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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
with Public Annex A**

Defence request regarding the first eight witnesses to be called by the Prosecution

Source: Defence for Mr. William Samoei Ruto

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

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I. Introduction

1. The Prosecution case against William Samoei Ruto is founded upon the evidence of certain key witnesses. The investigations conducted to date by the defence for Mr. Ruto ("Defence") reveal that there are substantial and credible reasons to believe that the evidence of these witnesses is fabricated. The Defence will endeavour to show that the actions and conduct of these witnesses constitute an orchestrated attempt to deceive the International Criminal Court, thereby obstructing the proper administration of justice contrary to Article 70 of the Rome Statute ("Statute"). The Defence is willing to provide the Trial Chamber with details of the information in its possession in an *ex parte* filing or an *ex parte*, Defence only, hearing should the Trial Chamber think this necessary or otherwise helpful.
2. To use a Kenyan colloquialism, based on witness statements and documents, the Defence has substantial grounds to believe that these eight key prosecution witnesses have been part of a deliberate and concerted scheme to "cook" evidence against Mr. Ruto. The Defence submits that it is in the interests of justice that this criminal scam be unmasked at the earliest possible opportunity once trial commences. Coupled to the alleged criminal conduct of various key prosecution witnesses, the Defence will show that the plight of the Defence has been significantly prejudiced by the wholly deficient and inept investigation of this case by the Office of the Prosecutor ("OTP"). For this reason, the Defence will file a separate application, as soon as possible, requesting that the ninth witness to be called be the OTP lead investigator charged with overseeing the investigation of this case.
3. For the reasons detailed in this Request, in order to safeguard Mr. Ruto's right to a fair and expeditious trial, and to safeguard and protect the proper administration of justice, the Defence requests that the Trial Chamber exercise its inherent powers pursuant to Article 64(2) of the Statute and order that the eight

impugned prosecution witnesses (P-0015, P-0016, P-0019, P-0024, P-0025, P-0028, P-0032, and P-0336)¹ be called immediately (and consecutively) after the end of the opening statements in this case. By calling these witnesses first, the Chamber will be able to chart the proper and just course of this trial from its outset and help prevent a miscarriage of justice.

4. In its “Defence Submissions on the Conduct of Proceedings”, the Defence requested that: (i) the Prosecution be directed to provide a schedule indicating the order of all witnesses it intends to call at trial; and (ii) the Defence be permitted to make submissions on the Prosecution’s proposed witness order.² The Defence maintains its request to be provided with a complete schedule of all witnesses the Prosecution intends to call at trial. Notwithstanding this, given the imminent trial start date and the fact that the Prosecution has indicated its first ten witnesses in the “Prosecution submissions on the conduct of the proceedings”,³ the Defence submits that filing the Request at this juncture is the most efficient way of proceeding.

II. Applicable Law

5. The Trial Chambers at this Court are vested with broad, discretionary powers to regulate and manage the conduct of proceedings before them. Underpinning these powers is the requirement set out in Article 64(2) of the Statute that “[t]he Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused”.
6. In this regard, the Statute and the Rules of Procedure and Evidence (“Rules”) provide:

Article 64(3): “Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall: (a) Confer with

¹ Despite certain filings concerning various affidavits of P-15, the Defence is proceeding on the assumption that the Prosecution still intends to call all eight witnesses to testify at trial.

² ICC-01/09-01/11-795, paras. 3(1) and 4.

³ The first ten witnesses will be: P-0287, P-0452, P-0185, P-0536, P-0464 (expert witness), P-0326, P-0189, P-0438, P-0376 and P-0410. See ICC-01/09-01/11-794, para. 5.

the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings; [...]"

Article 64(6): "[i]n performing its functions prior to trial or during the course of a trial, the Trial Chamber may, as necessary: (f) Rule on any other relevant matters."

Rule 134 (Motions relating to the trial proceedings): (1) "Prior to the commencement of the trial, the Trial Chamber on its own motion, or at the request of the Prosecutor or the defence, may rule on any issue concerning the conduct of the proceedings."

