



Original: English

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

Date: 14 July 2015

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

Public redacted version of “Ruto Defence request to rule inadmissible certain supporting material relied upon in the ‘Prosecution’s request for the admission of prior recorded testimony of [REDACTED] witnesses’ and to order the Prosecution to re-file its request”, 4 May 2015, ICC-01/09-01/11-1872-Conf

Source: Defence for Mr. William Samoei Ruto

Document 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 A. A. Khan QC
Mr. David Hooper QC
Mr. Essa Faal
Dato' Shyamala Alagendra
Ms. Leigh Lawrie

Counsel for Joshua Arap Sang

Mr. Joseph Kipchumba Kigen-Katwa
Ms. Caroline Buisman

Legal Representatives of the Victims

Mr. Wilfred Nderitu

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms. Paolina Massida

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr. Herman von Hebel

Counsel Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. The pool of evidence from which the Office of the Prosecutor (“OTP”) seeks to draw to support the *Prosecution’s request for the admission of prior recorded testimony of [REDACTED] witnesses* (the “Rule 68 Application”)¹ is unfairly and impermissibly broad. Not only does the OTP seek to rely on (i) “a substantial portion of...material” which “has not been formally admitted in the Court record of this case”,² but also on (ii) items previously declared inadmissible by this Chamber, (iii) items which are not included on the Prosecution’s List of Evidence, and (iv) three witnesses who are not included on the Prosecution’s List of Witnesses. Furthermore, the OTP seeks to rely on a considerable body of evidence concerning its Article 70 case³ which existed at the time Prosecution witnesses [REDACTED] testified but was not put to them, and thus, never tested by the Defence in cross-examination.
2. Even a cursory review of the Rule 68 Application and its supporting material demonstrates that the Defence is being asked, in essence, to meet and respond to almost the entirety of the Prosecution’s Article 70 case, a case which is not before this Chamber. Despite the Chamber’s direction that the present trial “must remain *firmly focused* on its own particular needs”,⁴ the Rule 68 Application risks “eclipsing the actual charges before the Chamber with aspects of inquiries that are better conducted in an Article 70 trial.”⁵
3. The defence for William Samoei Ruto (“Defence”) submits that this approach, unfettered by concerns of procedural fairness and the constraints of prior decisions or directions, is improper and incorrect. Accordingly, the Defence

¹ ICC-01/09-01/11-1866-Conf, 29 April 2015.

² Rule 68 Application, para. 57.

³ Much of the material appears to come from the case *Prosecutor v. Walter Osapiri Barasa*, ICC-01/09-01/13.

⁴ Decision on the Prosecution’s Eleventh Application for Addition of Documents to its List of Evidence and Disclosure, ICC-01/09-01/11-1625-Conf, 31 October 2014 (“**Decision on Eleventh Application**”), para. 32 (emphasis in original).

⁵ *Ibid.*

requests the Trial Chamber to: (i) rule that a significant amount of the supporting material, detailed below and upon which the Rule 68 Application largely rests, be declared inadmissible; and (ii) order the Prosecution to re-file its application with all references to the disputed supporting material removed.

II. Applicable Law

4. 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 Rome Statute (“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”.
5. More particularly, Article 64(6)(f) of the Statute provides that a Trial Chamber, may, “[i]n performing its functions prior to trial or during the course of a trial..., as necessary,...[r]ule on any other relevant matters.”
6. In respect of the admissibility of evidence, the Statute and Rules of Procedure and Evidence (“Rules”) confer on the Trial Chamber the following powers:

Article 64(9)(a): “The Trial Chamber shall have, *inter alia*, the power on application of a party or on its own motion to: Rule on the admissibility or relevance of evidence;”

Article 69(2): “The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. [...]”

Article 69(3): “The parties may submit evidence relevant to the case, in accordance with article 64. The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth.”

Article 69(4): “The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair

evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.”

Rule 63(2): “A Chamber shall have the authority, in accordance with the discretion described in article 64, paragraph 9, to assess freely all evidence submitted in order to determine its relevance or admissibility in accordance with article 69.”

