Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-01/09-01/11**

Date: **19 August 2015**

TRIAL CHAMBER V(A)

Before: **Judge Chile Eboe-Osuji, Presiding**
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 redacted version of

Separate, Partly Concurring Opinion of Judge Eboe-Osuji on the 'Decision on Prosecution Request for Admission of Prior Recorded Testimony'

Decision 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 Anton Steynberg

Counsel for William Samoei Ruto
Mr Karim Khan
Mr David Hooper
Mr Essa Faal
Ms Shyamala Alagendra

Counsel for Joshua Arap Sang
Mr Joseph Kipchumba Kigen-Katwa
Ms Caroline Buisman

Legal Representatives of Victims
Mr Wilfred Nderitu

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims
Ms Paolina Massidda

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

Partly Concurring Opinion of Judge Eboe-Osuji

1. I concur in the decision of the Chamber effectively excluding from consideration the additional documents that the Prosecution attached to the application. I also concur in the outcome of the decision on the merits of the application, to the effect that the out-of-court statements of [REDACTED]—should be accepted and considered for the truth of their contents.

2. I differ with my highly esteemed colleagues in three notable respects. First, I do not share the view that the new r 68 applies. Indeed, in my view, r 68 does not apply in any of its generations. Article 69(3) is the more appropriate provision. Second, in my view, the out-of-court statements of all [REDACTED]—including [REDACTED]—should be admitted and considered for the truth of their contents, because of the same basic considerations. But, finally, as regards the witnesses who had appeared and testified before the Chamber, there is a limitation as to the extent to which their out-of-court statements will be considered for the truth of their contents. And it is only to the extent that they have already been admitted onto the record for purposes of assessing the credibility of those witnesses in the context of the Prosecution's application to declare them hostile.

I. ADMISSIBIILTY OF ADDITIONAL EVIDENCE OF WITNESS INTERFERENCE

3. The chances of persuasion in courtroom advocacy are inversely enhanced whenever the path to a given proposition must take the mind through a maze of complicated arguments. This is a rule of thumb in jury trials, but no less so for trials before professional judges, though for different reasons.

4. The Prosecution's written submissions are laden with that difficulty, throughout. It may be easier to excuse it as regards the substance of the r 68 application, as the new rule itself is complex, too. But it is harder to excuse the difficulty in the part of the Prosecution's submissions that relate to the additional evidential materials they submitted in support of their application. I deal with that now.

5. In their application, the Prosecution requests the Chamber to admit, for truth of contents, the out-of-court statements that [REDACTED] had given to Prosecution investigators before the disappearance of one of the witnesses and the recantation of the rest [REDACTED]. The basis of the application is that there had been afoot a scheme of obstruction of justice that interfered with these witnesses. It is that scheme, the Prosecution argues, that must be blamed for the disappearance and the recantations.

6. In the course of the trial, the Chamber had repeatedly warned that this trial must remain firmly focussed on the charges confirmed against the two accused pursuant to article 7 of the Rome Statute. As those charges are not of article 70 offences, the Chamber repeatedly cautioned

that the element of witness interference (being an offence governed by article 70) should not pre-occupy this trial. Nevertheless, upon the urging of the Prosecution to allow evidence of witness tampering to be exhibited in the course of the trial, in order to give the Chamber 'a picture' of the extent of witness interference that would explain the recantations, the Chamber allowed 21 materials to be tendered into the record as evidence. They comprised about 288 pages. But in their eventual application, now under consideration, the Prosecution attached 210 further items, comprising about 1,669 pages, as additional evidence of witness tampering. The total numbers for the two batches of items would then be 231 items comprising about 1,957 pages.

7. The sprawling tendency of the Prosecution's position in this regard—undeterred either by the restraint of page limits for the application or by ample evidence already on the record—is possibly captured in the following submissions:

> The evidence that the Prosecution relies on to establish the interference of its Corrupted Witnesses consists of both evidence that is already part of the Court record and other (off-record) evidence gathered by the OTP, which has inherent indicia of reliability and corroborates the evidence on record. The Prosecution annexes in support of this application all evidence relied upon that is not already part of the record, either as viva voce testimony before the Chamber or otherwise admitted into evidence through a witness or bar table motion.
>
> In order to assist the Chamber to analyse the large volume of evidence relevant to this request, the Prosecution will identify and summarise below the most cogent portions of the evidence. However, due to space limitation the Prosecution is unable to cite all of the relevant facts here and relies upon the supporting evidence in its entirety annexed hereto.[1]

8. The Prosecution stressed that they were not urging the Chamber to 'admit' the additional materials into evidence; rather, they have been submitted for the Chamber to 'consider', for purposes of the Chamber's decision on r 68. But, the harder they argued that distinction, the clearer their argument looked like forced intellectualism whose sole purpose is to circumvent the Chamber's repeated caution against making the ultra-indictment complaint of witness tampering a central focus of this trial: considering that complaints of that kind do have their own proper place and manner in the scheme of administration of justice in this Court.

9. Against the background of the materials already admitted as to witness interference in this trial where that charge has not been laid, it is correct to reject the additional material as impermissibly cumulative evidence tending to show witness interference. The Prosecution's arguments do not reveal any clear difference between what the admitted evidence and the additional material tend to show, such as would make the latter non-cumulative.

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[1] Paragraphs 75 and 76 of the Prosecution's filings.

