

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/13

Date: 22 May 2015

TRIAL CHAMBER VII

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuca
Judge Bertram Schmitt

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

**IN THE CASE OF
THE PROSECUTOR *v.* JEAN-PIERRE BEMBA GOMBO, AIMÉ KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDÈLE BABALA WANDU
and NARCISSE ARIDO**

Public, with one public annex

Decision on Modalities of Disclosure

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 Kweku Vanderpuye

Counsel for Jean-Pierre Bemba Gombo

Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

Mr Paul Djunga Mudimbi

Counsel for Jean-Jacques Mangenda Kabongo

Mr Christopher Gosnell

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila

Counsel for Narcisse Arido

Mr Charles Achaleke Taku

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims **The Office of Public Counsel for the Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Others

Trial Chamber VII (the ‘Chamber’) of the International Criminal Court (the ‘Court’), in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, having regard to Articles 64(2), (3) and (6)(c), 67 and 68 of the Rome Statute (the ‘Statute’), Rules 76 to 84 and 87 of the Rules of Procedure and Evidence (the ‘Rules’) and Regulations 39 and 42 of the Regulations of the Court (the ‘Regulations’), issues the following ‘Decision on Modalities of Disclosure’.

I. Procedural history

1. On 25 February 2015, the Office of the Prosecutor (the ‘Prosecution’) filed a request (the ‘Redaction Protocol Request’)¹ for the Chamber to adopt a proposed redaction protocol in this case (the ‘Proposed Protocol’).²
2. On 20 March 2015, the Prosecution filed submissions in advance of the first status conference held before this Chamber and addressed, *inter alia*, the timing, volume and modalities of disclosure (the ‘Prosecution Status Conference Submission’).³
3. On 13 April 2015, the five accused (collectively, the ‘Defence’) jointly filed submissions on these topics before the first status conference (the ‘Defence Status Conference Submission’).⁴ In this submission, the Defence makes thirteen distinct disclosure related requests.
4. The Defence also responded to the Redaction Protocol Request this same day (the ‘Redaction Protocol Response’).⁵

¹ Prosecution’s submission on proposed redactions protocol, 25 February 2015, ICC-01/05-01/13-825 (with two annexes).

² ICC-01/05-01/13-825-AnxB.

³ Public redacted version of “Prosecution’s Observations on the Agenda of the First Status Conference”, 20 March 2015, ICC-01/05-01/13-859-Red, paras 8-14 (with four annexes; confidential version notified same day).

⁴ Joint Defence Observations on Modalities of Disclosure in Accordance with the Trial Chamber’s Order Regarding the Agenda of the First Status Conference (ICC-01/05-01/13-824), 13 April 2015, ICC-01/05-01/13-894.

⁵ Joint Defence Observations on the Redactions Regime for Trial Pursuant to the Trial Chamber’s Order Seeking Submissions in Advance of First Status Conference (ICC-01/05-01/13-824), 13 April 2015, ICC-01/05-01/13-902

5. On 24 April 2015, disclosure and redaction issues were further discussed at the first status conference.⁶
6. On 5 May 2015, the Prosecution responded to the new requests raised in the Defence Status Conference Submission (the 'Prosecution Modalities Response').⁷

II. Redaction Protocol Request

A. Whether to adopt a redaction protocol in this case

7. Redaction protocols have been adopted in recent trials as a means of facilitating the fair and expeditious conduct of the proceedings.⁸ The language in these protocols has evolved over time, but all distinguish between what the Proposed Protocol describes as 'standard redactions' and 'non-standard redactions'.
8. As regards standard redactions, redaction protocols identify certain standard redaction categories with corresponding alpha-numeric codes.⁹ The protocols provide timelines for when these redactions must be lifted. The disclosing party may apply and maintain standard redactions to disclosable material without seeking further approval from the Chamber, as the justification for these categories is always the same and in line with the jurisprudence of the Chambers of the Court.