Rule 64(3): “Evidence ruled irrelevant or inadmissible shall not be considered by the Chamber.”

III. Submissions

7. The Defence submits that it is unfair, improper and would cause significant prejudice to the Defence for the OTP to rely on a considerable body of the supporting materials referred to in the Rule 68 Application for the five reasons more fully argued below.
8. At the outset, it is important to note that the Defence submissions are supported by a detailed review of the indexes of the Prosecution’s supporting materials. In the actual filed version of the Rule 68 Application, the Defence was only given access to the index provided in Annex D1.⁶ The Prosecution furnished indexes of the materials provided in confidential and *ex parte* Annexes B1 to B11 only following a Defence request.⁷ Annotated versions of all these indexes have been prepared by the Defence which highlight additional important information about all the items relied upon in the Rule 68 Application.⁸ The annotated versions of the indexes are provided in Annexes 1 and 2 hereto and it may be of assistance to refer to these versions for the purposes of this request.⁹

⁶ The index provided in Annex D1 only provides information on “Page Ref” and “ERN”.

⁷ The indexes prepared by the Prosecution of the materials provided in Annexes B1 to B11 only included columns headed “Pages#”, “ERN”, “EVD (if applicable)”, “Source Identity” and “Type”.

⁸ The additional information concerns whether it is included in the OTP’s current List of Evidence (“In LoE? (#1641)”, “Chain of Custody”, “Date of disclosure” and whether the item is the subject of a decision on admissibility (“Ruling on admission (if applicable)”).

⁹ Annex 1 provides the annotated indexes of the materials provided in Annexes B1 to B11 of the Rule 68 Application. Annex 2 provides an annotated version of the index provided in Annex D1 of the Rule 68 Application.

Reasons why certain supporting materials should be ruled inadmissible

9. *First*, in the Rule 68 Application the OTP relies extensively on material related to [REDACTED]¹⁰ which was declared inadmissible by this Trial Chamber.¹¹ Contrary to the OTP's assertion, this reliance does "seek to circumvent"¹² the Chamber's decision and is in effect an unsubstantiated request for reconsideration. The decision was clear and unequivocal, stating that the declaration of inadmissibility was specific to "the present case".¹³ While the OTP is not using the material to prove the main facts in issue, it is relying upon inadmissible material to establish important secondary facts in the present case.¹⁴ Attempts to down play the import of the Rule 68 Application as simply a "procedural filing"¹⁵ are disingenuous. The plain fact is that the OTP's case against Mr. Ruto is dependent on the admission of the hearsay evidence which is the subject of the Rule 68 Application. In these circumstances, the OTP's purported use of the material does not fall within the Chamber's caveat that the [REDACTED] Decision "is without prejudice to the particular circumstances of any other proceedings in which the events and interviews in question may be an issue",¹⁶ nor does the OTP argue that it does. The OTP's use of the excluded material is, therefore, contrary to Rule 64(3)¹⁷ and all references to it should be struck from the Rule 68 Application.
10. *Second*, the bulk of the materials relied upon in the Rule 68 Application are items which are not included on the Prosecution's List of Evidence.¹⁸ For example, a review of the index of the items referred to in the solemn declaration of the lead

¹⁰ See, e.g., Rule 68 Application, paras. 92, 117, 118, 119, 131, 133 and 134. See also material provided in Annex B1 and Annex C1, paras. 159-162.

¹¹ Reasons for the Decision on Admission of Certain Evidence Connected to [REDACTED], rendered on [REDACTED], ICC-01/09-01/11-1753-Conf, 11 December 2014 ("[REDACTED] **Decision**").

¹² Rule 68 Application, para. 119.

¹³ [REDACTED] Decision, para. 44.

¹⁴ See *infra*, paras. 21 and 26 for a discussion on the matters at to be determined in an application submitted under Rule 68(2)(d) of the Rules.

¹⁵ Rule 68 Application, para. 60.

¹⁶ [REDACTED] Decision, para. 44.

¹⁷ Rule 64(3): "Evidence ruled irrelevant or inadmissible shall not be considered by the Chamber."

