) of the Rules."[26] [REDACTED] clearly does not meet these requirements.

28. In sum, the Defence has failed to demonstrate either that the Prosecution breached its disclosure obligations in respect of [REDACTED], or that the Defence has suffered any prejudice by not having receiving earlier disclosure of [REDACTED].

The Defence's other alleged disclosure failures

29. The Prosecution will briefly address each of these alleged further incidents of disclosure failure,[27] not all of which it accepts as such. To the extent that the Defence's complaints are supported by the facts, these incidents, while regrettable, are isolated oversights which must be considered, not in isolation, but rather in the context of the Prosecution's consistent and good-faith compliance with its disclosure obligations throughout the entire course of the proceedings since May 2011. In fact, during the past three and a half years the Prosecution has effected over 210 disclosures comprising over 6,300 items and almost 51,000 pages of material. In this context, a handful of disclosure oversights of non-critical documents cannot reasonably be held out as proof that "the Prosecution's disclosure system is consistently failing and is not fit for purpose".[28]

30. Furthermore, while the Defence has cried foul in the below instances regarding the Prosecution's alleged failure to disclose, in no instance has the Defence demonstrated any concrete prejudice, in particular, to the Defence's ability to prepare.

[REDACTED]

31. It is disingenuous of the Defence to seek to characterise [REDACTED] as a disclosure violation when it was fully advised - over one year prior to [REDACTED]. Further, the Defence suffered no prejudice and was in no way impeded in its cross-

[26] *Niyitegeka* Appeal, para.33.
[27] Request, paras.19-26.
[28] Request, para.2.

examination of P-0356. In any event, the fact that the witness [REDACTED] was not in dispute.

32. This information was disclosed to the Defence in the form of a report on 9 January 2013 which fully detailed the nature of [REDACTED]. The report was re-disclosed in a lesser redacted form ([REDACTED]) on 11 February 2013. Come 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. Upon being informed by the Defence that it required the [REDACTED] for its cross-examination of [REDACTED], the Prosecution provided them overnight and indeed the witness was confronted with them during his cross-examination.[29]

33. The Prosecution field staff collected all [REDACTED], which were disclosed to and used by the Defence. There was no reason to additionally collect [REDACTED].

The [REDACTED]

34. While the Prosecution acknowledges that this material had been in its possession for some time prior to disclosure, it disputes that it has "repeatedly" failed to disclose information [REDACTED]. While the Prosecution acknowledges that this information could have been identified and disclosed at an earlier stage, the material contained in Defence Annex F was effectively disclosed pursuant to the Prosecution's ongoing review of material in its possession – performed to ensure that items which should be disclosed are captured and disclosed – and well in advance of the anticipated testimony of the witness. Ironically, it is the Prosecution's own internal review procedures, which the Defence seeks to impugn, that identified this oversight.

35. The information contained in Defence Annexes F and G was disclosed to the Defence in January 2013 and June 2013 respectively[30] and all relevant follow-up clarifications (regarding the substance of the documents) were addressed. The Defence has now been in possession of this information for over 20 months.

[29] ICC-01/09-01/11-T-80-ENG ET, p.78, ln.5 *et seq*.
[30] Request, Annexes E and H.

[REDACTED]. As such, there is no prejudice to the Defence in its preparations, as it will have had ample time to prepare should it consider it necessary to use any of this material in its cross-examination of the witness.

Disclosure of material [REDACTED]

36. The Prosecution submits it has complied with its disclosure obligations in respect of this body of material. The Prosecution's collection of materials received [REDACTED] was reviewed and those items determined to be disclosable were disclosed. It 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.

37. If, upon receiving disclosure of certain items, the Defence has reverted to the Prosecution with further *inter partes* requests for additional potential documents or queries for clarification on the material provided, this alone does not establish that the Prosecution has violated its disclosure obligations. Rather, it demonstrates the ongoing need for the Defence to keep the Prosecution apprised of what it considers material to its preparations and to continue to make relevant and focussed requests where necessary.

38. Furthermore, there is no indication from the Defence that it was prejudiced in any manner in its preparations, in particular in its ability to cross-examine [REDACTED].

Forensic report relating to [REDACTED]

39. The Prosecution acknowledges that it would have been preferable for the report detailing [REDACTED] 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 the witness.[31] This was due to a delay by the Prosecution's Scientific Response Unit (the authors of the report), in registering the report in the

[31] [REDACTED].

