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

Date: 17 May 2011

**PRE-TRIAL CHAMBER II**

**Before:** Judge Ekaterina Trendafilova, Presiding Judge  
Judge Hans-Peter Kaul, Judge  
Judge Cuno Tarfusser, Judge

**SITUATION IN THE REPUBLIC OF KENYA**

**IN THE CASE OF  
THE PROSECUTOR *v.* WILLIAM SAMOEI RUTO, HENRY KIPRONO KOSGEY  
AND JOSHUA ARAP SANG**

**PUBLIC**

**Defence Request to Strike the Prosecution's Response to "Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194"**

**Source:** Defence

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

**The Office of the Prosecutor**

Luis Moreno-Ocampo, Prosecutor  
Fatou Bensouda, Deputy Prosecutor

**Counsel for the Defence**

Counsel for William Samoei Ruto:  
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Hooper QC, Kioko Kilukumi Musau,  
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Counsel for Henry Kiprono Kosgey:  
George Odinga Oraro, Julius Kemboy  
and Allan Kosgey  
Counsel for Joshua Arap Sang:  
Joseph Kipchumba Kigen-Katwa, Joel  
Kimutai Bosek and Philemon K.B. Koech

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States' Representatives**

Sir Geoffrey Nice QC  
Rodney Dixon

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms. Silvana Arbia, Registrar

**Counsel Support Section**

**Deputy Registrar**

Mr. Didier Daniel Pereira, Deputy  
Registrar

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## Procedural History

1. The Government filed its challenge to the admissibility of the case on 31 March 2011.<sup>1</sup>
2. On 4 April 2011, the Pre-Trial Chamber ordered the parties to file their response to the admissibility challenge by 28 April 2011.<sup>2</sup>
3. On 21 April 2011, the Government of the Republic of Kenya (the Government) filed a ‘Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194’,<sup>3</sup> (the Government Request) in which the Government requested the assistance of the Court and Prosecutor with respect to its national investigations. This Request was filed in the Kenya situation file.
4. On 28 April 2011, the Prosecution filed the ‘Prosecution Response to “Application on behalf of the Government of the Republic of Kenya pursuant to Article 19 of the ICC Statute”’ (the Prosecution Admissibility Response), in the Ruto et al case file.<sup>4</sup>
5. On 3 May 2011, in the Kenya situation, the Pre-Trial Chamber issued an ‘Order under Regulation 24(1) of the Regulations of the Court’,<sup>5</sup> in which the Chamber ordered the Prosecution to file its observations to the Request by 10 May 2011.
6. On 10 May 2011, the Prosecution filed the ‘Prosecution’s Response to “Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194”’<sup>6</sup> (the Prosecution Response). On 12 May 2011, the Prosecution filed a corrigendum, in which the Prosecution amended some footnotes, and included the names of the State Representatives on the cover page.<sup>7</sup>

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<sup>1</sup> ‘Application on behalf of the Government of The Republic of Kenya pursuant to Article 19 of the ICC Statute’, ICC-01/09-01/11-19.

<sup>2</sup> ‘Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute’, ICC-01/09-01/11-31.

<sup>3</sup> ICC-01/09-58

<sup>4</sup> ICC-01/09-01/11-69.

<sup>5</sup> ICC-01/09-60

<sup>6</sup> ICC-01/09-01/11-83, 10 May 2011.

<sup>7</sup> ICC-01/09-01/11-83-Corr.

7. The Defence for Mr. Ruto and Mr. Sang hereby requests the Honourable Pre-Trial Chamber to strike the Prosecution Response on the grounds that:
- i. the Prosecution Response was improperly filed in the Ruto et al case file rather than the situation file;
  - ii. it contains highly defamatory, prejudicial and completely unfounded allegations against the Defendant Mr. Ruto; and
  - iii. the content of the filing greatly exceeds the scope of the Government of Kenya Request and includes matters which are more directed at the Defendants in this case.
8. In terms of the second aspect, the Defence requests the Honourable Pre-Trial Chamber to consider sanctioning the Prosecution for abusing his office and duty to act in an objective and impartial manner, by using the court's processes to make a personal, slanderous attack on the Defendant, which could prejudice the Defendant's ability to obtain the cooperation of witnesses in his case.