¹⁸ The OTP's current List of Evidence is ICC-01/09-01/11-1641-Conf-Anx1, 7 November 2014.

investigator of the Kenya 1 article 70 investigations, [REDACTED],¹⁹ and provided in Annex D1 shows that 147 out of 165 items are not included on the List of Evidence.²⁰ The OTP's argument that all the material has been disclosed²¹ (which as noted below is incorrect) is no answer to the Defence complaint that it had no notice, prior to the submission of the Rule 68 Application, that the OTP intended to rely on any items not included on its List of Evidence in any way.

11. Indeed, the prejudice to the Defence in terms of notice is compounded by the fact that the majority of the items were disclosed as Rule 77 or PEXO evidence rather than incriminatory evidence. Again, using the index provided in Annex D1 as an example, of the 165 items referred to, 104 items are classified as Rule 77 evidence and 28 items are classified as PEXO evidence.²² Therefore, well over three quarters of the items referred to in [REDACTED] solemn declaration are classified as Rule 77 or PEXO and not as incriminatory evidence.²³ As observed by this Chamber, prior disclosure of items as PEXO or Rule 77 evidence does not amount to notice of the Prosecution's intention to rely on those items as incriminatory material.²⁴ Thus, it would be unfair to expect that full investigations and trial preparations have been properly conducted in respect of these items by the Defence simply by virtue of the fact of disclosure. The Defence maintains that the admission of this material would occasion significant prejudice to the fair trial rights of Mr. Ruto.

12. The index provided in Annex D1 also underlines another point of serious concern. Of the 165 items on the index, 76 were only disclosed for the first time

¹⁹ See Annex C1.

²⁰ Note the index provided in Annex D1 relates to the materials provided in Annex D3 of the Rule 68 Application.

²¹ Rule 68 Application, para. 57.

²² Items which were originally disclosed as Rule 77 or PEXO but which are now classified as incriminatory are treated as incriminatory for the purposes of the calculations.

²³ Note Annex D1 lists all the items referred to in the solemn declaration of [REDACTED] which is provided in Annex C1 of the Rule 68 Application.

²⁴ Decision on the Prosecution's Application for Addition of Documents to its List of Evidence, 3 September 2014, ICC-01/09-01/11-1485-Conf ("Decision on the OTP's Eighth Application"), para. 31.

in March and April 2015.²⁵ Another 10 items have not been disclosed to the Defence at all.²⁶

13. The OTP's reliance on material not included on the List of Evidence is contrary to the Trial Chamber's express direction that, if the OTP "intends to rely on additional evidence that forms part of [the] Article 70 allegations...it must disclose this material, and apply to the Chamber to add it to the LoE."²⁷ Clearly, this direction was intended in part to address the foregoing concern about fair notice being provided to the Defence. It is also a direction that the OTP has followed on at least four previous occasions.²⁸ In these four previous applications, the OTP gave notice of its stated intention to rely on the material appended thereto in support of any request it might make for the admission of prior witness statements.²⁹ In the Rule 68 Application, the OTP offers no reason why it has not complied with the Chamber's direction or its own practice in this instance. Furthermore, it is of concern that the OTP seeks to rely on 24 items³⁰

²⁵ The Defence submits that the Chamber's concerns about late disclosure voiced in June 2013 are apposite to the present situation. See Decision on prosecution requests to add witnesses and evidence and defence requests to reschedule the trial start date, 3 June 2013, ICC-01/09-01/11-762 ("**Decision on Trial Start Date**"), para. 90 ("[...], the Chamber is deeply concerned by both the significant volume of late disclosure in this case and the fact that at this late date, additional evidence still remains to be disclosed to the Defence. The Chamber recalls its previous decision delaying the original trial date, in which it found that "the disclosure of a large amount of materials close to the scheduled commencement date of trial puts a significant burden on the Defence's preparation" and noted that "the Defence was in a position to start conducting its investigations relating to a significant part of the disclosed material only recently and for some of it the Defence is still unable to investigate").

