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No.: ICC-01/09-01/11

Date: 16 February 2015

TRIAL CHAMBER V(A)

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

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR v. WILLIAM SAMOEI RUTO and JOSHUA ARAP SANG

Public redacted version of

Decision on the Ruto Defence's Request for Sanctions of 9 January 2015 (ICC-01/09-01/11-1773-Conf)

Decision 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 Khan

Mr David Hooper

Mr Essa Faal

Ms Shyamala Alagendra

Counsel for Joshua Arap Sang

Mr Joseph Kipchumba Kigen-Katwa

Ms Caroline Buisman

Legal Representatives of Victims

Mr Wilfred Nderitu

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
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

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V(A) (the ‘Chamber’) of the International Criminal Court (the ‘Court’, ‘ICC’), in the case of *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, pursuant to Articles 54(1)(a), 64(2), 64(6)(f), 68(1) and 71 of the Rome Statute (the ‘Statute’), renders this ‘Decision on the Ruto Defence’s Request for Sanctions’.

I. BACKGROUND

1. On [REDACTED] 2013, the Chamber issued [REDACTED]¹ in which it granted the request of the Office of the Prosecutor (the ‘Prosecution’) [REDACTED]. The Chamber’s ruling was based, *inter alia*, [REDACTED] as a result of circumstances outside the control of the Prosecution’.²
2. On 11 June 2014, the Victims and Witnesses Unit (‘VWU’) filed a report [REDACTED],³ [REDACTED].⁴
3. On 18 June 2014, the defence team for Mr Ruto (the ‘Ruto Defence’) made an oral application to either exclude the testimony of Witness 613 in total or limit it to what ‘she has seen and heard herself and not to repeat the hearsay evidence [REDACTED],⁵ [REDACTED]. The Ruto Defence supported its request by making reference to the interview records [REDACTED] (the ‘[REDACTED] Interview’).⁶ In response, Mr Lucio Garcia, counsel for the Prosecution (‘Prosecution Counsel’) stated that [REDACTED].⁷ Prosecution Counsel then clarified that during the relevant meeting with the witness, [REDACTED].⁸ [REDACTED].⁹ [REDACTED].¹⁰

¹ [REDACTED].

² [REDACTED].

³ Victims and Witnesses Unit’s observations pursuant to the “Provisional Direction on the Prosecution’s Request for Guidance [REDACTED]” (ICC-01/09-01/11-1351-Conf-Exp), 11 June 2014, ICC-01/09-01/11-1357-Conf-Exp.

⁴ Annex 1 to Victims and Witnesses Unit’s observations pursuant to the “Provisional Direction on the Prosecution’s Request for Guidance [REDACTED]” (ICC-01/09-01/11-1351-Conf-Exp), 11 June 2014, ICC-01/09-01/11-1357-Conf-Exp-Anx1, para. 11.

⁵ ICC-01/09-01/11-T-118-CONF-ENG, p. 7, line 12 to p. 8, line 24.

⁶ ICC-01/09-01/11-T-118-CONF-ENG, p. 9, lines 5-11.

⁷ ICC-01/09-01/11-T-118-CONF-ENG, p. 10, lines 17-18. See also ICC-01/09-01/11-T-118-CONF-ENG, p. 10, lines 23-25; p. 11, lines 11-13.

⁸ ICC-01/09-01/11-T-118-CONF-ENG, p. 15, lines 23-24; p. 16, lines 10-12. See also Annex A to the Prosecution’s [REDACTED] and request for guidance [REDACTED], 5 June 2014, ICC-01/09-01/11-1343-Conf-AnxA-Red.

⁹ ICC-01/09-01/11-T-118-CONF-ENG, p. 16, line 3.

4. On 10 July 2014, the Ruto Defence filed the 'Corrected and Amended Version of 'Provision of Information [REDACTED] and Request for Sanctions against the Prosecutor and/or OTP Staff Members'' (ICC-01/09-01/11-1425-Conf)' (the 'Request'), in which it requests the Trial Chamber to issue a reprimand to the Prosecutor and/or the appropriate Prosecution staff members for the alleged conduct complained of, namely: (i) failing to inform the Chamber of the material change in circumstance which affected its decision granting the addition of Witness 613 to the prosecution witness list; (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] during the [REDACTED] Interview.¹¹
5. The Ruto Defence also requests that the Chamber remind the Prosecution that its counsel and investigators must: (i) act fairly, honourably and impartially; (ii) comply with obligations under Article 54(1)(a) of the Statute strictly; (iii) not make oral or written submissions which are false or misleading; and (iv) take all necessary steps to correct an error or inaccuracy as soon as possible after it has been discovered.¹²
6. On 25 July 2014, the Prosecution filed the 'Prosecution Opposition to the Ruto Defence's request for sanctions (ICC-01/09-01/11-1425-Conf-Corr)' (the 'Response'), in which it submits that the Chamber should dismiss the Request.¹³
7. On 22 September 2014, the Ruto Defence made a further filing providing additional information relevant to the Request ('Supplemental Filing').¹⁴ In the Supplemental Filing, the Ruto Defence submits that in court, [REDACTED], the Prosecution had

