

**Cour
Pénale
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**International
Criminal
Court**

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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 observations on Article 55(2) interview conducted with [REDACTED]", 22 September 2014, ICC-01/09-01/11-1530-Conf

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") submits these observations pursuant to the Chamber's invitation¹ that the parties may submit written submissions on whether any issue under Articles 55(2)(d) and 69(7) of the Rome Statute ("Statute") is engaged by the suspect interview conducted by Prosecution investigators with [REDACTED] on [REDACTED] 2013 ("Suspect Interview").²
2. In short, it appears that there has been a breach of Article 55(2)(d) of the Statute. This breach casts substantial doubt on the reliability of the evidence – [REDACTED] may have said or done things that he would not otherwise have said or done had he been properly advised. Further, the court has a duty to protect witnesses, including those who become suspects. This protection was not fully afforded [REDACTED] during the Suspect Interview. Thus, to place any reliance on evidence obtained as a result of this unfair process would seriously damage the integrity of these proceedings. Accordingly, the Defence submits that, pursuant to Article 69(7), the Suspect Interview and its fruits should not be admitted into evidence.³

II. Submissions

Non-compliance with Article 55(2) of the Statute

3. From an analysis of the transcripts of the Suspect Interview, the Defence submits that [REDACTED] did not voluntarily waive his right to be assisted by counsel because he was not properly informed of the content of that right.
4. Article 55(2) of the Statute provides that a suspect has the following right:

¹ [REDACTED]

² The Suspect Interview comprises of the following 7 transcripts: [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED] and related audio recordings.

³ The fruits of the Suspect Interview are two audio recordings between [REDACTED] and [REDACTED]. The relevant ERNs and MFIs are: (i) [REDACTED] (audio); (ii) [REDACTED] (translation); [REDACTED] (transcription); (iv) [REDACTED] (audio); (v) [REDACTED] (transcription); (vi) [REDACTED] (transcript).

To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

5. The jurisprudence of the ICTR is of assistance in detailing the information that must be conveyed to a suspect in order for him or her to be properly and fully informed about the right to counsel. A suspect must be in possession of this bare minimum before he or she can voluntarily waive the right to counsel. In *Bagosora et al.*, the Trial Chamber found that:

National courts in which the right to counsel is recognized have elaborated that a waiver cannot be voluntary unless a detainee knows of the right to which he is entitled. To be so informed, the suspect must be informed that the right includes the right to the prompt assistance of counsel, prior to and during any questioning. Any implication that the right is conditional, or that the presence of counsel may be delayed until after the questioning, renders any waiver defective. These rights, and the practical mechanisms for their exercise, must be communicated in a manner that is reasonably understandable to the detainee, and not “simply by some incantation which a detainee may not understand”. Generally, a suspect may be taken to comprehend what a reasonable person would understand; but where there are indications that a witness is confused, steps must be taken to ensure that the suspect does actually understand the nature of his or her rights.⁴

6. Applying the foregoing to the instant case, it is clear from the following analysis that the right to counsel was not properly and fully explained to [REDACTED].
7. The first time the right to counsel was mentioned was apparently within the first few minutes of the witness being intercepted by the investigators, although it is observed that the transcript of this first part of the interview is incomplete and begins some way into the interaction between the investigators and [REDACTED].⁵ When the right to counsel was initially addressed, all that was conveyed to the witness, now a suspect, was the bare right to have a lawyer

⁴ *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, Decision on the Prosecutor’s Motion for the Admission of Certain Materials under Rule 89(C), 14 October 2004, para. 17 (internal footnotes omitted) cited with approval in *Prosecutor v. Sesay et al.*, SCSL-04-15-T-1188, Written Reasons – Decision on the Admissibility of Certain Prior Statements of the Accused Given to the Prosecution”, 30 June 2008, para. 63.

⁵ See [REDACTED]. The transcript self-evidently does not begin with the investigators introducing themselves to [REDACTED] but half way through a sentence.

present.⁶ None of the “practical mechanisms” to effectively and immediately access the right were explained. Of concern is that, on being told briefly about the right to counsel, the witness was clearly confused, specifically about how to realise this right.⁷ Indeed, the witness explained in testimony that he was not given an opportunity to “look for an advocate” and that he was “new...in that area”.⁸ Clearly, the witness did not understand that it was not his responsibility to find a suitable lawyer. Indeed, this analysis brings into question the basis on which Prosecution counsel put the proposition to the witness that “upon meeting the investigators, they explained to you - gave you your rights and then... all of you proceeded to go to a meeting room where you were asked questions by the investigators and you responded to these questions”.⁹ The witness was only informed of one right in incomplete terms while on the streets and before being put in a taxi to travel to the interview location. This is obviously irregular.