#### **Filing in the Case rather than the Situation**

9. Although the filing is framed as a response to the Government Request, both the initial filing and the corrigendum were filed in both the Kenyatta et al case, and the Ruto et al case rather than in the Kenya situation file.
10. Regulation 24(1) of the Regulations of the Court only permits a party to respond to a document which is filed in the same case file; it does not permit a party in a particular case to respond to a document filed in the situation file.
11. Whilst the Prosecution had a right to file a response to the Government Request in the Kenya situation, documents which are registered in the situation file are not automatically incorporated into the relevant case file. It is necessary for the Pre-Trial Chamber to issue a decision ordering the Registry to transfer the relevant documents to a particular case file.<sup>8</sup>

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<sup>8</sup> See for example, the orders at page 7-8, Prosecutor v. Ruto et al, Decision on Reclassification of Certain Documents, ICC-01/09-01/11-23, 1 April 2011.

12. The Prosecution has already exhausted its right to respond to the Government's challenge to admissibility, and, had the Prosecution Response been filed in the Kenya situation, it would not have formed part of the case record for the purposes of the Pre-Trial Chamber's determination of the admissibility challenge.
13. By directly filing the Prosecution Response in the Ruto et al case file, the Prosecution has improperly attempted to circumvent the appropriate court procedures.
14. Also, in his Response, the Prosecutor addresses several issues, which are extraneous to the scope of article 93(10) and rule 194. *The content of the filing exceeds the scope of the Government Request, and includes matters which are more directed at the Government's admissibility challenge.*
15. For example, the Prosecution refers to a nebulous and uncited 2003 prosecutorial policy on positive complementarity, whereby the Prosecutor should only proactively cooperate with States that are "are conducting genuine investigations and prosecutions".<sup>9</sup> The Prosecution also seeks to delimit the scope of article 93(10) to investigations against the same individuals as those who are being prosecuted before the ICC.<sup>10</sup>
16. Article 93(10) concerns requests for cooperation in connection with investigations into any crimes falling under the Rome Statute or serious national crimes. The question as to whether a national authority is either willing or able to carry out genuinely investigations is not relevant to a determination of an Article 93(10) request. Indeed, importing such criteria into Article 93(10) would create an anomalous situation where national authorities might not be able to carry out effective investigations without the assistance of the Court to obtain access to key evidence, but without such assistance, the national authority would not be able to demonstrate that they are able to investigate effectively and thus trigger the operation of Article 93(10).
17. Similarly, Article 93(10) is framed broadly to encompass any investigations into conduct, which constitutes a crime under the Statute. The correlation of domestic

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<sup>9</sup> At para 13.

<sup>10</sup> Prosecution Response at para 4.

investigations into crimes under the Statute with the cases against the Defendants is irrelevant to Article 93(10).

18. Given the irrelevance of these arguments to the Government Request, the Defence is concerned that the Prosecution has inappropriately used its right to respond to the Request as a vehicle for espousing arguments, which were not included in the Prosecution Admissibility Response, as to whether the efforts of the Kenyan Government are genuine.<sup>11</sup>
19. *Filing in the case rather than the situation constitutes, the Defence submits, an improper filing. The Defence assumes that it was done, in part, to influence the outcome of the admissibility proceedings. The Defence requests that the information contained within the Prosecution Response be excluded from the Chamber's consideration of the admissibility challenge, and any other judicial determinations concerning the Ruto et al case. Filings that constitute an abuse of the Court's processes can be disregarded by the Chamber.*<sup>12</sup>

### **Inappropriate and prejudicial statements**

20. The Defence is most concerned at the conduct of the Prosecutor in making slanderous and prejudicial allegations against Mr Ruto in his filing. His having filed publicly compounds the matter. There is no sufficient basis for making such allegations and the Defence submits that it is wholly improper for the Prosecutor, or any counsel, to conduct himself in this manner. The Prosecution has violated his duty to act as an impartial and objective Minister of Justice, by including baseless and highly prejudicial allegations against the Defendants in the filing.
21. The Pre-Trial Chamber has confirmed that the Chamber has an affirmative duty to uphold the fairness of the proceedings and thereby ensure that the integrity of the judicial process is not prejudiced by statements from the Prosecution.<sup>13</sup> This duty clearly extends to public filings before the Chamber, which are based on unfounded and highly prejudicial innuendo.

<sup>11</sup> See for example, paras 24-28.

