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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 Annex A

Public redacted version of Prosecution's response to the Defence requests to appoint an *amicus* prosecutor

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 Prosecution opposes the Defence requests to appoint an *amicus* prosecutor[1] for the purposes of investigating potential article 70 offences. The requests should be dismissed *in limine* on each of the following grounds:

   (i) Messrs Ruto and Sang[2] are no longer accused persons as the charges against them have been vacated. Accordingly, they have no legal standing to bring such a request;

   (ii) For the same reason, Trial Chamber V(A)[3] is no longer seized with the case against the Applicants and thus lacks the necessary jurisdiction to entertain the Defence Requests. In any event, requests pertaining to article 70 offences should be directed to the competent Pre-Trial Chamber; and

   (iii) The relief sought by the Applicants would require the Chamber to act *ultra vires* and usurp the discretion to initiate an investigation into offences under article 70, which the statutory framework of this Court confers exclusively upon the Prosecutor.

2. Alternatively, should the Chamber consider that it is properly seized with the matter, the Defence Requests should be dismissed on their merits. The material adduced in support of the Defence Requests simply does not warrant judicial intervention, as explained below. They are also premature, since much of the relevant material alleged to be in the possession of the Ruto Defence has not yet been provided to the Prosecution.

3. The Prosecution also deprecates the Ruto Defence allegations of misconduct against ICC staff members that are unsubstantiated, sensationalist and in some cases gratuitous. These allegations were included in full in the public redacted

[1] ICC-01/09-01/11-2028-Conf ("Ruto Defence Request") and ICC-01/09-01/11-2030-Conf ("Sang Defence Response"); (together "the Defence Requests").
[2] "The Applicants".
[3] "The Chamber".

version filed by the Ruto Defence and have been widely[4] – and in some instances incorrectly[5] – published in the media. This conduct has either intentionally or recklessly brought the ICC and its officials into disrepute and is thus in breach of the Code of Professional Conduct for Counsel.[6]

Confidentiality level

4. Pursuant to regulation 23*bis*(2), this Response is filed confidentially as it is in response to Defence filings of the same classification. The Prosecution will simultaneously file a public redacted version.

Procedural Background

5. On 5 April 2016, the Chamber issued its Decision on Defence Applications for Judgments of Acquittal ("Decision"). The Chamber, by majority, vacated the charges against both Mr Ruto and Mr Sang, without prejudice to their prosecution afresh in future.[7]

6. None of the Parties appealed the Decision. No proceedings are thus pending before the Chamber.

7. On 2 May 2016, the Ruto Defence filed the Ruto Defence Request.[8]

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[4] 'ICC staffers, witnesses may have received bribes, sexual favours – DP Ruto', https://citizentv.co.ke/news/icc-staffers-witnesses-may-have-received-bribes-sexual-favours-dp-ruto-125062/; 'William Ruto wants ICC staff charged', https://tuko.co.ke/125577-william-ruto-now-goes-fatou-bensoudas-people-icc-case.html; 'Kenyan VP accuses ICC staff of engaging in illicit sex with witnesses', http://www.news24.com/Africa/News/kenyan-vp-accuses-icc-staff-of-engaging-in-illicit-sex-with-witnesses-20160504-4; 'Ruto accuses Bensouda team of seeking sexual favours during ICC case', http://www.hivisasa.com/uasin-gishu/politics/137622; 'Kenya: DP Ruto Lawyers Go After ICC Staff, Witnesses (The Nation)', http://allafrica.com/stories/201605040372.html; 'Ruto's new filing keeps ICC agenda alive - Deputy President's defence accuses court officials of sexual misconduct with witnesses', http://www.nation.co.ke/news/Rutos-new-filing-keeps-ICC-agenda-alive/-/1056/3194276/-/espdrk/-/index.html; 'DP Ruto lawyers go after ICC staff, witnesses', http://www.nation.co.ke/news/DP-Ruto-lawyers-want-ICC-witnesses-probed/-/1056/3187784/-/118ari5z/-/index.html; 'Ruto wants Bensouda probed over ICC witness coaching, sexual harassment', http://www.the-star.co.ke/news/2016/05/03/ruto-wants-bensouda-probed-over-icc-witness-coaching-sexual-harassment_c1343956; All last accessed on 24 May 2016.

