

**Cour
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**International
Criminal
Court**

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Date: **3 August 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 “Corrected and Amended Version of ‘Provision of Information related to Witness [REDACTED] and Request for Sanctions against the Prosecutor and/or OTP Staff Members’ (ICC-01/09-01/11-1425-Conf)”, ICC-01/09-01/11-1425-Conf-Corr, 10 July 2014

Sources: 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

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 Massidda

**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

Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. The defence for Mr. William Samoei Ruto (the “Defence”) submits this filing following the Defence’s submissions at the hearing held on [REDACTED] 2014, concerning Witness [REDACTED] on the “*specific issue of whether the witness had clearly indicated to the OTP that he was willing to come and testify on the merits of this case, not just Article 70*”.¹
2. The Defence submits that a review of the relevant Prosecution disclosure, received after the [REDACTED] hearing, reveals that [REDACTED] was clearly willing to testify on substantive issues relating to the charges against Mr. Ruto. The witness made this patently clear during his interview with the Prosecution in [REDACTED] 2013. This position remained unchanged when he met with Prosecution counsel [REDACTED] on [REDACTED] 2014. The Defence is accordingly and regrettably compelled to conclude that [REDACTED] oral submissions on [REDACTED] 2014 on this issue were wholly inaccurate.²
3. The Prosecution had a duty to inform the Trial Chamber that [REDACTED] had expressed his willingness to testify. This fact constituted an important and material change of circumstance that the Defence submits the Prosecution was ethically obliged to bring to the attention of the Trial Chamber. This is particularly so given that the asserted refusal of [REDACTED] to testify had been advanced by the Prosecution as the justification upon which [REDACTED].³ No system of criminal justice can properly function unless the prosecuting authority acts with good faith and candour at all times, especially

¹ [REDACTED]

² According to Article 63(b) of the Code of Conduct for the Office of the Prosecutor (“Code”): “*In the course of their duties, Members of the Office shall not [...] (b) knowingly make an untrue statement of material fact to a judge, the Chamber, the Presidency, counsel or the Registry*”. According to Article 71 of the Code, which entered into force on 5 September 2013: “*Without prejudice to the standards of conduct applicable to all Staff members, those representing the Prosecutor at hearings before the Chambers of the Court shall, in particular: [...] (g) not deceive or knowingly mislead the Court, judge, counsel, or the Registry and take all necessary steps to correct an error or inaccuracy as soon as possible after it has been discovered.*”

³ [REDACTED]

towards the judges, which in the case of the ICC are sometimes compelled to make decisions based upon *ex parte* submissions. When changes of circumstances take place in relation to matters that have informed previous decisions of the Trial Chamber, it is imperative that the Trial Chamber is apprised of such new information.

4. Additionally, when the Prosecution was put on notice by [REDACTED] that his previous statement was untrue,⁴ it was obligated to fully investigate all circumstances concerning the falsification of evidence by him and to obtain the truth about all relevant facts pursuant to its obligations under Article 54(1)(a) of the Rome Statute ("Statute"). The Prosecution refused and/or failed to comply with its legal and ethical obligations, to the grave prejudice of Mr. Ruto. The manner in which Prosecution investigators conducted the interview with [REDACTED] between [REDACTED] 2013, was in breach of the Prosecution's duties under the Statute and the Code, in particular its duties detailed in Articles 49(a) and (b), and 51(a) of the Code.⁵
5. The Prosecution further misled the Chamber as to the real circumstances concerning [REDACTED] by providing information which was misleading and inaccurate, as well as failed to provide material information on the matter, in its [REDACTED]⁶ [REDACTED].
6. The failure of the Prosecution to discharge its legal and ethical duties in this case, as required by the Statute and the Code, is sanctionable conduct. The Defence respectfully requests the Trial Chamber to issue a reprimand to the Prosecutor and/or the appropriate Prosecution staff members for the conduct complained of

⁴ The Prosecution interviewed [REDACTED] between [REDACTED] 2013.

