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TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding
Judge Olga Herrera Carbuccion
Judge Robert Fremr

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

***THE PROSECUTOR v.
WILLIAM SAMOEI RUTO AND JOSHUA ARAP SANG***

Public

Public redacted version of "Ruto defence request to appoint an *amicus* prosecutor", 2 May 2016

Sources: Defence for Mr. William Samoei Ruto

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

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I. Introduction

1. The defence for Mr. William Samoei Ruto (“Defence”) respectfully requests the Trial Chamber to order the Office of the Prosecutor (“OTP”) to appoint an *amicus* prosecutor to investigate, with a view to initiating criminal prosecution, OTP witnesses, OTP intermediaries, and possibly ICC staff members, for offences against the administration of justice, contrary to Article 70 of the Rome Statute (“Statute”).
2. The Defence submits that there is sufficient evidence in the trial record and in the possession of the OTP and the Defence to provide reason to believe that: (i) OTP witnesses including, *inter alia*, P-0356, P-0409, P-0613 and P-0800 have deliberately given false testimony to this Chamber; and (ii) OTP intermediaries (and witnesses) P-0613 and P-0800 have tampered and/or interfered with the collection of evidence by the OTP, by identifying and coaching witnesses to give false information to the OTP during its investigations, which then formed the basis of its case against Mr. Ruto.¹
3. In addition, the Defence submits that OTP evidence gives reason to believe that ICC staff members may have: (i) engaged in sexual relations with witnesses² and their families;³ (ii) been bribed by witnesses;⁴ 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 claims.⁵ The Defence submits that such conduct may amount to offences under Article 70(1)(c) and/or

¹ Based on defence investigations, the Defence has reason to believe that other witnesses have knowingly given false testimony before this Chamber. However, the Defence has limited this request to 4 witnesses. The investigation undertaken by the *amicus* should, therefore, not be limited to the 4 witnesses highlighted in this request. Rather, the Defence should be at liberty to provide evidence and other information regarding further prosecution witnesses which it believes have committed Article 70 offences in order that these witnesses may be independently investigated and prosecuted by the *amicus* prosecutor.

² See Annex 2: KEN-OTP-0148-0706, ln. 1830; KEN-OTP-0145-0076 at 0080.

³ See Annex 2: KEN-OTP-0146-0294 at 0295.

⁴ See Annex 2: KEN-OTP-0148-0706, lns. 1831-1837.

⁵ See Annex 2: *e.g.*, KEN-OTP-0146-0346 at 0346-0347; KEN-OTP-0146-0335 at 0336; KEN-OTP-0146-0031; KEN-OTP-0157-3207 at 3237, lns. 952-973; KEN-OTP-0148-0706 at 0753, lns. 1521-1535; at 0764, lns. 1832-1840; KEN-OTP-0157-3207 at 3237, lns. 952-973; KEN-OTP-0145-0076 at 0080; KEN-OTP-0157-2598 at 2612 to 2613, lns. 428-494; KEN-OTP-0157-3032 at 3040 to 3045, lns. 209-399.

Article 70(1)(f) of the Statute. By encouraging, be it expressly or impliedly, and/or assisting OTP witnesses to defraud the ICC, these ICC staff members have fostered an environment in which defrauding and telling lies to the ICC was encouraged. The conduct of such staff members may also have brought the administration of justice into disrepute. These serious allegations merit independent investigation.

4. This request is warranted because the OTP has proved to be unwilling or unable to pursue investigations against its own witnesses and intermediaries where there is reason to believe that such individuals may have committed offences contrary to Article 70 of the Statute. The OTP's failure to use Article 70 in a dispassionate manner is evident not only in this case but also in other cases before the Court.⁶ In the *Katanga* case, Her Honour, Judge Van den Wyngaert, observed that *"the Prosecution has shown great zeal in other cases before this Court pursuing persons whom it suspects of having suborned testimony by launching a string of prosecutions under article 70. However, despite repeated requests and reminders by the Chamber in this case, the Prosecutor has still to take any initiative with regard to witness P-159, whose testimony the Prosecutor had to withdraw."*⁷

II. Procedural History

5. During the course of the trial against Mr. Ruto, the Defence has repeatedly alerted the OTP, both in court and at meetings, that there is reason to believe that certain of its witnesses may have committed offences against the administration of justice.
6. On 28 February 2014, during the course of P-0409's testimony, lead defence counsel, Mr. Karim Khan QC, advised the Chamber that he would be requesting

⁶ See, e.g., the approach taken in respect of the Prosecution's intermediaries in *Lubanga*, discussed below, where the Trial Chamber had to intervene in the final judgment.