²⁶ These items are: (i) KEN-OTP-0106-0304; (ii) KEN-OTP-0114-0223; (iii) KEN-OTP-0116-0500; (iv) KEN-OTP-0138-0092; (v) KEN-OTP-0139-0501; (vi) KEN-OTP-0153-0008; (vii) KEN-OTP-0153-0021; (viii) KEN-OTP-0153-0022; (ix) KEN-OTP-0153-0040; (x) KEN-OTP-0153-0054. The Defence has cross checked these items with the footnotes in [REDACTED] solemn declaration contained in Annex C1 and it appears that 7 of the non-disclosed items are not referred to therein. The Defence is seeking confirmation from the OTP that no reliance is being placed on these 7 undisclosed items for the purposes of the Rule 68 Application.

²⁷ Decision on Trial Start Date, para. 89.

²⁸ Corrected version of "Prosecution's eighth application pursuant to Regulation 35(2) of the Regulations of the Court", 21 August 2014, ICC-01/09-01/11-1463-Conf, ICC-01/09-01/11-1463-Conf-Corr ("**Eighth Application**"); Prosecution's ninth application pursuant to Regulation 35(2) of the Regulations of the Court, ICC-01/09-01/11-1511-Conf, 12 September 2014 ("**Ninth Application**"); Prosecution's tenth application pursuant to Regulation 35(2) of the Regulations of the Court, ICC-01/09-01/11-1532-Conf, 22 September 2014 ("**Tenth Application**"); Prosecution's eleventh application pursuant to Regulation 35(2) of the Regulations of the Court, ICC-01/09-01/11-1606-Conf, 15 October 2014 ("**Eleventh Application**").

²⁹ Eighth Application, para. 3; Ninth Application, fn. 6; Tenth Application, fn. 6; Eleventh Application, paras. 52 and 73.

³⁰ In Annex 1 hereto these items are identified in the indexes by the reference "In the OTP's list in # 1606-Conf-AnxN". More specifically, the items are KEN-OTP-0109-0002 referred to in Annex B7 and the following items

which it was prevented from adding to its List of Evidence by virtue of the Chamber's decision on the OTP's Eleventh Application.³¹ In these circumstances, all supporting material which is not included on the OTP's List of Evidence should be removed from the Rule 68 Application.

14. *Third*, to support the existence of an alleged witness bribery and recantation scheme, the OTP argues that not only were Prosecution witnesses [REDACTED] and [REDACTED] targets of this scheme but were also used to [REDACTED].³² Indeed, [REDACTED] is referred to throughout the application and related annexes [REDACTED]. Yet neither [REDACTED] nor [REDACTED] was ever questioned by the OTP about the alleged interference when they testified. Given Defence concerns, and the Chamber's reminders,³³ that the main case not become mired in an Article 70 case not before this Chamber, and the approach taken by the OTP in its examination in chief of these witnesses, neither witness was cross-examined on the interference allegations.
15. The Defence notes that all the material emanating directly from [REDACTED]³⁴ and [REDACTED]³⁵ and relied upon by the OTP in the Rule 68 Application was in the OTP's possession at the time these witnesses testified. [REDACTED] is the subject of a separate case currently before the Court, *The Prosecutor v. Walter*

referred to in Annex B6: KEN-OTP-0099-0286, KEN-OTP-0126-0182, KEN-OTP-0126-0164, KEN-OTP-0126-0172, KEN-OTP-0138-0531, KEN-OTP-0125-0322, KEN-OTP-0125-0360, KEN-OTP-0125-0375, KEN-OTP-0125-0402, KEN-OTP-0125-0434, KEN-OTP-0125-0461, KEN-OTP-0125-0488, KEN-OTP-0125-0494, KEN-OTP-0125-0499, KEN-OTP-0125-0505, KEN-OTP-0125-0518, KEN-OTP-0125-0547, KEN-OTP-0125-0571, KEN-OTP-0124-0021, KEN-OTP-0139-0095, KEN-OTP-0139-0093, KEN-OTP-0103-0081 and KEN-OTP-0140-0033. These items were part of the package of 539 items which were the subject of the OTP's Eleventh Application. See ICC-01/09-01/11-1606-Conf-AnxN.