Prosecution's evidence review and management system (Ringtail). While 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.

40. However, the late disclosure did not occasion any prejudice to the Defence. The Prosecution notes that it was not in dispute that [REDACTED]. The sole intended use for the report was to seek agreement with the Defence regarding the [REDACTED]. The report was consistent with [REDACTED] evidence and did not contain any Article 67(2) material. Furthermore, the witness did not actually testify until [REDACTED] and in fact the Ruto Defence elected not to cross-examine this witness at all.[32]

Disclosure of information concerning [REDACTED]

41. The delayed disclosure of [REDACTED] identity had been previously authorised by the Chamber [REDACTED].[33] [REDACTED].[34]

42. Subsequently the Chamber permitted the Prosecution to replace [REDACTED].[35] [REDACTED].

43. The Prosecution notes that certain self-contained portions of [REDACTED] statement did comprise hearsay evidence of which [REDACTED] was the source. Once [REDACTED] attendance was confirmed and the Prosecution completed its witness-specific evidence review, the Prosecution realised that it would be necessary to disclose the source of [REDACTED] hearsay evidence, [REDACTED]. It was for these reasons that the Prosecution sought the Chamber's guidance on [REDACTED] how best to proceed regarding resolution of this issue.[36]

44. The Prosecution acknowledges, in hindsight, that it should have brought these [REDACTED] to the attention of the Chamber on an *ex parte* basis earlier [REDACTED], rather than waiting until the Prosecution was certain [REDACTED]

[32] [REDACTED].
[33] [REDACTED].
[34] [REDACTED].
[35] [REDACTED].
[36] [REDACTED].

would testify. Nonetheless, the Prosecution submits that the prejudice occasioned to the Defence of receiving [REDACTED] identity and statement close to the testimony of [REDACTED] was minimal.

45. First, the information that [REDACTED] received from [REDACTED] was hearsay, the correctness of which [REDACTED] could not personally verify. As such, regardless of when disclosure of the source was made, the scope of the Defence's cross-examination in such a situation would have been necessarily limited to general enquiries on the circumstances of [REDACTED] receipt of the hearsay or other questions regarding its reliability, rather than [REDACTED] knowledge as to the substantive content itself – on which [REDACTED] would have been unable to comment. Therefore even if the Prosecution had disclosed this earlier, the scope of cross-examination would in fact have been little altered. In this regard, the Prosecution observes that the Defence in fact declined to ask general questions during its cross-examination on the reliability of this hearsay evidence, including on the reliability of the source [REDACTED], the circumstances of [REDACTED] receipt of it or even the content of the hearsay information.

46. Second, with the information now in the Defence's possession, it has ample time to investigate the information contained in [REDACTED] material and [REDACTED] testimony, and present evidence to the contrary during the Defence phase of these proceedings should the Defence consider it necessary.

Two redacted paragraphs in the statement of witness P-0516

47. The Prosecution acknowledges that the redactions to the two paragraphs in the statement of P-0516 concerning [REDACTED] should have been lifted and re-disclosed to the Defence earlier. Those redactions had originally been implemented pursuant to the Chamber's authorisation to delay disclosure of any information which would identify [REDACTED].[37] Once it was determined that [REDACTED]

[37] [REDACTED].

would not be testifying, [REDACTED][38] this would have been an appropriate juncture to lift the redactions to the two paragraphs.

48. The Defence raised this orally with the Bench at the start of P-0516's testimony and sought an order from the Chamber that the Prosecution be precluded from relying on this information in its questioning.[39] However, such a ruling was unnecessary since the Prosecution clarified that it had not intended to rely on these paragraphs in the examination of P-0516.[40] When asked by the Presiding Judge whether the Prosecution's undertaking satisfactorily resolved the matter, counsel for Mr Ruto confirmed that the matter was now resolved and that he was content to proceed.[41]

49. As such, P-0516 was neither questioned by the Prosecution on the contents of the two paragraphs in question, nor was he cross-examined on them by the Defence. Not only was this matter resolved in court; no prejudice has been shown by the Defence in its Request. If there was any prejudice occasioned in this situation, it was on the part of the Prosecution which, had it acted sooner, might have relied on the evidence in question.