⁷ ICC-01/04-01/07-3436-AnxI ("**Judge Van den Wyngaert's Dissent**"), para. 140.

the Prosecutor and Deputy Prosecutor to appoint an independent person reporting only to the Prosecutor and Deputy Prosecutor and not the trial team. Lead defence counsel further advised that he would be content to co-operate fully with such an independent person so that P-0409 could be investigated under Article 70.⁸

7. On 11 March 2014, Mr. Karim Khan QC and Dato' Shyamala Alagendra, met with the Deputy Prosecutor. At the meeting, Mr. Khan and Dato' Alagendra advised the Deputy Prosecutor of their serious concerns, based on information obtained during the course of defence investigations, that certain witnesses who: (i) had testified for the OTP at trial had fabricated their evidence and knowingly misled the Chamber; and (ii) were scheduled to testify had fabricated evidence. The Defence proposed that it provide the relevant information to the OTP on the condition that it not be shared with the OTP trial team and that it be received and investigated by an independent person reporting directly to the Prosecutor and Deputy Prosecutor. The Defence proposal was advanced as a moderate and reasonable position which would avoid any conflicts of interest, preserve the integrity of the then on-going trial proceedings and prevent any prejudice to the Defence in the presentation of its case occasioned by the advance disclosure of material necessary to the preparation of its defence.⁹
8. By way of follow-up to the 11 March 2014 meeting, the Deputy Prosecutor emailed the Defence on 10 April 2014 to advise that: *"[i]t is unnecessary at this stage, in my view, to consider launching an investigation under Article 70 of the Statute before the Trial Chamber has made its assessment of the evidence in its final judgment. If you wish to provide me with the information you say indicates that the witnesses are*

⁸ ICC-01/09-01/11-T-97-Red-ENG WT, 20:24-21:14. Hereinafter, transcript references for transcripts relating to the present proceedings will be abbreviated to "T-XX".

⁹ See the emails dated 11 March 2014 and 10 April 2014 from the Deputy Prosecutor to the Defence and the email dated 26 March 2014 from the Defence to the Deputy Prosecutor provided in Annex 1 hereto which refer to the 11 March meeting and the Defence proposal.

fabricating their testimony, I will, of course, receive it, but without conditions or any undertaking not to share it with the Prosecution team with carriage of this case. Where a witness has not already testified and been subjected to cross-examination, such information might be relevant to the decision whether or not to call the witness. As well, depending on the outcome of the trial, you may wish to consider whether to provide such information to me at the end of the case.”¹⁰

9. In light of the observations made by various Trial Chambers and, indeed, the OTP itself in the *Lubanga* case (which are discussed below) regarding the conflicts of interest which arise when Article 70 allegations are made to the OTP about their own witnesses, the Defence submits that the Deputy Prosecutor’s outright rejection of the Defence’s proposed safeguards regarding the receipt of the Defence material and his refusal not to share it with the OTP trial team is particularly troubling. The Defence material covered witnesses who had not yet testified and in respect of whom the OTP had given no undertaking that they would not be called. In these circumstances, the Deputy Prosecutor was proposing that the Defence provide the OTP with advance disclosure of extensive cross-examination material without any concomitant safeguards to mitigate any resulting prejudice to the Defence and Mr. Ruto. As a result, the Defence was placed in an invidious position and unable to share in full what it believes to be clear and compelling evidence of deliberate wrong-doing and falsifying of evidence by a network of OTP witnesses.

10. Notwithstanding the Deputy Prosecutor’s position, on 29 January 2015, Mr. Khan, attempted once again to address the issue and notified the Chamber that *“there was more than sufficient evidence”* for Article 70 proceedings to be commenced against another OTP witness, that the OTP had failed to do so and

¹⁰ See email dated 10 April 2014 from the Deputy Prosecutor to the Defence provided in Annex 1 hereto.

that this Chamber has the inherent power to order the appointment of an *amicus* prosecutor to investigate Article 70 complaints against OTP witnesses.¹¹

11. On 5 April 2014, in the *Decision on Defence Applications for Judgments of Acquittal* (“No-case Decision”),¹² a Majority of Trial Chamber V(A), Judge Herrera Carbuccia dissenting, held that the charges against Mr. Ruto were vacated and Mr. Ruto was discharged without prejudice to his prosecution afresh in future.¹³

