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No.: **ICC-01/09-01/11**
Date: **18 May 2016**

TRIAL CHAMBER V(A)

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

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

THE PROSECUTOR v. WILLIAM SAMOEI RUTO
AND JOSHUA ARAP SANG

Public

Sang Defence Response to 'Ruto defence request to appoint an *amicus* prosecutor'

Source: **Defence for Joshua arap Sang**

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

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I. INTRODUCTION

1. On 2 May 2016, the Defence for William Samoei Ruto submitted both a confidential and a public redacted request to appoint an *amicus* prosecutor with confidential annexes 1 and 2 ("Ruto Defence Request").[1] In this Request, the Ruto Defence requests that the Trial Chamber order the Office of the Prosecutor ("OTP") to appoint an *amicus* prosecutor to investigate, with a view to initiating criminal prosecution, OTP witnesses, OTP intermediaries, and possibly ICC staff members, for offences against the administration of justice, contrary to Article 70 of the Rome Statute ("Statute").[2]

2. On 10 May 2016, the Common Legal Representative for Victims submitted a Response to the "Ruto Defence Request to Appoint an *Amicus* Prosecutor" ("LRV Response"),[3] opposing the request, which it considered, *inter alia*, "frivolous and vexatious, misconceived in law, and an afterthought".[4]

3. The Defence for Joshua arap Sang hereby submits its response to the Ruto Defence Request. It supports, and joins the Ruto Defence Request and likewise requests the Trial Chamber to order the OTP to appoint an *amicus* prosecutor to investigate the commission of Article 70 offences by its witnesses, including those who also acted as intermediaries and by ICC staff members.

II. LEGAL SUBMISSIONS

RELUCTANCE TO PROSECUTE THEIR OWN WITNESSES/INTERMEDIARIES

4. The Defence submits that the arguments contained in the Ruto Defence Request are solid and have merit, and deserve genuine consideration by the Trial Chamber. As argued in the Ruto Defence Request, there is sufficient evidence in the trial record and in the possession of the OTP and the Defence to provide reason to

[1] ICC-01/09-01/11-2028-Conf; ICC-01/09-01/11-2028-Red (2 May 2016).
[2] ICC-01/09-01/11-2028-Conf, para. 1.
[3] ICC-01/09-01/11-2029-Conf (10 May 2016).
[4] *Ibid*, para. 2.

believe that offences under Article 70 have been committed.[5] In light of this evidence, a proper investigation of the commission of Article 70 offences is required to ensure and protect the administration of justice.

5. Offending against the administration of justice is a serious matter and is treated as such by the International Criminal Court ("ICC"). It can bring the ICC proceedings, relying heavily on the good faith and honesty of all involved, into disrepute. Five accused are facing trial for alleged Article 70 charges,[6] and a warrant of arrest has been issued against at least three Article 70 suspects.[7] The Prosecutor has indicated the importance to safeguard the integrity of the Court's proceedings, amongst others, by investigating, identifying, and prosecuting individuals who seek to pervert the ICC's course of justice:[8]

> The Chamber's decision to issue these warrants is significant. The integrity of witnesses is essential for the Court's determination of the truth. Interfering with the attendance or testimony of ICC witnesses, or retaliating against them are serious crimes under Article 70 of the Rome Statute.
>
> …
>
> Collectively, these warrants of arrest underscore my commitment to using, to the extent possible, available measures under the Rome Statute to safeguard the integrity of the Court's proceedings. My Office is investigating, identifying, and prosecuting individuals who seek to pervert the course of justice at the ICC.

6. It is regrettable that this Prosecutor's self-proclaimed commitment "to safeguard the integrity of the Court's proceedings" has so far only led to the prosecution of individuals who allegedly sought to manipulate the evidence in a manner favourably to the accused. The Prosecutor's commitment to investigate, and if appropriate, prosecute individuals for offenses against the administration of justice appears to be

[5] ICC-01/09-01/11-2028-Conf, paras 19-34.
[6] *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, ICC-01/05-01/13.
[7] *The Prosecutor v. Walter Osapiri Barasa*, ICC-01/09-01/13; Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the unsealing of Arrest Warrants in the Kenya situation, 10 September 2015, disclosing the existence of two arrest warrants under seal for Paul Gicheru and Philip Kipkoech Bett, at: https://www.icc-cpi.int//Pages/item.aspx?name=otp-stat-10-09-2015-2. It is possible that there are other outstanding warrants under seal.
[8] Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the unsealing of Arrest Warrants in the Kenya situation, *ibid*.

