



Original: English

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

Date: 9 January 2013

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

**Joint Defence Request for Leave to Appeal
the Decision on Witness Preparation**

Source: Defence for Mr. William Samoei Ruto
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. The defence for Mr. William Samoei Ruto and the defence for Mr. Joshua Arap Sang (the “defence”) hereby seek leave to appeal the Trial Chamber’s *Decision on Witness Preparation* (“Decision”)¹ pursuant to Article 82(1)(d) of the Rome Statute, Rule 155 of the Rules of Procedure and Evidence, and Regulation 65 of the Regulations of the Court. There are three appealable issues that arise from this Decision:
 - i. First Issue: The Chamber erred in departing from the established ICC Witness Familiarization Protocol which prohibited contact between the witness and the calling party after the witness arrived to give evidence, in finding that “it is neither practical nor reasonable to prohibit pre-testimony meetings between parties and the witnesses they will call to testify at trial” up to 24 hours prior to that witness’s testimony;²
 - ii. Second Issue: The Chamber erred in finding that “judicious witness preparation aimed at clarifying a witness’s evidence” up to 24 hours prior to that witness’s testimony could be “carried out with full respect for the rights of the accused”;³ and
 - iii. Third Issue: The Chamber erred in requiring, without considering the unique position of the defence (who does not have an obligation to take and/or disclose statements from witnesses) and without hearing the defence directly on the issue, both that (1) the calling party shall conduct its preparation session after witness statements have been taken and disclosed to the opposing party, and (2) the calling party shall video record the preparation session.⁴
2. The defence submits that these issues warrant the Appeal’s Chamber’s consideration in order to advance materially the proceedings in a fair and expeditious manner.

¹ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/09-524, Decision on witness preparation (“Decision”) and ICC-01/09-01/11-524-AnxA (“Protocol”), 2 January 2013.

² Decision, para. 50.

³ Decision, para. 50.

⁴ Protocol, p ##.

II. APPLICABLE LEGAL PRINCIPLES

3. Chambers have repeatedly stated that leave to appeal pursuant to Article 82(1)(d) will be granted only if it meets the following two cumulative criteria:
 - a) it must be an issue that would significantly affect
 - (i) both the fair and expeditious conduct of the proceedings; or
 - (ii) the outcome of the trial; and
 - b) it must be an issue for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.⁵

The interpretation of appealable issue

4. The Defence notes that an "issue" is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion.⁶ In addition, the Chamber has held that an appealable issue must emanate from the ruling of the decision concerned and not merely represent an abstract question or a hypothetical concern.⁷

The interpretation of fairness

5. The Chamber has previously found that the principle of fairness of proceedings is a fundamental element to all judicial proceedings, and is enshrined in various international legal instruments.⁸ One of the fundamental aspects of the right to a fair trial in criminal proceedings is that the proceedings should be adversarial in nature and that there should be equality of arms, in the sense of a fair balance

⁵ *Prosecutor v. Bemba*, ICC-01/05-01/08-532, Decision on the Prosecutor's Application for Leave to Appeal the "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", 18 Sept 2009 ("Bemba Leave to Appeal Confirmation Decision").

⁶ *Situation in the Democratic Republic of the Congo*, ICC-01/04-168, Appeals Chamber, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, para. 9 ("Lubanga Extraordinary Review Decision").

⁷ Pre-Trial Chamber II, *Bemba Leave to Appeal Confirmation Decision*, para 17. *See also, Prosecutor v. Bemba*, ICC-01/05-01/08-75, Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure, 25 August 2008, para. 11.

⁸ Article 10 of the Universal Declaration of Human Rights, article 14(1) of the International Covenant on Civil and Political Rights, Article 6(1) of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, Article 8(1) of the American Convention on Human Rights and Article 7(1) of the African Charter on Human Rights.

between the parties.⁹ Based on this, the Chamber has clarified that fairness is preserved when a party is provided with the genuine opportunity to present its case - under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent - and to be appraised of, and comment on, the observations and evidence submitted to the Court that might influence its decision.

The interpretation of expeditiousness

6. The expeditiousness of proceedings is closely linked to the concept of judicial proceedings "within a reasonable time"¹⁰ and complements the guarantees afforded to the suspect, such as the right to fair and public proceedings. The issue concerned must be of such nature as to significantly affect the expeditiousness of the proceedings, namely the speedy conduct of proceedings, without prejudice to the rights of the parties concerned.