III. Applicable Law

(a) Procedures for the investigation of offences against the administration of justice

12. Article 70 of the Statute, which deals with offences against the administration of justice, states, in relevant part, that:

The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally:

- (a) *Giving false testimony when under an obligation pursuant to article 69, paragraph 1, to tell the truth;*
 - (b) *Presenting evidence that the party knows is false or forged;*
 - (c) *Corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence;*
- [...]
- (f) *Soliciting or accepting a bribe as an official of the Court in connection with his or her official duties.*

13. Article 70(2) of the Statute provides that “*the principles and procedures governing the Court’s exercise of jurisdiction over offences under [Article 70(1)] shall be those provided for in the Rules of Procedure and Evidence*”, namely Rules 162 to 169.

14. According to Rule 165 of the Rules of Procedure and Evidence (“Rules”), “[t]he Prosecutor may initiate and conduct investigations with respect to offences defined in

¹¹ T-189, 106:3-107:21.

¹² ICC-01/09-01/11-2027-Conf; ICC-01/09-01/11-2027-Red.

¹³ ICC-01/09-01/11-2027-Red, p. 1.

article 70 on his or her own initiative, on the basis of information communicated by a Chamber or any reliable source.”

(b) The obligation of truthfulness

15. Pursuant to Article 69(1) of the Statute, “[b]efore 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.” Additionally, Rule 66(3) of the Rules requires that “[b]efore testifying, the witness shall be informed [by the Chamber] of the offense defined in article 70, paragraph 1(a).”

IV. Submissions

(a) The Trial Chamber retains jurisdiction and has authority to determine this request

16. Notwithstanding the No-case Decision, the Defence submits that this Chamber retains a limited residual jurisdiction to determine this request and it may grant the requested relief pursuant to its inherent powers to ensure and protect the administration of justice and its residual power to “rule on any other relevant matters” under Article 64(6)(f) of the Statute.
17. Further, despite the termination of the proceedings against H.E. Uhuru Kenyatta, Trial Chamber V(B) in the *Kenyatta* case held that a limited residual jurisdiction continued to exist for it to consider certain procedural matters.¹⁴ Given the seriousness and importance of the subject matter, the Defence submits that the request properly falls within the Chamber’s limited residual jurisdiction.

(b) The OTP and the Defence are in possession of information indicating the commission of Article 70 offences

18. As noted above, Rule 165(1) of the Rules provides that the OTP may initiate and conduct investigations with respect to Article 70 offences on the basis of information communicated by any reliable source. During the course of its

¹⁴ ICC-01/09-02/11-1005, para. 11.

investigations, the Defence has obtained reliable information, including cell-site data, registered title deeds to land and legal agreements, which provide reasonable grounds to believe that several OTP witnesses intentionally gave false testimony to this Chamber during the course of the trial against Mr. Ruto. The information in the Defence's possession goes beyond ordinary inconsistencies in the testimony of witnesses. What it shows, is that several OTP witnesses have deliberately fabricated evidence regarding the post-election violence ("PEV") and Mr. Ruto.¹⁵

19. Some of the information which provides reason to believe that OTP witnesses have deliberately fabricated evidence has already been disclosed to the OTP as part of Defence cross-examination related disclosure.¹⁶ This information, combined with that already in the court record and/or in the possession of the OTP, satisfies the threshold necessary to trigger an investigation into Article 70 offences. That said, the Defence is prepared to provide the additional material obtained during its investigations to any *amicus* prosecutor appointed subject to the protections outlined in paragraph 40 below.

(c) Examples of possible Article 70 conduct by OTP Witnesses and Intermediaries¹⁷

(i) P-0409

20. P-0409 testified before this Chamber that [REDACTED] during the PEV.¹⁸ During cross-examination, the Defence produced a photograph of [REDACTED]¹⁹ who P-0409 confirmed was [REDACTED].²⁰ In fact, as stated in Court, Defence investigations further reveal that P-0409 knew that [REDACTED]

¹⁵ *Contra* Trial Chamber II's approach in *Katanga*. See T-190, 4:14-5:24.

¹⁶ Note the information disclosed to date does not constitute the entirety of the information in the Defence's possession. See *infra*, para. 40.

¹⁷ Note Annex 2 hereto provides the relevant extracts of the evidence referred to in the following paragraphs which has not been admitted or MFI'ed during the course of proceedings.