<sup>12</sup> Prosecutor v. Bemba, 'Decision on the Admissibility and Abuse of Process Challenges', ICC-01/05-01/08-802, 24 June 2010, at para 231.

<sup>13</sup> Prosecutor v. Kenyatta et al, 'Decision on the Defence "Application for Order to the Prosecutor Regarding Extrajudicial Comments to the Press"' ICC-01/09-02/11-83, 5 May 2011.

22. The matters complained of are found in paragraph 6 of the Prosecution Response, and repeated more fully in paragraph 18 set out below;

18 The Prosecution also brings to the Chamber's attention the circumstances surrounding the recent dismissal of criminal fraud charges against Ruto in Kenya. Recent media reports indicate that witness tampering may have played a role in the recent dismissal of fraud charges that Ruto faced in Kenya. It was reported on 13 April 2011 that, "[o]f the witnesses that the prosecution had lined up, 13 could not be found and five died while the case was going on", while those "who made it to the court became hostile to the prosecution". On 16 April 2011, it was reported that the acquittal of RUTO was based on the Prosecution's failure to produce evidence linking him to the crimes charged.'

23. The basis for this serious allegation, made to the Chamber that has the conduct of the case at the present time, and contained in a public filing, is said to be a newspaper report.

24. Notwithstanding the reference to articles in the plural, the Prosecution has only cited one article from the Kenya Daily Nation.<sup>14</sup> Moreover, the article cited and the persons interviewed do not allege the existence of witness tampering, or any impropriety on the part of the Defendants in that case.

25. It is also of concern that the Prosecution has chosen to base its submissions on a media article, rather than the actual text of the judgment concerning the fraud case. In the judgment, the Chief Magistrate acquitted the defendants of the charges on the basis that although the Prosecution had called twenty witnesses to testify, this evidence failed to satisfy the threshold of a *prima facie* case that the charges were met.<sup>15</sup> The Chief Magistrate does not at any point attribute the acquittal to 'witness tampering', nor does the judgment refer to either deceased or hostile witnesses.

26. Before drawing the conclusions presented to court, the Prosecutor did not seek any input from either Mr. Ruto or Mr. Sang or from any primary party involved in criminal case trial before the Chief Magistrate at Nairobi, Kenya, or any other credible person whatsoever. The ICC Prosecutor thereby failed to afford himself an opportunity to know the following facts:

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<sup>14</sup> Walter Menya, "Police, AG trade blame over acquittal of Ruto," Daily Nation, 13 April 2011.

<sup>15</sup> The full text of the judgment is attached as an annex to this filing.

- a. That the Prosecution presented their case without in any way involving Mr. Ruto. The Prosecution's case vis-à-vis Mr. Ruto's defence was contentious and competitive;
- b. The reasons and circumstances of any witnesses alleged to be unavailable to the Prosecution, if any witnesses became unavailable as alleged (by reason of death or failure to testify), are wholly unknown and alien to Mr. Ruto, and any facts as to the status and the reasons of these witnesses are ordinarily and ideally in the exclusive knowledge of the Prosecution;
- c. The Prosecution and Kenyan courts have the necessary provisions in Kenyan Criminal laws to deal with any witnesses who fail to attend court to testify, or who become hostile in court. Further, the Prosecution has provisions on how to deal with matters of any deceased witnesses in the event of any suspect circumstances including revision of bond terms;
- d. The Prosecution did not ever allege any wrongdoing on the part of Mr. Ruto in the course of the trial. Neither did the court;
- e. The trial related to a culpable case arising in 1995. The case was filed in court in 2004. Substantive hearings by way of calling witnesses started in January 2011. Such delay to commence a criminal case would naturally subject witnesses to attrition in any criminal proceedings in any jurisdiction;
- f. Mr. Ruto was discharged and acquitted for complete lack of material evidence upon which a *prima facie* case would be said to have been made by the Prosecution to warrant his being put on his Defence.
- g. The time within which an Appeal could be lodged has expired. There is neither an Appeal nor an application to review. In effect, it must be concluded that the State and the Kenyan Prosecutor are satisfied with the criminal proceedings and Judgement, inclusive of how the witnesses were presented;
- h. In view of all of the above, it is unfortunate for the Prosecutor of the ICC to condescend to the Kenyan Courts, Kenyan Prosecutors and investigators, Kenyan procedures for criminal investigations and prosecution, and the discretionary choices of Kenyan institutions in their decisions and Judgments, including decisions on what witnesses to call, what to do with testimonies of witnesses, whether or not to appeal, and the integrity of the Chief Magistrate's verdict of the case.
- i. It is disappointing that the Prosecutor has allowed his own subjective and personalized perception of Mr. Ruto to amount to deeming him absolutely