Disclosure of information showing Mungiki support for the ODM and/or Raila Odinga

50. The Prosecution disputed the Defence assertion that evidence of Mungiki support for the ODM and/or Raila Odinga at the time of the 2007 election was material to any pertinent issue to be determined in this case and so declined the *inter partes* request for disclosure. The Prosecution never contended that it had no such information of Mungiki support in its possession, but rather that the Prosecution disputed its relevance.

51. As such, the Defence litigated the question before the Chamber,[42] which ruled in favour of its materiality ("Mungiki Decision").[43] With the Chamber having

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[38] [REDACTED].
[39] ICC-01/09-01/11-T-141-CONF-ENG, p.40 lns.14-16.
[40] *Ibid.*, p.41, lns.8-9.
[41] *Ibid.*, p.41, lns.10-19.
[42] ICC-01/09-01/11-1419-Conf-Red.

resolved the matter, the Prosecution duly proceeded to disclose such material in its possession. The Defence has failed to demonstrate how it has suffered any prejudice in either having not received the material sooner *proprio motu* from the Prosecution, or from having to seek an order from the Chamber to receive it.

52. As acknowledged by the Chamber in the Mungiki Decision, the Defence at the time of its *inter partes* request had not made sufficiently clear to the Prosecution exactly how such material would have been material, noting in particular that "*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…*".[44] In the Prosecution's respectful submission, notwithstanding the need to involve the Chamber and litigate the issue, had the Chamber considered that the Prosecution had violated its disclosure obligations, it would have stated so explicitly at the time of rendering the Mungiki Decision. Rather, the Chamber made a finding of materiality, ordered disclosure and left the matter there.

53. Finally, while it is neither appropriate nor necessary at this juncture to engage in a detailed discussion of the disclosed Mungiki material (which is not fully before the Chamber), the Prosecution disputes that the material shows a "large, clear and unequivocal body of evidence" of Mungiki support for the ODM during the 2007 election, or that this information "seriously undermines" the Prosecution case theory.[45] Such conclusions are not only significant over-statements, but are based on a selective reading of the materials disclosed.[46]

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[43] ICC-01/09-01/11-1465.
[44] *Ibid.*, para.13.
[45] Request, para.26.
[46] In this regard, it should be pointed out that the 701 items referred to by the Defence are not all items that support the Defence's proposition. Far from it. The Prosecution disclosed all material relevant to the issue of which party the Mungiki were supporting, since both material for and against the Defence proposition were assessed to be relevant.

54. For example, the first entry in Annex C, Part 3 is an extract from a statement of one [REDACTED].[47] [REDACTED][48] [REDACTED].[49]

55. There are further mischaracterisations by the Defence in its presentation to the Chamber of this Mungiki evidence contained in Annex C Part 3. Certain extracts conflate Mungiki support for the ODM during the 2007 election with Mungiki support during the 2005 referendum.[50] Additionally, certain extracts in Annex C Part 3 speak to *individual* Mungiki members supporting the ODM during part of the 2007 election campaign, but fail to explain that some of those same witnesses also claim to have given support to the PNU side after the violence broke out (once they were promised money and security for doing so).[51] It is thus incorrect and misleading for the Defence to assert that there is a "clear and unequivocal body of evidence" of Mungiki support for the ODM during the 2007 election.[52]

Conclusion

56. The Prosecution submits that it has not failed in the proper discharge of its disclosure obligations. The Defence Request relies on a handful of examples in isolation, ignoring the context of the Prosecution's diligent performance of its substantial disclosure obligations to date. Those few instances, which the Prosecution acknowledges amount to tardy disclosure, do not justify the Defence's allegations of a serious or consistent failure in the discharge of the Prosecution's disclosure obligations. Further, the Defence has failed to demonstrate real prejudice in any of these instances.

57. 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

[47] [REDACTED].
[48] [REDACTED].
[49] [REDACTED].
[50] See for example, Annex C Part 3, p.20-22, rows 27 & 28 (stating that the Mungiki supported the ODM during the 2005 referendum).
[51] [REDACTED].
[52] Request, para.26.

to justify the far-reaching and inappropriate relief sought by the Defence. The Prosecution accordingly submits that the Request should be dismissed.

Fatou Bensouda, Prosecutor

Dated this 16th day of January 2015

At The Hague, the Netherlands