much weaker, if at all existent, where it concerns individuals who allegedly have either themselves made false allegations against one or more accused, or induced, or attempted to induce others to do so. None of the intermediaries acting against the interests of the accused, or prosecution witnesses allegedly falsely incriminating the accused have been subjected to criminal proceedings. This is true even in the cases where findings have been made confirming their dishonesty. In this regard, the Defence notes Judge Van den Wyngaert's observations cited by the Ruto Defence regarding the Prosecutor's failure to investigate, let alone prosecute P-159 in the case of *Katanga & Ngudjolo*.[9]

7. It is further noteworthy that, in *Lubanga*, the integrity of three of the intermediaries who were used by the Prosecutor to collect evidence was seriously put in question. With regard to P-143, the Trial Chamber accepted that "there is a real risk that he played a role in the markedly flawed evidence that these witnesses provided to the OTP and to the Court".[10] The Chamber concluded that P-143 probably "persuaded, encouraged, or assisted witnesses to give false evidence".[11] The Chamber also found that "a real possibility exists that P-0321 encouraged and assisted witnesses to give false evidence".[12] And as to intermediary P-316, the Chamber went even further: "there are strong reasons to believe that P-316 persuaded witnesses to lie as to their involvement as child soldiers within the UPC."[13]

8. Even the OTP investigators themselves knew a long time that their intermediaries might be manipulative and have their own agendas.[14] In particular P-316 concocted numerous claims of threats, including that his assistant P-183 and his family had been killed, whilst the OTP investigators knew this to be false.[15] However, on orders of more senior employees within the OTP, the investigators continued to use these

[9] ICC-01/04-01/07-3436-AnxI ("Judge Van den Wyngaert's Dissent"), para. 140; ICC-01/09-01/11-2028-Red (2 May 2016).
[10] ICC-01/04-01/06-2842, Judgment Pursuant to Article 74 of the Statute (14 March 2012).
ICC-01/04-01/06-2842, para. 291.
[11] *Ibid*, paras. 291, 483.
[12] *Ibid*, paras. 483, 450.
[13] *Ibid*, para. 483.
[14] *Ibid*, paras. 205, 316.
[15] *Ibid*, paras. 205, 302-04, 313-319, 336-67.

intermediaries, not only in the case of *Lubanga*, but also *Katanga & Ngudjolo*, long after they had started to doubt their credibility.[16]

9. The Judges in *Lubanga* were not impressed, devoted 157 pages of their judgment to the issue of failed investigations and the (mis)use of intermediaries, and concluded that "the prosecution should not have delegated its investigative responsibilities to the intermediaries."[17] Only after the Chamber strongly encouraged the Prosecutor to initiate investigations against these intermediaries under Article 70 did the OTP eventually ask an independent prosecutor to look into the matter. It never led to prosecution.

10. The above examples demonstrate that there is a general and consistent reluctance on the part of the OTP to investigate, and where necessary, prosecute its own witnesses or intermediaries, unless such intermediaries are working contrary to the Prosecutor's interests. In this sense, these references to other cases are of "utility" (contrary to the LRV submissions, para. 3). The unsuccessful attempts by the Ruto Defence to have the OTP look at defence material potentially demonstrating reasonable ground to believe that Prosecution witnesses, intermediaries and staff members have engaged in conduct which is prohibited by Article 70, should not be considered in isolation, but rather in the context of this general reluctance. This is a recurring matter of concern, warranting the Chamber's consideration.

POWER UPON CHAMBER TO ISSUE ORDER SOUGHT

Legal Provisions

11. In light of the Prosecution's reluctance to prosecute "their own" under Article 70 of the Rome Statute, questions as to whether an investigation under Article 70 should be initiated should not solely lie with the Prosecution. As noted by Trial Chamber III in *Bemba*, Article 70 grants the Court jurisdiction over offences against the administration of justice, but "does not specify which organ of the Court has the competence for *investigating* such conduct".[18]

[16] *Ibid*, paras. 294, 315.
[17] *Ibid*, para. 482.
[18] Trial Chamber III, "Public redacted version of "Decision on the 'Defence application concerning Witness

12. Pursuant to Rule 165 of the Rules, the responsibility to initiate and conduct investigations in these circumstances lies with the prosecution.[19] Investigations can be initiated *proprio motu*, "or on the basis of information communicated by a Chamber or any reliable source". In *Bemba*, the Chamber held that, pursuant to Articles 64(2) and 64(6)(f) of the Statute, in the event that the OTP refuses to prosecute one of its own witnesses or intermediaries, it may "remind the prosecution of the authority that it has under Rule 165(1) of the Rules, and communicate to the prosecution any information the Chamber may have in relation to a possible Article 70 offence".[20]