8. In addition to failing to provide the minimum information detailed in *Bagosora*, the Defence makes the following further observations in relation to this initial explanation to the witness about his statutory right to counsel:
 - a. the matter was dealt with in under 3 minutes;¹⁰
 - b. there is an insinuation made by one investigator that needing a lawyer might somehow indicate that the witness had something to hide;¹¹ and
 - c. throughout the first part of the interview – from the witness being intercepted, to being taken in a cab to be interviewed at an undisclosed location – there is a palpable air of unexplained urgency, all of which

⁶ [REDACTED].

⁷ [REDACTED] (“**Interviewee:** I don't understand about the lawyer”) and [REDACTED] (“**Interviewee:** So even though I don't have any lawyer around, I don't know which lawyer should I take”).

⁸ [REDACTED].

⁹ [REDACTED].

¹⁰ At [REDACTED] the timestamp “00:03:12” is given which is some 30 lines after the end of the initial explanation about the right to counsel.

¹¹ [REDACTED] (“**Interviewer 2:** If you feel you need one. **Interviewee:** Pardon? **Interviewer 2:** If you feel that you need one.”)

gives rise to the concern that the witness felt rushed and harried, and, in fact, did not accompany the investigators voluntarily (see below).¹²

9. When the right to a lawyer was explained a second time to the witness, he had been with the investigators for just over an hour,¹³ had been searched¹⁴ and had had his phone taken away, ostensibly for security reasons.¹⁵ While the Defence acknowledges that the minimum information outlined in *Bagosora* was provided on this second occasion, the purpose of counsel's assistance was not properly explained to the witness. This serious failure undermines any assertion that "the suspect [did] actually understand the nature of his or her rights".¹⁶
10. In response to a direct question posed by the witness - "[w]hat's the work of this Legal Counsel? For what purpose is he coming in this situation?"¹⁷ – one of the investigators explained that it is for "if for some reason you wanted legal assistance".¹⁸ Clearly, the investigator did not think being a suspect in a criminal investigation was "reason" enough. The question posed is just one of many instances where the witness demonstrated confusion and a lack of comprehension about the serious situation with which he was faced. As discussed below, language was clearly a barrier, albeit one that perhaps the witness was not able to admit or acknowledge. However, experienced and professional investigators should have picked up on these signs of difficulty and inequality and taken steps to patiently address them in order to bring the interview onto a proper and fair footing. These steps were not taken.

¹² [REDACTED] ("**Interviewer 1:** [...] we're giving you the option of whether you want [a lawyer] present or not. But our position is here we need your assistance and we need it **Interviewer 2:** Soon"); [REDACTED] ("**Interviewer 1:** OK. You understand of course the urgency of what we're talking about as well?").

¹³ The first part of the interview lasted just over 32 minutes (see [REDACTED]). The right to counsel was mentioned in the second part of the interview just prior to the "[00:29:54]" timestamp (see [REDACTED]).

¹⁴ [REDACTED].

¹⁵ [REDACTED]. The Defence notes the taking of the phone is not recorded.

¹⁶ *Supra*, para. 5.

¹⁷ [REDACTED].

¹⁸ [REDACTED].

11. In fact, an analysis of the Suspect Interview shows that [REDACTED] was never provided with a proper explanation about the role of a lawyer and how a lawyer could assist him. Instead, he was told “in our world...you have the right to a lawyer the minute you are questioned by an authority”.¹⁹ The witness remained confused and asked again how a lawyer was “going to help”.²⁰ The investigator then said it was simply about trust – “if you don’t trust any of us here today then you can have a lawyer present to question what the process is.”²¹ Finally, the investigator states that the witness has a right to a lawyer “because that’s what the Rome Statute says”.²² It is accepted that the investigators do eventually explain – in the face of the witness’ apparent ignorance more than an hour into the interview²³ - that [REDACTED] is suspected of [REDACTED] and that this is a crime.²⁴ Crucially, however, at no time did the investigators explain the important protective function a lawyer plays in safeguarding the suspect’s rights and ensuring due process. This is a serious omission which undermines the fairness of the interview and indicates that the witness did not properly understand the nature of the right to counsel and, thus, did not voluntarily waive this right.

Other concerns raised by the Suspect Interview

12. The Defence appreciates that the Trial Chamber has requested submissions on Articles 55(2)(d) and 69(7). However, the Defence notes the following additional areas of concern regarding the overall fairness of the interview.

¹⁹ [REDACTED].

²⁰ [REDACTED].

²¹ [REDACTED]. See also [REDACTED].

²² [REDACTED].

²³ [REDACTED].

