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Date: **6 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 Sang Defence Response to 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,
11 May 2015, ICC-01/09-01/11-1875-Conf**

Source: Defence for Mr. Joshua arap Sang

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. Joshua arap Sang (“Defence”) hereby joins and supports the Request made by the Ruto Defence team on 4 May 2015 for the Chamber 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.¹ The Defence agrees with the Ruto Defence that in its current form, the Prosecution’s Rule 68 Application is of an unacceptable scope, given that it relies upon allegations which are untested and which do not form part of the official record. In short, the Rule 68 Application usurps the ongoing trial process. The evidence adduced therein must therefore be reduced and confined to its proper limits, in order to mitigate prejudice to the accused and to comply with previous decisions of this Chamber.

2. The relief sought by the Ruto Defence, namely the exclusion of some of the supporting material and the re-filing of the Application,² and for the Chamber to only rely on material that has been formally admitted into the record of the case,³ is both fair and reasonable. It is not a punitive request; it balances the rights of the accused with the right of the Prosecution to litigate an important issue. The Defence had intended to raise many of the present arguments in its substantive response to the Rule 68 Application, and to request that the entire application be denied, in part, on these bases. However, and without prejudice to its eventual response on the merits, the Defence appreciates that it is expeditious and logical to deal with these preliminary issues now and in a constructive manner.⁴

3. The Defence files this response confidentially, because both the Rule 68 Application and the Request have been filed confidentially and it refers to protected witness information. When the Prosecution files its public-redacted version, as it has indicated it would do “presently”,⁵ the Defence will be in a position to do the same.

¹ ICC-01/09-01/11-1872-Conf, 5 May 2011 (‘Request’). The Prosecution’s ‘Rule 68 Application’ is ICC-01/09-01/11-1866-Conf, 29 April 2015.

² Request, paras 4 and 34.

³ Request, paras 24 et seq.

⁴ Request, paras 28-32.

⁵ Rule 68 Application, para. 8.

II. SUBMISSIONS

4. In addition to the cogent, clear and persuasive arguments raised by the Ruto Defence in its Request, the Defence additionally raises and reiterates the following concerns about the supporting materials relied upon by the Prosecution in its application, and submits that these concerns likewise justify the exclusion of the materials from the Chamber's consideration.

5. The Defence submits that the Chamber is given a broad discretion to rule on all relevant matters under Article 64(6)(f). The Chamber should recall this power in determining what materials it should rely upon in determining the Rule 68 Application. It should also recall its responsibilities pursuant to Article 64(2) of the Rome Statute, to ensure that a trial is fair and conducted with full respect for the rights of the accused, in order to safeguard the proceedings from abuse. This Chamber, in the context of a bar table application, has already stated that it has the "power to exclude evidence, which may include for reasons of fairness, expeditiousness and public policy. Therefore, relevant evidence that may prejudice the fairness of the trial, including the rights of the accused or the fair evaluation of testimony or other evidence, may be excluded on that basis."⁶

A Prosecution by Paper

6. As it stands, the Prosecution seeks to prove its Main Case against the accused by relying on incriminatory prior recorded testimony of [REDACTED] witnesses whom they claim were the subject of interference. To substantiate this claim, the Prosecution relies only to a small degree on testimony or exhibits that have been elicited and tested in court, and to a large degree on annexes full of literal "paper tigers" purporting the existence of interference.⁷ This risks having the Trial Chamber embark upon a paper-based procedure akin to that envisioned for the confirmation of charges hearing, but where the Defence are given even less notice of the facts, and less of an opportunity to present evidence and to challenge the veracity and reliability of the Prosecution evidence, both in terms of the Main Case and the allegations of interference. The

⁶ ICC-01/09-01/11-1353, 10 June 2014, para 16.

⁷ Rule 68 Application, paras 1 and 2 ("The evidence already on record, together with that presented in support of the application, establishes the existence of an organized and effective scheme to persuade Prosecution witnesses to withdraw or recant their evidence, through a combination of intimidation and bribery").

Chamber should curtail the Prosecution's excesses before there is irreparable harm to the fairness of the proceedings.

7. Article 69(2) emphasises the principle of orality, stating that the testimony of a witness at trial shall be given in person, subject to a few exceptions. While this article is more directly relevant to the hearings in the Main Case, the Defence submits that as a corollary, the article requires that as far as possible, the Chamber should hear directly from someone who is making allegations of a serious nature which impact on the proceedings. The Ruto Defence rightfully refers to a subsidiary *voir dire* process as the best way for the Chamber to test contentious factual allegations, which do not directly relate to the Main Case.⁸

8. Instead, the Prosecution has chosen a contrary, paper-based approach, which deprives the Defence of the right to test the veracity of the allegations and the credibility of those making the allegations. Especially given the history of this case, the Prosecution should be the first to admit that what is captured in a conversational manner during an interview or during a phone call with a witness, is often very different from what is said when an individual is seated in a courtroom and has sworn an oath to tell the truth. The Chamber should be wary of putting too much reliance on uncontroverted paper statements regarding interference, even if the Chamber only has to "satisfy itself" in the context of a Rule 68 application. For this reason, the Ruto Defence's request that the only material which should be relied upon in support of the Rule 68 Application is material which has been formally admitted into the record of the case,⁹ has great merit.

9. Indeed, the Prosecution has insisted on placing allegations of interference onto the record of the case. The Prosecution has requested that witnesses be summoned to testify before the Chamber in the Main Case, even where the Prosecution had advance notice that the witnesses had recanted material portions of their original statements, precisely so that the Prosecution could lead evidence on record about interference. The Prosecution has asked for [REDACTED] of its witnesses to be declared hostile, so that it could question them, on the record, about intimidation or bribery.¹⁰ In so doing, the Prosecution must have realized the value of sworn testimony as opposed to

⁸ Request, paras 21 and 27.