¹⁸ T-93, 51:24-53:17; T-95, 8:18-9:10.

¹⁹ EVD-T-D09-00170; T-96, 90:4-12.

²⁰ T-96, 90:8-12.

was [REDACTED] and that he had [REDACTED] before he testified,²¹ and about [REDACTED] before he provided his statement to the OTP.²²

21. Defence investigations, the main results of which have been disclosed to the OTP for the purposes of cross-examination disclosure, indicate that P-0409 also deliberately misled the Chamber about his location during the PEV. A cell-site data report commissioned by the Defence contradicts P-0409's sworn testimony that he lived and was present in the [REDACTED] area during the PEV.²³ This report indicates that P-0409's phone was in North Nyanza, and not in North Rift, from 27 to 29 December 2007. Additionally, the Defence's examination of the electoral register shows that P-0409 was not registered at [REDACTED] Primary School in [REDACTED] for 2007 as he claimed but was registered in [REDACTED] Primary School in [REDACTED].²⁴
22. Moreover, Defence investigations referenced during cross-examination, provide reasonable grounds to believe that P-0409 claimed the loss of property during the PEV which he did not own and which his family disposed of 20 years previously. Specifically, the Defence obtained a statement from P-0409's father, [REDACTED],²⁵ and other documents²⁶ which show that in 1984 and 1992, [REDACTED] sold the lands that P-0409 identified in his victim application as being owned by him.²⁷

(ii) *P-0613*

23. On 18 June 2014, P-0613 testified that in 2007, PNU rallies in Turbo were disrupted by ODM supporters.²⁸ However, after P-0613 completed her

²¹ T-96, 93:23-94:2.

²² KEN-OTP-0080-0346. This statement is available in eCourt.

²³ MFI-D09-00174.

²⁴ T-96, 76:9-80:5. See also KEN-D09-0030-0414, available on eCourt, which is the document found at Tab 124 of the Defence bundle and referenced during P-0409's cross-examination (T-96, 78:9-10).

²⁵ See EVD-T-D09-00167, a photograph of P-0409's father.

²⁶ MFI-D09-00175; MFI-D09-00176; MFI-D09-00177; MFI-D09-00178; MFI-D09-00179.

²⁷ EVD-D09-00166.

²⁸ T-118, 28:18-30:23.

testimony, the OTP obtained [REDACTED] evidence of: (i) P-0613 admitting to [REDACTED] that she did not possess information about PNU or PNU rallies²⁹ and that she obtained her information from [REDACTED];³⁰ and (ii) other OTP witnesses who had first hand-knowledge, confirming that the evidence of P-0613 in that regard was “cooked up”.³¹ The evidence also suggests that P-0613 may have been coached by third parties prior to her testimony.³² The Defence is also in possession of evidence that other aspects of P-0613’s testimony were false. Of additional relevance to any Article 70 investigation is OTP evidence that P-0613 was motivated by financial gain and relocation out of Africa, and has repeatedly deceived and attempted to deceive the OTP and the VWU.³³

(iii) P-0800

24. When assessing P-0800’s sworn testimony, His Honour, Judge Fremr, observed that certain aspects were “implausible”, that “serious questions” were raised regarding the witness’ “trustworthiness” and that P-0800 had “demonstrated...a far-reaching willingness to manipulate the truth”.³⁴ The Defence shares this view and submits that the following examples provide reason to believe that P-0800 deliberately provided false testimony to the Court.
25. First, P-0800 testified that the entire basis of his knowledge concerning the 2007 election campaigns and the PEV was his work with [REDACTED].³⁵ However, evidence on the record, combined with material obtained during defence investigations, demonstrates that [REDACTED] did not exist in 2007 and that P-0800 only [REDACTED].

²⁹ Annex 2: KEN-OTP-0148-4808 at 4810.

³⁰ Annex 2: KEN-OTP-0148-4808 at 4811.

³¹ Annex 2: KEN-OTP-0148-0867, Ins. 238-314; KEN-OTP-0148-0663 at 0684 lines 655-658.

³² Annex 2: KEN-OTP-0148-4802.

³³ KEN-OTP-0148-4808 at 4812-4813; KEN-OTP-0146-0352; KEN-OTP-0146-0328 at 0328-0330; KEN-OTP-0148-4853 at 4854; KEN-OTP-0145-0165; [REDACTED]. See also [REDACTED]; KEN-OTP-0146-0346; KEN-OTP-0146-0335 at 0336; KEN-OTP-0146-0338; KEN-OTP-0148-4824; MFI-T-D09-00374; [REDACTED]; [REDACTED]; KEN-OTP-0148-0663 at 0683 to 0684, lines 603-658, and 0685 to 0687, lines 683-750. Note the OTP evidence referred to is contained in Annex 2.