[5] Several reports incorrectly attribute the alleged misconduct and evidence tampering to members of the OTP. *See* fn. 4 above: 'Ruto accuses Bensouda team of seeking sexual favours during ICC case'; Ruto wants Bensouda probed over ICC witness coaching, sexual harassment''; All last accessed on 24 May 2016.

[6] Article 24(1).

[7] ICC-01/09-01/11-2027-Conf. A public redacted version was issued on the same day.

[8] ICC-01/09-01/11-2028-Conf. A public redacted version was filed simultaneously.

8. On 10 May 2016, the Common Legal Representative for Victims filed his response to the Defence Request ("CLR Response").[9]

9. On 18 May 2016, the Sang Defence filed its response in which it supports and joins the Ruto Defence Request.[10]

Submissions

a. Messrs Ruto and Sang have no standing to bring this request

10. The Chamber's Decision vacating the charges has effectively terminated the proceedings against the Accused. The time limit for appealing the Decision has lapsed and the Decision is thus final. Although the vacation of the charges was "without prejudice to their prosecution afresh in future"[11], unless and until charges are reinstated, no *lis* exists between the Parties.

11. Thus, the Applicants are no longer "accused" or even "persons charged" before this Court and do not enjoy the rights conferred upon such persons by the Statute and Rules. In fact, they have no greater rights or standing than any other member of the public. This Chamber has previously dismissed *in limine* a filing by a member of the public for this reason.[12]

12. The fact that an investigation still exists that may, or may not, result in future charges is irrelevant. In the *Mbarushimana* case, Pre-Trial Chamber I ruled that, prior to the issuance of a warrant of arrest or summons, "under the statutory framework of the Court, there is no legal basis for a person under the Prosecutor's investigation to submit observations at the current stage of proceedings".[13]

[9] ICC-01/09-01/11-2029-Conf.
[10] ICC-01/09-01/11-2030-Conf.
[11] Decision, p. 1.
[12] [REDACTED].
[13] ICC-01/09-35, para. 10.

13. Similarly, Messrs Ruto and Sang no longer have the necessary legal standing to file the Defence Requests and they should be dismissed *in limine* for this reason alone.

b. The Chamber is no longer seized with the case against the applicants

14. For the same reasons, this Chamber is no longer seized with the case against the Applicants and thus lacks the necessary jurisdiction to entertain the Defence Requests.

15. The Defence argue that the Chamber retains a "residual jurisdiction" to entertain this Request pursuant to article 64(6)(f) of the Statute and "its inherent powers to ensure and protect the administration of justice". However, neither basis affords the Chamber jurisdiction to entertain the Defence request.

16. The plain language of the chapeau of article 64(6) confers the relevant powers upon a Trial Chamber for the limited purpose of "performing its functions *prior to trial or during the course of a trial*"[14]. Since there is neither a trial pending, nor before the Chamber at present, this provision does not apply.

17. The Prosecution does not dispute that a Trial Chamber has certain inherent or implied powers that may be exercised where this is necessary for it to discharge its mandate. However, the Appeals Chamber has clearly stated in its decision on the witness summons appeal[15] that such powers may only be resorted to in the case of a clear *lacuna* in the Statute or Rules.[16] No such *lacuna* exists with respect to the investigation and prosecution of offences against the administration of justice. Article 70 criminalises the relevant conduct and rule 165 of the Rules of Procedure and Evidence makes specific provision for the investigation and prosecution of these crimes. In particular, rule 165(1) unambiguously defines the respective roles

[14] Emphasis added.
[15] ICC-01/09-01/11-1598 OA7 OA8.
[16] *Ibid*., para. 105.

of the Chamber and the Prosecutor in this process. Thus, there is no reason to resort to inherent or implied powers in this matter.

18. Further, even assuming the existence of an inherent power to ensure and protect the administration of justice for present purposes, the exercise of such power must necessarily be limited to cases of which the Chamber is properly seized.[17] It cannot confer jurisdiction on the Chamber where none otherwise exists.[18] Ignoring such boundaries would lead to the absurd result, for instance, that a Chamber could purport to rely on this power to pronounce upon matters pending before another Chamber, or Division – or indeed another tribunal.