10. The Prosecution's efforts in seeking to have the Chamber consider these additional items is not assisted by their insistence that they had filed them in compliance with the Chamber's *Decision No 4 on the Conduct of Proceedings (Evidence and Solemn Declarations in Support of Applications)* dated 20 May 2014. In its terms, the Decision says:

> The Chamber notes that, in their written applications, the parties and participants often make assertions as to facts in support of their applications.
>
> HENCEFORTH, where such factual allegations are critical to the Chamber's determination of an application, *the requesting party or participant must support the assertion with evidence in the manner of documents or other evidential material.* ***In the absence of such evidential document or material***, the party or participant must provide a solemn declaration attesting to (a) the truth of any critical factual assertion, or (b) information (indicating its source) and belief of the truth of such critical factual assertion. [Emphases added.]

11. The Prosecution's reliance on this Decision is entirely misplaced in the aim of offloading unto the record a further number of 210 items of 1,669 pages, as further proof of witness tampering. It is clear that the objective of Decision No 4 is to avoid factual assertions on critical matters '[i]n the absence of' evidential support.' The aim of the Decision was never to facilitate evidence dumping. It must not be used in that way.

12. Perhaps, all that is wrong with what the Prosecution seeks to do is adequately captured by the various rules of efficiency and fairness in the administration of justice succinctly amalgamated in r 403 of the US Federal Rules of Criminal Procedure, which provides as follows: 'The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.' But there is not much that is remarkable about this particular rule in the US Rules of Criminal Procedure. It is merely a compendious codification of known rules of public policy, common sense and efficiency in the administration of justice, including the following: parties in litigation must avoid multiplicity of the issues, there must be an end to litigation, parties may not bolster their evidence, evidence must not be needlessly cumulative, parties must avoid time wastage, parties must avoid undue delay, parties must avoid unfair prejudice, etc.

13. Not only is the admission of the additional 210 items comprising 1,669 pages needlessly cumulative evidence tending to show witness interference; but the accumulation of 231 items comprising a total of 1,957 pages to prove witness interference for purposes of admission of out-of-court statements of [REDACTED] witnesess is an exercise that engages the essential principle that prejudicial effects of evidence must not outweigh probative value and that issues must not be multiplied in litigation. This is so in circumstances, such as here involved, in which neither the Prosecutor's indictment nor the Pre-Trial Chamber's confirmation decision (which defines the parameters of the charges for purposes of the trial) gives to the accused notice of

charges of witness tampering as part of the case now against them. Should the Pre-Trial Chamber, in future, confirm any charge of witness interference against these accused pursuant to article 70, it will be for the Trial Chamber tasked with that trial to decide whether the amount of evidence attached in the Prosecutor's present application would be an appropriate amount of evidence in such a future trial. But, for purposes of the case pending before this particular Trial Chamber, that amount of evidence is entirely unwarranted by what the Prosecution seeks to show.

14. It is for the foregoing reasons that the additional materials must be rejected and not considered. I shall next consider the substance of the Prosecution's application.

II. ADMISSIBIILTY OF THE OUT-OF-COURT STATEMENTS

(a) The Alternative Routes of Admissibility as Urged

15. The Prosecution seeks the admission of the out-of-court statements of the [REDACTED], primarily on the basis of the new r 68 that the ICC Assembly of States Parties adopted by consensus on 27 November 2013 (during their 12th session) through resolution ICC-ASP/12/Res 7.

16. In the alternative, the Prosecution had also argued three other routes of admissibility for the statements in question. They include article 69(2), article 69(3) and article 69(4) of the Statute.

17. I am not persuaded that article 69(2) and article 69(4) are true alternative routes besides r 68. This is because they both refer back to admissibility 'in accordance with the Rules of Evidence and Procedure.' I am thus not persuaded that those routes can reasonably by-pass r 68. I shall therefore concentrate in this segment with the question of admissibility through r 68.

(b) Admissibility on the Basis of Rule 68

18. I am not convinced that r 68 (old or new) is applicable for purposes of admissibility of the out-of-court statements for the truth of their contents. There are two main reasons why, and neither has much to do with considerations of retroactivity of the new r 68.[2] First, it seems to me

[2] Perhaps, purely as a matter of *obiter dictum*, two points may be taken up here on the matter of retroactivity. The first point is that r 68 is not excluded from application in the present case by operation of the rule against retroactive application of new law. It is noted that in paragraph 2 of the ASP Resolution 7 of 27 November 2013, something is said about retroactivity. But what is said is not that r 68 as amended may not apply at all to ongoing cases. Rather, the new rule states as follows: (i) it *emphasises* that the new rule may not be applied retroactively to the detriment of the accused in an ongoing case; and (ii) the new rule is without prejudice to the rights of the accused (under article 67); and, the protection of victims and witnesses their participation in the proceedings (under article 68(3)). It would not have been difficult for the Assembly of States Parties to have simply said that the new rule may not be applied to ongoing cases, if that were to be the intendment of paragraph 2 of Resolution 7. The second point on

that the overall intendment of r 68 is to make trials simpler and shorter, not longer and more complicated. The intendment, as it appears to me, is that to admit into the trial record materials that meet the test of 'testimony' will hopefully make proceedings simpler and shorter,[3] by avoiding reasonable disagreements as to admissibility and forensic value. It is for that reason that the drafters of the new rule went to great lengths to circumscribe the circumstances under which prior recorded 'testimony' is admissible into trials. To a similar effect may be noted the repeated indication that '[t]he fact that the prior recorded testimony goes to proof of acts and conduct of an accused may be a factor against its introduction, or part of it.'[4] In my view, there is great salutary potential for r 68 in circumstances other than those implicated in the present litigation.