³⁴ No-case Decision, Reasons of Judge Fremr, paras. 43, 116.

³⁵ T-154, 12:11-14:6; T-160, 9:12-14, 10:7-11:25.

26. The evidence on the record which provides a reasonable basis for questioning the veracity of P-0800's testimony about [REDACTED] is as follows. P-0800 testified that: (i) [REDACTED] and [REDACTED];³⁶ and (ii) [REDACTED] were already [REDACTED].³⁷ It was put to P-0800 in cross-examination that [REDACTED] told the OTP that he [REDACTED] and, therefore, P-0800 could not have [REDACTED].³⁸ The Defence notes that [REDACTED] subsequently testified that, from [REDACTED].³⁹ However, P-0800 maintained [REDACTED] and confirmed, again, that [REDACTED] by that time.⁴⁰ The Defence has other independent evidence which establishes that P-0800's account was false and that [REDACTED].
27. *Second*, P-0800 testified that, around two or three days after the announcement of the presidential results, he was present in [REDACTED] and witnessed the burning of the home of [REDACTED].⁴¹ He testified that from the date of the announcement of the results (30 December 2007), until 1 January 2008, he was in [REDACTED] in Eldoret.⁴² OTP evidence, in the form of independent and reliable Police records, establishes that the home of [REDACTED] was in fact burnt on 30 December 2007.⁴³ There is also evidence in the record that the witness claimed to have been at his home in [REDACTED] on 30 December 2007 and being personally attacked.⁴⁴ Clearly, P-0800 could not have been in all three places at once. The Defence submits that one (or all) of his versions is fabricated

(iv) P-0356

28. The Defence observes that Judge Fremr also identified concerns with the veracity of this witness' evidence. In addition to the learned Judge's observations at

³⁶ T-160, 9:12-14.

³⁷ T-160, 9:15-17.

³⁸ T-160, 16:19-17:5.

³⁹ T-162, 41:18-20.

⁴⁰ T-160, 16:19-17:5.

⁴¹ T-155, 68:8-69:25; T-155, 71:9-13.

⁴² T-156, 14:22-25.

⁴³ EVD-T-OTP-00332 at page 3.

⁴⁴ T-160, 35:8-38:8; EVD-T-D09-00356.

paragraph 58 of the No-case Decision, he also observed that P-0356's testimony raised questions about the exact timing of the alleged gun transaction.⁴⁵ P-0356 maintained that it took place on 31 December 2007.⁴⁶ However, his testimony on this point is incompatible with his testimony that he listened to the swearing in ceremony of President Kibaki in [REDACTED] at the time of the transaction⁴⁷ because this ceremony took place on 30 December 2007.⁴⁸ Judge Fremr found that P-0356 *"was not able to provide a convincing explanation for these discrepancies"* and noted that P-0356 had been *"deceitful in some of his dealings with the Prosecution, as well as the Victims and Witnesses Unit of the Registry."*⁴⁹ The Defence acknowledges that Judge Fremr stated that P-0356's past dishonesty did not mean that he necessarily lied about the alleged gun purchase.⁵⁰ However, the Defence submits that Judge Fremr's observations should be considered alongside the following evidence obtained by the Defence during the course of its investigations and provided to the OTP as part of the Defence's cross-examination disclosure obligations.

29. Given P-0356's testimony that: (i) he met with [REDACTED] between 3 pm and 4 pm on [REDACTED] December 2007 at [REDACTED] to discuss the gun purchase;⁵¹ and (ii) [REDACTED] were all present and involved in the gun transaction in [REDACTED] on 31 December 2007,⁵² the Defence obtained a cell-site report identifying the locations of the mobile phones used by the aforementioned individuals including the witness on the relevant dates.⁵³ This report was prepared by the same expert jointly instructed by the defence and the

⁴⁵ No-case Decision, Reasons of Judge Fremr, para. 59.

⁴⁶ T-82, pp. 10-11.

⁴⁷ T-82, 11:10-14.

⁴⁸ ICC-01/09-01/11-451-AnxA, p. 3.

⁴⁹ No-case Decision, Reasons of Judge Fremr, para. 60.

