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TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding Judge
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 "Prosecution's response to the Ruto Defence request to rule certain supporting material inadmissible", 11 May 2015, ICC-01/09-01/11-1874-Conf

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The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Anton Steynberg

Counsel for the Defence

For William Samoei Ruto:

Mr Karim Khan
Mr David Hooper
Ms Shyamala Alagendra

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

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Others

Introduction

1. The Ruto Defence requests¹ the Chamber to rule inadmissible, and order removed, certain supporting material² relied upon in the Prosecution's Rule 68 Request.³ The Prosecution submits that the request should be dismissed.
2. The Inadmissibility Request misconstrues the purpose for which the Supporting Material was adduced. The Prosecution has never sought the admission of this material into evidence at trial. On the contrary, it explicitly stated that the Supporting Material was submitted for the sole purpose of establishing the factual basis for its Rule 68 Request. The statutory framework of the Court does not require that material adduced in support of procedural filings be "admitted". Thus, the Chamber need not rule on its admissibility.
3. The Supporting Material is relevant to the determination of the factual issues which the Chamber is required to decide. The Ruto Defence does not argue otherwise. It is inappropriate and impractical to limit the Chamber to evidence already on record in making its decision, as suggested.
4. Additionally, the Ruto Defence traverses several issues that could and should have been dealt with in its substantive response. It is undesirable and inefficient to litigate the admissibility of the prior recorded testimony in a piecemeal fashion. Accordingly, the Chamber may consider whether it is appropriate to treat the Inadmissibility Request as part of the Ruto Defence's substantive response, and adjust the page limit accordingly.

Confidentiality

5. This response is filed as Confidential since it responds to a filing of similar classification.

¹ ICC-01-09-01/11-1872-Conf ("Inadmissibility Request").

² ("Supporting Material"). The Prosecution notes that the Ruto Defence has not provided a precise list of the items it seeks to exclude.

³ Prosecution's request for the admission of prior recorded testimony of [REDACTED] witnesses, ICC-01/09-01/11-1866-Conf ("Rule 68 Request").

Submissions

6. The Prosecution submits that the Inadmissibility Request should be dismissed.
- (i) The Prosecution does not seek “admission” of the evidence**
7. The main relief sought by the Ruto Defence is an order declaring the Supporting Material “inadmissible”. However, as the Prosecution stated clearly in the Rule 68 Request,⁴ *it does not seek the admission of the supporting material in the criminal trial.*⁵ In these circumstances, the relief sought is inapposite.
8. The legal provisions relied upon by the Defence do not support this relief.⁶ Interpreted in their proper context, they regulate the admission of evidence *at trial*.⁷ In other words, the admission of evidence upon which the Chamber may rely in deciding the ultimate issue – the guilt or innocence of the accused.⁸ This is clear, firstly, from the location of the provisions in Part 6, entitled “The Trial”. Secondly, it is evident from the plain language of article 69 that its provisions govern the admission of evidence at trial.⁹
9. Thus, although the Chamber is free to consider the relevance and probative value of the Supporting Material in the course of its decision on the Rule 68 Request,¹⁰ there is no requirement to first rule on the “admissibility” thereof.

(ii) Material adduced in support of a filing need not be “admitted”

10. The Ruto Defence has not identified any provision in the Court’s statutory framework, nor any precedent, that requires a Chamber to “admit” material

⁴ Rule 68 Request, para.58.

⁵ In this context, the phrase “criminal case” is used to denote the trial of the Accused on the article 7 charges preferred upon them, as opposed to the administrative meaning of “case” to describe the broader legal proceedings before the Court under case reference ICC-01/09/01/11.

⁶ i.e an order declaring the Supporting Material inadmissible; articles 64(9)(a), 69(2), 69(3) and 69(4).

⁷ Rule 122(9) also extends this to use at the Confirmation Hearing, *mutatis mutandis*.

⁸ Or the confirmation of the charges, as the case may be.