³¹ See Decision on the OTP's Eleventh Application, para. 34 ("the Chamber limits its authorisation to add items to the List of Evidence to a total of 100 items").

³² See, e.g., Rule 68 Application, paras. 63, 65, 71, 73, 78, 82, 89, 90, 92, 93, 95-121.

³³ See, e.g., ICC-01/09-01/11-T-188-CONF-ENG ET, p. 14, lines 18-23.

³⁴ Annex B8 contains the supporting materials related to the interference of [REDACTED]. A review of the annotated index of this Annex produced by the Defence and provided in Annex 1 hereto shows that all the materials for which [REDACTED] was the source were in the hands of the OTP at the time this witness testified, although it is acknowledged that item 6 on the index (KEN-OTP-0118-0011) was a "running" statement extending from [REDACTED] 2013.

³⁵ Annex B9 contains the supporting materials related to the interference of [REDACTED]. A review of the annotated index of this Annex produced by the Defence and provided in Annex 1 hereto shows that all the materials referred to therein were in the hands of the OTP at the time this witness testified.

Osapiri Barasa.³⁶ The veracity or otherwise of the allegations on which the *Barasa* case is based will be determined, at first instance, by the Pre-Trial Chamber in that case. It is unnecessary and burdensome for the Defence and, indeed, the Chamber in the present case to make determinations on matters that have not been tested and which do not need to be decided in order to determine the Article 7 case against Mr. Ruto. In any event, the Defence submit that the Rule 68 Application should be based on and limited to admissible evidence, which is directly relevant to the [REDACTED] witness who are the subject of the Application.

16. Of additional relevance is that both [REDACTED] and [REDACTED] *could* have been questioned on these issues at the time they testified in the same manner the OTP extensively questioned [REDACTED] and [REDACTED] on this alleged “scheme”. The OTP chose not to. In these circumstances, it would be highly prejudicial for the OTP to now rely upon evidence it never sought to elicit from its own witnesses when they were on the stand and under oath. Had the Prosecution sought to elicit such evidence in chief, the Defence would have had the opportunity to confront and test the veracity of this evidence. This is precisely what the Defence did in the case of [REDACTED] and [REDACTED]. In relation to those witnesses, the Defence tested their accounts extensively. For example, in the case of [REDACTED] where the OTP spent [REDACTED] sessions (approximately [REDACTED] hours) eliciting evidence of alleged interference, the Defence tested that account and spent about [REDACTED] sessions (approximately [REDACTED] hours) of its allocated time testing the veracity or otherwise of the witness’s account concerning this alleged “scheme”.
17. The OTP’s reliance throughout the application on information, the sources of which are [REDACTED] and [REDACTED], means that untested hearsay

³⁶ ICC-01/09-01/13.

evidence - not given under oath - is being used to seek the admission of hearsay evidence itself not given under oath. Not only is this course clearly unfair to the Defence but it ignores the inherent dangers of hearsay evidence. It is acknowledged that hearsay evidence is permitted at this Court but the perils of relying on it have been consistently underlined by this and other Trial Chambers.³⁷

18. In these circumstances, the Defence submits that the OTP's reliance on [REDACTED] and [REDACTED] for the purposes of the Rule 68 application is not permitted and should be excluded.
19. *Fourth*, three witnesses who are not on the OTP's List of Witnesses are relied upon in the Rule 68 Application, namely: (i) [REDACTED]; (ii) the lead investigator of the Kenya 1 Article 70 case, [REDACTED]; and (iii) an investigator on the Kenya Situation, [REDACTED]. The Defence was only provided with disclosure of the material relating to the [REDACTED] 2015 interviews conducted with [REDACTED] on 17 April 2015. Of note, is that this disclosure was classified as PEXO. As regards [REDACTED] and [REDACTED], the Defence was only provided with their solemn declarations which are more properly described as witness statements on 9 March 2015 and 29 April 2015 respectively.³⁸
20. It stands to reason that an order similar to that requiring the OTP to apply to add to its List of Evidence any Article 70 material that it intends to rely on in this case

³⁷ See in this case ICC-01/09-01/11-T-54-CONF-ENG ET, p. 60, lines 16-24 and p. 61, lines 12-17; ICC-01/09-01/11-T-62-CONF-ENG CT, p. 39, line 25 to p. 40, line 11 and p. 63, lines 11-25; ICC-01/09-01/11-T-119-CONF-ENG ET, p. 59, line 25 to p. 60, line 9.