(with annex). *See also* Email from a Legal Officer of Trial Chamber VII to the parties, 10 April 2015 at 10:23 (indicating that any response to the Redaction Protocol Request must be contained in the Defence Status Conference Submission).

⁶ Transcript of Hearing, 24 April 2015, ICC-01/05-01/13-T-8-CONF-ENG.

⁷ Prosecution's Response to Joint Defence Observations on Modalities of Disclosure, 5 May 2015, ICC-01/05-01/13-933, *submission directed by Chamber in ICC-01/05-01/13-T-8-CONF-ENG*, page 24 lines 20-24.

⁸ Trial Chamber I, *The Prosecution v. Laurent Gbagbo*, Decision on the Protocol establishing a redaction regime, 15 December 2014, ICC-02/11-01/11-737 (with public annex) (the '*Gbagbo* Redaction Protocol Decision'); Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on the Protocol establishing a redaction regime, 12 December 2014, ICC-01/04-02/06-411 (with public annex); Trial Chamber V, *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Decision on the protocol establishing a redaction regime, 27 September 2012, ICC-01/09-02/11-495 (with public annex; corrigendum issued 5 October 2012) (the '*Muthaura/Kenyatta* Redaction Protocol Decision'); Trial Chamber V, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the protocol establishing a redaction regime, 27 September 2012, ICC-01/09-01/11-458 (with public annex; corrigendum issued 5 October 2012) (the '*Ruto/Sang* Redaction Protocol Decision'). *In this same vein, see also* Pre-Trial Chamber II, *The Prosecutor v. Dominic Ongwen*, Decision on issues related to disclosure and exceptions thereto, 23 April 2015, ICC-02/04-01/15-224.

⁹ As examples in the Proposed Protocol, redactions to locations of witness interviews/accommodation are category 'A.1', redactions to identifying and contact information of parties' staff are category 'A.2', and so on.

9. As regards non-standard redactions, the disclosing party also applies these redactions when disclosing material, but must then seek authorisation from the Chamber on a case-by-case basis to maintain them. Requests to maintain standard redactions beyond the expiry of the applicable time limits are treated as non-standard redactions.
10. Importantly, when the receiving party objects to the application of standard redactions, these disputed redactions are also treated as non-standard redactions. In such cases, the disclosing party shall retain the burden of proof to justify the challenged redactions. As such, the only times when the Chamber dispenses with an individual assessment of redaction requests 'are situations where both parties are satisfied that such an assessment is unnecessary.'¹⁰
11. Redactions are granted if they satisfy the following requirements: (i) the existence of an objectively justifiable risk to the safety of the person or interest concerned, or which may prejudice further or ongoing investigations; (ii) the risk must arise from disclosing the particular information to the receiving party, as opposed to the public; (iii) the infeasibility or insufficiency of less restrictive protective measures and (iv) an assessment as to whether the redactions sought are prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Additionally, if the redaction is granted, there is an ongoing obligation to periodically review the decision authorising the redactions should circumstances change.¹¹

¹⁰ *Ruto/Sang* Redaction Protocol Decision, ICC-01/09-01/11-458, para. 15; *Muthaura/Kenyatta* Redaction Protocol Decision, ICC-01/09-02/11-495, para. 15. *See also* Trial Chamber IV, *The Prosecutor v. Abdallah Banda Abakaer Nourain*, Decision on the Prosecution's application for redactions; the Common Legal Representative request for disclosure; the Defence request for reclassification; and Decision establishing simplified proceedings related to future applications for non-disclosure, 19 November 2013, ICC-02/05-03/09-524, para. 41.