19. The second reason for my inability to see r 68 as applicable lies in the very meaning of the term 'testimony', which appears in the phrase 'prior recorded testimony'. It is a cardinal rule of treaty interpretation that terms are to be given their 'ordinary meaning' in their context

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retroactivity is the lack of persuasion that I find in the technical argument that the only 'change[s] in the law' that article 24(2) of the Rome Statute contemplates are changes to 'substantive law'—hence, since the Rules of Procedure and Evidence are 'procedural law', article 24(2) cannot apply to any changes made to them. For one thing, it is obvious that what gives that proposition seeming cover is the provision of article 51(4) of the Statute which—as paragraph 2 of ASP Resolution 7 indicates—excludes retroactive operation of amendments to 'Rules of Evidence and Procedure' in a way that is detrimental to the accused. But, there is some difficulty in the fact that article 51(4) says nothing about amendments to the other regulatory instruments of the Court which in their own terms can very well operate in a manner that can have detrimental effect on the rights of the accused. This means that the mechanical exclusion of article 24(2) from any influence in the realms of 'procedural law', may leave changes in much of the Court's procedural instruments (other than the Rules of Evidence and Procedure) statutorily unregulated from the perspective of retroactive operation that may be detrimental to the rights of the accused. Second, the 'substantive law' versus 'procedural law' dichotomy has encountered sensible criticism from eminent jurists whose views I find the more persuasive on the matter. Notably, in Maxwell v Murphy [1957] 96 CLR 261 at 267, Chief Justice Dixon of the High Court of Australia criticised what he described as '[t]he inveterate tendency of English law to regard some matters as evidentiary or procedural which in reality must operate to impair or destroy rights of substance.' Similarly in Tolofson v Jensen [1994] 3 SCR 1022 [at p 1071], Justice LaForest of the Supreme Court of Canada (writing for the majority of the Court) expressed criticism when it was found that the Privy Council had in a certain judgment '[continued] to cling to the old English view that statutes of limitation are procedural.' He found the distinction as an approach that can be demonstrably lacking in substance. He expressed approval instead with the trend within the Canadian judiciary to 'chip away' at the technical distinction between what is termed 'substantive' and that termed 'procedural', alternatively referred to respectively as rights and remedy, with the view to doing justice. Perhaps, the substantive inadequacy of the technical 'substantive law' versus 'procedural law' distinction is brought home to the ICC when one considers, for instance, that the Regulations of the Court provide for things such as the contents of an indictment (reg 52), modification of legal characterisation of the facts, and so on, which may have substantive impacts on the rights of the accused. It thus becomes evidently unsustainable to say that article 24(2) of the Statute may not operate to limit the application of the Regulations of the Court because they are 'procedural law' and not 'substantive law'.

[3] Indeed, the report that accompanied the new r 68 to adoption makes this intendment clear. First, it is stated in the executive summary that '[t]he proposed amendment is intended to reduce the length of ICC proceedings and streamline evidence presentation.' ICC, Working Group on Lessons Learnt, 'Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence (Prior Recorded Testimony) dated 27 September 2013, p 1. Expanding on this statement of purpose, it was further stated as follows: 'The current rule 68 has not been used a great deal in Court proceedings to date. The WGLL considers that an amendment to rule 68 could be adopted to give the Trial Chamber more discretion to introduce transcripts or previously recorded reliable testimony in particular cases.' *Ibid*, para 3.

[4] See r 68(2)(c)(ii) and r 68(2)(d)(iv).

and in the light of the object and purpose of the treaty.[5] As will shortly become evident, I am not persuaded that the circumstances of the present litigation require more than the ordinary meaning to be given to the term 'testimony', which connotes averments of facts under oath or under solemn affirmation *in lieu* of oath. That meaning is clear enough from the *Oxford English Dictionary*. It defines 'testimony' as 'an oral or written statement under oath or affirmation'. Similarly, *Black's Law Dictionary* instructs that 'testimony' means '[e]vidence that a competent witness under oath or affirmation gives at trial or in affidavit or deposition'. None of the out-of-court statements made by the concerned witnesses was made under oath or solemn affirmation *in lieu* of oath.

20. I am aware that the new r 68(2)(b)(ii) provides that 'prior recorded testimony falling under sub-rule (b) may only be introduced if it is accompanied by a declaration by the testifying person that the contents of the prior recorded testimony are true and correct to the best of that person's knowledge and belief. Accompanying declarations may not contain any new information and must be made reasonably close in time to when the prior recorded testimony is being submitted.' It will be tempting to hold this provision up as suggesting that 'testimony' need not be sworn (so to speak), except for purposes of r 68(2)(b). It is an understandable—and reasonable—view. But it is not a conclusive view on the matter, capable of removing all doubts to the effect of diminishing 'testimony' out of its traditional usage. This is why: (i) r 68 does not make sufficiently clear that, for its own purposes, the ordinary meaning of 'testimony' (requiring the element of oath or affirmation) no longer applies; (ii) while r 68 of the Rules of Procedure and Evidence consistently employs the term 'testimony' and not 'statement' in its provisions, there are other provisions in the same the Rules of Procedure and Evidence, specifically r 76, where the term 'statements' has been consistently employed in the usual manner that does not require the element of oath or affirmation; (iii) article 69 of the Rome Statute speaks of the verb 'testifying' and its derivative noun 'testimony', providing that '*before* testifying, each witness shall, in accordance with the Rules of Procedure and Evidence, give an undertaking as to the truthfulness of the evidence to be given by that witness', and r 66 specifically provides for the undertaking that each witness must give '*before* testifying'—i.e. before giving their 'testimony'. [Emphases added.]