19. In support of its assertion of a residual jurisdiction, the Defence Requests also rely on a decision of Trial Chamber V(B) in the *Kenyatta* case.[19] However, that decision specifically confined the residual jurisdiction "to consider *certain procedural matters*, including possible reclassification of filings or certain matters relating to pending appeals."[20] These are issues with which the Trial Chamber V(B) was already seized, but had not yet been finalised. This is clearly distinguishable from the present Defence Requests. It is also significant that Trial Chamber V(B) specifically stated that "pursuant to Article 70 of the Statute, it is noted that *the Court*[21] retains jurisdiction over any interference with a witness or with the collection of evidence."[22]

20. Nor does the fact that other tribunals confer upon a Chamber the power to appoint an *amicus* prosecutor to investigate offences against the administration of justice take the Defence case any further.[23] Article 21 clearly sets out the applicable law to be applied in this Court and makes no provision for importing

[17] ICC-02/05-03/09-410, para.78. *See also* ICC-01/09-01/11-1066, para. 56 where, on the issue of the accused's presence at trial, the Appeals Chamber found that the Trial Chamber had erred in deriving the source of its discretionary powers from article 64(6)(f) when the Statute already provided for that power in article 63(1).
[18] In an analogous situation, the Appeals Chamber rejected an argument that it had an inherent right to entertain an appeal where none was otherwise permitted by the Statute and found the matter to be "non-justiciable", *see* ICC-01/04-168, paras. 22-23, 26 and 39-42.
[19] ICC-01/09-02/11-1005.
[20] *Ibid*., para. 11.
[21] That is, *the ICC*, as opposed to that Chamber.
[22] ICC-01/09-02/11-1005, para. 10 (emphasis added).
[23] *See* Sang Defence Response, paras. 25-26.

procedures and remedies not contained in the Court's legal framework, on the basis that these exist at other tribunals.[24] In this regard, the Court's legal framework is clear: under the unequivocal terms of rule 165, it is the Prosecutor who commences and carries out investigations with respect to the offences defined in article 70. No other mechanism is contemplated by the Statute or the Rules.

21. In any event, the jurisprudence of this Court has established that the Pre-Trial Chamber seized with the situation is the competent judicial authority to make determinations on matters pertaining to article 70 investigations.[25]

22. For all these reasons the Chamber should decline to exercise jurisdiction and dismiss the matter *in limine.*

c. The relief sought would require the Chamber to act ultra vires *the statutory framework*

23. As already advanced, under the explicit terms of Rule 165(1), the authority and discretion to initiate and conduct article 70 investigations rests solely with the Prosecution.[26] The Prosecutor can do so *proprio motu*, or on the basis of information communicated by a Chamber or any "reliable source". The Appeals Chamber in the *Lubanga* case reiterated this principle: "It follows that the decision whether to initiate or conduct investigations on alleged offenses as provided by article 70 of the Statute lies within the purview of the Prosecutor."[27] Indeed, this Chamber has also previously held that "when there is any indication as to whether such an [article 70] offence may have been committed, *it is for the Prosecutor to investigate whether indeed that has occurred*".[28]

[24] This Chamber has affirmed that "while the jurisprudence of the *ad hoc* tribunals […] may provide relevance guidance, it is not controlling." (ICC-01/09-01/11-1334, para.11).
[25] ICC-01/05-01/08-2606-Red, paras. 16-21; *See also* ICC-01/05-01/08-1100-Conf, para 13 and ICC-01/05-01/08-992-Conf, para 15, where the Chamber recognises the jurisdiction of the Pre-Trial Chamber in respect of article 70 investigations.
[26] This is in line with the separation of powers and functions between the Prosecution and the Judiciary in the architecture of the ICC as discernible from, *inter alia*, articles 42(1), 54, 57 and 64 of the Statute.
[27] ICC-01/04-01/06-3114, para. 19 (emphasis added). *See also* ICC-01/04-01/06-2843, para. 21.
[28] ICC-01/09-01/11-T-190-CONF-ENG, p. 26, lns. 7-12 (emphasis added).

