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TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding
Judge Christine Van den Wyngaert
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

***THE PROSECUTOR v. WILLIAM SAMOEI RUTO
AND JOSHUA ARAP SANG***

Public

Written Submissions in Response to Order Scheduling a Status Conference

Source: Defence for Mr. 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 14 May 2012, Trial Chamber V issued an *Order Scheduling a Status Conference* ("Order"),¹ which listed several agenda items for discussion at a status conference to be held on 11 June 2012. The Trial Chamber requested the parties to make written submissions on any relevant agenda items by 28 May 2012.
2. The Defence for Mr. Ruto and the Defence for Mr. Sang hereby make the following submissions, keeping in mind that the Defence's ability to make an informed decision with respect to several of the issues is highly dependent on the case that the Prosecution intends to present at trial. Thus, the Defence will be in a better position to provide more detail to the Chamber as the pre-trial period progresses and Prosecution disclosures are made.

II. SUBMISSIONS

Agenda Item A: Date of Trial

3. The Prosecution is the triggering force of the proceedings. At this time, the Defence does not know the extent of the Prosecution case, or even whether the Prosecution intends to rely on evidence and witnesses that it used for purposes of confirmation, or on entirely new evidence. Once a timeline for disclosure is set and the Defence has had sight of the material, the Defence will be better able to assist the Trial Chamber with a precise amount of time that is necessary to ensure that the defence has adequate time for the preparation of the defence, as required by Article 67(1)(b).
4. Furthermore, the Accused has the right to obtain and examine witnesses on his behalf under the same conditions as witnesses against him, as well as the right to raise defences and to present other admissible evidence (Article 67(1)(e)). These rights must be implemented in a way that is effective and not illusory. For the Defence to meaningfully exercise these rights, the Defence is entitled to have sufficient time to analyse and react to the Prosecution case.²

¹ *Prosecutor v. Ruto and Sang*, ICC-01-09/01-11-413, Order scheduling a status conference, 14 May 2012.

² The accused will be disadvantaged if he is forced to go to trial before he is ready to test every aspect of the Prosecution's case. *Prosecutor v. Krajisnik*, IT-00-39-T, Decision on Defence Motion for Adjournment, 21 September 2004, para. 2.

5. Additionally, the Defence needs to be given adequate time to prepare for its case, in order to ensure that the accused is not placed at a disadvantage.³
6. The Defence submits that, at the very least, it will require a minimum of four months from the time the Prosecution has made its final disclosures in order to complete its investigations and preparations for trial. This period is further justified by the fact that, at the confirmation stage, it emerged that the Prosecution had neither investigated available exculpatory evidence nor interviewed the suspect.
7. Moreover, the Defence requests that the trial commence after the next general election in Kenya, which is currently scheduled for March 2013. The Defence submits that the elections and campaign environment that has already obtained would limit Mr. Sang's capacity to effectively investigate and make arrangements for trial. This would render an effectual defence difficult prior to the 2013 elections. For instance, some of Mr. Sang's potential witnesses were engaged in politics during the 2007-2008 election cycle, and they have likewise re-engaged themselves for the 2013 election.
8. The Defence is cognisant of the court's duty under Article 67(1)(c) to try the accused without undue delay. But, in addition, the Defence submits that a balance should be struck between the duty to avoid delay and the risk of a commencing a hasty trial whose likely effect would be to undermine the Defence's entitlement to adequate time for preparation and a fair trial.

Agenda Item B: Languages

9. At this stage, the Defence anticipates disclosing evidence and calling witnesses who will testify in Kiswahili, Kalenjin (specifically the Nandi dialect) and Kikuyu. The Defence will need to have audio and video broadcasts and other materials translated from these languages to English for purposes of disclosure prior to trial.

³ For example, *Ngirabatware v. Prosecutor*, ICTR-99-54-A, Decision on Augustin Ngirabatware's Appeal of Decisions Denying Motions to Vary Trial Date, 12 May 2009, para. 28.