criminally guilty on any allegation made, including allegations in newspapers, and websites, and by NGOs. It is regretted that the Prosecutor has allowed it to be possible to be viewed as advancing the goals of persons that do not wish Mr. Ruto and Mr. Sang well. Such persons are, in all probability, responsible for influencing the opinionated views in newspapers, websites and NGO agendas, for the Prosecutor's subsequent use as if it was established fact.

27. In addition to these express statements concerning Mr Ruto, the Prosecution also refers to the following at paragraphs 7 and 21 of the Prosecution Response:

7. Additionally, Kenyan newspapers recently reported the killing of a senior government official in his home in Kenya, which is widely believed to be linked to his testimony before the WAKI Commission on the post-election violence and to fears that he might be cooperating with this Court.

[...]

21. Additionally, a recent incident is particularly illustrative of this degrading security environment likely to be linked, directly or indirectly, to OTP investigation. On 28 April 2011, Bernard Kimeli, the former senior Deputy Commissioner of Police of the Kenya Police Training College, was killed in his house in a rich and well-protected suburb of Nairobi. Circumstances indicate that his murder was well prepared. Media reports and comments on Kenyan websites and blogs allege that his murder was probably linked to OTP investigations because his attackers only took documents from his house. It is alleged that due to his position, Kimeli was in possession of sensitive information in relation to the misuse of Police resources by the Government of Kenya and or the PNU during the post-election violence. It should be noted that, despite the fact that Kimeli did not give any testimony to a Kenyan investigation, he was mentioned by another witness as one of the three senior police officers forced to retire during the violence, allegedly due to his opposition to the PNU's misuse of the police force at that time.

28. The Prosecution has attributed its information to 'Media reports and comments on Kenyan websites and blogs', and has only cited one anonymous media article, which is itself, based on unidentified sources.<sup>16</sup> In contradistinction to the Prosecution's assertion that "his murder was probably linked to OTP investigations because his attackers only took documents from his house", in a subsequent report to the Kenyan National Assembly, the Internal Security Assistance Minister informed the Assembly that the only thing which had been taken from the house was one mobile phone.<sup>17</sup> The

<sup>16</sup> <http://www.the-star.co.ke/national/national/22726-why-top-cop-was-murdered>

<sup>17</sup> Hansard (Records of Parliamentary Proceedings), 10 May 2011, page 25, available from [http://www.parliament.go.ke/index.php?option=com\\_content&view=article&id=184&Itemid=159](http://www.parliament.go.ke/index.php?option=com_content&view=article&id=184&Itemid=159)

police spokesperson has also confirmed that the police have not found any evidence linking the murder to the post-election violence.<sup>18</sup>

29. The Defence would also like to emphasise that Mr. Ruto has no personal knowledge of who Mr. Kimeli was, and did not know the circumstances of his situation. Mr. Ruto had no interest in Mr. Kimeli's history, or possible activities.
30. The Prosecution also insinuates that the Defendants have been utilising their associates to circumvent the conditions imposed in the Decision on the Summons, and the Single Judge's directive that the Defendants must refrain from engaging in speeches which could be construed as an incitement to violence:

23. For instance, Laikipia East Member of Parliament Mwangi Kiunjuri said that persons other than the six suspects do not have to obey orders of this Chamber to refrain from hate speech or public incitement, and "are free to talk as we wish". At a rally held earlier in April 2011, Kiunjuri and others, in the company of Ruto and Uhuru Kenyatta, made statements which were considered so troublesome that the Ministry for Internal Security and the National Cohesion and Integration Commission warned politicians against engaging in hate speech and incitement, indicating that they were using the same type of language which helped to ignite the 2007 post-election violence.

31. As concerns the assertion that associates of Mr. Kenyatta and Mr. Ruto have engaged in behaviour, which would fall foul of the condition imposed by the Chamber against the Defendants, the article cited by the Prosecution only attributes extremely tame political comments to these associates, which have no ethnic overtones.<sup>19</sup> Indeed, this type of political banter is far less inflammatory than the accusatory language utilised by the Prosecutor in his actual filing, which could inflame ethnic hatred and distrust by elevating speculative rumours to the status of ICC investigative findings.