¹¹ *Gbagbo* Redaction Protocol Decision, ICC-02/11-01/11-737, para. 11; *Ruto/Sang* Redaction Protocol Decision, ICC-01/09-01/11-458, para. 11. These requirements are derived from Appeals Chamber jurisprudence. *See* Appeals Chamber, *The Prosecutor v. Germain Katanga*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 13 May 2008, ICC-01/04-01/07-475, OA, paras 56, 70-73, 97; Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", 13 October 2006, ICC-01/04-01/06-568, OA 3, paras 36-39;

12. The Defence submits that ‘a case-by-case assessment of redaction requests, and not a protocol, is the method best suited to redactions in the present case’.¹² The Defence’s primary relief sought is to adopt a procedure whereby: (i) the Prosecution would simultaneously submit to the Defence, on an *inter partes* basis, the redacted material and a detailed explanation of what has been redacted; (ii) in the event any redaction is contested by the Defence, the Prosecution shall request authorisation from the Chamber to maintain the disputed redactions and (iii) the Prosecution remains under an on-going duty to review the necessity of any redactions and to lift them where possible, irrespective as to whether the Defence has contested them.¹³
13. The Chamber does not consider this proposal to be substantially different from the procedure set out in the Proposed Protocol. The Chamber further considers that the standard redaction codes, along with pseudonyms as appropriate, provide a sufficiently detailed explanation of what has been redacted for the Defence. Irrespective of the scope of this case or the number of redactions which are ultimately required,¹⁴ the Chamber still sees efficiency benefits from adopting a redaction protocol, and sees no reason to depart from an increasingly uniform practice of Trial Chambers on this point.

B. Terms of the redaction protocol

14. The Proposed Protocol is based on the versions adopted in the *Ntaganda* and *Gbagbo* cases, which were in turn based on the redaction protocols first adopted

Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”, 14 December 2006, ICC-01/04-01/06-773, OA 5, paras 33-34; Appeals Chamber, *The Prosecutor v. Germain Katanga*, Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, 13 May 2008, ICC-01/04-01/07-476, OA 2, para. 64.

¹² Redaction Protocol Response, ICC-01/05-01/13-902, para. 1.

¹³ Redaction Protocol Response, ICC-01/05-01/13-902, paras 1, 3-10, 58.

¹⁴ In March 2015, the Prosecution estimated that around 40 items required redactions. By April 2015, this number had already more than doubled to 93 items. Compare Prosecution Status Conference Submission, ICC-01/05-01/13-859-Red, para. 10, with ICC-01/05-01/13-T-8-CONF-ENG, page 18 line 22 to page 20 line 10.

by Trial Chamber V.¹⁵ The Prosecution proposes certain modifications to the recent redaction protocols, and the Defence, as an alternative form of relief, proposes several changes of its own. The Chamber accepts that these protocols adopted in past cases are indeed a good starting point from which to proceed in this case. This section will only address changes which have been proposed to the most recent redaction protocol adopted in the *Gbagbo* case.¹⁶

15. The Prosecution proposes to group certain sub-categories of information which identify similar classes of individuals.¹⁷ The Chamber considers that this will streamline the application of the protocol, and accepts this modification.

16. The Prosecution proposes to provide unique pseudonyms only for investigators and intermediaries, rather than for all persons redacted pursuant to the standard codes falling under Rule 81(2) of the Rules.¹⁸ The Defence opposes this change, arguing that '[w]ithout unique pseudonyms, the Defence is left unable to identify whether, for instance, the same source was used in relation to several matters'.¹⁹ The Chamber appreciates the technical challenge faced by the Prosecution, as it may come into contact with a significant number of individuals who may require unique pseudonyms in the course of its investigation. However, the importance of the Defence being able to trace the actions of persons across documents makes it essential for these pseudonyms to be maintained. This modification is rejected – the disclosing party must provide pseudonyms for the investigators, intermediaries, staff, experts and other persons indicated in Categories A.2-A.6 of the Proposed Protocol.

17. The Prosecution proposes 'ongoing redaction' for the identifying information of its investigators, as opposed to lifting these redactions 'when the identity of the

¹⁵ Redaction Protocol Request, ICC-01/05-01/13-825, para. 2.

¹⁶ *Gbagbo* Redaction Protocol, ICC-02/11-01/11-737-AnxA.

¹⁷ Redaction Protocol Request, ICC-01/05-01/13-825, para. 17 (concerning: (i) redactions to party and Court staff; (ii) certain persons who assist during interviews who are not staff and (iii) leads/sources).