24. Accordingly, while the Chamber may *communicate* information to the OTP – as both this Chamber[29] and the *Lubanga* Trial Chamber[30] have done - the discretion whether to initiate an investigation on the strength of that information lies with the Prosecutor.[31] Assuming that the information reaches the threshold to commence an investigation, the Prosecutor should of course take appropriate steps to ensure that the risk of a conflict of interest is avoided for the purpose of any investigation.[32] The Prosecution notes that despite the fact that issues raised in the Defence Requests have previously been aired,[33] this Chamber has not yet seen fit to communicate any relevant information to the Prosecution for the purpose of initiating an article 70 investigation.

25. Accordingly, the Prosecution respectfully submits that the relief sought in the Defence Request – namely to "order" the Prosecution to appoint an *amicus* prosecutor to investigate alleged article 70 offence – would require the Chamber to usurp the role of Prosecutor and act in a manner that is *ultra vires* the powers conferred on it by the Statute. For this reason too, the Defence Request should be dismissed *in limine*.

d. The Defence Requests should be rejected on the merits

26. In the event that the Chamber considers that it is properly seized with the Defence Requests and has the necessary authority to grant the relief requested, the Prosecution submits that the Requests should nevertheless be dismissed on their merits, as they do not establish the need for judicial intervention.

[29] ICC-01/09-01/11-T-190-CONF-ENG, pp. 25-26.
[30] ICC-01/04-01/06-2842, para. 483.
[31] ICC-01/04-01/06-T-350-Red2-ENG at p. 17, lns.7-19: "Given the extent to which this scheme has been regulated in the Rome Statute framework, *it is clear that the Judges have not been given power to remove responsibility from the Prosecution by appointing an independent investigator.* Clearly, if a team prosecuting a case were to find itself placed in a position of conflict when investigating or prosecuting alleged Article 70 offences, it would then be necessary to refer the issue either to members of the OTP who were uninvolved with the proceedings or, in an extreme situation, to an independent investigator." (Emphasis added). *See also* ICC-01/05-01/08-2830-Red para. 14.
[32] ICC-01/04-01/06-2842, para. 483; ICC-01/04-01/06-T-350-Red2-ENG at p. 17, lns.7-19.
[33] *See* ICC-01/09-01/11-1908-Conf-Corr, para. 49; ICC-01/09-01/11-T-97-CONF-ENG, p. 22, lns. 21-25.

27. At the outset it should be stated that the Prosecution takes seriously offences against the administration of justice and will not hesitate to institute article 70 proceedings where the evidence and gravity of the alleged conduct warrant this. That said, the investigation and prosecution of alleged article 70 offences falls within the ancillary jurisdiction of the Court and will only be pursued where there are compelling reasons to do so.

28. Contrary to the Defence's suggestion, the Prosecution has not refused to investigate alleged article 70 offences involving its own witnesses and intermediaries. Indeed, [REDACTED], upon which the Ruto Defence relies so heavily in its Request, were the product of such investigation. Neither did the Deputy Prosecutor refuse to investigate the alleged offences brought to his attention by counsel for Mr Ruto. Rather he declined - quite properly - to do so during the course of the ongoing trial[34] and on the terms the Ruto Defence sought to impose.[35]

29. The Prosecution reiterates that it will carefully consider whether any information that may be communicated to it by the Defence provides compelling reasons to commence or continue any lines of investigation of possible article 70 offences. It will also take the steps it considers appropriate to ensure that the decision is taken objectively, which may include appointing persons outside the trial team to review the material. If necessary, an external party may be engaged. However, the Prosecution will not accept the information subject to Defence conditions as to which members of its staff may or may not have access to it.

30. The Prosecution notes the Ruto Defence's purported concerns about allowing the trial team access to the material in light of the possibility of their client being re-charged. In this regard the Prosecution observes that the concern presumes that the same prosecution team and witnesses would be involved in any future prosecution, both of which are uncertain. More importantly, the material

[34] Ruto Defence Request, para. 8.
[35] *Ibid*., Conf-Anx1, p. 5.

described appears to be exculpatory in nature and there is no apparent risk of self-incrimination. The limited strategic advantage that the Ruto Defence may gain by keeping the exculpatory information secret does not justify the conditions it seeks to impose.