⁵ See Annex A hereto, containing a copy of the transcripts of the Prosecution's interview with [REDACTED] between [REDACTED] 2013.

⁶ [REDACTED].

in this filing, namely for: (i) failing to inform the Chamber of the material change in circumstance which affected its previous decision [REDACTED]; (ii) providing information which was untrue in the course of oral submissions in court; (iii) failing to provide material information and providing information which was misleading and inaccurate in its written submissions; and (iv) the manner in which Prosecution investigators conducted the interview with [REDACTED] between [REDACTED] 2013.

7. There are basic tenets of conduct for officers of the court which must be followed to ensure the proper administration of justice. Further, it is the right of an accused that any investigations and prosecution against him be conducted by a prosecuting authority which is fair, impartial and competent. The “‘fight against impunity’ does not provide a justification for infringing upon the rights of the accused”.⁷
8. This request is submitted on a confidential basis as it contains information concerning confidential Prosecution witnesses.

II. Procedural Background & Defence Submissions

9. On [REDACTED] 2013, the Chamber issued its “Decision [REDACTED]”,⁸ in which it granted the Prosecution’s request to [REDACTED]. The Chamber granted the request on the basis that [REDACTED]⁹ [REDACTED].¹⁰
10. The Defence was not provided with details of the circumstances which necessitated the Prosecution withdrawing [REDACTED], save the limited information available in redacted Prosecution filings that the witness was not

⁷ *Prosecutor v. Germain Katanga*, Minority Opinion of Judge Christine Van den Wyngaert, 7 March 2014, ICC-01/04-01/07-3436-AnxI, para. 50.

⁸ [REDACTED]

⁹ [REDACTED]

¹⁰ [REDACTED]

willing to testify and had decided to withdraw from the ICC process [REDACTED].¹¹ In these filings, the Prosecution additionally submitted that [REDACTED]¹² [REDACTED].¹³

11. It was only on [REDACTED] 2014, [REDACTED] commenced [REDACTED] testimony, that the Defence was put on notice that the hearsay evidence [REDACTED] was expected to provide originated from [REDACTED].¹⁴ On the same day, the Prosecution disclosed the transcripts of the interview it held with [REDACTED] between [REDACTED] 2013.

12. On [REDACTED] 2014, the Defence made an oral application seeking the exclusion of the proposed testimony of [REDACTED].¹⁵ [REDACTED]. To this end, reference was made to the interview records of [REDACTED] with Prosecution investigators, where he responded affirmatively when asked the following by the Prosecution investigator [REDACTED]: “*Are you willing to stand by the statement that you just gave us over the last 2 days and swear upon it. And tell the truth and nothing but the truth?*”¹⁶

(i) Oral submissions of Prosecution Counsel on [REDACTED] 2014

13. In response to the Defence oral application, Prosecution counsel [REDACTED] submitted that he was directly informed by [REDACTED] that he was not willing to testify.¹⁷ [REDACTED] repeated this position, more than once in his submissions,¹⁸ including the statement: “*I personally met him on several occasions,*

¹¹ [REDACTED]

¹² ICC-01/09-01/11-866-Conf-Red2, para. 23.

¹³ [REDACTED]

¹⁴ [REDACTED]

¹⁵ [REDACTED]

¹⁶ See Annex A hereto – Transcript of Interview of [REDACTED], KEN-OTP-0131-0283_R01 at p. 0315, lines 1067 to 1089.

¹⁷ [REDACTED]

¹⁸ [REDACTED]

the witness has categorically explained to me and stipulated to me in very clear terms that he does not want to come and testify [...]".¹⁹