⁹ “*Before testifying*, each witness shall ... give an undertaking of truthfulness *of the evidence to be given* by that witness”, article 69(1); “*The testimony of a witness at trial* shall be given in person...”, article 69(2); “The parties may submit evidence *relevant to the case...*”, article 69(3); “The Court may rule on the relevance or admissibility of any evidence taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a *fair trial* or to a *fair evaluation of the testimony of any witness...*”, article 69(4); “The Court shall not require *proof of facts* of common knowledge, but may take judicial notice of them”, article 69(6); (emphasis added).

¹⁰ As explained in more detail below; *See* section (ii) below.

adduced in support of a procedural filing. The Prosecution submits that there is no such provision. Nor is this the practice of this or any other Chamber.

11. It is common practice, for instance, to support filings requesting the continued detention of an accused with evidential material. Chambers have frequently relied upon such material, without first “admitting” it and such decisions have been upheld on appeal.¹¹
12. In this case, it has been the practice of both the Prosecution¹² and Defence¹³ to support factual assertions with evidential material, where appropriate. Although all such materials form part of the record of the case,¹⁴ they are not automatically admitted as evidence in the criminal trial.
13. The Prosecution submits that the Chamber may assess the Supporting Material without first going through the preliminary step of “admitting” it. This is without prejudice to the Chamber’s powers, in exceptional circumstances, to strike from the filing - or simply ignore - material that is irrelevant, frivolous or vexatious. Absent these circumstances, the Chamber may freely assess all the Supporting Material, taking into account the relevance and probative value of each item, in the context of the totality of the evidence, and accord it such weight as it deserves.

(iii) The Chamber requires the filing of supporting material

14. In the Decision No. 4 on the Conduct of Proceedings,¹⁵ the Chamber specifically directed the Parties to support “factual allegations ... critical to the Chamber's determination of an application” with documents or other evidential material,

¹¹ See for instance: *Gbagbo* ICC-02/11-01/11-548-Conf-Red, paras.45, 48, 54.and 69; *Ngudjolo* ICC-01/04-01/07-572 (OA 4), paras.23-25; *Ntaganda* ICC-12/04-02/06-OA, para.43 *et seq.*

¹² The Prosecution has annexed sworn declarations to at least four previous filings. Although two of these were originally filed *ex parte* [REDACTED], in the two *inter partes* filing the Defence raised no objection to this practice [REDACTED] Furthermore, supporting material has been provided in several other filings, such as the Summons Request (ICC-01/09-01/11-1120-Conf-Red).

¹³ [REDACTED]. Additionally, the Ruto Defence has handed in supporting material from the bar table in support of oral motions; *See* ICC-01/09-01/11-T-35-ENG ET, p.22, ln.22 *et seq.*

¹⁴ In the administrative sense of the word.

¹⁵ ICC-01/09-01/11-1312.

- failing which, a solemn declaration.¹⁶ This is precisely what the Prosecution did in its Rule 68 Request. The issue of improper interference is critical to the Chamber's determination of the Rule 68 Request. Accordingly, the Prosecution has attempted to provide the Chamber with as much relevant material as possible to assist it in this task.
15. The Chamber did not impose any limits on the type or source of such supporting material. Significantly, it is not limited to admitted evidence, evidence contained in the list of evidence ("LoE"), nor evidence from witnesses on the Prosecution's list of witnesses ("LoW"), as the Defence now urges. On the contrary, the Chamber's requirement of a sworn declaration "[i]n the absence of such evidential document or material ..." ¹⁷ indicates that it pertinently foresaw the situation where such material would **not** be on the record, or otherwise in the possession of a party.
 16. The Ruto Defence did not seek to appeal Decision No. 4 on the Conduct of Proceedings, but now attempts to persuade the Chamber, in effect, to alter the terms of the decision by significantly circumscribing the type of supporting material that may be adduced. This should not be permitted.
 17. Such limits would be also impractical and, indeed, would defeat the very purpose for which the Supporting Material is required, as explained below.¹⁸ Indeed, it may be observed that if the Supporting Material already forms part of the admitted evidence, it would be unnecessary to attach it to a filing at all.
 18. Accordingly, the Prosecution submits that it is both unnecessary and inappropriate for the Chamber to rule upon the "admissibility" of supporting material adduced in conformity with its prior directions.