21. In the circumstances, it may be that what r 68(2)(b)(ii) really does in context is highlight confusion or ambiguity in the drafting of an important legal text. But, that amounts to raising a *doubt* as to the significant question whether the term 'testimony' for other purposes of r 68 requires oath or affirmation. The matter is significant indeed, because we are engaged in a criminal trial. In that context, is not a trifling for the average defendant when the Prosecution seeks to resort to r 68 for purposes of putting incriminatory out-of-court statements into the

[5] See article 31(1) of the Vienna Convention on the Law of Treaties.

record. Thus, any reasonable doubt as to what r 68 imports for the average defendant is more acceptably resolved in his or her favour, according to a trite rule.

22. So, r 68(2)(b)(ii) does not assist in removing the essential element of an oath or solemn affirmation from the meaning of 'testimony'. If that is the intendment, then the States Parties may consider making it very clear at the next opportunity.

23. In the meantime, the Prosecution must contend with the requirement of oath or affirmation for 'testimony.' For a number of reasons, I do not accept Mr Steynberg's submission that the requirement of solemn affirmation *in lieu* of oath is met by the terminal 'Witness Acknowledgment' pro-forma uniformly appended at the end of OTP statements, saying: 'This Statement has been read over to me [in the English or other language that the witness understands] and is true to the best of my knowledge and recollection. I have given this Statement voluntarily and I am aware that it may be used in legal proceedings before the International Criminal Court and that I may be called to give evidence before the International Criminal Court.'

24. To admit this kind of declaration as having the effect of a solemn affirmation *in lieu* of oath would be an impermissible adulteration of the meaning of oath or a solemn affirmation *in lieu* of oath. It is possibly more difficult an argument to accept than the prior argument that 'testimony' in the context of r 68 does not, at all, require an oath or affirmation. First, there is no known judicial precedent—and Mr Steynberg cited none—that has accepted such declarations made to Prosecution or Defence investigators as amounting to solemn affirmations *in lieu* of oaths. Second, no one is free to arrogate unto her(him)self the authority to administer oaths or solemn affirmations *in lieu* of oaths. Authority under the law is required, by way of statutory commission or some other authorisation.[6] Furthermore, the placement of the 'Witness Acknowledgment' at the end of OTP statements should correctly serve the important function of proving the witness's *acknowledgment* that the statement had been 'read over' to him or her in a *language* that (s)he understands. It is, however, problematic as the *only* vow of veracity apparent from the statement, for purposes of an oath or an affirmation *in lieu* of an oath. The better place for such an oath or solemn affirmation *in lieu* of oath should be at the beginning of the transaction—before the factual averments. As Justice McLachlin (as she then was) noted at the Supreme Court of Canada: 'Before a person can give evidence under oath, it must be established that the oath in some way gets a hold on his conscience, that there is an appreciation of the significance of testifying in court under oath.'[7] In affidavits and statutory declarations *in lieu* of affidavits, the deponents' solemn vows of veracity usually bracket the averments of facts and

[6] See, for instance, r 68(2)(b)(iii) of the ICC Rules of Procedure and Evidence. See also s 19 of the *Interpretation Act* (1985) (of Canada) and *Commissioner for Oaths Act* (1889) (UK) and similar legislation in various countries regulating the administration of oaths and affirmations. See also *Amtorg Trading Corporation v United States*, 71 F 2d 524 (1934) at p 530 [US Court of Customs and Patent Appeals].

[7] *R v Khan* [1990] 2 SCR 531 at p 538 [Supreme Court of Canada].

percipience. That is to say, the affidavit or solemn declaration will usually commence with the identifying particulars of the deponent, immediately followed by words to the effect of 'DO MAKE OATH AND SAY AS FOLLOWS ...'. The factual averments follow next, with the deponent indicating how (s)he gained knowledge of the facts. Upon completion of those averments, the deponent also swears or solemnly affirms 'the foregoing' to be true.

25. And, a third difficulty with Mr Steynberg's argument is that a precedent that adulterates the meaning of 'testimony' will likely apply to the out-of-court statement of every witness in every case in this Court, regardless of the side seeking to use such an out-of-court statement. It may be that the Prosecution would, with admirable magnanimity, have embraced with equal enthusiasm the application of the term 'testimony' to out-of-court statements on the Defence side of this case. Perhaps. But, there will be equality of arms in the application of the resulting precedent in every case in this Court where the new r 68 is sought to be employed. With the greatest respect, I do not join my highly esteemed colleagues in creating such a precedent, if that were to be any fair result of their reasoning.