14. On [REDACTED] 2014, the Defence requested disclosure which supported [REDACTED] submissions outlined above. In response to this request, the Prosecution disclosed the: (i) [REDACTED],²⁰ [REDACTED];²¹ and (ii) [REDACTED].²²
15. Having carefully reviewed the disclosure received, the Defence is compelled to regrettably conclude that [REDACTED] submissions were inaccurate. Further, the Defence has been provided with only one record of a meeting between [REDACTED] and [REDACTED]. In that meeting, the witness was told that his "statements to the Prosecution" would be disclosed to the Defence along with his identity. The witness was informed by [REDACTED] that his identity would be disclosed "regardless of his refusal". Critically, and contrary to the stated position of prosecuting counsel, there was no discussion concerning the willingness or otherwise of [REDACTED] to testify.²³
16. As at the date of this filing, the Defence has not been provided with any information by the Prosecution indicating that since his interview on [REDACTED] 2013, [REDACTED] has expressed an unwillingness to testify in

¹⁹ [REDACTED]. The Defence notes that it was only *after* it requested disclosure of information concerning [REDACTED] representations (that the witness had expressly and clearly informed him of his unwillingness to testify), and after it informed the Chamber that such disclosure would be necessary to also determine if there were any ethical breaches, did [REDACTED] attempt to clarify that the purpose of his meeting with [REDACTED] was to discuss disclosure of his identity. Nevertheless, [REDACTED] repeated that his position was that the witness's response gave a clear indication that [REDACTED] was unwilling to testify. As at the date of this filing, the Prosecution has not answered the Presiding Judge's question posed at the [REDACTED] hearing: "[A]re you saying that all the witness told you was, 'I do not want my identity disclosed to the Defence.', or did the witness also say, 'I do not want to come and testify.'?" ([REDACTED]).

²⁰ [REDACTED]

²¹ Annex A is the investigative report (KEN-OTP-0131-0415_R01) dated [REDACTED] 2014, related to a meeting between [REDACTED] and [REDACTED] and a Prosecution investigator held on [REDACTED] 2014. Annex C is an investigative report (KEN-OTP-0123-0299_R01) prepared by Investigator [REDACTED] related to the Prosecution interview with [REDACTED] between [REDACTED] 2013.

²² [REDACTED]

²³ [REDACTED]

the present trial. He expressed a clear willingness to testify to the information he provided to Prosecution investigators during the interview sessions held between [REDACTED] 2013. The information he provided at that time undoubtedly concern the merits of this case and include the following allegations: (i) details about PNU rallies;²⁴ (ii) details about meetings [REDACTED] at Mr. Ruto's house including the meeting [REDACTED];²⁵ (iii) details [REDACTED] Mr. Ruto say in meetings concerning the violence²⁶ and who attended meetings where Mr. Ruto spoke;²⁷ (iv) details of what happened at a political meeting/rally in November 2007 at Mr. Ruto's residence;²⁸ (v) details about what the witness saw and heard at the ODM Rally in Huruma in December 2007 attended by Mr. Ruto and other ODM leaders;²⁹ (vi) circumstances which led Kikuyus to leave [REDACTED] in 2007;³⁰ (vii) details of what took place in [REDACTED] on 27 December 2007 (voting day);³¹ (viii) details of what took place on the date of the announcement of the results of the Presidential election declaring Mr. Kibaki as the winner and the events that followed, including a meeting in [REDACTED] and the violence that followed;³² (ix) details concerning the burning and looting of Kikuyu property in [REDACTED], and killings of civilians in [REDACTED];³³ (x) details about the meeting attended by "elders" in [REDACTED] during the violence in early 2008;³⁴ (xi) details of efforts by Prosecution witnesses and third parties to fabricate evidence in order to falsely implicate Mr. Ruto in the charges.³⁵

²⁴ Annex A – Transcript of Interview KEN-OTP-0131-0162_R01 at p. 0164-0172, lines 42-335.

²⁵ Annex A – Transcript of Interview KEN-OTP-0131-0162_R01 at p. 0174-0175, lines 394-442.

²⁶ Annex A – Transcript of Interview KEN-OTP-0131-0162_R01 at p. 0178-0179, lines 535-546.

²⁷ Annex A – Transcript of Interview KEN-OTP-0131-0162_R01 at p. 0179, lines 549-570.

²⁸ Annex A – Transcript of Interview KEN-OTP-0131-0162_R01 at p. 0179-0181, lines 572-0633.