³⁸ The Defence submits that the solemn declarations clearly exceed what was envisaged by the Trial Chamber's direction in Decision No. 4 on the Conduct of Proceedings (Evidence and Solemn Declarations in Support of Applications), ICC-01/09-01/11-1312, 20 May 2014. *E.g.*, [REDACTED] declaration does not confine itself to confirming the factual allegations referred to in the main filing but provides a history of the Kenya 1 Article 70 investigations, a narrative seeking to explain all the supporting materials provided and even extends to [REDACTED] theories (at Annex C1, para. 236). [REDACTED] declarations are also detailed, are not limited to confirming facts referred to in the main filing but include his views on the conduct of [REDACTED] and that [REDACTED] (at Annex D2).

should apply to witnesses and their addition to the List of Witnesses. However, the OTP has made no such application to add any witnesses from its Article 70 case to its List of Witnesses for the purposes of the Rule 68 Application. Furthermore, any eleventh hour application to add witnesses to the list should be denied as tardy and contrary to Mr. Ruto's right to an expeditious trial. This is particularly so when the Rule 68 Application was conceived more than a year ago and has had a very long gestation.

21. The fact that these three individuals do not provide evidence relevant to the main case is irrelevant. As more fully argued below, the Rule 68 procedure is a contested process in which the Defence is entitled to fully participate, including by making challenges to each element of the Rule 68(2)(d) test. The fact that decisions concerning the admission of evidence involve the determination of secondary facts does not mean that the opposing party should not be entitled to full and fair disclosure of the basis on which the moving party intends to prove those secondary facts. The example provided in domestic jurisdictions of a "trial within a trial" or a *voir dire*, in which questions of admissibility are usually dealt with, demonstrates that there is no suspension of procedural fairness simply because the facts in issue are not those relating to the main charges. Proper disclosure is made and all parties are given an opportunity to lead and test the evidence at issue.
22. Reliance on [REDACTED], [REDACTED] and [REDACTED], none of whom are witnesses in this case, in the manner currently envisaged in the Rule 68 Application will result in prejudice to the Defence. In these circumstances, no reliance should be placed on the evidence of these witnesses, their statements should be declared inadmissible for purposes of the Rule 68 Application and all references to their evidence in the application should be removed. The Defence

submits that it should not be required to expend its limited resources to investigate “witnesses” who have been improperly injected into the case.

23. *Five*, the approach taken by the OTP in the Rule 68 Application outlined above not only raises serious concerns about unfairness to the Defence in the process but highlights a wider concern for the administration of justice. It is important to bear in mind that the allegations of a witness interference scheme, including the allegations that Mr Ruto or associates working on his behalf are involved, are all untested and still only at the investigation phase. To progress beyond this phase, they will need to go through the confirmation process and be considered by a Pre-Trial Chamber.³⁹ Yet, given the volume of untested material the Chamber is being asked by the OTP to consider, it appears that the Chamber is being asked to make a determination on almost the entirety of the OTP’s Article 70 case. As previously argued by the Defence, this creates tension between the roles and responsibilities of the Pre-Trial Chamber and this Chamber.⁴⁰ This tension underlines that the Prosecution’s proposed course is improper and extraordinarily burdensome on a Defence focused on addressing Article 7 allegations concerning the 2007 post-election violence in Kenya. In these circumstances, the Defence respectfully recalls the Trial Chamber’s previous recognition that the role any allegations about witness interference should play in the main case is strictly limited. Indeed, the Chamber has previously noted the OTP’s previous submission that it was to be given simply “a ‘picture’ of the widespread scheme of witness interference”.⁴¹ A fuller inquiry is only warranted in a separate, spinoff case properly conducted within the Court’s established legal framework.