¹⁰ ICC-01/09-01/11-T-118-CONF-ENG, p. 16, lines 21-23.

¹¹ ICC-01/09-01/11-1425-Conf-Corr, para. 6.

¹² Request, ICC-01/09-01/11-1425-Conf-Corr, para. 39.

¹³ ICC-01/09-01/11-1446-Conf-Exp, with Annex A. A confidential redacted version was filed as ICC-01/09-01/11-1446-Conf-Red.

¹⁴ Provision of Information relevant to Ruto Defence Request for Sanctions (ICC-01/09-01/11-1425-Conf-Corr), ICC-01/09-01/11-1529-Conf.

stated [REDACTED].¹⁵ The Ruto Defence submits that this was contrary to the Prosecution's prior submissions on the matter.¹⁶

8. On 24 September 2014,¹⁷ the Prosecution filed a response to the Supplemental Filing in which it submits, *inter alia*, that the Ruto Defence premise that Prosecution Counsel's statements on [REDACTED] were inconsistent with the Prosecution's prior submissions on the matter was 'erroneous'.¹⁸

II. SUBMISSIONS AND ANALYSIS

9. The Chamber notes at the outset that, pursuant to Articles 64(2), 64(6)(f) and 71 of the Statute, it has the power to regulate the conduct of the proceedings, including, where necessary, to order sanctions for misconduct. These powers also extend to misconduct occurring outside the courtroom.¹⁹ The Chamber is thus competent to, and will, examine the Request pursuant to these powers.

(i) Alleged failure to provide material information and provision of untrue or inaccurate information

Submissions

10. The Ruto Defence notes that during the [REDACTED] Interview with Prosecution investigators, [REDACTED].²⁰ The Ruto Defence submits that this constitutes a material change in circumstances and that the Prosecution was duty-bound to apply

¹⁵ Supplemental Filing, ICC-01/09-01/11-1529-Conf, para. 3.

¹⁶ Supplemental Filing, ICC-01/09-01/11-1529-Conf, para. 4.

¹⁷ See e-mail from Legal Officer of the Chamber on 23 September 2014 at 11:23 shortening the deadline for any responses to the Supplemental Filing.

¹⁸ Prosecution's Response to the Defence's Provision of Information to Ruto Defence Request for Sanctions (ICC-01/09-01/11-1425-Conf-Corr), ICC-01/09-01/11-1544-Conf.

¹⁹ See *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Order on the filing of a public redacted version of Mr Kabongo's Response to the Request for Disqualification and warning to Counsel for Mr Kabongo, Mr Jean Flamme, pursuant to rule 171 (1) of the Rules of Procedure and Evidence, 14 October 2014, ICC-01/05-01/13-693, OA [Appeals Chamber]; Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation", 9 October 2014, ICC-01/09-01/11-1598, OA7/OA8 [Appeals Chamber]; *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on the Defence application concerning professional ethics applicable to prosecution lawyers, 31 May 2013, ICC-01/09-02/11-747, paras 13-14 [Trial Chamber V].

²⁰ Request, ICC-01/09-01/11-1425-Conf-Corr, para. 12.

to the Chamber for leave [REDACTED].²¹ The Ruto Defence submits that the Prosecution Counsel provided inaccurate oral submissions on [REDACTED] in advising the Chamber [REDACTED].²² The Ruto Defence submits that there was no discussion, in the documents disclosed to the Ruto Defence, [REDACTED],²³ and at no time since [REDACTED].²⁴

11. The Ruto Defence contends that the Investigator's Report annexed to the [REDACTED]²⁵ provides a misleading summary of the purpose, nature and content of the [REDACTED] Interview [REDACTED], and fails to provide the Chamber with certain material information.²⁶

12. [REDACTED].²⁷ [REDACTED].²⁸ [REDACTED].²⁹ [REDACTED].³⁰ [REDACTED].³¹ [REDACTED].³²

13. The Prosecution submits that there has been no change [REDACTED].³³ [REDACTED].³⁴

Analysis

14. The Chamber notes that the purpose of the Prosecution meeting [REDACTED] was, *inter alia*, to discuss whether [REDACTED].³⁵ However, during the meeting the witness informed the Prosecution that the statement he had given to the Prosecution

²¹ Request, ICC-01/09-01/11-1425-Conf-Corr, paras 18-19.