²⁹ Annex A – Transcript of Interview KEN-OTP-0131-0162_R01 at p. 0181-0184, lines 634-724.

³⁰ Annex A – Transcript of Interview KEN-OTP-0131-0162_R01 at p. 0184-0185, lines 732-780.

³¹ Annex A – Transcript of Interview KEN-OTP-0131-0162_R01 at p. 0186-0187, lines 782-833; Transcript of Interview KEN-OTP-0131-0199_R01 at p. 0201-0202, lines 50-100.

³² Annex A – Transcript of Interview KEN-OTP-0131-0162_R01 at p. 0187-0189, lines 846-890; Transcript of Interview KEN-OTP-0131-0199_R01 at p. 0202- 0208, lines 96-280.

³³ Transcript of Interview KEN-OTP-0131-0199_R01 at p. 0208-0215, lines 309-524.

³⁴ Transcript of Interview KEN-OTP-0131-0199_R01 at p. 0215-0216, lines 526-561.

³⁵ Transcript of Interview KEN-OTP-0131-0132 at p. 0137-149, lines 147-550.

17. Further, it is noted that during its interview on [REDACTED] 2013, the Prosecution investigator [REDACTED] formed the view that [REDACTED] was not under any threat and that his previous claims of being in fear were false. [REDACTED] confirms during the interview that *“it’s of course, become clear today that you’ve never had any security concern, apart from rumours... actually, baseless rumours, unfounded rumours”*.³⁶
18. [REDACTED].³⁷ [REDACTED].³⁸ The fact that the Prosecution’s position had changed and that the witness’s security concerns were *“baseless”* and based only upon *“unfounded rumours”* constitutes an additional matter which, the Defence respectfully submits, the Prosecution was ethically compelled to bring to the Chamber’s attention as soon as practical after this information was received (i.e. in [REDACTED] 2013).
19. Prosecuting counsel submitted that: *“[h]ad the witness indicated to the Prosecution at any time that he would want to come and testify or he had changed his position in coming to testify before this Court, the Prosecution would have made a reg 35 application to this Chamber to allow the witness to come and testify since he has vital information.”*³⁹ Prosecuting counsel [REDACTED] repeated the Prosecution’s position again that *“had the witness at any point indicated that he did want to come and testify, your Honours, I can assure you we would have made an application for that because his information is vital”*.⁴⁰ In these circumstances, the Prosecution was duty-bound to apply to the Chamber for leave for [REDACTED] to be re-added to the witness list and his testimony presented before the Chamber,

³⁶ Transcript of Interview KEN-OTP-0131-0283_R01, at p. 0293, lines 323-327.

³⁷ [REDACTED]

³⁸ [REDACTED]

³⁹ [REDACTED]

⁴⁰ [REDACTED]

[REDACTED]. The failure of the Prosecution to so act is regrettable and a matter of serious concern to the Defence.

20. Whether the witness was going to provide an account which was favourable to the Prosecution is an entirely separate issue and does not justify the Prosecution's silence on such matters. The fact that the account given by [REDACTED] during the [REDACTED] 2013 interviews undermined the Prosecution case does not justify the Prosecution's abdication of its duty of candour owed to the Trial Chamber. Indeed, the converse is the case. The exculpatory nature of the evidence made immediate and timely disclosure to the Trial Chamber of the new account/change in circumstances even more necessary. [REDACTED] confession that he had lied in his previous account (upon the instigation of [REDACTED]) had real and profound implications on the propriety of calling [REDACTED] at all. This is particularly so as [REDACTED] was intended to provide hearsay evidence of information provided to [REDACTED] by [REDACTED]. This constitutes a distinct and separate reason why the Prosecution was obligated, if acting in conformity with its applicable statutory duties and professional standards, to bring these matters to the attention of the Chamber in a timely manner, and certainly before calling [REDACTED] to the stand. The Prosecution could then, if it did not intend to rely upon [REDACTED], have applied to the Chamber for leave to withdraw [REDACTED] from its witness list for the real reasons – the falsity of his account, as it did with P-25. [REDACTED] should also have been withdrawn in these circumstances, or at least the Prosecution was obligated not to lead the knowingly unreliable hearsay evidence the witness allegedly received from [REDACTED].