The interpretation of "outcome of the trial"

7. The Appeals Chamber has held that the Chamber "must ponder the possible implications of a given issue being wrongly decided on the outcome of the case. The exercise involves a forecast of the consequences of such an occurrence".¹¹

The interpretation of "immediate resolution...to materially advance the proceedings"

8. As the Appeals Chamber has previously determined, the issue must be such "that its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the

⁹ See for instance, European Court of Human Rights ("ECtHR"), *Domho Beheer B.V. v. The Netherlands*, Judgment of 27 October 1993, vol. 274, Series A, Application no 14448/88, para. 33; *Rowe and Davis v. United Kingdom*, Judgment of 16 February 2000, Application no 28901/95, para. 60; *Brandstetter v. Austria*, Judgment of 28 August 1991, vol. 211, Series A, Application nos 11170/04, 12876/87 and 13468/87, paras 66-67; *Jasper v. the United Kingdom*, Judgment of 16 February 2000, Application no 27052/95, para. 51; *Coëme and Others v. Belgium*, Judgment of 22 June 2000, Application nos 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, para. 102; Human Rights Committee, Communication no. 307/1988, *John Campbell v. Jamaica*, para. 6.4; Communication no 779/1997, *Åarela and Näkkäläjärvi v. Finland*, para. 7.4; M. Nowak (ed.), U.N. Covenant on Civil and Political Rights, CCPR Commentary, (Engel Publisher, 2nd rev. ed., 2005), p. 321, para. 29.

¹⁰ See e.g. ECtHR, *Pélissier and Sassi v. France*, Reports of Judgments and Decisions, 1999-11, Application no 25444/94, paras 67; Inter-American Court of Human Rights ("IACtHR"), *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, Judgment of 21 June 2002, Series C, No 94 (2002), para. 143; M. Nowak (ed.), U.N. Covenant on Civil and Political Rights, CCPR Commentary, (Engel Publisher, 2nd rev. ed., 2005), p. 333 et seq., with further references to case law.

¹¹ Lubanga Extraordinary Review Decision, para. 13.

judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial." Furthermore, "advancing" the proceedings has been identified by the Appeals Chamber as "removing doubts about the correctness of a decision or mapping a course of action along the right lines"; the term "immediate" has been defined as "underlin[ing] the importance of avoiding errors through the mechanism provided by subparagraph (d) by the prompt reference of the issue to the court of appeal".¹²

III. SUBMISSIONS

9. The defence seeks leave to appeal the three issues listed above, which emanate from the Decision and which are identifiable subjects or topics requiring a decision for its resolution. These are novel issues for the Appeals Chamber and are ones which are more than simply questions over which there is disagreement or conflicting opinion. Moreover, the defence submits that each of these issues affect the fair and expeditious conduct of the hearing and require an immediate resolution by the Appeals Chamber so as to materially advance the proceedings, as detailed below.

First Issue: The Chamber erred in departing from the established ICC Witness Familiarization Protocol which prohibited contact between the witness and the calling party after the witness arrived to give evidence, in finding that "it is neither practical nor reasonable to prohibit pre-testimony meetings between parties and the witnesses they will call to testify at trial" up to 24 hours prior to that witness's testimony

10. The issue of whether it is practical and reasonable to prohibit pre-testimony meetings with witnesses arises directly from the decision, as it results in the Trial Chamber's determination to allow witness preparation and put a Protocol into place establishing guidelines for such conduct. The Chamber's decision is completely contrary to all prior ICC jurisprudence on this issue. Previous Chambers have acknowledged that a clear line cut-off point goes some way to preventing the inevitable influence on a witness' testimony that will necessarily entail. Further, the *Lubanga* chamber noted that proofing is not supported by the

¹² *Ibid*, paras 14-19.

statutory texts of the ICC¹³ nor is it a uniform practice of other international criminal tribunals or national jurisdictions.¹⁴ Furthermore, the *Lubanga* Trial Chamber noted that the ICC has, “through important advances, created a procedural framework which differs markedly from the ad hoc tribunals”.¹⁵

11. The defence submits that for the Chamber to essentially read witness preparation provisions into the framework of the ICC Statute (namely the trial management provisions of Article 64)¹⁶ which no other Chamber has done, creates an issue that significantly affects the fair conduct of the proceedings, in that it allows the calling party to meet and have substantive discussions with a witness on the eve of his or her testimony before the court. This is at a time when the calling party will have noted the weaknesses of its case and the places where there are evidentiary gaps that need to be filled. Furthermore, it is at this time that the witness will be perhaps his or her most vulnerable, and at the same time the most earnest to please the calling party. This threatens the adversarial nature of the proceedings, as it places the calling party in an advantageous position, to inadvertently or otherwise influence the content of a witness’s testimony just before he or she takes the stand.