31. In considering whether the information available meets the threshold necessary to commence an investigation, the Prosecution must also bear in mind that in order to successfully prosecute a witness under article 70(1)(a), it would have to prove beyond a reasonable doubt that the witness' evidence was demonstrably false,[36] and that he gave such false evidence intentionally, knowing it to be false.[37] Thus, the evidence would also have to exclude the possibility of an honest mistake. Significantly, as the SCSL Trial Chamber noted in the *Sesay* case, simply demonstrating "inconsistencies, inaccuracies or contradictions in the evidence of a witness that raise doubts to his or her credibility is not enough to establish that he or she has made a false statement."[38]

32. Additionally, the Prosecution considers that even where there appear to be reasonable grounds to believe that an article 70 offence may have been committed, the Prosecutor may take into account other factors including the seriousness[39] of the alleged offence in assessing whether there are compelling reasons to commence an investigation. This is in line with the policy to prosecute those most responsible for the most serious offences. In this regard, it is necessary to consider, *inter alia*, the effect of the alleged conduct on the proceedings and

[36] *See*, e.g., ICC-01/05-01/13-749 at para. 28; *Prosecutor v. Jean-Paul Akayesu*, Decision on the Defence Motions to Direct the Prosecutor to Investigate the Matter of False Testimony by Witness "R", ICTR-96-4-T, 9 March 1998, ("*Akayesu* Decision"), p.2, which found, *inter alia*, that "it is generally accepted that false testimony may be defined as a false statement made in court under oath or solemn declaration" and that "a false testimony may therefore consist of either an affirmation of a false fact or negation of a true fact."

[37] Although article 70 is silent on the specific *mens rea* requirements, it may be assumed for present purposes that knowledge and intent will also have to be proved beyond reasonable doubt, in accordance with article 30 of the Statute.

[38] *Sesay et al*, Decision on the Sesay Defence Motion to Direct the Prosecutor to Investigate the Matter of False Testimony by witness TF1-366, SCSL-04-15-T, 25 July 2006, para. 29. *See also* ICC-01/04-01/07-T-190-Red-ENG, p. 4, ln 25 - p. 5, ln. 10, and ICC-01/05-01/08-2830-Red, paras. 15-17.

[39] Although the article 53 gravity threshold does not apply to article 70 investigations, this is certainly an issue that the Prosecution may justifiably take into account.

whether it was committed by an individual witness acting of his/her own volition, or as part of a broader, concerted effort to pervert the course of justice.[40]

33. Thus, where the OTP has initiated investigations and proceedings pursuant to article 70 in the past, it has been in situations of concerted campaigns to bribe or influence witnesses in order to affect the outcome of a trial, such as in the *Barasa et al* case where the Prosecution had compelling evidence of ongoing efforts to bribe and corrupt Prosecution witnesses during trial; or in the *Bemba et al* case, where evidence provided compelling grounds to believe that certain members of the defence now on trial before another Trial Chamber of this Court conspired with witnesses to fabricate evidence. Apart from the obvious seriousness of these cases, there was also ample objective evidence warranting the initiation of an investigation.

34. The Prosecution does not intend to embark upon a detailed analysis of the material relied upon by the Ruto Defence in support of its allegations that the identified Prosecution witnesses gave false testimony, as contemplated in article 70(1)(a). However, the observations set out in the following paragraphs are germane.

35. Firstly, the Ruto Defence base many of their claims of false testimony on the existence of countervailing evidence, which is alleged to demonstrate the falsity of the witnesses' evidence. However, in order to achieve a conviction on this basis, the Prosecution would have to prove beyond a reasonable doubt that the countervailing version was in fact true and that the only reasonable inference to be drawn is that the witness' evidence is false, and intentionally so. Much of the material relied upon by the Ruto Defence does not even approach this standard of

[40] Case law from the ICTR adds a number of other considerations, see e.g., the *Prosecutor v. Karemera et al*, Decision on "Joseph Nzirorera's Appeal from Refusal to Investigate [a] Prosecution Witness for False Testimony" and on Motion for Oral Arguments, 22 January 2009, para. 21. *See also Akayesu* Decision, pp. 2-3.

