

ANNEX

SEPARATE FURTHER OPINION OF

JUDGE EBOE-OSUJI

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1. I wholly share the decision of the Chamber, rejecting the application of Mr Ruto's Counsel. I do, however, wish to express the following thoughts separately.

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2. Article 70 aims to underscore the need for everyone to respect the judicial processes of this Court. Everyone is bound by that imperative – be they judges of this Court and their staff, the Prosecutor and her staff, the Registrar and his staff, lawyers of every nation (whether they are Congolese, Kenyan or Dutch), cabinet ministers of States Parties, etc.

3. It does not contradict the decision of the Chamber to observe that the application as made highlights the need for objective yardsticks that guide the decision to prosecute or not pursuant to article 70. Notably, even the Deputy Prosecutor acknowledges the OTP's need 'to develop a clearer conception of when recourse to Article 70 should be exercised.'¹ Dictates of transparency would recommend this to be done and quickly, in order to minimise occasions in which observers are left wondering why it may be appropriate for the OTP to launch article 70 investigation and prosecution in one case, but not in another case in which questions of article 70 prosecution had also arisen.

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4. Also as a matter of professional responsibility, I feel compelled to address the complaint that the Deputy Prosecutor had declined to receive from the Ruto Counsel evidence that they had volunteered to give to him on the condition that he must not share the evidence with prosecution counsel having actual carriage of the case in court.²

5. Reading the submissions of the Ruto Counsel, my understanding of what happened was this. The Ruto Counsel had approached the Deputy Prosecutor in the course of the trial. They informed him that they had 'clear and compelling evidence'³

¹ See James Stewart's email of 11 March 2014, Annex 1 to the Ruto Application, ICC-01/09-01/11-2028-Conf-Anx1, page 2.

² See the Ruto Application, ICC-01/09-01/11-2028-Conf, paras 5 – 9.

³ See *ibid*, para 9.

which would show that certain prosecution witnesses who had testified and others yet to testify had engaged in fabrication of evidence to be given in court. The Ruto Counsel volunteered to provide the Deputy Prosecutor with such information, in order that he may promptly start an article 70 investigation; provided he undertook to keep the information from the prosecution counsel that had actual carriage of the case in the courtroom.⁴ Having considered the matter, the Deputy Prosecutor replied as follows: (a) that he would gladly receive the information that the Ruto Counsel had in mind to give to him; (b) that he would not undertake to keep the information from the prosecution counsel having actual carriage of the case in the courtroom, since sharing the information with them may indeed result in not putting the impugned witnesses on the stand (presumably diminishing any prospect of complicity of the Deputy Prosecutor and his staff in subornation of false testimony before the Trial Chamber); (c) that the Ruto Counsel might, as an alternative course, find it more convenient or conducive to the circumstances of an on-going trial to hold off altogether on the idea of sharing the information with the Deputy Prosecutor, and to use the material instead in robust cross-examination of the impugned prosecution witnesses, in order to expose before the Trial Chamber such witnesses' lack of credibility (presumably much better for the overall defence of Mr Ruto); and, (d) if the Ruto Counsel chose the last course of action, the question of proceeding against any perjured witnesses on the basis of article 70 could always be revisited upon the conclusion of the case (presumably, also, as it would be inappropriate and unusual to harass witnesses with perjury investigation before they testify).⁵

6. It appears that the Ruto Counsel found the Deputy Prosecutor's position to be surprisingly wrong. I disagree. I find it a very fair, balanced and entirely correct approach from one party to another in the course of an adversarial criminal trial.

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7. The foregoing observations notwithstanding, I fully share the Chamber's conclusion that the 'case' of *Prosecutor v Ruto and Sang* before this Chamber ended ahead of the current application. And it is in the public interest that it must be

⁴ See *ibid*, para 7.

⁵ See Mr James Stewart's email of 10 April 2014, Annex 1 to the Ruto Application, ICC-01/09-01/11-2028-Conf-Anx1, page 6.

treated as ended. As the Latin maxim has it: *interest reipublicae ut sit finis litium*. It is correct to decline jurisdiction on the merits of the application.

Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, appearing to be 'Eboe-Osuji', written over a horizontal line.

Judge Eboe-Osuji
(Presiding)

Dated 2 June 2016

At The Hague, The Netherlands