13. The Defence submits that such an approach does not prevent the Chamber to go further, where appropriate, and order the Prosecutor to appoint an *amicus* prosecutor to investigate, with a view to initiating criminal prosecution. This may be necessary where the OTP appears to be reluctant to initiate such proceedings for the mere reason that it concerns one of its own witnesses or intermediaries. Indeed, the Chamber in *Bemba* was also "mindful that Rule 165(1)'s allocation of investigatory authority may give rise to conflicts of interest in situations where a prosecution witness appears to have committed an offence under Article 70 of the Statute".[21] As the Ruto Defence also pointed out,[22] even the OTP itself has acknowledged that "a conflict of interest" could exist in such a situation.[23] In the view of the Chambers, this could "influence the authority given to [the Prosecutor] to initiate such an investigation".[24]

14. To avoid that offenses against the administration of justice remain unpunished, it would be necessary for the Chamber to intervene where the OTP refuses to initiate an investigation into Article 70 offenses for reasons relating to a conflict of interest (unwillingness to prosecute prosecution witnesses and/or intermediaries), and not because there are no reasonable grounds to believe that such offenses may have been

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CAR-OTP-WWWW-0042's evidence'" of 10 October 2013", 16 October 2013, ICC-01/05-01/08-2830-Red, para. 13.

[19] Trial Chamber II, "Decision on the Prosecution's renunciation of the testimony of witness P-159", 24 February 2011, ICC-01/04-01/07-2731, para. 18;

[20] *Bemba*, *supra*, ICC-01/05-01/08-2830-Red, para. 14. See also Trial Chamber I, ICC-01/04-01/06-T-350-Red-ENG CT3, page 16, lines 18 to page 17, lines 1-6; Trial Chamber II, ICC-01/04-01/07-T-190-Red-ENG, page 1 line 22 to page 5, line 24.

[21] *Bemba*, *supra*, ICC-01/05-01/08-2830-Red, para. 14.

[22] ICC-01/09-01/11-2028-Conf, para. 39.

[23] ICC-01/04-01/06-2716, Prosecution's Observations on Article 70 of the Rome Statute, para. 11.

[24] ICC-01/04-01/07-T-190-Red-ENG, p. 4 lines 1-5.

committed. This power follows from Article 64(6)(f) as well as an inherent power to avoid an injustice.

15. Article 64(6)(f) authorizes a Chamber to rule on all "relevant matters". In light of the importance to safeguard the judicial integrity of the ICC proceedings, the matter concerned undoubtedly qualifies as a "relevant" matter. The fact that the proceedings have come to an end does not make the matter concerned less "relevant". Indeed, such investigation and eventual prosecution is necessary to protect the integrity of the proceedings in this case (even if retroactively), as well as other ICC proceedings. If evidence comes to light which demonstrates that one or more individuals may have engaged in conduct prohibited by Article 70, then surely an investigation into the alleged conduct with a view to prosecution would still be as relevant as it would have been earlier. Since the beginning of the proceedings, the Defence for Mr Sang and of Mr Ruto have continuously pointed out to the OTP that its own intermediaries and/or witnesses were unreliable and lying, and that adequate investigations had not yet been carried out, which created the very risk that offenses against the administration of justice were being committed.

16. Also, the Ruto Defence has clearly demonstrated that it has tried to resolve the matter long ago. It has raised these matters throughout the entire proceedings and, to the extent allowed, has used such material in its cross-examination of prosecution witnesses. However, the Defence could not unlimitedly introduce its own material in the course of the Prosecution case, and was frequently disallowed from doing so. Instead, it was instructed to wait for its defence case. The fact that not all material have been used can therefore not be blamed on the Defence, nor be an obstacle from relying on Article 64(6)(f) to order the Prosecutor to appoint an *amicus curiae*.[25]

17. Accordingly, the strong objections of the LRV are unmerited and have no basis in law.[26] The relevant question at this point in time is not whether the Prosecutor rightly or wrongly rejected earlier Defence requests to look into the matter and on which conditions. Rather, the relevant question is whether there are reasonable grounds to

[25] Contrary to the LRV submissions, ICC-01/09-01/11-2029-Conf, paras. 9-12.
[26] *Ibid*, paras. 7-12.

believe that one or more Article 70 offenses have been committed, which ought to be investigated.