26. It is for the foregoing reasons that I do not consider any generation of r 68 as applicable in the present litigation. It is therefore unnecessary for me to consider any further condition of its applicability, or the rest of the arguments of the parties as to its application.

(c) Admissibility on the Basis of Article 69(3)

27. But, the route of article 69(3) is quite another matter. This is to the extent that it provides, among other things, that '[t]he Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.' To that extent, the provision does not, on its face, refer back to admissibility 'in accordance with the Rules of Evidence and Procedure,' as do article 69(2) and article 69(4).

28. In my view, article 69(3) is a very important expression of the plenitude of a Trial Chamber's incidental jurisdiction to do justice in the case, by admitting necessary evidence in the interest of justice, beyond any limitations that may be inherent in the Rules of Evidence and Procedure, and particularly in the context of the tabulated categories indicated in r 68.

29. The value of article 69(3) in that function is fully consistent with the general principle of justice classically expressed by Collins MR as follows in an English case: 'Although I agree that a Court cannot conduct its business without a code of procedure, I think that the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress, and the Court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case.'[8]

[8] *In Re Coles and Ravenshear* [1907] 1 KB 1 at p 4 [Court of Appeal of England and Wales].

The principle in question has also found expression in Kenya,[9] Tanzania,[10] Canada,[11] US,[12] Australia,[13] New Zealand,[14] etc. Courts of law are thus not to be hamstrung in their ability to do justice fully in the case, due to the limitations of the rules of court. That is the precise point of the 'authority' that article 69(3) gives a Trial Chamber to 'request the submission of all evidence that it considers necessary for the determination of the truth.'

30. Before proceeding, two observations may be made. The first is that it may be considered that article 69(3) is complementary to article 64(2) and article 64(6)(f) both of which speak to a residual power of a Trial Chamber to conduct a fair trial and to make any necessary decision in that regard. But it is enough that article 69(3) expresses, on its face, authority in the Chamber to admit any evidence necessary to be considered in the search for the truth. The second observation is this. That article 69(3) speaks of the Chamber's authority to 'request' submission of all evidence it considers necessary for the determination of the truth, does not alter the outcome that the Chamber may admit such materials if they have been brought to the Chamber's attention. For, it goes without saying that the Chamber may admit into the record the kind of evidence which it has the authority to request, when such evidence has been anticipatorily brought to the attention of the Chamber.

31. In the special and exceptional circumstances of this case, I shall admit the out-of-court statements, by way of exercise of the authority indicated in article 69(3). But, I must stress that the exercise of the authority under article 69(3) is particular on the facts of this case: it is not a necessary precedent for future cases.

The Exceptional Circumstances of this Case

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[9] Section 22(3)(d) of the *Constitution of Kenya* requires that Rules of Court must conform to the principle that 'the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities'.
[10] According to article 107A (2) (e) of the *Constitution of the United Republic of Tanzania*: 'In delivering decisions in ... civil and criminal matters in accordance with the laws, the court shall observe the following principles, that is to say... to dispense justice without being tied up with [technical] provisions which may obstruct dispensation of justice.'
[11] In Canada, Rules of Court generally contain provisions, such as 2.01 of the *Criminal Proceedings Rules for the Superior Court of Justice (Ontario)*, which provides: 'A judge of the court may only dispense with compliance with any rule where and to the extent it is necessary in the interests of justice to do so.'
[12] Rule 2 of the US Federal Rules of Criminal Procedure provides: 'These rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay.' And rule IA 3-1 of the *Local Rules of Practice* for the United States District Court for the District of Nevada more explicitly provides: 'The Court may *sua sponte* or on motion change, dispense with, or waive any of these Rules if the interests of just so require.'
[13] According to rule 2.03 of the *Supreme Court Criminal Rules* (2013) of South Australia: 'The Court may at any time dispense with compliance with all or any part of these rules including a rule relating to or governing powers that the Court may exercise of its own motion.' Similarly reg 6(1) of the Australian Capital Territory *Court Procedures Rules* (2006): 'The court may, by order, dispense with the application of a provision of these rules to a particular proceeding, before or after the provision applies and on any conditions it considers appropriate.'
[14] Rule 1.5(2) of the New Zealand *Criminal Procedure Rules* (2012) provides: 'If these rules do not make provision or sufficient provision for a matter that arises in a proceeding, the court may give any directions or rulings about the matter that the court considers appropriate in the interests of justice.'

32. It must thus be stressed that the exceptional circumstances that warrant the exercise of the authority under article 69(3) involve the union of actions and efforts that have the obvious aim or effect of preventing this trial or of frustrating its progress.

33. In considering the exceptional circumstances that warrant the exercise of the authority under article 69(3), it may be helpful to begin with the submission in the Ruto Defence papers, saying as follows: 'Mr Ruto and the Defence, on Mr Ruto's instructions, have repeatedly *made public pleas for the ICC to be given space to do its work* and *for witnesses not to withdraw but to come to court to speak the truth.* The Defence has repeated these calls in Court, in the presence of Mr Ruto.'[15] The following related submission of the Ruto Defence[16] is also significant:

> [I]t is relevant to note that the Defence has, at all times, sought to secure the integrity of the proceedings in order to ensure Mr Ruto's fair trial rights and as a function of being officers of the Court. Apart from the very many public declarations and statements referred to above, the Defence formally wrote to [a named individual]. This letter put [the named individual] on notice and effectively amounted to a "cease and desist" letter, in the event that the information received by the Defence was true.[17] ...