²² Request, ICC-01/09-01/11-1425-Conf-Corr, paras 14-15.

²³ Request, ICC-01/09-01/11-1425-Conf-Corr, para. 15.

²⁴ Request, ICC-01/09-01/11-1425-Conf-Corr, para. 16.

²⁵ Annex C to the Prosecution's update [REDACTED] and request for guidance [REDACTED], 5 June 2014, ICC-01/09-01/11-1343-Conf-AnxC-Red.

²⁶ Request, ICC-01/09-01/11-1425-Conf-Corr, paras 22-24.

²⁷ Response, ICC-01/09-01/11-1446-Conf-Red, paras 6, 55.

²⁸ Response, ICC-01/09-01/11-1446-Conf-Red, para. 33.

²⁹ Response, ICC-01/09-01/11-1446-Conf-Red, para. 34, citing KEN-OTP-0131-0283_R01, p. 0313.

³⁰ Response, ICC-01/09-01/11-1446-Conf-Red, para. 34.

³³ Response, ICC-01/09-01/11-1446-Conf-Red, paras 6, 55.

³⁴ Response, ICC-01/09-01/11-1446-Conf-Red, para. 10.

³⁵ KEN-OTP-0131-0132_R01, p. 0134.

in [REDACTED] was false and that [REDACTED].³⁶ [REDACTED].³⁷ [REDACTED].³⁸ [REDACTED].³⁹ [REDACTED].⁴⁰ [REDACTED],⁴¹ [REDACTED].⁴²

15. In the light of the totality of the circumstances surrounding the question [REDACTED]⁴³ - the Chamber is not persuaded that the statement [REDACTED] was 'patently clear', as the Ruto Defence suggests;⁴⁴ [REDACTED].⁴⁵ There is room for reasonable disagreement as to the correctness of the investigator's decision to pursue the matter no further after the [REDACTED] Interview, as appears to be the conclusion of the investigator who stated towards the end of the [REDACTED].⁴⁶ It is important, however, to keep in mind that the significance of that conclusion by the investigator may ultimately engage the margin of deference that parties must enjoy in the making of a judgement call as to [REDACTED], without prejudice to the question whether bad faith is clearly implicated in that judgement call when made by the ICC Prosecutor.

16. The Chamber particularly notes at this juncture that the Prosecution's conclusion that [REDACTED] appeared to have resulted (as observed earlier) more from an inference drawn by the Prosecution [REDACTED]. It may, of course, be argued that this interpretation is unreasonable on the part of the Prosecution, [REDACTED].⁴⁷ But, such an argument misses the point about the dissonance between the [REDACTED] respective states of mind, in the relevant context of the issue at hand.

³⁶ KEN-OTP-0131-0132_R01, pp. 0135, 0147, 0152.

³⁷ KEN-OTP-0131-0132_R01, p. 0137.

³⁸ KEN-OTP-0131-0283_R01, p. 0307.

³⁹ KEN-OTP-0131-0283_R01, pp. 0312-0315.

⁴⁰ KEN-OTP-0131-0283_R01, p. 0312-315.

⁴¹ KEN-OTP-0131-0283_R01, p. 0315.

⁴² KEN-OTP-0131-0283_R01, p. 0315.

⁴³ [REDACTED], Annex A to the Prosecution's update [REDACTED] and request for guidance [REDACTED], 5 June 2014, ICC-01/09-01/11-1343-Conf-AnxA-Red, p. 3. See also, Annex 1 to the Victims and Witnesses Unit's observations pursuant to the "Provisional Direction on the Prosecution's Request [REDACTED]" (ICC-01/09-01/11-1351-Conf-Exp), 11 June 2014, ICC-01/09-01/11-1357-Conf-Exp-Anx1, para. 10.

⁴⁴ Request, ICC-01/09-01/11-1425-Conf-Corr, para. 2.

⁴⁵ ICC-01/09-01/11-T-118-CONF-ENG, p. 7, lines 16-18.

⁴⁶ KEN-OTP-0131-0283_R01, p. 0322.

⁴⁷ Request, ICC-01/09-01/11-1425-Conf-Corr, paras 17-18.