¹⁶ *Ibid.*, para.2; In full: "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 critical factual assertion, or (b) information (indicating its source) and belief of the truth of such critical factual assertion".

¹⁷ *Ibid.*

¹⁸ See para.29 and part (iv) below.

(iv) The Ruto Defence does not dispute the relevance of the Supporting Material

19. The Prosecution argued in its Rule 68 Request that the Supporting Material is probative and relevant to the Chamber's determination of the Request.¹⁹ Significantly, among all their objections to the Supporting Material, the Ruto Defence does not dispute this.
20. The Prosecution submits that the clear relevance of the Supporting Material to the critical issues in the Rule 68 Request militates strongly against the relief sought.

(v) None of the objections raised warrant the removal of the Supporting Material

21. Turning to the five objections raised by the Ruto Defence to the Prosecution's Supporting Material, none of them – individually or cumulatively – justify the relief sought. Running through all five objections, like a golden thread, is the conflation of two distinct purposes for which evidence may be presented to the Chamber, i.e.: (i) evidence tendered for admission at trial; and (ii) material adduced in support of procedural filings.

(a) Supporting Material previously ruled inadmissible

22. This objection rests on the faulty premise that the Chamber's ruling that the material related to [REDACTED] ("the Disputed Material") was inadmissible at trial²⁰ *ipso facto* prevents the Prosecution from relying on it in the Rule 68 Request.
23. Contrary to the Ruto Defence's assertions,²¹ the use of the Disputed Material in support of the Rule 68 Request falls squarely within the Chamber's *caveat* that its ruling was without prejudice to the admission of the evidence in "any other proceedings in which the events and interviews in question may be an issue".²²

¹⁹ Rule 68 Request, para.58.

²⁰ ICC-01/09-01/11-1753-Conf.

²¹ Ruto Defence Request, para 9.

²² ICC-01/09-01/11-1753-Conf, para.44.

The material is adduced in different proceedings,²³ different circumstances and for a different purpose.

- (i) Previously, the Prosecution sought the admission of the Disputed Material into the trial record to impeach the credibility of [REDACTED], whose rights were said to be infringed through the denial of counsel. Now, the Prosecution does not seek to admit the Disputed Material, but only to rely on it in a procedural filing, to support the finding that [REDACTED] was improperly interfered with. Any misgivings that the Chamber might have as to the reliability of the Disputed Material due to the circumstances in which it was obtained, may be dispelled by the comprehensive corroboration of this fact in the [REDACTED].²⁴
- (ii) The Chamber's previous admissibility ruling rested heavily on its assessment of "the probative value of the evidence to the *merits* of the case before the Chamber".²⁵ However, now the Disputed Material is directly relevant to a critical factual finding that the Chamber is required to make, in order to determine the admissibility of the prior recorded evidence under rule 68(2)(d).

24. The Ruto Defence labels as "disingenuous" the Prosecution's characterisation of the Rule 68 Request as a procedural filing.²⁶ This, they argue, is because the Prosecution case against Mr Ruto depends upon the admission of the prior recorded testimony.

25. However, this argument conflates the *nature* of the Rule 68 Request with its *importance*. The importance of a procedural filing to the success of a case does not alter its procedural character. In this respect the Rule 68 Request is no

²³ I.e. in a procedural filing, rather than at trial.

²⁴ As more fully described in the Rule 68 Request.

²⁵ *Ibid.*, para 43 (emphasis in original).