¹⁸ Redaction Protocol Request, ICC-01/05-01/13-825, paras 18-19. Rule 81(2) of the Rules governs restrictions on disclosure when 'disclosure may prejudice further or ongoing investigations'.

¹⁹ Redaction Protocol Response, ICC-01/05-01/13-902, paras 40-45.

last witness interviewed or contacted by that investigator is disclosed'.²⁰ The Prosecution has made this same argument in the past in other cases, and it has been rejected on grounds that, by the time the identity of the last witness contacted by the investigator is disclosed, 'the Prosecution's investigations [...] should be sufficiently complete so that the investigators' identities can be disclosed without any undue prejudice to the Prosecution's investigations'.²¹ The Prosecution's arguments in this case are unpersuasive for this same reason - if the Prosecution believes it is necessary to have ongoing redactions for its investigators due to security concerns or other reasons, then it may file a non-standard redaction request. This modification is rejected.

18. The Defence requests that eleven standard redaction categories (or sub-categories) be removed from the protocol, and that '[a]ny redaction should be lifted no later than four months prior to the start of trial'.²² Having considered the arguments of the Defence, the Chamber is unpersuaded that there is any reason to depart from how past redaction protocols have set out standard categories or the timelines for lifting them, subject to the streamlining proposal accepted at paragraph 15 above. The Chamber considers that removing so many standard redactions from the ambit of the protocol is unwarranted and would defeat its purpose. These modifications are all rejected.

19. The Defence also requests that any information falling under standard redaction codes which is contained in evidence falling potentially under Article 67(2) of the Statute²³ or Rule 77 of the Rules²⁴ must be treated as a non-standard

²⁰ Redaction Protocol Request, ICC-01/05-01/13-825, paras 20-25.

²¹ *Gbagbo* Redaction Protocol Decision, ICC-02/11-01/11-737, para. 35.

²² Redaction Protocol Response, ICC-01/05-01/13-902, paras 15-38, 48-50, 59(a), (c) and (e).

²³ Article 67(2) provides: '[i]n addition to any other disclosure provided for in this Statute, 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. In case of doubt as to the application of this paragraph, the Court shall decide'.

²⁴ Rule 77 provides: '[t]he 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 control of the Prosecutor, which are material to the preparation of the defence or are intended

redaction.²⁵ The Chamber considers that such a limitation is unnecessary – the disclosing party is to apply any standard redactions in good faith and the Prosecution is obligated to not take measures to protect victims and witnesses in a manner that would be ‘prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial’.²⁶ Should the receiving party have any concerns as to how standard redactions are applied, they may challenge them and trigger the same review which would result from this information falling under non-standard redactions.

20. The Defence requests that the Chamber ‘order the Prosecution to review all existing redactions with a view to assess whether they are still justified, and to lift them, replace them with appropriate codes or apply for continued redactions, within one month of its decision on the redaction regime’.²⁷ The Chamber recalls that the Prosecution already has an ongoing obligation to review its redactions, and that, accordingly, no order is necessary in this regard. As to the timeline for applying for non-standard redactions, this will be addressed in Section IV below.

21. Finally, the Defence makes certain ancillary requests regarding: (i) Prosecution intermediaries, (ii) the procedure for applying for non-standard redactions and (iii) the procedure for raising an *inter-partes* dispute.²⁸ The Defence gives no indication that it has sought any information from the Prosecution as to its use of intermediaries in this case, and the Chamber will not consider this any further until this step is exhausted. As for the latter two requests, the Chamber does not consider it necessary for the redaction protocol to regulate these questions – the parties can liaise with each other regarding an appropriate procedure for raising

for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial, as the case may be, or were obtained from or belonged to the person’.

²⁵ Redaction Protocol Response, ICC-01/05-01/13-902, paras 39, 59(b). The Defence mentions Rule 78 in its submissions, not Rule 77, but its amendments to the Proposed Protocol are based on the language of Rule 77. *See* ICC-01/05-01/13-902-AnxA, para. 10.