18. It is also not too late to invoke Article 64(6)(f).[27] There is no apparent reason why this case should be treated differently than the Kenyatta case on the sole basis that the Kenya case did not go to trial. Fact of the matter is that, though the proceedings in the case against Mr Ruto and Mr Sang have come to an end, they can be reopened in the future. The majority declared a mistrial, not an acquittal, and as such the proceedings are still open.[28] In this sense, there is no difference with the Kenyatta case. Accordingly, the Chamber has the power to make the order sought on the basis of Article 64(6)(f).

Inherent jurisdiction

19. Aside from the applicability of Article 64(6)(f) of the Statute, the Chamber has inherent jurisdiction to issue the order sought. The fact that there is no specific reference in the Statute to a power to order the Prosecutor to appoint an *amicus* prosecutor to investigate, with a view to initiating criminal prosecution under Article 70 of the Statute does not mean that such a power does not exist. The absence of express authority in the Statute has not prevented judges on previous occasions from exercising such authority nonetheless. They could do so, for instance, to safeguard the integrity of the proceedings and the administration of justice. Where the Statute leaves a gap, in line with article 31(1) of the Vienna Convention on the Law of Treaties, the object and purpose of the Rome Statute should be considered in addressing the lacuna.[29]

20. This Chamber, as well as other Chambers, have relied on inherent jurisdiction on a number of occasions. The ICC Chambers have been extremely creative with regards to the rights of victims, almost undefined by the Statute, Rules or Regulations. In addition, judges have, for instance, accepted the remedy of 'stay of proceedings'

[27] Contrary to the submissions of the LRV, *ibid*, paras. 9-12.
[28] ICC-01/09-01/11-2027-Red, Decision on Defence Applications for Judgments of Acquittal (5 April 2016), para. 464.
[29] Vienna Convention on The Law of Treaties, United Nations Treaty Series 18232, vol. 1155, p. 331.

against an abuse of process,[30] as well as the submission of 'no case to answer' motions,[31] whilst neither is explicitly provided for in the ICC Statute or Rules. Authority to order a mistrial in this case was found by relying on Article 64(2) in conjunction with Article 4(1) of the Rome Statute, obliging the Chamber to ensure a fair trial,[32] and on Article 21 to look for legal solutions on the basis of legal instruments other than the Court's own legal texts where the latter 'offered no ready solutions to the problem at hand'.[33]

21. This Chamber has relied on the doctrine of 'implied' powers and 'inherent' jurisdiction as defined by the International Court of Justice ('ICJ') to hold that "*An international institution – particularly an international court – is deemed to have such implied powers as are essential for the exercise of its primary jurisdiction or the performance of its essential duties and functions.*"[34] The majority of this Chamber also found support in the doctrine of 'implied powers', in addition to a combination of articles 4(1) and 64(2), to order a mistrial.[35]

22. As confirmed by the ICJ,[36] from the notion of 'implied powers' follows the notion of 'inherent jurisdiction' allowing the judiciary to make rulings on the basis of legal principles not explicitly codified, but which follow from the objective and intention behind the codified legal principles. The Chamber in *Kenyatta* relied on its inherent

[30] ICC-01/04-01/06-1401, TCI Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13-06-2008; ICC-01/04-01/06-1486, AC Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 21-10-2008; ICC-01/04-01/06-2517-Red, TCI Redacted Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, 08-07-2010; ICC-01/04-01/06-T-314-ENG ET WT 15-07-2010; ICC-01/04-01/06-T-315-ENG ET WT 08-10-2010.
[31] ICC-01/09-01/11-2027-Red, TCV(A) Public redacted version of: Decision on Defence Applications for Judgments of Acquittal, 05-04-2016 ("Decision on Defence Applications for Judgments of Acquittal").
[32] *Ibid*, para. 190.
[33] *Ibid*, para. 192.
[34] ICC-01/09-01/11-1598, 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", para. 81.
[35] Decision on Defence Applications for Judgments of Acquittal, para. 191.
[36] Nuclear Tests Case (New Zealand v France) (Judgment) (1974) ICJ Reports 457 [International Court of Justice], para. 23; Nuclear Tests Case (Australia v France) (Judgment) (1974) ICJ Reports 253 [International Court of Justice], para. 23. See also Summons Decision, para. 78.

jurisdiction to allow recourse to reconsideration notwithstanding the absence of an express provision.[37]

23. The international tribunals have similarly concluded that a Chamber has inherent authority to take certain measures which may not be expressly provided for in their Statute or Rules.[38] Also where a matter is squarely within the discretion of the Prosecutor, such as the decision who to prosecute, and who not to prosecute, there is an inherent power on the Chamber to intervene where such a decision has been made on the basis of an improper motive.[39]

24. Given the importance of dealing with Article 70 allegations appropriately, failure to do so could damage the integrity of the entire court system. Accordingly, in light of the importance of this issue for the integrity of these and all other ICC proceedings, the Defence submits that the Chamber has inherent jurisdiction to issue the order sought.