⁵⁰ No-case Decision, Reasons of Judge Fremr, para. 60.

⁵¹ T-75, 55:4-10.

⁵² T-75, 81:22-82:6, 90-91.

⁵³ The witness confirmed that the number attributed to him in the report [REDACTED] for the period 6 December 2007 to 31 July 2008 is correct (T-82, 68:16-69:8).

OTP in the *Kenyatta* case.⁵⁴ The report (KEN-D09-0028-0202) was disclosed to the OTP on 21 January 2014.⁵⁵

30. With regards to the alleged [REDACTED] December 2007 meeting at [REDACTED], the cell-site data report shows that P-0356's phone was in [REDACTED] (where he was a tractor driver), [REDACTED] km from [REDACTED] where he claims he was meeting [REDACTED]. The report also shows that on 31 December 2007, the mobile phones of P-0356, [REDACTED] were all in completely different locations. Based on their phone locations, [REDACTED] and [REDACTED] were in Eldoret ([REDACTED] miles from [REDACTED]), [REDACTED] was in Nairobi and P-0356 was in [REDACTED]. The Defence submits that the evidence is sufficiently cogent that it may reasonably trigger an investigation into the possible commission of Article 70 offences.

31. Furthermore, the [REDACTED] (KEN-D09-0028-0137), provided to the OTP on 20 January 2014,⁵⁶ indicates that [REDACTED], a [REDACTED] based in Nairobi,⁵⁷ was [REDACTED] in Nairobi on 31 December 2007.⁵⁸ This document supports the conclusion derived from the cell-site data report that [REDACTED] was in Nairobi and not in [REDACTED] on the evening of 31 December 2007.

(v) P-0613 and P-0800 interfered with the collection of evidence

32. OTP evidence demonstrates that P-0800 and P-0613 introduced witnesses, including [REDACTED]⁵⁹ and [REDACTED]⁶⁰ to the OTP and instructed these witnesses to provide false information implicating Mr. Ruto in the PEV. P-0613 and P-0800 also promised them that, if accepted as witnesses in the case, they

⁵⁴ T-85, 58:10-59:13.

⁵⁵ The report can be accessed by the Chamber via eCourt.

⁵⁶ This document can be accessed by the Chamber via eCourt.

⁵⁷ T-82, 72:8-73:21.

⁵⁸ T-82, 72:8-74:6.

⁵⁹ [REDACTED]

⁶⁰ [REDACTED]

would receive financial benefits and relocation outside of Kenya by the ICC.⁶¹ P-0800 and P-0613 reassured the witnesses that OTP investigators operated from Uganda and would not come to Kenya to verify the accuracy of their accounts.⁶²

33. In relation to [REDACTED], this Chamber has previously noted that the relationship between [REDACTED] could “*be indicative of interference when the witness was first approached by the Prosecution*” and that [REDACTED] was influenced by improper interference by individuals including [REDACTED].⁶³
34. In Annex 2 hereto, the Defence provides examples of the evidence arising from the [REDACTED] which provides reason to believe that P-0613, P-0800 and ICC staff may have committed offences contrary to Article 70.

(d) *The OTP is unwilling and/or unable to investigate the commission of Article 70 offences*

35. Despite being aware of the above facts and evidence, the OTP maintained its reliance on all its trial witnesses, including the “*unreliable and incredible*”⁶⁴ P-0743 albeit only to the extent that he was corroborated,⁶⁵ right up until proceedings were brought to an end by the No-case Decision. Accordingly, it appears that the OTP has failed to investigate any of the evidence available to it indicating the possible commission of Article 70 offences by its witnesses, including those who also acted as intermediaries and by ICC Staff members.
36. These failures demonstrate that the OTP is unwilling and/or unable to properly investigate the commission of Article 70 offences where those offences may have been committed by its own witnesses or ICC staff members. In these circumstances the immediate intervention of the Chamber is required pursuant

⁶¹ [REDACTED]

⁶² [REDACTED]

⁶³ ICC-01/09-01/11-1938-Conf-Corr, para. 55 and fns. 80-81.

⁶⁴ T-182, 8:1-2.

⁶⁵ T-185, 43:6-9.

to its inherent powers to ensure and protect the administration of justice and/or its residual power under Article 64(6)(f) of the Statute.