²⁶ Inadmissibility Request, para.9.

different to the Prosecution's requests to admit evidence relevant to P-0013²⁷ and [REDACTED].²⁸

(b) Supporting Material not on List of Evidence and/or not disclosed

26. The Ruto Defence complains that much of the Supporting Material is not included on the Prosecution's LoE. This should come as no surprise, since the Prosecution does not intend to use it as evidence in the criminal trial. For the same reason, it would have been inappropriate to disclose the material as "incriminating evidence", since the Prosecution does not rely upon it to incriminate the Accused. It is, however, considered relevant to the preparation of the Defence or, in appropriate circumstances, under article 67(2). It was thus appropriately disclosed under these categories.
27. As the Ruto Defence itself notes,²⁹ the Chamber has not permitted the unfettered admission of evidence relating to witness interference, as this is not directly relevant to the main issue at trial. Yet they seek to prevent the Chamber from having access to the same material, which is indisputably relevant to the Rule 68 Request, by requiring it to first pass through the filter of admission at trial. The result will be that evidence which is directly relevant to the critical issue for decision may be excluded due to its lack of relevance to a separate issue. The flaw in such an approach is self-evident.
28. Furthermore, the majority of the Supporting Material was only gathered long after the Prosecution had filed its LoE. The Ruto Defence argue that the Prosecution should have sought leave to add this material to its LoE, as it did in its last four regulation 35(2) requests.³⁰ Once again, however, this argument overlooks the fact that the Prosecution sought to add that evidence to the LoE as impeachment evidence that was directly relevant to the summonsed

²⁷ ICC-01/09-01/11-1619-Conf-Corr.

²⁸ ICC-01/09-01/11-1535-Conf.

²⁹ Inadmissibility Request, para.23.

³⁰ ICC-01/09-01/11-1463-Conf-Corr; ICC-01/09-01/11-1511-Conf; ICC-01/09-01/11-1532-Conf and ICC-01/09-01/11-1606-Conf

- witnesses. Thus, the material was relevant at trial, since it related to the credibility of trial witnesses. The Prosecution submits that it was under no duty to seek the admission of Supporting Material which it did *not* intend to traverse with any witness, nor otherwise introduce into evidence.
29. The purpose of the LoE³¹ is to provide the Defence with adequate notice as to the evidence that the Prosecution intends to lead *in support of the charges preferred against the Accused*. If this list were diluted with extraneous material, on the off-chance that it might be necessary to support some future filing, this purpose would be substantially compromised.
 30. The Ruto Defence complain that the Prosecution's failure to include the Supporting Material in the LoE has deprived the Defence of adequate notice that this material would be relied upon. The Defence does not explain, however, how the mere inclusion of the material on the LoE would have alerted it that such material might be relied upon in a future Rule 68 Request.
 31. Furthermore, the Defence have been on notice for almost a year of the Prosecution's intention to seek the admission of the prior recorded evidence of the summonsed witnesses on the grounds of improper interference. It surely cannot come as a surprise, then, that the Prosecution seeks to rely on evidence of interference that has been faithfully disclosed to the Defence over the course of the article 70 investigation.
 32. There is no statutory duty to provide advance notice of intention to rely on specific supporting material prior to submitting a filing. Nor does Decision No. 4 on the Conduct of Proceedings require such notice. However, even if, *arguendo*, the Ruto Defence's complaint of lack of notice were founded, this does not justify the relief sought. While adequate notice is an important fair trial principle, it is not an absolute requirement. A criminal trial is a dynamic process and where circumstances change for reasons outside of the control of

³¹ And the LoW, for that matter.

the Prosecution, a degree of flexibility is appropriate. Even more so when the changed circumstances are orchestrated through a criminal scheme, implemented for the benefit of the Accused.