cogency and in many instances there appears to be little prospect of obtaining further or better evidence.[41]

36. The Defence simply assume the version of events outlined in the Defence Requests to be the truth, and the witness' version to be false, based on whatever material it has at hand. The veracity of the information contained in this material has, of course, not yet been established. Given the extent of concerted witness interference and bribery by persons acting for the benefit of the then-Accused,[42] it is at the very least unsafe to assume that the Defence witnesses and evidence in fact represents the conclusive truth of the matter. Additionally, the Defence are not merely impartial observers, but represent the interests of the Applicants and their interpretations and opinions - and any information provided - must be viewed in that light. In this regard, the Prosecution notes that the Defence Requests are silent as regards the most blatant examples of false testimony on record – that of the recanting witnesses.[43]

37. Secondly, the Ruto Defence has in certain instances misquoted the relevant evidence,[44] taken it out of context or given it an interpretation that is not the only reasonable one.[45]

38. Thirdly, even where the evidence does provide reason to believe that an aspect of a witness' evidence is untrue, it often does not exclude the possibility of an honest mistake. This is particularly relevant in relation to details such as dates, where witnesses can often be genuinely mistaken.

39. Fourthly, the Prosecution observes that the Ruto Defence would have the Prosecution rely on evidence of witnesses that they themselves have alleged to be untruthful and unreliable in order to trigger an investigation.[46]

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[41] [REDACTED].
[42] As already accepted by the Chamber, see ICC-01/09-01/11-1938-Conf-Corr, paras. 55, 79, 109, 126; ICC-01/09-01/11-2027-Conf, *Reasons of Judge Fremr*, paras. 147-8; *Reasons of Judge Eboe-Osuji*, paras. 2, 7, 151-158, 464; ICC-01/09-01/11-2027-AnxI; *Dissenting Opinion of Judge Herrera Carbuccia*, para. 30.
[43] [REDACTED].
[44] *See* para. 47 below.
[45] [REDACTED].

40. Finally, the entirety of material gathered by the Ruto Defence allegedly establishing that Prosecution witnesses lied is not before the Chamber. Accordingly, the Chamber is not in a position to assess whether or not any other evidence alleged to be in the possession of the Defence lends support to their claims.

41. The Prosecution therefore submits that the evidence presented by the Ruto Defence is insufficient to warrant judicial intervention. To the extent that much of the evidence relied upon has also not yet been provided to the Prosecution for consideration, the request for judicial intervention is also premature.

d. Unfounded allegations against ICC staff have brought the Court into disrepute

42. The Ruto Defence allegations of misconduct against ICC staff members are unsubstantiated, sensationalist and in some respects gratuitous, given their apparent irrelevance to any potential article 70 investigation.[47] The fact that the Ruto Defence has chosen to publish these allegations in the public redacted version of these filings is extremely regrettable. Given that the allegations are made prominently in the introduction to the Ruto Defence Request, but then never again relied upon in the body of the filing, it might be concluded that the sole purpose of their inclusion was to publicly embarrass the ICC and its staff members. At the very least it was reckless conduct that has brought the Court and its officials into disrepute.

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[46] [REDACTED]. Other allegations of article 70 conduct on the part of witnesses in the Defence Request are based on [REDACTED] collected by the Prosecution in connection with its article 70 investigations into witness tampering. [REDACTED] unsubstantiated and in some instances, taken out of context. With respect to allegations of attempts by Prosecution witnesses to coach other witnesses, the Ruto Defence relies on the evidence of recanting witnesses [REDACTED], Ruto Defence Request para 32), whom they also accused of being inherently unreliable [REDACTED] and whom the evidence clearly demonstrates had been bribed to lie to the Court. It is instructive to note that [REDACTED] also claimed to have been induced by OTP staff members to give false evidence, a claim that the Ruto Defence specifically rejected (*See* ICC-01/09-01/11-T-140-CONF-ENG, p. 85 ln. 23 – p. 86, ln. 2).