21. The failure to bring the material change of circumstances and all relevant and accurate information on this issue to the attention of the Chamber in a timely

and clear fashion raises, as noted by the Presiding Judge, “a serious matter”.⁴¹ Of equal concern are the averments made by Prosecuting counsel when this issue was raised in court by the Defence. For reasons detailed in this filing, the Defence is compelled to conclude that Prosecuting counsel [REDACTED] fell well short in his duty of candour and ethical obligations not to knowingly mislead the Court while making submissions in response to the Defence application. His submissions were simply not factually correct. A careful review of the transcript and the disclosures provided to the Defence subsequently, demonstrate a worrying trend in which the aim of Prosecution counsel appeared to be countering Defence submissions with arguments ‘to win a point’ instead of objective, considered and accurate responses expected from officers of the court.

(ii) Misleading and False information contained in Annex C to Prosecution Filing 1343

22. The Defence submits that the Prosecution has acted improperly and in breach of its duties, in annexing an “Investigator’s Report” as Annex C to its [REDACTED],⁴² which provides a misleading summary of the purpose, nature and content of the interview between the Prosecution and [REDACTED] and which failed to provide material information to the Chamber. The most critical information that was not provided in the Investigator’s Report was that [REDACTED] was indeed willing to testify. The Investigator’s Report purports to provide a summary of Article 70 issues derived during the interview. It gives the impression that [REDACTED] was changing his original account because of undue pressure and/or interference which may give rise to Article 70 concerns. This is false.

⁴¹ [REDACTED]

⁴² [REDACTED]

23. Despite significant (and the Defence submits undue) pressure from Prosecution investigators, [REDACTED] was consistent during his entire interview between [REDACTED] 2013 that: (i) he was providing truthful testimony voluntarily out of his own free will;⁴³ (ii) nobody from “Ruto’s side” knew the original account he had provided to the Prosecution in 2012 and so could not influence him;⁴⁴ and (iii) that he was willing to testify in court. None of these critical issues is mentioned in Annex C.
24. A thorough and complete reading of the transcripts of the interview leaves no room for doubt – [REDACTED] was firm in his position that his previous account provided in 2012 was false, and the account he gave the Prosecution between [REDACTED] 2013, was the truth. A proper reading of the transcripts further makes clear that the statement in Annex C that *“Later in the interview, witness [REDACTED] admitted that his new version he had provided to Investigators was in fact a lie and he indicated his original version being the statement that was obtained was in fact the truth”*, is simply not true. The Prosecution itself expressed doubts concerning the veracity of the report by its investigators,⁴⁵ but downplays the impropriety by referring to the transcript of the interview itself as being “ambiguous”. The Defence submits that there is no ambiguity.
25. Paragraph 16 of Prosecution filing 1343 makes it clear that Prosecution counsel had reviewed the [REDACTED] 2013 interview transcripts in drafting this filing. Accordingly, counsel should have known that [REDACTED] had indicated his willingness to testify. This important fact was not included in Annex C, nor in the substantive filing and was denied by Prosecution counsel [REDACTED]

⁴³ KEN-OTP-0131-0132_R01, at p. 0137, lines 152-163; KEN-OTP-0131-0132_R01 at p. 0138, lines 187-193; KEN-OTP-0131-0132_R01 at p. 0147, line 503; KEN-OTP-0131-0199, at p. 0225, lines 855-866; KEN-OTP-0131-0199, at p. 0226, line 890 and KEN-OTP-0131-0230, at p. 0246, line 528.

⁴⁴ KEN-OTP-0131-0132 at p. 0157, line 0856 to p. 0158, line 0876, and KEN-OTP-0131-0283_R01, at p. 0296, lines 451 to p. 0297, line 453.