25. This is also in line with the procedure adopted by the *ad hoc* tribunals, where it is the Chamber and not the Prosecutor which decides on issues of contempt. Indeed, pursuant to Rule 77(C) of the Rules of the International Criminal Tribunal for the former Yugoslavia ('ICTY') and the International Criminal Tribunal for Rwanda ('ICTR'), if a Chamber 'has reason to believe that a person may be in contempt of the Tribunal', it may either direct the Prosecutor to investigate the matter (i), or, in case of a conflict of interest, direct the Registrar to appoint an amicus curiae to investigate the matter "and report back to the Chamber as to whether there are sufficient grounds for instigating contempt proceeding" (ii). The Chamber may also initiate proceedings itself (iii). If the Chamber considers that there are sufficient grounds to proceed

[37] *Prosecutor v. Uhuru Muigai Kenyatta*, Decision on the Prosecution's motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial, ICC-01/09-02/11-863, 26 November 2013, para. 11. *See* also *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the defence request to reconsider the "Order on numbering of evidence" of 12 May 2010, ICC-01/04-01/06-2705, 30 March 2011, para. 12.
[38] *Prosecutor v Bagosora et al*, No. ICTR-98-41-T, *Decision on Ntabakuza Petition for a Writ of Mandamus and Related Defence Requests* (18 April 2007), para. 5; *Prosecutor v Bobetko*, No. IT-02-62-AR54 *bis*, *Decision on Challenge by Croatia to Decision and Orders of Confirming Judge* (29 November 2002), para. 15; *In the Case Against Florence Hartmann*, No. IT-02-54-R77.5, *Reasons for Decision on the Defence Motion for Stay of Proceedings for Abuse of Process* (3 February 2009), para. 4; *Prosecutor v Mucic et al*, No. IT-96-21-A*bis*, Judgment on Sentence Appeal (8 April 2003), para. 16.
[39] *Prosecutor v. Ndindiliyimana et al*. ICTR-2000-56-T (Decision on Urgent Oral Motion for a Stay of the Indictment, or in the Alternative a Reference to the Security Council, 26 March 2004), paras. 23 & 25.

against a person for contempt, it may direct the Prosecutor or an amicus curiae to prosecute the matter, or prosecute the matter itself (D)(i)&(ii).

26. Similarly, Rule 91(B)(i) of the ICTR/ICTY Rules, relating to false testimony, provides that "[i]f a Chamber has strong grounds for believing that a witness has knowingly and wilfully given false testimony, it may direct the Prosecutor to investigate the matter with a view to the preparation and submission of an indictment for false testimony". The ICC would be the only international court where such important decisions are solely within the discretion of the OTP. It is submitted that the Chamber should, at a minimum, be able to intervene when the OTP abuses its discretion under Rule 165.

27. Accordingly, the Defence submits that the Chamber should be concerned only with the question as to whether there are reasonable grounds to believe that Article 70 offenses have been committed. If the Chamber considers there are reasonable grounds, the Defence submits it should order the Prosecutor to appoint an *amicus curiae*, as requested here and by the Ruto Defence.

REASONABLE GROUNDS

28. The Defence submits that the Ruto Defence has clearly shown reasonable grounds to believe that multiple witnesses, intermediaries and potentially OTP staff members have engaged in conduct prohibited by Article 70 of the Statute. In particular, the annexes to the Ruto Defence Request suggest such conduct occurred.

29. In addition, the evidence submitted throughout the proceedings, as well as the Majority's subsequent findings in the *Decision on Defence Applications for Judgments of Acquittal*, show that the witnesses were motivated by considerations other than to tell the truth. In particular, it has become clear that witnesses P-800, P-658 and P-356, amongst others, did not shy away from distorting the truth and make false allegations under oath. The Defence notes that the Majority uttered critical remarks about their credibility.