33. The Prosecution submits that, in the present circumstances, the appropriate remedy is not to deprive the Chamber of the evidential material necessary to make an informed decision, as the Defence urges. Rather, it is to allow the Defence adequate time to prepare its response. The Prosecution notes that the Chamber has already doubled the Defence's response time to six weeks – with the consent of the Prosecution.³² This is ample time to prepare their response.
34. The Defence complain that 10 items contained in Annex D1 (relating to the sworn declaration of [REDACTED] - “the Sworn Declaration”) have not been disclosed.³³ The Prosecution notes that five of these items were either previously disclosed under different ERNs³⁴ or the information contained therein disclosed in a different format.³⁵
35. The Prosecution concedes that, through oversight, the remaining five items had not been disclosed prior to the filing of the Rule 68 Request. All five items³⁶ have since been provided to the Defence. However, the Prosecution submits that this oversight, though regrettable, has not caused material prejudice to the Defence, for the following reasons:
 - (i) The non-disclosed items are very limited in nature, comprising chiefly of short Investigation Reports. They constitute a miniscule proportion of the

³² ICC-01/09-01/11-T-198-CONF-ENG p.28 ln.15 – p.29 ln.15.

³³ Inadmissibility Request, para 12; fn.26. Contrary to the Ruto Defence's assertion, all 10 items are footnoted in the Sworn Declaration. *See* fns. 212 (KEN-OTP-0106-0304); 43 (KEN-OTP-0114-0223); 30 (KEN-OTP-0153-0008); 148 (KEN-OTP-0116-0500); 149 (KEN-OTP-0138-0092); 295 (KEN-OTP-0139-0501); 146 (KEN-OTP-0153-0021); 144 (KEN-OTP-0153-0022); 225 (KEN-OTP-0153-0040) and 80 (KEN-OTP-0153-0054).

³⁴ KEN-OTP-0106-0304 (**Item 1** on the Ruto Defence list) is a duplicate of KEN-OTP-0103-0220; KEN-OTP-0116-0500 (**Item 4**) is a duplicate of KEN-OTP-0117-0022, both of which have been disclosed previously.

³⁵ The information contained in KEN-OTP-0139-0501 (**Item 6**) was disclosed *via* an *inter partes* email sent to both Defence teams on 18/09/2014 at 19:35, which reads “[REDACTED]”. KEN-OTP-0114-0223 (**Item 2**) was disclosed in hard copy pursuant to decisions of the Single Judge of PTC I: ICC-01/09-01/11-1003 and -1011. Furthermore, this item is a [REDACTED] transcript The English translation is KEN-OTP-0114-0198, which was disclosed previously. The information contained in the Investigation Report KEN-OTP-0153-0040 (**Item 9**) is reproduced in [REDACTED] witness statement KEN-OTP-0111-0162 at paras.14-17.

³⁶ And indeed the items referred to in the previous footnote.

Supporting Material. They have all now been provided to the Defence - more than four weeks in advance of their response deadline.

- (ii) The material is not critical to the Rule 68 Request. The Chamber's direction to support factual assertions with a sworn declaration did not require that such declaration themselves be supported by underlying evidence. Indeed, the Prosecution submits that a sworn declaration by a senior investigator on the OTP staff - subject to possible sanction under the OTP Code of Conduct and article 70(1)(b) of the Statute – provides sufficient confirmation of the investigative steps described therein.³⁷ Nevertheless, in order to forestall any Defence request for the underlying records and the attendant delays, the Prosecution elected to provide the Parties and the Chamber with relevant underlying material. Thus, even if these five items were to be excluded (or simply ignored), there is no reason to remove the relevant factual assertions from the Sworn Declaration.

(c) Supporting Material not tendered through [REDACTED]

36. The Prosecution accepts that it could have attempted to tender article 70 material through witnesses [REDACTED], but elected not to. [REDACTED]³⁸ [REDACTED].
37. Further, at that time the evidence was not considered relevant enough to the ultimate issue to pass the article 69(4) threshold for admission at trial. This view is fortified by various statements by the Chamber regarding the limited relevance of evidence of witness interference in the main case, as noted by the Ruto Defence itself.³⁹
38. It is highly probable that any attempt to lead these [REDACTED] witnesses on their article 70 evidence would have been strenuously opposed by the Defence.