10. In the *Lubanga* and *Katanga* cases, the Registry, as neutral organ, had to verify translations produced by the parties.⁴ However, the Defence notes that Article 67(1)(f) states that an accused shall have, free of any cost, the assistance of a competent interpreter and such translations as necessary to meet the requirements of fairness. The Defence submits that it is preferable, when time and fairness permit, for an interpreter/translator, paid for by the Court, to produce translations of any potential exhibits in advance, so that proceedings are not delayed.
11. Further, the Defence requests the disclosure of the qualifications of the proposed court translators/interpreters, particularly those dealing with the Kalenjin language, to ensure that they are properly conversant with the Nandi dialect.

Agenda Item C: Anticipated Length of Evidence

12. The Defence intends to robustly challenge the Prosecution case. The length of the defence case evidence is therefore highly dependent on the breadth and complexity of the Prosecution case. Therefore, the Defence is not in a position to anticipate the length of its evidence at this time.

Agenda Items D, E and G: Disclosure and Redactions

13. In order for the Defence to meaningfully and adequately prepare for trial, it must receive from the Prosecutor full disclosure as soon as practically possible.
14. In terms of modalities, the Defence requests that any evidence previously disclosed for purposes of confirmation retain its original ERN number. This would aid the efficiency of the process by not requiring the Prosecution to re-disclose the same material with a different identification number.
15. Furthermore, where the Prosecution have decided not to rely on information previously disclosed for purposes of confirmation, the Defence requests that the Prosecution indicate why a certain witness or piece of evidence is no longer relied

⁴ *Prosecutor v. Lubanga*, ICC-01/04-01/06-T-179-Red-ENG, 27 May 2009, p. 29-34 (stating a procedure for introducing extracts of videos in a non-court language); *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-T-183-Red-ENG, 6 Sept 2010, p. 67-69 (where the Registry checked a translation done by the OTP in relation to video recordings); ICC-01/04-01/07-T-177-Red-ENG, 25 Aug 2010, p. 1-5 and 16-19 (where subtitles were translated by the party showing the video, the Registry was required to cross-check the translation, which determination would be binding).

upon. The Defence submits that this qualifies as potentially exculpatory material, falling under Article 67(2).

16. The Defence acknowledges that the Statute and Rules 81 and 82 allow for redactions to disclosure, on the basis of the protection and privacy of victims and witnesses. However, the Defence submits that the Trial Chamber should strictly supervise the redaction process. If any redactions are called for by the Prosecution, all requests for redactions should be carefully scrutinized on a case-by-case basis, with the input of the Defence.⁵ In *Katanga*, the Chamber

... recalled the importance it gives to the judicial scrutiny which every application for redactions must undergo. It considers that the effective and continuous performance of this scrutiny on a case-by-case basis constitutes the best safeguard for the Defence. In order to be able to fully perform this task, the Chamber must receive all the necessary information from the Prosecutor. In fact, it is under the obligation to balance the various interests at stake, as stipulated in rule 81 of the Rules, whilst ensuring that the process includes safeguards that would protect the accused persons' interests so as to comply as far as possible with the requirements of adversarial proceedings and the principle of equality of arms.⁶

17. The Defence notes that the Appeals Chamber has set down the following requirements which must be met before the Chamber can approve a request for redactions:

- 1) the existence of an objectively justifiable risk to the safety of the person concerned or which may prejudice further or ongoing investigations;
- 2) the existence of a link between the source of the risk and the accused persons;
- 3) the infeasibility or insufficiency of less restrictive protective measures;
- 4) the obligation to periodically review the decision authorizing the redactions should circumstances change.⁷

⁵ *Prosecutor v. Katanga and Ngjudjolo*, ICC-01/04-01/06-T-179-Red-ENG, para. 5 (*Katanga* Disclosure Decision).

⁶ *Katanga* Disclosure Decision, para. 7.

⁷ *Prosecutor v. Katanga*, ICC-01/04-01/07-475, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 13 May 2008, paras 71, 73 and 97; *Prosecutor v. Lubanga*, ICC-01/04-01/06-568, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", 13 October 2006, para. 37 and ICC-01/04-01/06-773, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", 14 December 2006, para. 33.