7. Also of relevance to the instant request is an accused's statutory right to a fair hearing conducted impartially, and to the minimum guarantee, in full equality, to be tried without undue delay (Article 67(1)(c) of the Statute).

III. Submissions

8. As the Prosecution has rightly acknowledged, it is the Trial Chamber which has the "ultimate discretion...to determine the order of witnesses."⁴ The legal basis for this discretion is found in the foregoing provisions of the Statute and Rules. The Defence submits that it is in the interests of justice that this discretion be exercised to order the Prosecution to call P-0015, P-0016, P-0019, P-0024, P-0025, P-0028, P-0032, and P-0336 as its first eight witnesses for the following reasons.
9. *First*, the Defence submits that this proposed order will protect the integrity of these proceedings and, thus, better assist the Trial Chamber to discharge its truth finding mandate. Defence investigations have revealed that these eight witnesses are engaged in a concerted process to contaminate Prosecution investigations to a significant extent through the deliberate and organised fabrication of evidence. This scheme links all eight witnesses, has been years in the making and has been, or still is, supported by various international and domestic Kenyan organisations. The Defence's allegations that these witnesses are peddling lies are

⁴ ICC-01/09-01/11-794, para. 5. The Defence has likewise submitted that "the order in which witnesses are called must, ultimately, be a matter within the purview of the Chamber's authority" (ICC-01/09-01/11-795, para. 4).

not speculative, but are based on extensive investigations into the issue and are supported by the evidence collected by the Defence – both witness-related and documentary. Should the Chamber require the Defence to provide support for its assertions, further details can be provided to the Chamber in an *ex parte* filing or *ex parte* Defence only hearing scheduled by the Trial Chamber.

10. The Defence submits that it is not required by the Statute, the Rules or the Court's jurisprudence to disclose such information to the Prosecution; clearly, to do so would irremediably prejudice defence investigations. Furthermore, revealing its trial strategy to the Prosecution, before such key prosecution witnesses are called, would render the prospects of a fair trial in this case remote, if not impossible. The Defence is under no illusions as to the seriousness of the allegations it makes in this Request. Indeed, the Defence makes these submissions in full cognizance of its obligations under the Code of Professional Conduct for Counsel requiring that counsel must not knowingly mislead the Court or state something as true which counsel believes to be false.⁵ The Defence respectfully submits that the present Request is necessary for the proper conduct of trial proceedings. Additionally, the relief requested will help safeguard the fair trial rights of Mr. Ruto and ensure that the administration of justice is best protected in the circumstances of this case.
11. The Defence submits that the integrity of these proceedings will be significantly enhanced by hearing the eight impugned prosecution witnesses sequentially. Bearing in mind the information which the Defence has collected regarding the deep rooted links, both personal and organisational, between all these witnesses, and the methods used to create "consistency" between their concocted accounts, the Defence submits that by calling these witnesses back-to-back, the opportunity to organise, collaborate and further fabricate is reduced to the extent possible in the present circumstances.

⁵ Code of Professional Conduct for counsel, Article 24(3) ("Counsel shall not deceive or knowingly mislead the Court. He or she shall take all steps necessary to correct an erroneous statement made by him or her or by assistants or staff as soon as possible after becoming aware that the statement was erroneous.").

12. Corruption of a judicial process and false testimony under solemn declaration or oath is viewed exceptionally seriously in domestic systems,⁶ as it is under the Rome Statute,⁷ because of the real risk that in giving false evidence not only may a miscarriage of justice occur, but that confidence in the whole administration of justice may be seriously undermined. The Defence submits, with the greatest of respect, that the administration of justice is under peril in the present case. It is out of concern for this risk, and most directly the fair trial rights of Mr. Ruto, that the Defence submits the present Request. So great is the risk of concoction and fabrication of testimony that the Defence intimates that additional measures may be required to preserve the integrity of proceedings in the present case. One such measure may be ensuring that none of the eight witnesses listed in this Request are able to communicate with each other or follow the testimony of any of the others, until all such evidence is completed and safely before the Trial Chamber. The Defence raises this issue now, whilst realising that such a Request will have to be subject to a separate application at a later stage.