⁴⁵ ICC-01/09-01/11-1343-Conf-Red, para. 16.

during his oral submissions to the Chamber on [REDACTED] 2014. A prosecutor, acting in good-faith and impartially, would not have appended Annex C to its filing. Rather, a diligent prosecutor discharging his or her duties properly would have ensured that all utterances and averments made to the Chamber were accurate, complete and true.

26. The Defence is left with no choice but to conclude that the Prosecution in this case deliberately withheld from the Chamber, at all stages, the critical fact that [REDACTED] was willing to testify to the merits of the case against Mr. Ruto. The Defence respectfully submits that judicial intervention is necessitated now to ensure that the Prosecution takes steps to ensure such conduct is not repeated and the integrity of this trial is protected.

(iii) Conduct of Prosecution Investigator during the interview of [REDACTED]

27. The Defence has previously submitted that it has been significantly prejudiced by the wholly deficient and inept investigation of this case by the Prosecution.⁴⁶ The interview conducted by Prosecution investigators [REDACTED] and [REDACTED] with [REDACTED] between [REDACTED] 2013 is a classic example of this deficiency and ineptitude. Namely, the Prosecution investigators stubbornly refused to receive PEXO information that [REDACTED] had come forward voluntarily to provide. Rather, upon hearing that the account given was contrary to the narrative the Prosecution is alleging in the present case, a confrontational and accusation laden stance was adopted by the Prosecution investigators.

⁴⁶ Defence request regarding the first eight witnesses to be called by the Prosecution, 19 July 2013, ICC-01/09-01/11-818, para. 2.

28. The Prosecution was under a legal and ethical duty to vigorously pursue its investigations into all matters concerning [REDACTED] false statement and to uncover the network of witnesses and intermediaries who were deceiving the Court (and hence obstructing the proper administration of justice contrary to Article 70 of the Statute). [REDACTED] was a key witness whose evidence would shed light on some critical issues surrounding the case against Mr. Ruto. [REDACTED] not only voluntarily made contact with the Prosecution investigators in order to tell them the truth about the falsification of evidence, but importantly, he was willing to come forward and provide this information on oath to the Judges of the ICC.
29. When the interview commenced on [REDACTED] 2013, [REDACTED] informed the Prosecution investigators that he had previously provided a false account to the Prosecution because of the encouragement of another Prosecution witness, [REDACTED],⁴⁷ and that he wanted to tell the OTP investigators *"the truth completely without any worry"*.⁴⁸ [REDACTED] continued to provide information about allegations which form the basis of and are relevant to the Prosecution's case against Mr. Ruto as detailed in paragraph 16 above.
30. During the interview, Prosecution investigator [REDACTED], on [REDACTED] 2013, told [REDACTED] that: *"You gave us an elaborate statement ... in 2012 ... over a period of 3 days. If I lied about these things ... [I] would basically go through each and every part that I lied about and I will say "I lied about this. I lied about that."*⁴⁹ [REDACTED] is correct that the proper way to proceed was for the witness to have provided a truthful account of each and every allegation he previously made in 2012. Where [REDACTED] fails in [REDACTED] professional and ethical obligations is that it was [REDACTED] responsibility as the investigator

⁴⁷ [REDACTED]

⁴⁸ Annex A – Transcript of Interview KEN-OTP-0131-0132_R01 at p. 0160, lines 929-954.

⁴⁹ Annex A – Transcript of Interview KEN-OTP-0131-0283 at p. 0307, lines 800-832.

to take the witness through his previous statement and question him on the veracity of each and every previous allegation. This was the duty of the investigator, not the witness. This is precisely what [REDACTED] failed to do, to the peril of Mr. Ruto and to the jeopardy of the proper administration of justice. [REDACTED] failed in [REDACTED] duties despite recognising that [REDACTED] had “*made strong false allegations against one of the suspects. Mr. RUTO*”⁵⁰ when he was interviewed in 2012.