²⁶ Article 68(1) of the Statute.

²⁷ Redaction Protocol Response, ICC-01/05-01/13-902, paras 55-56, 59(f).

²⁸ Redaction Protocol Response, ICC-01/05-01/13-902, paras 27, 51-54, 57.

inter-partes disputes, and the appropriate classification of non-standard redaction requests can be dealt with on a case-by-case basis.

22. For the foregoing reasons, the Chamber decides to adopt the amended version of the Proposed Protocol which is attached as an annex to the present decision.

III. Disclosure modalities

23. The Chamber will now address the relief sought by the parties regarding disclosure modalities. For any disclosure modalities not addressed by the present decision, the parties are to proceed as they have done previously in this case. For any new disclosure issues which may arise, the parties are to endeavour to resolve these issues *inter partes* before seizing the Chamber.²⁹

A. Communicating materials to the Chamber

24. Currently, all materials disclosed *inter partes* are also transmitted to the Chamber, irrespective of whether the disclosing party intends to use them as evidence.³⁰

25. The Defence requests that: (i) only items contained in the Prosecution's list of evidence be transmitted to the Chamber and (ii) all items currently on E-court which are not included in the parties' lists of evidence at the confirmation of charges stage should be removed.³¹

26. The Prosecution agrees that, going forward, materials should not be communicated to the Chamber. However, the Prosecution submits that it is unwarranted to remove the Chamber's access to materials already provided.³²

27. The Chamber considers that there is no compelling reason to remove its access to all disclosed materials. It is more efficient for this access to be maintained, as

²⁹ ICC-01/05-01/13-T-8-CONF-ENG, page 4 lines 16-21.

³⁰ Transcript of Hearing, 4 December 2013, ICC-01/05-01/13-T-2-Red-ENG, page 31 line 25 to page 32 line 3.

³¹ Defence Status Conference Submission, ICC-01/05-01/13-894, paras 3-4, 37(a)-(b).

³² Prosecution Modalities Response, ICC-01/05-01/13-933, paras 4-8.

removing it requires the Chamber to direct that access be given on an *ad hoc* basis whenever the parties cite to supporting materials which the Chamber cannot review. Chambers in all cases have access to items which are not ultimately considered in its judgment, such as items deemed inadmissible during trial. As professional judges, there is no risk of prejudice being caused by exposing the Chamber to such information.

28. That said, the Chamber emphasises that it is not the role of the Chamber to conduct any *proprio motu* investigation into the materials the parties do not intend to rely on at trial. In this regard, the Chamber is mindful of Article 74(2) of the Statute, which directs the Chamber to base its judgment on the merits ‘only on evidence submitted and discussed before it at trial’. It is for the parties to select which materials they wish to submit and discuss as evidence during the trial.

29. Notwithstanding, the Chamber recalls its responsibility to ensure that disclosure takes place under satisfactory conditions and highlights its authority under Article 69(3) of the Statute to request the submission of all evidence that it considers necessary for the determination of the truth.

B. Providing further details when disclosing materials

30. Currently, when disclosing incriminating materials, the Prosecution explains that, although an item intended to be relied upon by the Prosecution is marked as ‘incriminating’ (meaning that the Prosecution intends to rely upon it to prove the confirmed charges at trial) the item may contain information falling under Article 67(2) of the Statute or Rule 77 of the Rules.³³ The Prosecution is not providing any sort of elements based chart when effecting disclosure; such charts would link the new disclosure to each constitutive element of each offence and the applicable modes of liability.

³³ Prosecution Modalities Response, ICC-01/05-01/13-933, para. 11.