37. The Defence submits that no witness should have a licence to lie with impunity or cause false evidence to be given to a prosecution authority. An investigation should be commenced where there are reasonable grounds to believe that any witness or other person has given false evidence under oath or interfered with the collection of evidence in ICC proceedings. Further, for the reasons more fully adumbrated below, where the witness at issue was called by the OTP, the investigation should be subject to the basic safeguards proposed by the Defence during its 11 March 2014 meeting with the Deputy Prosecutor. In short, there is no justifiable basis to delay investigations until the end of trial as a matter of policy. Indeed, it appears that this strategy has only been advocated by the OTP in respect of its own witnesses.⁶⁶ There has been no such delay by the OTP in launching investigations into other individuals.⁶⁷

(e) An amicus prosecutor should be immediately appointed

38. For the reasons outlined below, an independent *amicus* prosecutor, reporting to the Prosecutor and Deputy Prosecutor and separated by “Chinese walls” from any OTP staff member with any connection to the original trial proceedings in this case is necessary.
39. *First*, an *amicus* prosecutor must be appointed to avoid any conflicts of interest. Article 70(2) of the Statute when read with Rule 165(1) of the Rules establishes

⁶⁶ See, in the *Katanga* case, the “Prosecution’s response regarding its investigations into the alleged false testimony of witness P-159”, 31 January 2012, ICC-01/04-01/07-3225, in which the Prosecutor informed the Chamber that, more than two years after the witness had been withdrawn, “the Prosecution has not yet undertaken further investigative steps to pursue the contradiction between the testimony of the witness and other information in its possession and disclosed to the parties” (para. 6). The reason provided was that “the Prosecution determined that there are no special circumstances warranting action before the final judgment” and that, on balance, “it is best to not appear to be trying to influence the ongoing proceedings” (para. 6). See also, in this case, the Deputy Prosecutor’s email of 10 April 2014 provided in Annex 1 hereto.

⁶⁷ See, e.g., the Article 70 proceedings brought in the cases of: (i) *Prosecutor v. Bemba et al* (ICC-01/05-01/13); (ii) *Prosecutor v. Barasa* (ICC-01/09-01/13); and (iii) *Prosecutor v. Gicheru and Bett* (ICC-01/09-01/15).

that the OTP has the primary (although the Defence submits not the sole) authority to initiate an investigation into Article 70 offences.⁶⁸ However, as the OTP has acknowledged, the Court's regime gives rise to complications and "*a conflict of interest could exist where the decision by the Prosecution to investigate or prosecute alleged Article 70 offences were committed by a Prosecution witness.*"⁶⁹ In these circumstances, the correct approach is to appoint an *amicus* prosecutor or, in the words of the OTP for "*the Office to contract with a totally independent counsel to conduct the investigations.*"⁷⁰

40. In order for the *amicus* remedy to be effective, the appointment should be subject to certain conditions. In the first place, to maintain independence, the *amicus* prosecutor should report only to the Prosecutor and the Deputy Prosecutor. Further, any information provided to him/her should not be shared with any OTP staff member with any connection to the original trial proceedings in this case. This separation is necessary because OTP staff members may be witnesses in connection with certain aspects of the investigation. In addition, the effect of the No-case Decision appears to be that the OTP may apply to re-institute proceedings in the future. Therefore, fairness dictates that information which is material to the preparation of Mr. Ruto's defence should not be shared without restriction in the office which may seek to bring a future prosecution. In this regard, and as indicated above, the Defence recalls that the information already disclosed to the OTP as part of the disclosure of intended cross-examination materials does not constitute the entirety of the relevant information in the Defence's possession. Significant further information remains in the possession

⁶⁸ ICC-01/04-01/07-T-190-Red-ENG WT, 3:14-22; ICC-01/04-01/7-2731, para. 18; ICC-01/04-01/06-2842 (*"Lubanga Judgment"*), para. 483.

⁶⁹ ICC-01/04-01/06-2716 (*"Prosecution's Observations on Article 70 of the Rome Statute"*), para. 11. In *Katanga*, Trial Chamber II also recognised "that any possible false testimony attributable to a Prosecution witness is likely to create a situation of conflict of interests, which could influence the authority given to [the Prosecutor] to initiate such an investigation" (ICC-01/04-01/07-T-190-Red-ENG WT, 4:1-5). *See also* the concerns of Trial Chamber I – "[t]he Chamber hereby communicates the information set out above to the OTP, and the Prosecutor should ensure that the risk of conflict is avoided for the purposes of any investigation" (*Lubanga Judgment*, para. 483).