31. The Prosecution investigator unnecessarily reminded the witness at several points to give an account of what he heard and saw himself, even though it was apparent that was what the witness was in fact doing.⁵¹ The Prosecution investigator’s interjections appear to have been made in order to distract and curtail the witness from providing details of exonerating information. This is apparent in [REDACTED] response to the interventions where he asks the investigator “*for example, if I go to the extent of saying that somebody is innocent...you won’t allow me to say that.*”⁵² The witness told [REDACTED] that [REDACTED] interruptions made him feel that if he continued speaking, what he was saying was not going to be accepted by the Prosecution.⁵³ The Defence submits that the manner in which [REDACTED] handled the witness was “utterly inappropriate”.⁵⁴

32. During the interview, [REDACTED] engaged in a ‘personal attack’ upon the witness. [REDACTED] displayed a worrying absence of objective detachment,

⁵⁰ Annex A – Transcript of Interview KEN-OTP-0131-0283 at p. 0310, lines 905-913.

⁵¹ See, e.g., Annex A – Transcript of Interview KEN-OTP-0131-0199_R01 at p. 0221, lines 723-739.

⁵² Annex A – Transcript of Interview KEN-OTP-0131-0199_R01 at p. 0219, line 680 to p. 0220, line 682.

⁵³ Annex A – Transcript of Interview KEN-OTP-0131-0199_R01 at p. 0222, line 780 to p. 0223, line 791.

⁵⁴ *Prosecutor v. Callixte Mbarushimana*, Decision on the confirmation of charges, 16 December 2011, ICC-01/04-01/10-465-Red, para. 51.

but rather unleashed a tirade of accusation and baseless speculation in a bid to discredit a narrative that the witness was clearly willing to give.⁵⁵

33. The verbal manipulation that characterised [REDACTED] conduct of the interview is further compounded by the inequality in arms during the interview between interviewer and interviewee. In particular, the interview was conducted through interpretation and the witness appeared less sophisticated than the interviewer. The interviewee was clearly unhappy, he reported feeling unwell,⁵⁶ and his discomfort was further reflected in verbose expressions of remorse.⁵⁷ The Defence cannot help wonder where the Prosecution's oft asserted regard for Article 68 had vanished to during its interview with [REDACTED] on [REDACTED] 2013.

34. Contrary to Article 49 of the Code of Conduct, and the requirement under the ICC staff regulations that staff members act with impartiality, fairness, honesty and truthfulness, at the conclusion of the interview, [REDACTED] forced [REDACTED] own narrative upon the witness. [REDACTED] improperly – and without basis – asserted that [REDACTED] 'new' version of events was false, and the original, 2012 version was true.⁵⁸ The witness was given little opportunity to respond, and when he did, he remained true to his 'new' version of events.⁵⁹ The interview can only be described in the same way that Pre-Trial Chamber I in the *Mbarushimana* case described the behaviour of the Prosecution

⁵⁵ Note [REDACTED] remarks, in KEN-OTP-0131-0283 at p. 0291, lines 275-277: "*Your motivation always shifts according to what you can gain.*" See again KEN-OTP-0131-0283 at p. 0304, line 717 to p. 0305, line 724: "[B]ut just for the record, I would like to make clear... you withheld vital information for your own benefit... and you only produced it now because perhaps you think it's convenient for you."

⁵⁶ Annex A – KEN-OTP-0131-0283_R02, at p. 321, line 1265.

⁵⁷ Annex A – KEN-OTP-0131-0283_R02, at p. 0327, lines 1475-1482. See also p. 0310, line 920.

⁵⁸ Annex A – KEN-OTP-0131-0283_R02, at p. 0311, lines 946-947: "*Are you asking me now to forgive you because you came here and just lied to us over the last 2 days?*" See also p. 0312, lines 976 to p. 0315, line 1060, p. 0316, lines 1096-1102, p. 0321, lines 1278-1280, p. 0322, lines 1291-1294, and p. 0326, lines 1450-1453.