30. In relation to P-800, the majority made multiple findings about him having misled the court by testifying falsely under oath (see para. 41 … "he initially misled the court by first testifying under oath that he himself had spoken with the youth"); and therefore found his evidence "incapable of belief".[40]

31. Not only has P-800 been found to have lied under oath, the majority also stressed that he "admitted to his involvement in witness interference under oath"[41] and that the Prosecutor relied on P-800's direct involvement in witness interference in bribing other prosecution witnesses.[42] The majority then provided details about P-800's witness interference and attempts to bribe witnesses as an inducement to recant;[43] and to lure P-495 into witness interference as well.[44]

32. According to the majority, these matters raised "serious questions regarding Witness 800's trustworthiness."[45] Indeed, they held that he "demonstrated a willingness to lie in return for personal gain and induce others to lie as well, apparently without concern for the significant implications of such dishonesty" and highlighted his "far-reaching willingness to manipulate the truth" without there being a suggestion of him having "acted under duress or fear of retribution".[46]

33. Given these findings, the Defence submits that there are very strong and clear reasons for the Prosecutor to investigate and prosecute P-800 under Articles 70(1)(a) and (c). The Majority findings in respect of P-800 go far beyond pointing out inconsistencies in his testimony;[47] rather they suggest intentional dishonesty on the part of P-800 that should undoubtedly be investigated and prosecuted.

34. Though less blatant, the majority of the judges were also highly critical as regards the credibility of other prosecution witnesses, in particular of P-658, and P-356.

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[40] Decision on Defence Applications for Judgments of Acquittal, para. 116.
[41] *Ibid*, para. 42.
[42] *Ibid*, footnote 66 referring to the Prosecution's request for the admission of prior recorded testimony of six witnesses, 29 April 2015, ICC-01/09-01/11-1866-Conf, Parts VI and VII.
[43] *Ibid*, footnote 67, ICC-01/09-01/11-T-157-Conf-Eng (20 November 2014), 13-14.
[44] *Ibid*, footnote 69, *ibid*, 16-18.
[45] *Ibid*, para. 43.
[46] *Ibid*, para. 43.
[47] Mere inconsistencies are insufficient to warrant investigations under Article 70. *See Prosecutor v. Katanga & Ngudjolo*, Transcript of hearing, 22 September 2010, ICC-01/04-01/07-T-190-ENG Red, page 5 lines 1-10.
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35. For instance, the majority expressed "serious doubt surrounding Witness 658's testimony"[48] especially in light of the fact that he "earlier deliberately deceived the court".[49]

36. The majority further found that P-356 should be treated with "extreme caution"[50] not least because of his willingness to be "deceitful in some of his dealings with the Prosecution, as well as the Victims and Witnesses Unit of the Registry",[51] demonstrating his capability "of acting in a mendacious manner".[52] The majority also pointed at many contradictions in his sworn testimony, in particular in respect of the alleged acquisition of guns,[53] and his "wholly unconvincing" explanation for the fact that he did not mention the accused in relation to the guns allegation in an earlier interview with an NGO.[54]

37. The Defence is of the view that these critical observations of the majority, seriously questioning the trustworthiness of the above and other prosecution witnesses, at least warrant an investigation under Article 70(1)(a). Words which imply intentional conduct, such as "deceived" and "deceitful", suggests the Majority has taken the view that these witnesses acted with the requisite intention under Article 70. In any event, when considered in the context of the totality of the evidence, including that submitted by the Ruto Defence, the Defence submits that such observations do not merely go to the credibility of the witnesses concerned; they suggest that false sworn evidence has been provided to the Court.

38. Accordingly, the Defence submits that the 'reasonable grounds to believe' test has been met in respect of P-800, P-658 and P-356, as well as those referred to in the Ruto Defence Request.

[48] Decision on Defence Applications for Judgments of Acquittal, para. 101.
[49] *Ibid*, para. 53, 98.
[50] *Ibid*, para. 61.
[51] *Ibid*, para. 60.
[52] *Ibid*, para. 60.
[53] *Ibid*, para. 58, 59.
[54] *Ibid*, para. 58.

III. CONCLUSION

39. On the basis of the above arguments, as well as those put forth by the Ruto Defence, the Defence respectfully requests the Trial Chamber to order the OTP to appoint an *amicus* prosecutor to investigate, with a view to initiating criminal prosecution, OTP witnesses, OTP intermediaries, and possibly ICC staff members, for offences against the administration of justice, contrary to Article 70 of the Rome Statute.

Respectfully Submitted,

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Joseph Kipchumba Kigen-Katwa
On behalf of Mr Joshua arap Sang
Dated this 18th day of May 2016
In Nairobi, Kenya