<sup>18</sup> J Kinyua, 'Police Writes to ICC Over Kimeli's Murder', The Nairobi Star 8 May 2011, <http://www.nairobistar.com/classicnews/23618-police-writes-to-icc-over-kimelis-murder->

<sup>19</sup> "Mr Kenyatta pioneered the use of the word *kimundu* (a nuisance bully) to refer to Mr Odinga, and that word was liberally used by most of the Kikuyu-speaking MPs whenever they spoke about him. "*Riu tondu atindaga akiuga ni tunyuaga muno-ri, no anga tunyuaga na nyina? Na tondu atindaga akiuga tuthii Hague ri, Hague iyo ni ya nyina? Hague ni kwa nyukwa guku ugutinda ukiina?* (Now that Raila keeps describing some of us as drunkards, do we go drinking with his wife? And now that he keeps telling us to go to The Hague, is that Hague his mother's place? Is The Hague your mother's place for you to keep singing about it?)," he asked at Githunguri. "*Ithui tutikoragwo na thina na andu a Nyanza, tiga kimundu kimwe, na ni mukiui* (We don't have a problem with the people of Nyanza, but with one man, and you know who he is)," he added" John Ngirachu, "Uhuru and Ruto warned over hate speech at rallies", Daily Nation, 2 April 2011.

32. In each of the above instances, the Prosecution has failed to adduce any credible foundation for these allegations, and misrepresented the contents of the media articles upon which the Prosecution purports to rely. In this regard, in the Katanga and Ngudjolo case, Judge Steiner expressed her concern “by the fact that the Prosecution, whose activities must be directed by the principle of objectivity pursuant to article 54 (1) (a) of the Statute, has used in support of the Prosecution Application a number of sources that manifestly do not offer any support for its application; and that, in the view of the Single Judge, the Prosecution must refrain in future applications from resorting to this practice in order to mislead the Single Judge”.<sup>20</sup>
33. The Prosecution has also insinuated that the alleged events should be attributed to the Defendants or their associates. By including these grave and prejudicial allegations in a public filing before the Court, the Prosecution is lending credence to these scurrilous rumours, and the official approbation of the ICC Prosecutor.
34. Although the allegations concern conduct which falls outside the time frame of the charges, they can significantly prejudice Defence investigations by portraying the Defendants as dangerous or threatening individuals, which may deter potential witnesses from cooperating with the Defence. The statements also violate the presumption of innocence by portraying the Defendants as having the propensity to engage in or encourage the same type of conduct as is referred to in the charges (murder, incitement to violence).
35. The Prosecutor has a broad statutory duty under article 54(1)(c) to respect fully the rights of all persons arising under the Statute. In this connection, the ICTY has held that whilst the parties have a right to explore matters which may assist their case, such as domestic investigations or convictions, they have a duty to refrain from making allegations, which do not have a reasonable evidentiary basis.<sup>21</sup> For example, in the Gotovina case, the Prosecutor was ordered to withdraw allegations concerning the criminal character of a witness, which were only based on a newspaper article.<sup>22</sup>

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<sup>20</sup> Decision revoking the prohibition of contact and communication between Germain Katanga and Mathieu Ngudjolo Chui ICC-01/04-01/07-322, 13 March 2008.

<sup>21</sup> Prosecutor v. Krajisnik, Case No. IT-00-39-T, Decision on Cross-Examination of Milorad Davidovic, 15 December 2005, at paras 9-10.

<sup>22</sup> Prosecutor v. Gotovina et al, Transcript of 30 September 2009, T. 22352 – T22355.

Article 14 of the Guidelines on the Role of Prosecutors also enjoins Prosecutors to desist from pursuing any unfounded charges.<sup>23</sup>

36. The ICC Prosecution is also expected to conduct impartial and objective investigations, which aim to assist the Court to determine the truth. In so doing, the Prosecution should focus on finding reliable and credible evidence, rather than trawling through the trash cans of rumour and gossip sites, rags and blogs.