17. The investigator's doubt [REDACTED] addresses at best the Prosecution's acceptance or belief of the reasonableness [REDACTED] as an objective matter. It is to be noted that, even so, the VWU did not eventually share the doubt indicated by the Prosecution investigator. The VWU did accept the seriousness of [REDACTED].⁴⁸ Be that as it may, the doubts of the Prosecution investigator [REDACTED] do not legally cover the field of the factors to be taken into account as regards the real question now in [REDACTED]. That is to say, in the examination of the particular question presented, [REDACTED] is not to be discarded, merely because the Prosecution investigator (or indeed the Prosecution itself) doubted the seriousness of these concerns as an objective factor. This is the more so when the VWU did not share the doubt expressed by the Prosecution investigator (and indeed the Prosecution on another occasion).⁴⁹

18. The Chamber notes that, although in the thrust and parry of oral submissions, the Prosecution Counsel may indeed have initially left the impression by his words [REDACTED].⁵⁰ It is also the case that, in the course of further inquiry from the Bench, the Prosecution Counsel eventually clarified that the conclusion [REDACTED] was the product of deduction [REDACTED].⁵¹ Indeed, it would have been much better if the relevant members of the Prosecution had directly, clearly and specifically enquired [REDACTED]. And, it would also have been better if the Prosecution Counsel had not left the initial impression [REDACTED] as a 'categorical' statement of position. There are times when a pause in oral submissions will be necessary, in order to verify the factual bases of the

⁴⁸ Annex 1 to the Victims and Witnesses Unit's observations pursuant to the "Provisional Direction on the Prosecution's Request for Guidance [REDACTED]" (ICC-01/09-01/11-1351-Conf-Exp), 11 June 2014, ICC-01/09-01/11-1357-Conf-Exp-Anx1, para. 10; Prosecution's update [REDACTED] and request for guidance [REDACTED], 5 June 2014, ICC-01/09-01/11-1343-Conf-Red, paras 12, 18.

⁴⁹ In its initial response to a report of the VWU (filed on 11 June 2014, ICC-01/09-01/11-1357-Conf-Exp-Anx1) confirming the seriousness of the [REDACTED], the Prosecution noted that 'the VWU ha[d] not alleged any compelling reasons for amending the provisional direction [of] the Chamber [REDACTED]' (Email from the Prosecution to Trial Chamber V(A) Communications sent on 11 June 2014 at 15:43). The Prosecution did not, however, maintain that position in its final response to the VWU's report (Prosecution's submissions, as directed in Decision ICC-01/09-01-11-1351-Conf-Exp, 12 June 2014, ICC-01/09-01/11-1359-Conf-Exp).

⁵⁰ ICC-01/09-01/11-T-118-CONF-ENG, p. 9, line 13- p. 10, line 1; p. 10, lines 23-25; p. 11, lines 9-13; p. 16, line 3.

⁵¹ ICC-01/09-01/11-T-118-CONF-ENG, p. 16, lines 18-23.

submissions. But these failings do not necessarily justify the Ruto Defence suggestion of bad faith on the part of the Prosecution, such as must result in sanctions. For, it is not necessary to view through the lens of professional misconduct occasional lapses more readily seen as a human affliction to which no legal professional is truly always immune, though the ideal remains to spare no effort to avoid them.

19. For these reasons, the Chamber is not persuaded that the Prosecution failed to provide material information, or that it misinformed the Chamber, as the Ruto Defence suggests.

(ii) Manner in which Prosecution investigators conducted the [REDACTED] Interview [REDACTED]

Submissions

20. The Ruto Defence raises a number of concerns regarding the conduct of the [REDACTED] Interview [REDACTED]. [REDACTED].⁵² The Ruto Defence submits that Prosecution investigators refused to receive potentially exonerating information [REDACTED].⁵³ The Ruto Defence further contends that the investigators failed to appropriately heed Article 68 of the Statute by failing to consider [REDACTED].⁵⁴ The Ruto Defence also submits that the investigators engaged in a personal attack upon [REDACTED]⁵⁵ and failed to act in an impartial manner as required by paragraph 49 of the Code of Conduct for the Office of the Prosecutor, by forcing their own narrative [REDACTED].⁵⁶

21. The Prosecution submits that while the [REDACTED] Interview was robust, it was in no way improper.⁵⁷ In response to the arguments put forward in the Request, the

⁵² Request, ICC-01/09-01/11-1425-Conf-Corr, para. 30.

⁵³ Request, ICC-01/09-01/11-1425-Conf-Corr, para. 27.

⁵⁴ Request, ICC-01/09-01/11-1425-Conf-Corr, para. 33.