[47] The Prosecution observes that sexual relations between an ICC staff member and a witness, while clearly unacceptable conduct and grounds for disciplinary action, does not in itself amount to an offence under article 70. The same applies to allegations of financial misconduct and breach of VWU protocols. No connection between the alleged conduct and the evidence of the relevant witnesses is suggested by the evidence, nor is it explained by the Defence Requests.

43. The Ruto Defence Request alleges that "OTP evidence gives reason to believe that ICC staff members may have: (i) engaged in sexual relations with witnesses and their families; (ii) been bribed by witnesses; and (iii) were party to the submission of false financial claims, breaches of VWU protocols by witnesses, and obtaining pecuniary benefit from the false financial claim."[48]

44. Unsurprisingly, given the salacious nature of the allegations, they have been widely reported in the media.[49] Also unsurprising, due to the vagueness of the Defence's contentions, the misconduct has in several instances been incorrectly attributed to members of the Prosecution.[50]

45. The Ruto Defence has been repeatedly cautioned by this Chamber not to make unsubstantiated allegations of impropriety or bad faith.[51] Notwithstanding these warnings, it has chosen to make these accusations publicly based on the flimsiest grounds.

46. All the Ruto Defence allegations appear to be based upon [REDACTED] collected by the Prosecution in connection with its own article 70 investigation. For allegations of sexual misconduct with witnesses, the Ruto Defence cites [REDACTED][52] [REDACTED]. One [REDACTED] contains absolutely no reference to any sexual misconduct with witnesses whatsoever. The other is the following exchange:

> [REDACTED][53]

This is the sole basis for the Ruto Defence's public assertion that ICC staff members engaged in sexual relations with their witnesses. It is, on the face of it,

[48] Ruto Defence Request, para. 3.
[49] *See* fn. 4 above.
[50] *See* fn. 5 above.
[51] For instance, in light of the allegations levelled by the Ruto Defence in filing ICC-01/09-01/11-1425-Conf-Corr, the Chamber reminded counsel in this case "to consider that the dictates of graceful professionalism should encourage counsel to give each other the benefit of the doubt in the face of the temptation to stake an opponent upon the pillory of professional misconduct." [REDACTED] The same courtesy should be extended to other officials of the Court.
[52] [REDACTED].
[53] [REDACTED].

nothing more than unsubstantiated hearsay or speculation and patently an insufficient basis to level serious and public allegations of misconduct against ICC staff members. Additionally, the Prosecution notes that the individual concerned was not even a trial witness. Thus, even if the allegation were true, it is hard to imagine how this could amount to an offence under article 70.

47. With respect to the allegation that ICC staff engaged in sexual relations with family members of witnesses, the Ruto Defence cite the following portion of a summary [REDACTED]:

> [REDACTED]

[REDACTED][54] [REDACTED] the word [REDACTED] *could* be interpreted to mean sexual activities, this is by no means the only interpretation. Once again, this ambiguous and speculative remark provides no reasonable basis to level serious and public accusations.

48. With respect to the accusations of bribery, the sole basis for this is [REDACTED][55] Once more, the allegation is based on nothing more than [REDACTED], who have no apparent factual basis for their speculation.[56]

49. Article 24(1) of the Code of Professional Conduct ("CPC") for counsel explicitly states that "Counsel shall take all necessary steps to ensure that his or her actions or those of counsel's assistants or staff […] do not bring the Court into disrepute." Making serious and public accusations of sexual and other misconduct against staff members of this Court on such patently flimsy grounds is contrary to counsel's duty under article 24(1) of the CPC. The Prosecution submits that there are ample grounds for the Chamber to consider submitting this matter to the Registrar under Article 34(1)(a) of the CPC for transmission to the Commissioner. Alternatively, the conduct is at least deserving of censure by the Chamber.

[54] [REDACTED].
[55] [REDACTED].
[56] [REDACTED].

Relief requested

50. The Prosecution requests the Chamber to:

(a) Dismiss the Defence Requests *in limine* for the reasons outlined above;

(b) In the alternative, dismiss the Defence Requests on their merits; and

(c) Consider referring to the Registrar a potential breach article 24(1) of the Code of Professional Conduct for counsel, alternatively issue an appropriate censure to counsel.

Fatou Bensouda, Prosecutor

Dated this 24th Day of May 2016

At The Hague, the Netherlands