18. The Defence submits that the Chamber should show “particular vigilance” with respect to redactions of potentially exculpatory material,⁸ in order to safeguard the rights of the accused.

Agenda Item H: Rules 79 and 80

19. The Defence intends to introduce evidence showing that the accused were not at particular places at certain times.

Agenda Item I: Experts

20. The Defence may instruct an expert on its own, or in conjunction with the Prosecution, but it is too early to state this definitively. Experts may be called to assist the court in relation to Kalenjin traditions, culture, religion, and language; the media culture in Kenya; Kenyan legal systems and investigative bodies and commissions of inquiry; and the functioning of the Kenyan Government, including intelligence matters.

Agenda Item J: Agreed Evidence

21. Per Article 66(2), the onus is on the Prosecutor to prove the guilt of the Accused. However, in order to aid the efficiency of the proceedings, the Defence and Prosecution have engaged in preliminary discussions about potentially agreeing on some evidence. The Defence has asked the Prosecution to put together a list of facts for consideration.

Agenda Item K: Victim Participation

22. The question of victim participation should be decided as early as practicably possible, so as not to overwhelm the parties with victims’ applications when they are otherwise undertaking critical preparations and investigations in anticipation of the start of trial.

Agenda Item L: E-Court Protocol

23. The Defence requests that in addition to the standardized E-Court Protocol, the parties exchange text-searchable PDF copies of all non-confidential disclosure. This

⁸ *Katanga* Disclosure Decision, para. 9.

will save the parties valuable time, which would otherwise be spent downloading, saving, and converting disclosure into PDFs with optical character recognition.

Agenda Item M: Rule 134(2)

24. The Defence may raise preliminary issues under Rule 134(2).

Agenda Item O: Site Visit

25. The Defence submits that a site visit to several locations in Kenya would be of significant assistance to the judges, and that this should ideally take place after the Prosecution case but before the Defence case.

Agenda Item P: Protected Witnesses Protocol

26. The highly restrictive and unworkable regime that was in effect during the confirmation stage, requiring the Defence to consult with WVU prior to talking to any potential witness,⁹ should not be reinstated. Furthermore, the Defence submits that whatever regime or modalities the Trial Chamber adopts should apply equally to both parties and the Victims' Representative and should not be used as a pretext to frustrate the Defence's genuine attempts to investigate its case.

Other Agenda Items and Issues

27. The Trial Chamber stated, at para. 4 of the Order, that should the parties wish to add other items to the agenda of the status conference, they should indicate such in their written submissions.
28. Thus, and in light of the Appeals Chamber's recent dismissal of the Defence's jurisdiction appeal,¹⁰ wherein the Chamber found that the definition of organization or organizational policy was an issue for trial, the Defence requests that the Trial Chamber order a briefing schedule for the parties to submit written submissions on their interpretation of the law on this critical definition. Fairness dictates that the accused know with clarity the precise contours of the charges against him.

⁹ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-38-Corr and ICC-01/09-01/11-86.

¹⁰ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-414 OA3 OA4, Decision on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the Decision of Pre-Trial Chamber II of 23 January 2012 entitled 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute', 24 May 2012.

29. Additionally, the Chamber ordered that if the parties are aware of any other issue which must be resolved prior to trial, they should bring it to the attention of the Trial Chamber. Consequently, the Defence raises the concern that the Registry has still not provided it permanent office space in the ICC complex, more than a year after the initial appearance of the accused. The Defence is unaware of how it is to engage in the disclosure process and effectively prepare for trial without adequate facilities.

III. CONCLUSION

30. The Defence looks forward to addressing the Trial Chamber in more detail on these issues, and in response to the Prosecution's submissions, during the Status Conference on 11 June 2012.



Joseph Kipchumba Kigen-Katwa
On behalf of Mr. Joshua Arap Sang
Dated this 28th day of May 2012
In Nairobi Kenya