⁹ Request, paras 24-26.

¹⁰ Rule 68 Application, paras 4-5.

accusations on paper. The Prosecution has taken an extraordinary amount of court time to ask witnesses about interference allegations, implicitly acknowledging that the Trial Chamber could not properly make a finding about interference on the basis of untested materials. The Prosecution cannot now have it both ways and suggest that it is sufficient to rely on unchallenged statements and hearsay reports.

Prejudice to Defence Preparation

10. It would be highly prejudicial to the Defence if the Chamber were to place reliance on the supporting materials of the Rule 68 Application, for which the Defence has had little notice or has previously seen little need to investigate. The Defence, with the guidance of the Chamber, has always considered the Article 70 allegations to be peripheral¹¹ and not sufficiently connected to the Main Case to warrant spending limited time and legal aid resources on investigating and analysing all of them. As the factual assertions do not concern the Main Case, and, as the Ruto Defence points out, have been disclosed as Rule 77 or Pexo material,¹² the Defence has not focused on them. It would be extremely unfair to expect the Defence to now participate in a full-fledged competition between witness statements and investigation reports collected by the Prosecution over the course of three years, and those collected by the Defence in a matter of weeks.

Inappropriate Declarations of Lead Investigator [REDACTED]

11. The Defence contends that the solemn declaration of the lead investigator into Article 70 matters, [REDACTED], and the solemn declaration of the lead investigator for the Kenya situation regarding [REDACTED], annexed to the Rule 68 Application as Annex C1 and D2 respectively, should be struck out as unnecessary and improper. The declaration of [REDACTED] is 68 pages long and contains a comprehensive overview of the alleged interference in relation each witness. As [REDACTED] himself explains in paragraph 7: “The main purpose of this declaration is to explain the nature and background of the article 70 investigation, the investigative steps taken, the nature of the evidence and data gathered and the results of analysis performed on such evidence and data. In order to understand the investigative steps taken, it is

¹¹ ICC-01/09-01/11-1625-Conf, 31 October 2014, para. 32.

¹² Request, para. 11.

necessary to briefly detail certain reports from witnesses and other persons, which resulted in action by the OTP.”

12. Furthermore, in [REDACTED] declaration, he attests to information and events for which he has no personal knowledge, even where other investigators who were better placed to depose to the issue were available to comment.¹³ For instance, in relation to [REDACTED], [REDACTED] did not supervise the related investigations, yet he includes a summary overview based on documentary records “for the sake of convenience”.¹⁴ Essentially, in so doing, [REDACTED] attempts to give an expert veneer to a collection of investigators’ reports and interviews, the records of which the Chamber is able to read and analyse for itself. There is no value to such an approach.
13. The Prosecution ostensibly annexed his declaration “as per the direction of the Chamber”.¹⁵ The Chamber’s *Decision No. 4 on the Conduct of Proceedings (Evidence and Solemn Declarations in Support of Applications)*,¹⁶ at paragraph 2, reads:

“HENCEFORTH, where such factual allegations are critical to the Chamber’s determination of an application, the requesting party or participant must support the assertion with evidence in the manner of documents or other evidential material. *In the absence of such evidential document or material*, the party or participant must provide a solemn declaration attesting to (a) the truth of any factual assertion, or (b) information (including its source) and belief of the truth of such critical factual assertion.” (emphasis added)

In this instance, there is a plethora of documents and other evidential material and so [REDACTED] declarations are necessary to comply with the Chamber’s direction. In any event, his declaration goes well beyond simply attesting to the truth of any factual assertions or information.

14. The Defence submits that in actuality, [REDACTED] declarations impermissibly add substantive arguments and explanations¹⁷ to the core Rule 68 Application and should be struck out for being an unnecessary and improper back door expansion of the

¹³ Many of the other involved investigators provided cursory solemn declarations in Confidential Annexes C2, C3, C4, C6, C7, C8, C9, C10, C11 and C12.

¹⁴ ICC-01/09-01/11-1866-AnxC1-CONF, paras 8 and 261; ICC-01/09-01/11-1866-AnxD2-CONF.

¹⁵ Rule 68 Application, para. 59.

¹⁶ ICC-01/09-01/11-1312, 20 May 2014.

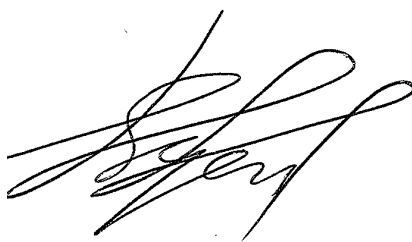
¹⁷ Regulation 36(2)(b) explicitly states that any appendix attached to a document filed by a party or a participant “shall not contain submissions”.

already-enlarged 80-page filing. Indeed, this Chamber has previously declined to consider the contents of an annex, where the annex was found to contain anything other than non-argumentative material.¹⁸

III. CONCLUSION

15. Accordingly, for the above reasons, and for the reasons set out in the Ruto Defence Request, the Defence joins and supports the Ruto Defence request for the Trial Chamber to declare that the supporting material relied on in the Rule 68 Application is inadmissible for those purposes and to 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,



Joseph Kipchumba Kigen-Katwa
On behalf of Mr. Joshua arap Sang
Dated this 6th day of August 2015
In Nairobi, Kenya

¹⁸ ICC-01/09-01/11-844, 7 August 2013, paras 8-9.