37. The Prosecution's filing relates to two domestic judicial proceedings, one of which is a *sub-judice* investigation. Notwithstanding the fact that these proceedings are being convened in a domestic forum, it is highly inappropriate for the Prosecutor, as one of the highest officials of the ICC, to proffer his own version of the events, which is only supported by scant media articles, and which has not been tested and endorsed in a court of law. Although it may be necessary for the ICC to determine the propriety of domestic proceedings, the Trial Chamber in the Bemba case strongly cautioned the parties against making assertions concerning domestic court proceedings or governmental actions, which are only based on speculation contained in media or NGO reports, as opposed to more credible forms of evidence.<sup>24</sup>

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<sup>23</sup>Guidelines on the Role of Prosecutors Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders', Havana, Cuba, 27 August to 7 September 1990.

<sup>24</sup> At page 74, the Trial Chamber cited article 24 of the Code of Professional Conduct for Counsel, which provides that:

1. Counsel shall take all necessary steps to ensure that his or her actions or those of counsel's assistants or staff are not prejudicial to the ongoing proceedings and do not bring the Court into disrepute.
2. Counsel is personally responsible for the conduct and presentation of the client's case and shall exercise personal judgement on the substance and purpose of statements made and questions asked.
3. Counsel shall not deceive or knowingly mislead the Court. He or she shall take all steps necessary to correct an erroneous statement made by him or her or by assistants or staff as soon as possible after becoming aware that the statement was erroneous.
4. Counsel shall not submit any request or document with the sole aim of harming one or more of the participants in the proceedings.

At para 235, the Trial Chamber found that "only in exceptional circumstances should this Chamber seek to go behind a national judicial decision, particularly when the matter has been litigated before the final court of appeal. Given the lack of any evidence of material impropriety or irregularity in those proceedings (as opposed to speculation and quotations from reports that have not been introduced properly into evidence - see the development of this point below), it is unnecessary for this Chamber to attempt to define the ambit of those exceptional circumstances."

At para 255 the Chamber further concluded that "counsel simply quoted, for instance, from written reports and interviews with politicians in the written submissions, without applying to the Chamber for leave to rely on them as documentary evidence. Examples of this approach by the defence include "well-informed observers": Peace and Security in Africa; extracts from FIDH reports; extracts from a report by Human Rights Watch; and a "Weblog", allegedly quoting President Kagame of Rwanda. In the circumstances, given that their provenance and reliability is entirely uninvestigated and untested, these materials carry little, if any, evidential weight." Prosecutor v. Bemba, 'Decision on the Admissibility and Abuse of Process Challenges', ICC-01/05-01/08-802

38. Article 71(1) of the Statute provides that the “Court may sanction persons present before it who commit misconduct”. In the Lubanga case, the Trial Chamber found that the right to public hearings entails an “increased the need for responsible and balanced comments and reporting of the case [...] Most importantly, and as a matter of professional ethics a party to proceedings is expected not to misrepresent the evidence, to misdescribe the functions of the parties or the Chamber, or to suggest or imply without proper foundation that anyone in the case, including the accused, has misbehaved.”<sup>25</sup>
39. In terms of its findings, the Trial Chamber expressed its opprobrium concerning the Prosecution spokesperson’s unsubstantiated insinuations that Mr. Lubanga had intimidated witnesses, and observed that “ it is critical that potential witnesses and participating victims are reassured that they will receive proper protection before the Court. Creating the false impression that an accused is intimidating witnesses could well serve to discourage others from participating in the Court's cases, thereby damaging the legitimacy of the institution, and its ability to function.”<sup>26</sup>
40. The Chamber did not sanction the Prosecution in that case, but it did express “the strongest disapproval of the content of this interview”, and further stated that “if objectionable public statements of this kind are repeated the Chamber will not hesitate to take appropriate action against the party responsible.”<sup>27</sup>
41. The Prosecutor’s responsibility in the present case is far more heightened in the present case as the Prosecutor has sought to cloak these rumours in the respectability of an official court filing. Moreover, in the context of the Kenya situations and cases, the Pre-Trial Chamber has very recently brought to the attention of the Prosecutor on two separate occasions the importance of respecting the presumption of innocence in official statements, and ensuring that such statements do not prejudice a fair and impartial trial.<sup>28</sup> **The Prosecution demonstrates a propensity to make highly**

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<sup>25</sup> Decision on the press interview with Ms Le Fraper du Hellen, ICC-01/04-01/06-2433, 12 May 2010 at paras 38 and 39.