13. *Second*, these eight witnesses should be heard at the outset of the trial for reasons of fairness and judicial efficiency and economy. As clearly evidenced by the analysis set out in “**Annex A**” hereto, the core of the Prosecution case against Mr. Ruto is provided by seven out of the eight witnesses identified in this Request, rather than the ten witnesses the Prosecution proposes to call at the start of trial. The Defence alleges that the eighth witness, P-0032, is directly relevant to this issue as he acted as one of the intermediaries who mobilised these witnesses

⁶ As observed by the majority of the Supreme Court of the United States in an opinion written by Justice Hugo Black, there is a marked difference between circumstances in which a witness, “on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury”, and a “deliberately planned and carefully executed scheme to defraud not only [a government entity] but [a court]” (*Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245 (1944)). In the latter circumstance, “tampering with the administration of justice [...] involves far more than an injury to a single litigant”, but is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society” (*Id.*, at p. 246). While the court’s four dissenters disagreed with the remedy reached by the majority, the dissent opined that “[n]o fraud is more odious than an attempt to subvert the administration of justice”, and that “[t]he court is unanimous in condemning the transaction disclosed by [the] record” of the case (*Id.*, at p. 251).

⁷ Article 70 (3) of the Statute provides that, in the event of a conviction under Article 70, the Court may impose a term of imprisonment up to 5 years in length and/or a fine.

knowing that their accounts were “cooked”. P-0032 supplied these witnesses to the OTP who adopted their accounts without necessary investigations as to the veracity of their “stories”.

14. All indications are that this trial will be a lengthy one. Based on the Prosecution’s current estimates for its examination-in-chief⁸ and the Defence’s proposal that it be allotted the same time for cross-examination,⁹ the Prosecution case is scheduled to take approximately 726 hours, which, if court sits for 5 hours per day, amounts to 145.2 days. Accordingly, the Defence submits that the combined considerations of fairness plus judicial efficiency and economy dictate that the core of the Prosecution case should be tested at the outset of trial, particularly when the Defence has sound reasons to believe that this core is rotten. In the circumstances of this case and given the challenge which the Defence asserts it is able to make, it makes no sense to wait for, at minimum, 160 hours of Prosecution witness testimony before even just one of the principal witnesses against Mr. Ruto is heard.¹⁰ Nor does such approach protect Mr. Ruto’s right to an expeditious trial.
15. *Third*, the Defence underlines that its concerns about the credibility and reliability of the witnesses who form the mainstay of the Prosecution case are extremely serious and, as discussed below, may later give rise to arrests and prosecutions for offences under Article 70 of the Statute. Therefore, the Defence submits that its request cannot be dismissed as simply part and parcel of the normal and routine challenges defence teams make, to varying extents, regarding the credibility and reliability of prosecution witnesses in criminal trials. Nor, can it be dismissed on the basis that, in all trials, witness credibility issues arise. The

⁸ Using the estimates provided by the Prosecution for its examinations-in-chief in ICC-01/09-01/11-540-Conf-AnxB-Red, the Prosecution case is slated to last 363 hours. When calculating this figure, the Defence has proceeded on the basis that: (i) P-0111, P-0144, P-0450, P-0471, P-0481 and P-0534 have been withdrawn; (ii) P-0024 is the redacted witness referred to on p. 11; and (iii) P-0376 is the redacted witness referred to on p. 39.

⁹ ICC-01/09-01/11-795, para. 9.

¹⁰ The figure of 160 hours is based on the estimates provided in ICC-01/09-01/11-540-Conf-AnxB-Red for the examinations-in-chief for the Prosecution’s first witnesses and the proposal by the Defence that it be accorded the same amount of time for cross-examination.