³⁷ As noted in para.14 above, the Chamber foresaw the use of such solemn declarations in the **absence** of other evidential material.

³⁸ [REDACTED].

³⁹ Ruto Defence Request, para.23 and fn 41.

Given the Chamber's views on the relevance of the evidence, it is unlikely that the Prosecution would have been permitted to lead it, had it attempted to. It is also worth noting that the available article 70 evidence of these [REDACTED] witnesses contained in the Supporting Material, which is now relied upon in the Rule 68 Request, was disclosed to the Defence prior to their testimony. The Defence was thus at liberty to cross examine them on this evidence, but also chose not to do so.

39. Accordingly, the Prosecution submits that the failure to question the witnesses on this evidence is no bar to its use for the limited purpose of the Rule 68 Request. This is more so in circumstances where their evidence of interference is comprehensively corroborated in many respects by objective evidence, such as [REDACTED] and contemporaneous reports to OTP investigators.

(d) Supporting Material from witnesses not on the Prosecution's witness list

40. The Ruto Defence complains that [REDACTED] of the witnesses relied upon are not on the Prosecution's LoW.⁴⁰ Again, this is not surprising, since none of the [REDACTED] witnesses provides evidence relevant to the criminal trial. And again, their statements were recorded long after the LoW was filed.
41. What is surprising, however, is the Ruto Defence's statement that "[t]he fact that these [REDACTED] individuals do not provide evidence relevant to the main case is irrelevant".⁴¹ The Inadmissibility Request does not explain on what conceivable legal basis the Prosecution could have sought to add these [REDACTED] witnesses to its LoW. It also does not explain how amending the LoW prior to filing the Rule 68 Request, for the specific purpose of adding these witnesses, would have put the Defence in a materially better position. Any additional notice that such an amendment may have provided may be, and has been, adequately offset by an extension of time to respond.

⁴⁰ [REDACTED]; See Inadmissibility Request, para.19

⁴¹ Ruto Defence Request, para.21.

42. The Prosecution observes further that [REDACTED] witnesses complained of are OTP investigators, whose sworn declarations were submitted in compliance with the Chamber's specific instructions.⁴² The [REDACTED] is [REDACTED] whose statement was only taken by the Prosecution in [REDACTED].
43. For the same reasons provided in section (c) above, the omission of these names from the LoW should not prevent the Prosecution from relying on this evidence.

(e) Miscellaneous objections under the rubric "administration of justice"

44. It is difficult to discern precisely what is the crux of the Ruto Defence's complaint under this rubric. It appears to be that the Chamber is allegedly asked to usurp the role of the Pre-Trial Chamber, in confirming the charges that may be preferred against Walter Barasa, if and when he is arrested and surrendered to the Court. If so, the objection is misplaced for a number of reasons:
- (i) Firstly, the Ruto Defence is not mandated to raise such an objection on behalf of Barasa. Absent this, they have no legal standing on this issue.
 - (ii) Secondly, it is speculative: Barasa may in fact never be arrested and surrendered to the Court.
 - (iii) Thirdly, any ruling by this Chamber regarding Mr Barasa's interference with witnesses will not be not binding on the PTC - any more than the PTC's finding that there are reasonable grounds to believe that Barasa improperly interfered with witnesses is binding on this Chamber. Of course, both such decisions may have persuasive value, but this is no grounds for objection.
 - (iv) Finally, any eventual decision by the PTC on the confirmation of charges against Barasa will be based on a different record of evidence, a different

⁴² *Per* ICC-01/09-01/11-1312.

standard of proof and the comprehensive legal arguments of all parties.
As such the two matters are clearly distinguishable.