⁵⁹ Annex A – KEN-OTP-0131-0283_R02, at p. 0311, line 954 to p. 0312, line 958, p. 0313, line 1015, and p. 0315, lines 1088-1089.

investigator in that case: *“The reader of the transcripts of interviews is repeatedly left with the impression that the investigator is so attached to his or her theory or assumption that he or she does not refrain from putting questions in leading terms and from showing resentment, impatience or disappointment whenever the witness replies in terms which are not entirely in line with his or her expectations.”*⁶⁰

35. This interview constitutes a staggering example of a general refusal on the part of the Prosecution to discharge the mandatory obligations contained in Article 54(1) of the Statute. The Defence submits that professional responsibilities and rules of deontology, on the level of the individual staff members referred to above, are given scant regard, if considered at all. The overall impression is that the Prosecution does not want to hear anything which may not support its narrative in this case and is more than willing to accept and rely on changing accounts of events that suits its narrative.⁶¹

36. The prejudice to the Defence and to Mr. Ruto is even more stark in this instance because [REDACTED] is in fear that if his name were disclosed to the Defence, *“his life would be in jeopardy [...] that even if a gun was placed on his head and a coffin brought in the room he would never agree to have his name disclosed”*.⁶² Such a witness is most unlikely to agree to meet with the Defence and equally, the Defence would not, in the interest of his welfare, want to contact this witness, given his stated, albeit exaggerated, fears. In the circumstances, the Defence will not be able to obtain this exonerating information and present it to the Chamber to consider in its assessment of the truth of the case against Mr. Ruto.

⁶⁰ *Prosecutor v. Callixte Mbarushimana*, Decision on the confirmation of charges, 16 December 2011, ICC-01/04-01/10-465-Red, para. 51.

⁶¹ [REDACTED]

⁶² See ICC-01/09-01/11-1343-Conf-AnxA-Red, containing a copy of the Investigative Report KEN-OTP-0131-0415_R01, at 0416.

37. The Defence submits that this Chamber has the authority to address the misconduct of the Prosecution investigator during the interview with [REDACTED]. Trial Chamber V(b) has held that it *“has the power to address misconduct occurring outside the courtroom by having recourse to its broad discretionary powers to ensure a fair trial and uphold the interests of justice as provided for in Article 64(2) of the Statute and to rule on any other relevant matters in performing its functions as provided for in Article 64(6)(f) of the Statute.”*⁶³

38. The conduct of Prosecution counsel and investigators detailed in this filing constitutes a serious breach of the legal and ethical obligations of the Prosecutor and her staff members. It speaks of a prosecution entity which had abdicated its duties of candour, impartiality and fairness and is driven by a “conviction at all cost” attitude. The manner in which Prosecution counsels and investigators have handled the issue concerning [REDACTED] is in breach of Mr. Ruto’s fair trial rights. As observed by Her Honour, Judge Van Den Wyngert: *“Considerations about procedural fairness for the Prosecutor and the victims and their Legal Representatives, while certainly relevant, cannot trump the rights of the accused. After all, when all is said and done, it is the accused - and only the accused - who stands trial and risks losing his freedom and property.”*⁶⁴

III. Relief requested

39. In light of the foregoing, the Defence respectfully requests that the Chamber :

- (i) issue a reprimand and/or appropriate sanction to the Prosecutor and/or the appropriate Prosecution staff members for the conduct complained of in Section II above; and

⁶³ Decision on the Defence application concerning professional ethics applicable to prosecution lawyers, 31 May 2013, ICC-01/09-02/11-747, para. 14.

⁶⁴ *Prosecutor v. Germain Katanga*, Minority Opinion of Judge Christine Van den Wyngaert, 7 March 2014, ICC-01/04-01/07-3436-AnxI, para. 311.

- (ii) remind the Prosecutor and the Prosecution that Prosecution counsel and investigators have, individually, the legal and ethical obligation to: (a) act fairly, honourably and impartially; (b) to comply with Article 54(1)(a) obligations strictly; (c) that counsel must not make oral or written submissions which are false or misleading; and (d) take all necessary steps to correct an error or inaccuracy as soon as possible after it has been discovered.

Respectfully submitted,



Karim A.A. Khan QC

Lead Counsel for Mr. William Samoei Ruto

Dated this 3rd Day of August 2015
At The Hague, the Netherlands