Defence's concerns do not relate to isolated incidents or witnesses. Instead, the Defence is driven to submit that there are substantial reasons to believe that these eight prosecution witnesses are involved in a deliberate scheme to corrupt this trial, undermine the administration of justice and harness the Court's proceedings for their own ends. If the Defence is right, then the reliability of the Prosecution's contentions against Mr. Ruto in this case, as a whole, will be called into serious question.

16. *Fourth*, the Defence submits that there is no reason why the eight witnesses should not be called first. The Prosecution suffers no prejudice save a re-ordering of the presentation of its case; re-orderings are part of the ordinary course of criminal trials where witnesses have to be replaced by other witnesses due to illness, unavailability and other routine matters. Where the Prosecution might suffer inconvenience in having to reorganise its witness order, Mr. Ruto will suffer real prejudice if the witness order is not reorganised as requested, with the result that the Defence is compelled to embark on a lengthy trial, where the primary witnesses and the core allegations against Mr. Ruto are not to be heard for months. It will give little comfort to the Defence and Mr. Ruto if these key witnesses are heard many months – or even years – down the line and only then does it become clear then that there has been an orchestrated attempt to pervert the proper administration of justice. Similarly, to cut off this alleged hydra-headed attempt to suborn the proper administration of justice, it is essential, in the respectful view of the Defence, that members of this alleged conspiracy give evidence sequentially to mitigate the risk of continued collusion further infecting the Court's process.
17. Further submissions are premature beyond the relief requested herein. That said, the Defence considers it necessary to raise another option that may be open to it at a later stage – which is directly linked to the present Request. In the event the Trial Chamber grants the present Request and the eight witnesses are heard, two possibilities arise upon completion of the evidence of these eight witnesses: (1)

either trial will continue and the Chamber may order that the rest of the evidence is called by the parties and the case will be determined in the usual way;¹¹ or (2) should the Defence succeed in exposing the eight witnesses as part of criminal conspiracy, the Defence may be minded to make what will in effect be an abuse of process application and/or request for termination of the present proceedings.¹²

18. In the course of such an application, the Defence may consider it necessary to seek the Trial Chamber's leave to interpose some of its own Defence witnesses, in what would essentially be an evidentiary hearing concerning the conduct and veracity (or otherwise) of the eight prosecution witnesses who will have testified first, should this Request be granted. Such a procedure may enable the Trial Chamber to decide whether it is necessary and/or fair to allow the present trial to continue against Mr. Ruto or whether the trial should properly be terminated. As mentioned, in the event the Defence does not succeed in exposing these witnesses as perjurers, or if the Trial Chamber considers it otherwise necessary to continue with the trial, no prejudice would have been caused to any party. If the Defence succeeds, however, in unmasking these witnesses and the Trial Chamber grants an application of the type mentioned above, Mr. Ruto's fundamental fair trial rights will have been guaranteed and the charges against Mr. Ruto will have been determined after months of trial – rather than years.

IV. Relief Requested

19. In view of the imminent trial start date, and the significance of this Request, if granted, for the planning purposes of the various organs and entities of the Court including the Victims and Witnesses Unit, the Defence requests that the Trial Chamber amend the deadlines for the responses to the Rule 134 motion

¹¹ Namely, the Trial Chamber would issue a decision on the guilt or innocence of the accused on each of the counts alleged pursuant to Article 74 of the Statute.

¹² For sake of clarity, the Defence notes the obvious point that any such application is a distinct form of relief than that provided by a “no case to answer” motion, regarding which the Trial Chamber invited the parties to make submissions on, in its Order ICC-01/09-01/11-778.

notifications provided in its order of 19 June 2013 to order that responses be filed to this request on an expedited basis.¹³

20. In addition, and for the reasons set out above, the Defence requests that the Trial Chamber order the Prosecution to call P-0015, P-0016, P-0019, P-0024, P-0025, P-0028, P-0032, and P-0336 as its first eight witnesses.

Respectfully submitted,



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

Dated this 19th Day of July 2013
At The Hague, Netherlands

¹³ ICC-01/09-01/11-778, para. 4.