(vi) The approach suggested by the Ruto Defence is inappropriate and impractical

45. The Inadmissibility Request advances no legal basis in the Statute and Rules for what it suggests is the “correct” approach: namely to limit supporting material in filings such as the Rule 68 Request to evidence already on the record. The three reasons that they do advance in support of this theory do not withstand scrutiny.

- (i) Firstly, the reliance on the Chamber’s decisions on admissibility is misplaced, since relate to a completely different context. While a “picture” of the witness interference may be sufficient in the main case, where this is only indirectly relevant to the main issues, the same cannot be said in the Rule 68 Request. On the contrary, improper interference is perhaps the single most important issue at stake in the Request. The Prosecution - which bears the burden of satisfying the Chamber of this fact - must ensure that it provides adequate supporting material upon which the Chamber may reach an informed decision.
- (ii) Secondly, there is no danger that the trial will be “eclipsed by the article 70 investigation”. The Prosecution has stressed that the Supporting Material is adduced for the sole purpose of the Rule 68 Request, and does not seek admission at trial. Thus, once the Chamber has ruled on this issue, that will end the matter.
- (iii) Finally, the Prosecution submits that the Ruto Defence’s “fairness” arguments are overstated and may be adequately offset by an appropriate extension of response times. In this regard, the Prosecution notes that the Ruto Defence has not requested any further extension of their response time, even in the alternative, in order to make the necessary enquiries. This begs the question whether the real objective of the Inadmissibility

Request is to hobble the Prosecution's ability to support its Rule 68 Request, rather than to secure adequate time to respond.

46. The suggested approach is also impractical. The universe of issues which a Chamber may be required to decide during the course of a trial is far broader than the narrow question of guilt or innocence. Thus, it is obvious that factual allegations in filings will more often than not depend on evidential material beyond what is contained in the trial record.⁴³ Limiting supporting material to evidence on record would thus deprive the Chamber of the factual basis on which to render an informed decision.
47. This is especially true of requests to admit evidence under rule 68(2)(c) and (d). By their nature, the need to resort to these provisions will normally only arise due to unforeseen developments during the course of a trial. They will also normally involve issues that are not relevant at trial. Thus, applying the approach suggested by the Ruto Defence will effectively render rule 68(2)(c) and (d) dead letter law. The Prosecution submits that the Chamber should not adopt a procedure that renders ineffectual a provision of the Statute or Rules, which are the primary sources of law of the Court.⁴⁴
48. Lastly, one example of the impractical nature of the suggested approach is that it takes no account of the timing of the filing in question. Thus, hypothetically, if a filing is submitted at the beginning of the trial, rather than towards the end of the Prosecution's case, there may be little or no evidence on record on which to rely.

(vii) The submissions should have been contained in the Ruto Defence's substantive response

49. As explained above, the Inadmissibility Request to rule the Supporting Material inadmissible is unnecessary, since the Prosecution does not seek to admit it. Thus, this interlocutory filing has needlessly added to the already extensive

⁴³ Or the LoE and LoW.

⁴⁴ Article 21 of the Statute.

litigation in this case which will require filings by all Parties and a decision by the Chamber. This may potentially delay the resolution of the Rule 68 Request and hence the close of the Prosecution's case.

50. Many of the complaints directed at the Prosecution's Supporting Material could have, and should have, been made in the course of the Ruto Defence's response. They are more appropriately made in the course of submissions on the credibility or probative value of the Supporting Material, rather than its "admissibility".
51. Hence, the Chamber may, in its discretion, consider whether it would be appropriate for the Chamber to treat the Inadmissibility Request as part of the Ruto Defence's substantive response and adjust the page limit accordingly.
52. The Prosecution submits that in order to avoid any delay on account of the Inadmissibility Request, the Chamber should also maintain the current filing schedule and rule on all contentious matters in a single ruling once that schedule is complete.

Relief

53. For the foregoing reasons, the Prosecution requests the Chamber to dismiss the Inadmissibility Request.



Fatou Bensouda, Prosecutor

Dated this 16th day of July 2015

At The Hague, the Netherlands