²⁴ [REDACTED]. The Defence notes that the explanation emphasised the assistance sought by the Prosecution but without any promise to the witness of immunity or other normal guarantee in exchange for such assistance which a lawyer would normally canvas with the Prosecution.

13. *First*, prior to any caution being given and just 10 minutes after being taken into effective detention (see below), one investigator begins substantive questioning of the witness.²⁵ This was clearly improper.
14. *Second*, the voluntariness of the interview is open to serious question. Indeed, it appears that the witness only understood that the interview was voluntary at a point when he had already been with the investigators for nearly an hour.²⁶ The basis for the witness' confusion is clear. Within 15 minutes of being with the investigators, the witness is told they have evidence "implicating [him] in [REDACTED]",²⁷ that "the purpose of what [they're] doing [there] is to investigate all [REDACTED] matters"²⁸ and that the "end result" is to "obtain arrest warrants".²⁹ An understanding of this initial part of the Suspect Interview explains the witness' testimony to the Chamber that he cooperated because he thought the alternative was arrest.³⁰
15. *Third*, the extent to which Article 55(1)(c) was adhered to is also open to doubt. The witness clearly expressed a preference to communicate in Swahili.³¹ However, rather than simply suspending the interview for a short period until the interpreter arrived, the investigators continued the interview. It is acknowledged that the witness stated he was happy to continue.³² However, the interactions between the investigators and witness clearly indicate that the witness' ability to fully and clearly express himself in English is not such that any part of a suspect interview should have been conducted in the absence of professional language assistance. The Defence also notes that certain crucial

²⁵ [REDACTED] ("Interviewer 1: Were you to report to anybody when you came here?").

²⁶ [REDACTED] ("Interviewer 1: Earlier on in our discussion ... in my discussions with you ... [...] Interviewer 1: I said that you would be coming with me voluntarily. [...] Interviewer 1: ... and that you may leave if you wish. [...] Interviewer 1: Did you understand that? [...] Interpreter: To be honest I didn't understand that ...").

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ [REDACTED].

³⁰ [REDACTED].

³¹ [REDACTED].

³² [REDACTED].

exchanges were not translated at all, notwithstanding the presence of the interpreter.³³ Best practice would have been to conduct the entirety of the Suspect Interview through translation to ensure fairness at all times.

16. *Fourth*, bearing in mind the witness' initial mis-understanding that he had no choice but to accompany the investigators combined with the fact that the witness' phone was taken and he was searched without any indication that he could refuse such a search, the circumstances in which the witness found himself do, at least initially, have the air of effective detention. As a result, it is questionable whether the remainder of the interview was conducted on a voluntary basis. Indeed, once the voluntary nature of the interview was finally explained to the witness, the impression is that he only continued with the interview because he was there now and so proceeded out of resignation.³⁴
17. *Fifth*, the length of the interview is also a point of concern. It appears the witness was first intercepted by the investigators around 11.30 am.³⁵ The final part of the Suspect Interview ends almost exactly 12 hours later at 11.25 pm.³⁶ While there may have been breaks taken during this 12 hour period, it is clear that the witness is being spoken to regularly during this period, often for hour long periods. The Defence submits that the situation was clearly unsatisfactory and unfair to the witness. There appears to be no justification as to why the witness was required to remain with the investigators for such an extended period.

Application of Article 69(7)

18. In light of the breach of Article 55(2)(d) and the other points of concern listed above, the Defence submits that the interview was clearly unfair. The inequality

³³ See, e.g., [REDACTED] (where it is explained to the witness in English that he is suspected of [REDACTED]); [REDACTED] (explanation of the purpose of a lawyer is given).

³⁴ [REDACTED] "**Interpreter:** Although I didn't plan it right away from home. **Interviewee:** ... since he has requested, I can listen.")

³⁵ The second part of the interview commences at 12.05 pm (see [REDACTED]). By this time, the witness has already been with the investigators for over 30 minutes (see [REDACTED]).

³⁶ [REDACTED].

between [REDACTED] and the investigators as regards positions of authority and knowledge of the ICC system required the investigators to show greater care and diligence in explaining the witness' statutory rights than was displayed in the transcripts. Accordingly, pursuant to Article 69(7) and for the reasons set out above including at paragraph 2, the Suspect Interview and its fruits should not be admitted into evidence.

III. Classification

19. These observations are filed confidentially because they refer to testimony heard in private session and to confidential Prosecution witness material.

IV. Requested Relief

20. For the reasons set out above, the Defence respectfully submits that, pursuant to Article 69(7), the Suspect Interview and its fruits should not be admitted into evidence.

Respectfully submitted,



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Dated this 30th Day of July 2015
At The Hague, Netherlands