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[15] Ruto Defence Response, para 46 [emphases added.]
[16] *Ibid*, para 47.
[17] It may be helpful to set out in full the text of the email [dated 21 September 2013] that Mr Khan sent to the named individual. I reads as follows:

> I am Lead Counsel for H E William Ruto. As you are aware, we are currently in trial before the International Criminal Court (ICC) where allegations of Mr Ruto's involvement in the PEV of 2007 and 2008 are being tested. We have received allegations from various sources that you are holding yourself out as being a member or otherwise associated with the Defence Team of H E William Ruto. This is of course, not correct. You have absolutely no involvement in my team nor have you been tasked directly or indirectly by H E William Ruto to have any involvement in the ICC case or with any putative witness (whether for the Prosecution or for the Defence). This has been confirmed by H E William Ruto himself. *Even more worrying is the information I have received from various sources that you are allegedly seeking to contact people believed to be ICC Prosecution witnesses, with the intention of asking them to "come home" or not testify before the ICC.*
>
> As you are no doubt aware, it is a criminal offence under Article 70 of the Rome Statute to interfere in anyway with witnesses, or otherwise obstruct the proper administration of justice. I hereby must put you on notice that if these allegations are indeed true, such conduct and activities must desist immediately failing which I may be compelled to make a formal complaint to the Kenyan Bar Association, the Kenyan Police authorities and/or the International Criminal Court.
>
> I have not had the opportunity to independently verify the veracity of the information I have received and I therefore cannot attest to its accuracy, at this stage. If it is false, I hope you will understand the ethical obligations and concerns that compel me to write this letter in the manner that I have. If it is true, these are issues that are obviously of the

34. The Ruto Defence did not let matters lie there. Rather, on [a given date], Lead Counsel instructed that a formal complaint be filed with the Inspector General of Police.[18]

35. Two matters of significance are apparent from the Ruto Defence submissions. One is its apparent congruence with the Prosecution's complaint that there is a concern that third parties holding themselves out as connected to Mr Ruto have been engaged in actions intended to prevent the appearance of Prosecution witnesses. According to his submissions, Mr Khan was so troubled with that concern that he took it upon himself to send a 'cease and desist' communication to a named individual, a lawyer who might have been holding himself out as a member of the Ruto Defence team. About six months later, Mr Khan also wrote a complaint to Kenya's Inspector General of Police, since Mr Khan's 'cease and desist' communication had not produced the intended effect.

> gravest concern to the Defence of H E William Ruto, as we would deplore any such activities and cannot be associated with any such conduct. Indeed, we would support the strongest action against anyone engaged in such criminal activities.' [Emphasis added.]

Although the Chamber declined to consider the additional materials that the Prosecution sought the Chamber to consider for purposes of this litigation, it helps to keep firmly in mind the fact that the reason for the rejection is that the Prosecution was seeking to pile on unnecessarily cumulative evidence on the evidential point in question. There is, therefore, no inconsistency in considering Mr Khan's email, which is not unnecessarily cumulative evidence.

[18] It may also be helpful to set out the material passages of the complaint that Mr Khan tabled to the Inspector General of Police in a letter dated 28 March 2014. They read as follows:

> During the course of defence investigations, it has come to our attention that one [the named individual] had been passing himself off as a member of the Defence Team of Hon William Ruto. We have also received information that he had been interfering with or involved in improper dealings with both suspected ICC Prosecution and Defence witnesses, including by giving them money. Such conduct is not only a violation of Article 70 of the Rome Statute and actionable before the ICC, it also violates Kenya law.
>
> On 21 December 2013 [*sic*] Mr Karim Khan QC wrote to [the named individual] ... formally putting him on notice that his alleged conduct was a violation of the law and that if these allegations are indeed true, such conduct and activities must desist immediately failing which we would make a formal complaint to the Kenyan Bar Association, the Kenyan Police authorities and/or the International Criminal Court. In spite of this complaint and warning to [the named individual] this Defence team has recently received information that his alleged improper interference with prosecution and defence witnesses has and is continuing.
>
> This Defence Team is concerned that these activities, if true, are unlawful, may jeopardise defence investigations and can potentially put both prosecution and defence witnesses at risk. Additionally, these unlawful activities of [the named individual] may be erroneously attitude to this Defence Team or to H E Mr William Ruto himself. It is for these reasons that I hereby file this complaint on behalf of the Defence Team of H E Mr William Ruto so that it may be investigated and necessary and appropriate action in accordance with Kenyan law.

36. The second matter of significance flowing from Mr Khan's actions relates to his submission that he had 'made public pleas for the ICC to be given space to do its work'. Indeed, he had made such appeals in the course of some of his submissions in this case, during public sessions.

37. I must here observe that Mr Khan's actions—both in making such appeals and in taking it upon himself to take steps aimed at arresting the actions of the individual alleged to have been involved in witness interference—are actions that are consistent with both the best traditions of an honourable profession and the obligations of an officer of the court. And, that is notwithstanding any other occupational benefit that such actions may bring to Mr Khan and to his client: such as ensuring that the named individual whose conduct Mr Khan was reproaching is not mistaken as operating in cahoots with the *bona fide* members of the Ruto Defence team—as well as any other jeopardy to the cause of the Defence—in this case.