<sup>26</sup> At para 51.

<sup>27</sup> At para 53.

<sup>28</sup> Kenya situation, Decision on the "Application for Leave to Participate in the Proceedings before the Pre-Trial Chamber relating to the Prosecutor's Application under Article 58(7)", ICC-01/09-42, 11 February 2011 at para 22; Prosecutor v. Kenyatta et al, ‘Decision on the Defence "Application for Order to the Prosecutor Regarding Extrajudicial Comments to the Press"’ ICC-01/09-02/11-83, 5 May 2011.

**prejudicial and damaging remarks concerning suspects who have themselves limited resources to combat such prejudicial comments.**

42. In light of the Prosecution's continued disrespect for the principles of the presumption of innocence and the requirements of a fair and impartial trial, coupled with the Prosecutor's abuse of the Court's procedures by improperly filing the Prosecution Response in the Ruto et al case, the Defence respectfully requests the Honourable Pre-Trial Chamber to order the Prosecution to formally apologise to the Defendants and to withdraw the allegations from the 'Prosecution's Response to "Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194"'<sup>29</sup>(the Prosecution Response) concerning the Defendants.
43. The Defence further requests the Pre-Trial Chamber to consider sanctioning the Prosecution for misconduct under Article 71 of the Statute. Rule 171 of the Rules of Procedure and Evidence sets out the possibility that the Chamber may, after warning an official of the Court, interdict that person from the proceedings and from exercising their functions before the Court on a temporary basis.
44. The Defence submits that the Honourable Pre-Trial Chamber has jurisdiction under the said Article 71 of the Statute and Rule 171 of the Rules of Procedure and Evidence to issue a warning to the Prosecutor that he risks interdiction from proceedings together with any other sanctions the Court may deem fair and just in the event of continued abuse of the court process and violation of the rights of the suspects including Mr. Ruto, the consequences of which would prejudice the cause of a fair, just, and expeditious trial and injure the integrity of the ICC processes and institutions by:-
- a. Seeking the court to treat as facts newspaper materials, whose sources, integrity, and veracity are wholly non-existent;
  - b. Seeking to incite and procure ethnic hatred and distrust on the Kenyan case by speculative and scurrilous rumours, unsound conclusions, transference and relocation of third party acts on the suspects, misrepresenting, exaggerating and twisting the true status of facts and logic, in a manner designed to purport that such are products of ICC investigative findings;

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<sup>29</sup> ICC-01/09-01/11-83, 10 May 2011.

- c. Endeavouring to erode and eradicate the suspect's right to the presumption of innocence;
- d. Applying active industry to scare away any possible witnesses for the suspects;
- e. Embarrassing the court by holding out invitations to the judges to make findings on baseless assertions and allegations made by the media and NGOs without foundation against the integrity of the domestic judicial proceedings and Government actions in Kenya;
- f. Making improper filings outside the time allocated, and beyond the scope of the subject application before the court, and outside the relevant file, and attempting to circumvent the appropriate court procedures;
- g. Damaging the integrity of the Office of an ICC Prosecutor, by violating the obligation to act objectively and impartially as a Minister of Justice, and in disregard of the reality of the fact that said Prosecutor is one of the highest officials of ICC;
- h. Making public filings in respect to Mr. Ruto on slanderous, prejudicial, defamatory and unfounded representations, proffering unsubstantiated insinuations, misrepresentative evidence and misdescribing facts; and
- i. Attempting to drive the court's proceedings towards making the same a personal matter between the occupant of the Office of the Prosecutor and Mr. Ruto.

### **Relief Sought**

45. For the reasons set out above, the Defence for Mr. Ruto and Mr. Sang respectfully request the Pre-Trial Chamber to:

- i. strike the Prosecution Response from the record of the Ruto et al case (and thereby disqualify the filing from the Chamber's consideration in the admissibility challenge);
- ii. should the filing be refiled in the Kenya situation, order the Prosecution to formally apologise to the Defendants and withdraw all unfounded and prejudicial allegations; and
- iii. consider sanctioning the Prosecutor under article 71(1) of the Statute.



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Joseph Kipchumba Kigen-Katwa  
On behalf of Mr. Joshua Arap Sang and Mr. William Samoei Ruto

Dated this Tuesday, 17 May 2011

At Nairobi, Kenya