³⁹ ICC-01/09-01/11-T-23-CONF-ENG ET, p. 33, lines 14-15 and 21-23.

⁴⁰ Defence response to Corrected version of “Prosecution’s eighth application pursuant to Regulation 35(2) of the Regulations of the Court”, 21 August 2014, ICC-01/09-01/11-1463-Conf, ICC-01/09-01/11-1466-Conf, 26 August 2014, paras. 3 and 15.

⁴¹ Decision on Eleventh Application, para. 34. *See also* para. 32.

The correct approach

24. The Defence submit that the only material which should be relied upon in support of the Rule 68 Application is material which has been formally admitted in the Court record of this case, i.e. sworn testimony or admitted exhibits. This approach has merit on a number of bases. First, it conforms to the Chamber's decisions on admissibility and also on the number of items which could be added to the List of Evidence to give a "picture" of the alleged witness interference scheme. Secondly, it gives effect to the Chamber's direction that the Article 7 trial not become eclipsed by the Article 70 investigation. Thirdly, it ensures fairness to the Defence. The material which the Defence is expected to address in its response to the Rule 68 Application should be known, have been investigated and have been tested via examination in chief, cross-examination and/or questioning from the Bench. No new investigations should be required. In this regard, the Rule 68 Application and response should mark the final stage of a process, the culmination of which is the rendering of the Chamber's decision. It should not reveal for the first time a substantially new, untested body of evidence which the Defence is required to investigate and address, in written form, in a short timeframe.
25. When considering the correct procedure to be followed, it is important to remember that Rule 68 is a contested process. The non-moving party is not expected or required to be a passive observer to the application. Accordingly, the non-moving party (in this case the Defence) must be accorded a fair opportunity to challenge and address each element of the Rule 68 test. In this regard, fairness requires as a bare minimum full and timely disclosure of the documents and witnesses comprising the case which the non-moving party will be expected to meet plus an opportunity to test and challenge the evidence led. If the Rule 68 Application is permitted to proceed in its current form, these minimum guarantees will not have been complied with.

26. The Defence submits that the OTP's attempt to present its application as a procedural filing concerning the admission of evidence is overly simplistic.⁴² The Defence acknowledges that the ultimate issue for determination under the Rule 68 process is the admissibility of prior recorded testimony. But, where the application is made under Rule 68(2)(c) or Rule 68(2)(d), to reach a decision on this issue, the Chamber requires to satisfy itself first that certain facts have been proven to the requisite standard,⁴³ e.g., that a person's failure to give evidence has been materially influenced by improper interference. Therefore, the inquiries to be made in the context of a Rule 68(2)(c) or Rule 68(2)(d) application are of a different order than those to be made in the context of an ordinary request for the admission of documents where questions of reliability, relevance and probative value can generally be gleaned from the face of the document.
27. In addition to the factors identified in paragraph 24 above, the Defence position that the OTP is not permitted to pursue an open ended approach to the material it can rely upon in support of its Rule 68 Application is supported by the practice followed in domestic jurisdictions when faced with similar admissibility issues. In both England and Canada, prior inconsistent statements can only be admitted for the truth of their contents in circumstances where a witness has failed to either testify at all or to repeat or adopt the information contained in an out-of-court statement due to fear if following a *voir dire* the trial judge is satisfied that certain conditions are met.⁴⁴

This request cannot be dealt with in the context of the response to the Rule 68 Application

28. How the Defence responds to the Rule 68 Application depends, in part, on the extent of the supporting material it is expected to address. The Defence has

⁴² See, e.g., Rule 68 Application, paras. 27, 61 and 62.

⁴³ What that standard is need not detain us for the purposes of the present request.