⁷⁰ Prosecution's Observations on Article 70 of the Rome Statute, para. 11.

of the Defence which, it is submitted, must be independently assessed by an independent *amicus* prosecutor in determining whether Article 70 proceedings should be instigated against certain OTP witnesses and other court staff detailed in this request.

41. *Second*, there is precedent for the appointment of an outside prosecutor by the OTP to investigate Article 70 offences in a situation where possible conflict of interest concerns were raised. In the *Lubanga* judgement, Trial Chamber I communicated information to the OTP about potential Article 70 violations by three OTP intermediaries. When communicating this information, Trial Chamber I expressly stated that “*the Prosecutor should ensure that the risk of conflict is avoided for the investigation.*”⁷¹ As a result, the OTP contracted with a prosecutor from another tribunal to evaluate the information available to it regarding the three intermediaries for the purpose of an “*independent assessment as to whether there were grounds to prosecute*”.⁷²

(f) Updates to be provided by the amicus prosecutor

42. The unfortunate reality, and one which has occasioned judicial comment,⁷³ is that the OTP has demonstrated a clear unwillingness or inability to utilise Article 70 of the Rome Statute against its own witnesses. In stark terms, since the establishment of this Court, there is not one case where the OTP has sought to bring Article 70 proceedings against even one of its own witnesses. As further demonstrated in this filing, reasonable requests and offers of cooperation from the Defence have been unreasonably rejected by the OTP. Cognisant of this reality, if the Chamber orders the appointment of an *amicus* prosecutor, the

⁷¹ *Lubanga* Judgment, para. 483.

⁷² Comments by Cristina Ribeiro, Investigation Coordinator, Office of the Prosecutor, International Criminal Court, International Bar Association round table discussion – Witnesses under threat? Part 2: The International Criminal Court and managing/protecting witnesses, 15 July 2013, The Hague, Netherlands, minute 07:40 to 08:40, available at: <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=EDFE91E7-ED49-4CB1-B125-528EB35C35B9>. Ms. Ribeiro indicated that the final assessment was a non-decision in view of the poor quality of the witnesses against the intermediaries and, therefore, the matter was closed.

⁷³ See Judge Van den Wyngaert’s Dissent, para. 140.

Defence respectfully submits that continued judicial oversight from this Chamber is required. Accordingly, the *amicus* prosecutor should be ordered to provide the Chamber and the Defence (as complainants) with regular updates regarding his/her investigations into the allegations of Article 70 offences committed by OTP witnesses and ICC staff members, such updates to advise ultimately whether or not the *amicus* prosecutor recommends that criminal proceedings against any or all of the individuals at issue should be initiated.⁷⁴

V. Classification

43. This request is filed confidentially because it refers to confidential evidence. The annexes are also filed confidentially because Annex 1 refers to the email addresses of OTP and Defence team members and Annex 2 refers to confidential evidence. A public redacted version of the request will be filed simultaneously.

VI. Relief requested

44. For the reasons set out above and pursuant to the Chamber's inherent powers to ensure and protect the administration of justice and/or its residual power under Article 64(6)(f) of the Statute, the Defence requests the Trial Chamber to order the OTP to: (i) appoint an *amicus* prosecutor, reporting to the Prosecutor and Deputy Prosecutor and separated by "Chinese walls" from any OTP staff member with any connection to the original trial proceedings in this case, to receive and investigate information obtained by the Defence during the course of its investigations and other information in the trial record and in the OTP's possession, which provides reason to believe that several OTP witnesses and/or ICC staff members may have committed offences under Article 70; and (ii) update the Trial Chamber and the Defence about the steps which have been taken in regard to the investigation of the alleged commission of Article 70

⁷⁴ In *Katanga*, Trial Chamber II ordered the Prosecution to file an update "about which steps have been taken in regard to the alleged false testimony of witness P-159 and whether or not it intends to initiate criminal proceedings against him". See ICC-01/04-01/07-3223. See also the Prosecutor's update ICC-01/04-01/07-3225.

offences and to advise whether or not the *amicus* prosecutor intends to initiate criminal proceedings against any or all of the individuals at issue.

45. In the alternative, the Defence requests that the Trial Chamber submit the case to the competent authorities of the State Party (or States Parties) where the witnesses, intermediaries and staff at issue are located, in accordance with Article 70(4) of the Statute and Rule 162(4) of the Rules for investigation and prosecution.

Respectfully submitted,



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Lead Counsel for Mr. William Samoei Ruto

Dated this 2nd Day of May 2016
At The Hague, the Netherlands