31. The Defence requests for the Prosecution to indicate precisely when incriminating or Rule 77 materials also contain potentially exculpatory material. The Defence also requests the Prosecution to review all previously disclosed materials for this purpose.³⁴ The Defence further requests an element based chart accompanying all disclosure, indicating that '[t]he chart should include the Doc ID of the documents, as well as references to the specific paragraph(s) of the updated DCC. In addition, it should indicate the specific paragraph(s) of the document related to the specific element of the offence.'³⁵
32. The Prosecution responds that these requests should be rejected, as the Prosecution is not statutorily obligated to provide this information and it is for the Defence to make its own assessments of disclosed materials.³⁶
33. The Chamber is not persuaded by the Defence arguments that it is necessary to require the Prosecution to provide this additional information.

C. Translations

34. The Defence requests that 'any video or audio recording be disclosed together with a transcription and a translation of the transcript, if the latter is in a language other than French or English.'³⁷
35. The Defence also requests for the Prosecution to translate into one of the working languages of the Court all Article 67(2) or Rule 77 materials which are in neither English nor French. In the alternative, the Defence requests the Chamber to order that sufficient resources be accorded to the Defence for

³⁴ Defence Status Conference Submission, ICC-01/05-01/13-894, paras 5-8, 37(c)-(d).

³⁵ Defence Status Conference Submission, ICC-01/05-01/13-894, paras 9-12, 37(e). See also ICC-01/05-01/13-T-8-CONF-ENG, page 57 line 20 to page 60 line 9.

³⁶ Prosecution Modalities Response, ICC-01/05-01/13-933, paras 9-15.

³⁷ Defence Status Conference Submission, ICC-01/05-01/13-894, paras 13, 37(f).

translation of disclosure, including intercepts, which are in a language other than the working languages of the court.³⁸

36. The Prosecution responds that: (i) it is more efficient to provide the audio-visual material as soon as possible with transcripts or translations to follow, indicating that such disclosures include metadata which will ensure that the Defence can always link a given translation to the original material³⁹ and (ii) it does not have an obligation to translate Article 67(2) or Rule 77 materials for the Defence.⁴⁰

37. As to the issue of the timing of transcripts and translations of audio-visual material, the Chamber considers that it is more efficient to disclose such material as soon as possible and then have the Prosecution provide the corresponding transcripts/translations when they are ready. However, the Chamber emphasises that any transcriptions/translations of audio-visual materials must be completed by the disclosure deadline set out in Section IV below.

38. Under the particular circumstances of this case, imposing additional translations on the Prosecution at this point in the proceedings would impact the feasibility of the disclosure deadline. Further, the Chamber also notes that many of the materials at issue are the accuseds' own communications, which would certainly be intelligible to those accused without need for any translation.⁴¹

39. The Chamber considers it more appropriate proceeding along the lines of the Defence's alternative request for sufficient translation resources. The Chamber notes that both the Prosecution and the Registry have expressed willingness to liaise with the Defence teams regarding language assistance needs.⁴² As the Chamber has indicated previously, the Defence teams are to consult with the

³⁸ Defence Status Conference Submission, ICC-01/05-01/13-894, paras 21-23, 37(i).

³⁹ Prosecution Modalities Response, ICC-01/05-01/13-933, paras 17-18.

⁴⁰ Prosecution Modalities Response, ICC-01/05-01/13-933, paras 21-23.

⁴¹ See Decision on the "Defence request for an order requiring the translation of evidence", 11 February 2014, ICC-01/05-01/13-177, para. 10.

⁴² Prosecution Modalities Response, ICC-01/05-01/13-933, para. 23; ICC-01/05-01/13-T-8-CONF-ENG, page 79 line 14 to page 80 line 14.

Registry 'for purposes of exploring other reasonable arrangements with a view to lasting or *ad hoc* solutions for language needs'. The Chamber is 'to be seized of complaints concerning translation of discrete materials in whole or in part if following those consultations counsel still require translation to ensure the rights of the accused because the arrangements made were not satisfactory in that regard'.⁴³

D. Numbering disclosed items

40. The Defence requests that the same numbering (ERN/Doc ID) is kept for the documents which were already disclosed at the confirmation stage.⁴⁴ The Prosecution clarifies that it does not intend to re-disclose evidence already disclosed at the confirmation stage, and to the extent such disclosure is required (such as lesser redacted versions of items) the E-Court Protocol adequately regulates this matter.⁴⁵ As there is no proposal to change the numbering of items already disclosed, the Chamber considers that no ruling is required on this point.