⁴⁴ See, e.g., *R. v. B.(K.G.)*, [1993] 1 S.C.R. 740, section VI for Canada and Archbold, *Criminal Pleading, Evidence and Practice* 2014, Sweet & Maxwell, para. 4-357.

previously submitted that it has not been able to investigate evidence now relied upon for the first time by the Prosecution for the purposes of its Rule 68 Application.⁴⁵ Be that as it may, for the Defence to file an effective response, it must know the proper scope of the evidentiary material on which the OTP is permitted to rely. Accordingly, the Defence respectfully submits that a ruling on the present request is required before it files its response to the Rule 68 Application.⁴⁶

29. By way of example, because this will be the first time amended Rule 68 is judicially considered, one of the live issues for determination is the extent to which the apparent role of a party or someone acting on behalf of a party to proceedings in the improper interference will be considered when assessing whether the various elements of the Rule 68(2)(d) test are satisfied.⁴⁷ In the Rule 68 Application, the OTP uses the allegation that “the evidence establishes...that those responsible for [the] improper interference scheme were, at the very least, acting for the benefit of the Accused”⁴⁸ to make arguments about prejudice,⁴⁹ the probative value of the evidence contained in the recanting witnesses’ prior inconsistent hearsay statements⁵⁰ and the interests of justice.⁵¹

30. The Defence denies that Mr. Ruto is involved in any way in the interference of witnesses and, therefore, questions whether an accused should effectively be penalised for the actions of others. However, the Defence acknowledges that any questions and arguments raised about the relevance of the alleged role of the

⁴⁵ See paras. 11 and 22 above.

⁴⁶ *E.g.*, the Defence has not carried out any investigations into [REDACTED] because this individual and [REDACTED] role in proceedings were only disclosed to the Defence on 17 April 2015. Further, [REDACTED] material was disclosed as PEXO which again indicated that no immediate investigations were required.

⁴⁷ *E.g.*, at the ICTY, Rule 92*quinqies* states that as part of the interests of justice inquiry “the apparent role of a party or someone acting on behalf of a party to the proceedings in the improper interference” should be considered. In contrast, amended Rule 68 is silent on the matter.

⁴⁸ Rule 68 Application, para. 2.

⁴⁹ *See, e.g.*, Rule 68 Application, para. 46.

⁵⁰ *See, e.g.*, Rule 68 Application, para. 51

⁵¹ *See, e.g.*, Rule 68 Application, para. 139.

accused or those allegedly working on his behalf in interfering with witnesses are matters which will ultimately be decided in the Chamber's Rule 68 decision. But the Defence needs to know now the parameters of the evidentiary material being used to support the allegations that Mr. Ruto or individuals acting on his behalf or for his benefit are involved in a witness interference scheme so that it can meet them.⁵²

31. Finally, the Defence submits that it is in the interests of efficiency and expediency for the Trial Chamber to determine this request now because it will establish at the outset whether the parties are permitted to go beyond the evidence on the record and effectively engage in a paper *voir dire* by annexing statements and transcripts in support of their submissions.
32. The Defence remains committed to meeting the 10 June 2015 deadline for filing its response to the Rule 68 Application. Therefore, the Defence respectfully requests that to ensure it is able to meet this deadline, the Chamber order an expedited time frame for the filing of responses to this request. In addition, should the Chamber grant the request, the Defence requests that the Prosecution be ordered to re-file its application with all references to the disputed supporting material removed within three days of the Chamber's decision and well in advance of the 10 June 2015 deadline.

IV. Classification

33. This request and related annexes are filed on a confidential basis because they relate to a confidential prosecution filing.

⁵² The OTP argues that "the evidence establishes...that those responsible for [the] improper interference scheme were, at the very least, acting for the benefit of the Accused" (see Rule 68 Application, para. 2). But material provided to support this assertion, referred to throughout the application, goes further and in untested, unsworn hearsay statements alleges Mr. Ruto's involvement. See Rule 68 Application, paras. 83, 88, 89, 103, 106, 122, 146, 151, 172, 173, 221, 222.

V. Requested Relief

34. For the reasons set out above, the Defence respectfully requests the Trial Chamber to:

- (i) order an expedited time frame for the filing of responses to this request;
- (ii) rule that the disputed supporting material relied on in the Rule 68 Application be declared inadmissible; and
- (iii) order the OTP to re-file its application with all references to the disputed supporting material removed within three days of the Chamber's decision.

Respectfully submitted,



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

Dated this 14th Day of July 2015
At The Hague, Netherlands