38. But, more requires to be said on the significance of Mr Khan's public pleas for the ICC to be given space to do its work. It must be observed that such a call had deserved making in this case, in light of what may be observed as a course of conducts, evidently connected to the members of both the Kenyan executive and legislative branches of government, the object of which was to prevent the trial running its course. The conducts in question include high profile campaigns on the diplomatic front, as well as parliamentary debates and resolutions. Notably, the Chamber was once constrained to conduct a hearing as to the forensic consequences—specifically in relation to witnesses in this case—of a certain resolution passed by the Parliament of Kenya calling for Kenya's withdrawal from the ICC, while the trial was in progress.[19]

39. In addition to the foregoing actions and utterances from government sources, there is information to the effect that community leaders were similarly engaged in public utterances against this trial. Indeed, there is an abundance of news reports in the mainstream Kenyan media to that effect.[20] Such reported public utterances of community and church leaders and elders,

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[19] See transcript of the hearing in the afternoon of 18 September 2013: ICC-01/09-01/11-T-32-Red-ENG WT 18-09-2013 1/48 SZ T.

[20] *The Star*, 31 January 2015, 'Kikuyu elders hold prayers in Mombasa for Ruto's ICC Case' ['The Gikuyu Council of Elders have today held an elaborate traditional prayers in Mtwapa Township in the county of Kilifi ostensibly to seek God's intervention in having the Deputy President William Ruto and radio journalist Joshua Arap Sang case at the International Criminal Court (ICC) terminated. ...'.] <http://www.the-star.co.ke/article/kikuyu-elders-hold-prayers-mombasa-rutos-icc-case#sthash.0O9fFi09.dpbs>; *Daily Nation*, 9 December 2014, 'Withdraw case against William Ruto, [Rift Valley Council Elders] tell ICC <www.nation.co.ke/news/politics/William-Ruto-ICC-Case-Rift-Valley-Elders/-/1064/2550146/-/t81seq/-/index.html>; *Daily Nation*, 8 October 2014, 'Drop Kenyan cases, ICC told' ["The ICC should terminate cases against Mr Kenyatta and other Kenyans linked as the court lacks evidence," said a former Anglican Church of Kenya's Eldoret Diocese bishop ..., adding: "This will also enhance peaceful co-existence among Kenyans." [The] Bishop ... regretted that the ICC trials against Mr Kenyatta, Deputy President William Ruto and radio journalist Joshua arap Sang had taken too long. "Let us forgive each other and reconcile instead of opening up old wounds" <http://mobile.nation.co.ke/news/Drop-Kenyan-cases-ICC-told/-/1950946/2479814/-/format/xhtml/item/0/-/14udq2hz/-/index.html>; *The Star*, 7 October 2014, 'Bishop Asks ICC to Drop Uhuru, Ruto Cases' [The head of the Catholic diocese of Eldoret ... has challenged the ICC prosecutor

depending on the particular cultural ethos of the given community, may also contribute to the chilling atmosphere that witnesses may find intimidating—even merely in the manner of news reports, let alone when the reported events actually occurred.

40. In addition to the foregoing concerns, the Chamber has also had to reproach the conducts of anonymous bloggers intent on revealing the identities of protected witnesses, with the obvious aim of intimidating those witnesses.

41. All these actions, coming as they were, in the course of this case, were always fraught with the danger of jointly or severally creating or contributing to an intimidating climate for witnesses. They truly evoke an unbridled form of the very definition of contempt of court as laid down by Lord Russell of Killowen LCJ in *Regina v Gray*: to the effect that 'any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court.'[21] It should be noted, against that background, that contempt of court in some national jurisdictions is a *strict liability* offence, if the impugned conduct has the tendency 'to interfere with the course of justice in particular legal proceedings regardless of intent to do so.'[22]

42. It is noted that, as regards the role of parliamentarians whose conducts and utterances are implicated in the foregoing review, the rule of parliamentary immunity may, of course, afford protection from actual contempt of court proceedings for what is said and done in Parliament. But, that rule of immunity is not known to prevent the recognition that parliamentary speeches and actions can have the potential to obstruct the course of justice in an active criminal case, whether or not the conduct amounting to obstruction of justice is in fact prosecuted as such. And such obstructions of justice may take the shape of not only the danger of undue influence in the mind of jurors (where applicable), but also the danger of creating an intimidating atmosphere for witnesses and their families.

43. As a general matter, it is apparent that the cases that tax the administration of international criminal justice are often cases deriving from emotive political or social issues for the communities concerned. Still, the conducts being prosecuted are inexcusable criminal acts. Difficult relationship issues within the family do not excuse violence and murder within the

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Fatou Bensuda to own up on the cases against President Uhuru and Deputy President William Ruto. [The Bishop] said the ICC is facing one of the greatest huddles of maintaining its credibility following testimonies by a number of witnesses that they were paid to testify. The bishop was speaking at St Joseph's Ngechek Catholic Church on Sunday. He asked Kenyans to pray for the President. [The Bishop] warned Christians against the use of the Bible to swear in courts, saying the ritual had been abused as witnesses tell lies. ...' <http://allafrica.com/stories/201410071445.html>; The Standard, 27 December 2013, 'Leaders Call for Withdrawal of ICC Cases' <www.standardmedia.co.ke/?articleID=2000100889&story_title=Kenya-leaders-call-for-withdrawal-of-icc-cases>

[21] *Regina v Gray* [1900] 2 QB 36 at p 40.
[22] See, for instance, s 1 of the Contempt of Court Act (1981) of the UK.

family. So, too, criminal conducts do not become excusable when they result from difficult inter-communal relationships. And, so, criminal courts, be they at the domestic sphere or at the international level, must, as Mr Khan urged, be given space to do their work. This requires, among other things, the avoidance of acts and conducts that may result in the deliberate or unintentional obstruction of justice in the manner of witness intimidation. It is, indeed, a minimum requirement of the interests of justice.