E. Provision of further disclosure

41. The Defence requests that the Prosecution disclose certain information under Article 67(2) of the Statute, including: (i) orders or filings from the Main Case which are potentially exculpatory and (ii) information 'tending to discredit Prosecution, intermediaries or staff'.⁴⁶

42. The Prosecution responds that it has already reviewed its database from the Main Case for disclosure purposes. The Prosecution submits that the request for information discrediting Prosecution staff is overbroad, as such information need not have any bearing on the credibility of Prosecution witnesses. Moreover,

⁴³ See ICC-01/05-01/13-T-8-CONF-ENG page 25 line 21 to page 26 line 4.

⁴⁴ Defence Status Conference Submission, ICC-01/05-01/13-894, paras 14, 37(g).

⁴⁵ Prosecution Modalities Response, ICC-01/05-01/13-933, para. 19. See also Annex to the Registration of the E-court Protocol pursuant to oral order from 04 December 2013, 6 December 2013, ICC-01/05-01/13-35-Anx.

⁴⁶ Defence Status Conference Submission, ICC-01/05-01/13-894, paras 26-28, 37(j).

the Prosecution argues that such a request is unnecessary because, as a matter of practice, it already disclosed to the Defence information that ‘may affect the credibility of [P]rosecution evidence’ under Article 67(2), regardless of whether it also incidentally affects the credibility of others.⁴⁷

43. The Chamber does not see any basis at this time for concluding that the Prosecution has been deficient in exercising its disclosure obligations for these kinds of materials, and recalls that the Prosecution may request the Chamber’s ruling under Article 67(2) of the Statute in conjunction with Rule 83 of the Rules.⁴⁸ The Chamber considers that the Prosecution is not obligated to provide information above and beyond its statutory disclosure obligations which tend to discredit its staff or intermediaries in a general sense.

F. Provision of information related to the disclosure process generally

44. Asserting that only 1.2% of the Prosecution’s disclosed evidentiary material to date has been identified as potentially exculpatory, the Defence requests that the Chamber order the Prosecution to: (i) provide information regarding the method and search terms used to identify Article 67(2) and Rule 77 material to the Defence and the Chamber; (ii) file a written certification that it has searched any and all relevant records and that all potentially exculpatory material has been disclosed to the Defence and (iii) provide a monthly report on the status of disclosure.⁴⁹
45. The Prosecution responds that all these measures are unwarranted and unnecessary.⁵⁰

⁴⁷ Prosecution Modalities Response, ICC-01/05-01/13-933, paras 24-26.

⁴⁸ Article 67(2) of the Statute, Rule 83 of the Rules (‘[t]he Prosecutor may request as soon as practicable a hearing on an *ex parte* basis before the Chamber dealing with the matter for the purpose of obtaining a ruling under article 67, paragraph 2’).

⁴⁹ Defence Status Conference Submission, ICC-01/05-01/13-894, paras 15-19, 29-31, 35-36, 37(h), (k) and (m).

⁵⁰ Prosecution Modalities Response, ICC-01/05-01/13-933, paras 20, 26, 29.

46. The Chamber does not consider any of these measures to be necessary at the present time. The Chamber will not engage in any discussion as to the Prosecution's disclosure methodology until the Defence can first demonstrate that it has unsuccessfully sought specific kinds of materials from the Prosecution. The Chamber notes that verification orders have been made in some past cases, but they have been remedial steps taken in the face of established disclosure violations.⁵¹ There is no comparable evidence of Prosecution disclosure violations in the present case - the percentage of disclosed documents labelled as potentially exculpatory does not, without more, reveal that the Prosecution has failed to act in full conformity with its obligations under Article 54(1)(a) of the Statute. Ordering monthly disclosure reports is likewise unnecessary in view of the imminence of the disclosure deadline set by the Chamber below.