⁵⁵ Request, ICC-01/09-01/11-1425-Conf-Corr, para. 32.

⁵⁶ Request, ICC-01/09-01/11-1425-Conf-Corr, para. 34.

⁵⁷ Response, ICC-01/09-01/11-1446-Conf-Red, para. 12.

Prosecution submits that the transcripts indicate that [REDACTED] was reluctant to 'rehash old ground' and in this context it was appropriate for the investigators to challenge his new assertions rather than address the [REDACTED] statement line by line.⁵⁸ [REDACTED], the investigator's comments were aimed at determining the truth, not obscuring it.⁵⁹ Thirdly, the Prosecution notes that at all times there was a psychosocial expert present during the [REDACTED] Interview and appropriate regard was given to Article 68 requirements [REDACTED].⁶⁰ Finally, [REDACTED] therefore there was nothing inappropriate in vigorously questioning the truthfulness [REDACTED].⁶¹

Analysis

22. As discussed earlier, during the [REDACTED] Interview, Prosecution investigators tried to clarify [REDACTED]. There was no allegation made to the effect that the Prosecution had failed to disclose both accounts fully to the Defence, nor to suppress the later account. In those circumstances, the Chamber is not persuaded that the manner of the Prosecution's interview was improper. As regards the Ruto Defence's submission as to the witness's well-being, the Chamber notes that, during the interview, the investigators had promptly reacted to the witness's complaints and arranged for him to see a doctor.⁶² The Chamber is thus not persuaded that the Prosecution had failed in its duty to protect the well-being of [REDACTED] during the interview in question.

⁵⁸ Response, ICC-01/09-01/11-1446-Conf-Red, para. 39.

⁵⁹ Response, ICC-01/09-01/11-1446-Conf-Red, para. 40.

⁶⁰ Response, ICC-01/09-01/11-1446-Conf-Red, para. 41.

⁶¹ Response, ICC-01/09-01/11-1446-Conf-Red, para. 42.

⁶² KEN-OTP-0131-0194_R01, p. 0196.

III. CONCLUSION

23. In view of the foregoing, the Chamber is not satisfied that the conduct of Prosecution Counsel and investigators warrants issuing a reprimand or other sanctions.
24. The Chamber, however, reminds all parties and participants that they should always make sure that the submissions they make are accurate, both in the courtroom and in filings.⁶³ If necessary, counsel may always request an opportunity to make proper inquiries on particular factual issues which arise. Relatedly, it is noted that *inter partes* notification of oral motions, where possible, would assist in the smooth and efficient conduct of proceedings. Moreover, the Chamber emphasises that every effort should be made to avoid situations likely to give rise to litigation of this nature. Careful consideration should also be given to the gravity of the circumstances before initiating such litigation as it inevitably diverts time and resources from the main substantive focus of the proceedings.
25. The Chamber encourages all counsel in this case to consider that the dictates of graceful professionalism should encourage counsel to give each other the benefit of the doubt in the face of the temptation to stake an opponent upon the pillory of professional misconduct. The resulting litigation and lingering rancour involve the risk of distraction from the real interests that brought counsel to their respective tasks in the case.
26. Finally, the Chamber notes that document ICC-01/09-01/11-811-Conf-Red2 was filed with the date of 23 July 2014 and at a time when the exchange of filings regarding the present Request was ongoing. It is likely that the document was filed pursuant to the Chamber's direction of [REDACTED].⁶⁴ The Chamber considers that the delay in filing this redacted version after the Chamber's direction could have resulted in

⁶³ It is noted that in this litigation it was necessary for the Ruto Defence to itself correct a 'substantive error' in its filing, ICC-01/09-01/11-1425-Conf-Corr-Anx, para. 3.

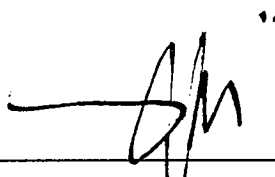
⁶⁴ Final Direction on the Prosecution's Request for Guidance on Disclosure Relating to [REDACTED], 13 June 2014, ICC-01/09-01/11-1364-Conf, p. 8.

confusion, and that it would have been preferable for any filings necessitated by the Chamber's direction to have been made more promptly after that direction was given.

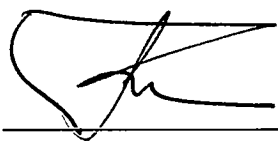
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request.

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



Judge Chie Eboe-Osuji
(Presiding)

Judge Olga Herrera Carbuccion

Judge Robert Fremr

Dated 16 February 2015

At The Hague, The Netherlands