44. In my view, the interests of justice directly perturbed by the exceptional circumstances of this case, involving conducts capable of creating a dissuasive atmosphere for Prosecution witnesses, fully warrant the Chamber's exercise of the article 69(3) authority, for purposes of having regard to the witness statements that the Prosecution urges the Chamber to consider for the truth of their contents.

Protection of the Interests of the Accused

45. However, the broader interests of justice as indicated above also command a fair consideration of the interests of the accused. It requires an appropriate balancing act.

46. Thus, in the exercise of the article 69(3) power, the Chamber must at all times remain fully conscious of the interests of the accused. In that connection, the Chamber must remain mindful of the following considerations:

a. The statement of [REDACTED] is unsworn, he did not attend and testify and the Chamber had no opportunity to observe his demeanour, he was not cross-examined, and the Chamber was unaware of the prevalent atmosphere in the interview that resulted in what the witness averred in his statement;

b. The [REDACTED]witnesses who had appeared before the Chamber had (during their appearance) been cross-examined extensively by both the Defence and by the Prosecution (the later as a function of declaration of hostility) in relation to the relevant averments in their out-of-court statements;

c. The prior statements of the [REDACTED] witness will be limited only to what they were examined upon while on the stand and nothing beyond; and

d. The admission of the prior statements does not give them an irrebuttable presumption of credibility. Credibility of the statements will be assessed in the usual manner, taking into account the foregoing and other factors.

47. In the disposition, I would grant the Prosecution's request in the following way. First, the entire statements of [REDACTED] will be admitted unto the record, to be considered for the truth of their contents.

48. And, second, the out-of-court statements of the [REDACTED] witnesses already admitted onto the record for other purposes will now be considered for the truth of their contents: and this, it must be emphasised, is only to the extent that counsel for the Prosecution

and the Defence asked specific questions of the [REDACTED] witnesses and received answers to the questions asked (including in relation to documentary and other materials put to the particular witness while on the stand). There is reason and persuasive authority[23] for this limitation. The Prosecution had these witnesses on the stand for lengthy periods. During that time the Prosecution had the opportunity to put questions to the witnesses, [REDACTED] of the Prosecution. Thus, the Prosecution was afforded a fair opportunity to have the witnesses specifically address their minds, under oath, to aspects of their out-of-court statements that were of particular interest to the Prosecution. Similarly, the Defence had an opportunity to question the witnesses on aspects of their testimonies in response to the questions of the Prosecution. In the circumstances, considerations of efficiency and fairness to both the witnesses and the Defence, require that only the evidence of these witnesses to the extent of those questions and answers (including questions and answers connected to documentary and other materials put to the witness while on the stand) may be considered for the truth of their content.

[23] In *Prosecutor v Halilović (Decision on Admission into Evidence of Prior Statement of a Witness)* dated 5 July 2005 [ICTY Trial Chamber I(A)], the Chamber declined to admit a prior inconsistent statement for the truth of its contents, considering among other things that: (i) 'the party calling the witness may challenge the witness' credibility on portions of his or her testimony ... by confronting the witness with specific passages of his or her prior statement, so that explanations can be given for the alleged discrepancies and these explanations can be tested by cross-examination;' (ii) 'confronting a witness with material passages of his or her prior statement allows the witness to explain, comment or elucidate on the existence of the alleged inconsistencies and therefore is respectful of the witness's integrity and enhances the reliability of the testimony;' (iii) 'the Prosecution, had the possibility, especially during the three-day deposition on 8-10 July 2003, to put to the Witness the material passages of his prior statement, and that the reasons provided by the Prosecution for its failure to do so, namely, the "witness's health" and the need "to save time", do not constitute a valid justification;' (iv) 'that during the deposition the Prosecution only indicated to the Witness that his testimony was contradictory in light of his prior statement on certain points, namely, the existence of a command post in Jablanica and the role of the Accused as a commander, and that it did not even indicate the alleged inconsistency concerning the knowledge of the Accused of Croat villagers living in Grabovica;' (v) ' therefore that the Witness, by not being confronted with the material passages of his prior statement, was not given the opportunity to explain or deny the alleged inconsistencies with full awareness of what he had previously stated;' (vi) 'the Witness was nonetheless able to explain, even if only in general terms, the alleged inconsistencies in relation to the existence of a command post in Jablanica and the role of the Accused as a commander;' and, (vii) 'he challenged part of the Witness' testimony and the Witness' explanation of the alleged inconsistencies are reflected, even if only in general terms, in the transcript of the deposition, and that they will be considered, within the context of the trial record as a whole, by the Trial Chamber when assessing the weight to be given to this evidence.'

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

Judge Chile Eboe-Osuji
Presiding Judge

Dated this 19 August 2015

At The Hague, the Netherlands