IV. Disclosure deadline

47. The Defence requests that all incriminating material must be disclosed by the Prosecution on an on-going basis, and at the latest four months prior to the start of the trial.⁵²

48. The Prosecution indicates that it is unable to indicate a deadline by which it can finalise disclosure in view of certain outstanding materials it cannot collect for reasons beyond its control.⁵³ The Prosecution estimates that, for the materials in

⁵¹ Trial Chamber V(A), *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), 16 February 2015, ICC-01/09-01/11-1774-Red (confidential version filed 9 January 2015), para. 59 ('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'); Trial Chamber V(B), *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.

⁵² Defence Status Conference Submission, ICC-01/05-01/13-894, paras 32-34, 37(1).

⁵³ Prosecution Status Conference Submission, ICC-01/05-01/13-859-Red, para. 12; ICC-01/05-01/13-T-8-CONF-ENG, page 8 line 19 to page 13 line 12.

its possession, it would be able to finalise its disclosure obligations by the end of June 2015.⁵⁴

49. The Chamber considers it appropriate to set a deadline for the Prosecution to disclose any incriminating material it intends to rely on at trial. The Chamber already forewarned that such a deadline might be imposed at the first status conference.⁵⁵

50. The Chamber realises that the Prosecution has not been able to review certain materials which were collected well before now. Some of these materials have been withheld because they are being reviewed by an independent counsel to see if they are privileged, whereas others have not been provided because they contain electronic data which has not been extractable to date.⁵⁶ Despite the Prosecution's lack of fault as to why it has not been able to review these materials, waiting for them would entail a delay of an indefinite duration. It is noted that the Prosecution sought and obtained confirmation of charges on the basis that the Prosecution had evidence to establish substantial grounds to believe that the accused committed the crimes charged. The trial may not thus be delayed on the speculative hope that further evidence may be uncovered from materials not now in the possession of the Prosecution. Given the Chamber's obligation to ensure an expeditious trial which occurs without undue delay, at some point the Prosecution must proceed to trial with the evidence in its possession.

51. As such, the Chamber sets a disclosure deadline of 30 June 2015 for the Prosecution. This is the date by which the Prosecution itself indicated it could finish its disclosure review of the materials in its possession. By this date, the Prosecution must disclose all evidence upon which it intends to rely at trial.

⁵⁴ Prosecution Status Conference Submission, ICC-01/05-01/13-859-Red, para. 11; ICC-01/05-01/13-T-8-CONF-ENG, page 9 line 21 to page 10 line 15.

⁵⁵ ICC-01/05-01/13-T-8-CONF-ENG, page 70 lines 9-13.

⁵⁶ *See generally* Decision Providing Materials in Two Independent Counsel Reports and Related Matters, 15 May 2015, ICC-01/05-01/13-947.

52. Moreover, the Chamber recalls the duty of the Prosecution to disclose, pursuant to Article 67(2) of the Statute, any evidence in its possession which is exculpatory in nature 'as soon as practicable'. This obligation is ongoing and requires the Prosecution to disclose such materials possibly much earlier than 30 June 2015.
53. Further, the Prosecution must file any requests to apply non-standard redactions to materials currently in its possession by no later than 9 June 2015, so that there is time to rule on these requests before the disclosure deadline.
54. As for the exact date of the commencement of trial after full disclosure, this will be addressed by way of a separate decision.

FOR THE FOREGOING REASONS THE CHAMBER HEREBY


ADOPTS the redaction protocol in the annex of the present decision;

ADOPTS the disclosure modalities as set out in Section III of the present decision;

ORDERS the Prosecution to file any requests to apply non-standard redactions to materials currently in its possession by no later than 9 June 2015; and

ORDERS the Prosecution to disclose all incriminating materials, and to complete its disclosure review of all materials in its possession, by 30 June 2015.

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



Judge Chile Eboe-Osuji, Presiding

Judge Olga Herrera Carbuca

Judge Bertram Schmitt

Dated 22 May 2015

At The Hague, The Netherlands