12. The issue of whether it is neither practical nor reasonable to prohibit pre-testimony meetings between a calling party and a witness significantly impacts the expeditiousness of the proceedings. By determining that essentially there is no other time and place that is conducive for conducting witness preparation, the Chamber has almost certainly lengthened the proceedings. As the Chamber notes, both parties agree that witness preparation meetings typically result in the disclosure of additional evidence to the opposing party. Such late disclosure will typically require an adjournment for the opposing party to investigate the new information. It is less likely that new information would emerge from the witness spontaneously on the stand, in the absence of the witness having discussed it with

¹³ ICC-01/04-01/06-679, 8 November 2006, para. 26; see also, ICC-01/04-01/06-1049, 30 November 2007, paras. 35-36.

¹⁴ ICC-01/04-01/06-679, 8 November 2006, paras. 33-39.

¹⁵ ICC-01/04-01/06-1049, 30 November 2007, para. 45.

¹⁶ Decision, paras 26-27 (stating that Article 64 “is formulated so as to give judges a significant degree of discretion concerning the procedures they adopt in this respect, as long as the rights of the accused are respected and due regard is given to the protection of witnesses and victims”).

the calling party first, so there is less likelihood of delay and adjournment if this approach is adopted.

13. If the Appeals Chamber were to decide that it is not impractical or unreasonable for the calling party to conduct witness preparation as part of the party's investigations in advance of testimony, this would advance materially the proceedings. A properly vetted witness, prepared well in advance of testimony (rather than at the last minute), would facilitate a fair and expeditious trial, which is not marred by disputes concerning witness coaching or inappropriate rehearsal of testimony.
14. While the defence appreciates that the Chamber has incorporated several safeguards into this process (recognizing the role of cross-examination and the requirement to video record all preparation sessions), these are safeguards that are retrospective in effect. The Chamber cannot undo a harm, which has been done. If it is found in retrospect that witness testimony has been tainted through prepping sessions, the only cure is for the Chamber to disregard that testimony. This may result in the Chamber needlessly hearing testimony from witnesses that it will not consider in the end. This is not a fair or expeditious way to conduct the trial. Thus it is imperative that the Appeals Chamber be given an opportunity to immediately determine whether it is not practical or reasonable to prohibit the practice of pre-testimony meetings between the calling party and a witness, up to 24 hours before testimony, so that the prosecution can prepare and proceed accordingly when starting its case in April.

Second Issue: Whether the Chamber erred in finding that "judicious witness preparation aimed at clarifying a witness's evidence" up to 24 hours prior to that witness's testimony could be "carried out with full respect for the rights of the accused"

15. In the Decision, the Chamber determined that "properly conducted, witness preparation is also likely to enhance the efficiency, fairness and expeditiousness of the present trial".¹⁷ The Chamber held that witness preparation aims to enhance the efficacy of the proceedings, whereas the purpose of investigations is to obtain

¹⁷ Decision, para. 35.

evidence.¹⁸ While that may be so, the reality is that witness preparation both enhances efficacy and almost inevitably produces new information requiring disclosure. Thus the question of whether witness preparation can be carried out, at such a late juncture, with “full respect for the rights of the accused”, arises directly from the decision.

16. This issue impacts directly on the question of fairness to the accused. The defence submits that it is not fair for the accused to receive late or rolling disclosure as the trial progresses. The defence is disadvantaged by not having, from the outset, the clarifications and additional information of the sort that will arise during prepping sessions, such as a witness’s comments on a potential exhibit. This type of information should be solicited from witnesses during the investigative process well before the start of trial. The concerns about tainted evidence emerging during last-minute proofing sessions must also be considered in terms of its impact on the rights of the accused to a fair trial.
17. Late disclosure of information may result in lengthy adjournments, as discussed above at paragraph 12, which delay the trial and are prejudicial to the accused’s right to a speedy proceeding.
18. The defence submits that an immediate resolution of the question, of whether witness preparation as late as 24 hours before testimony can be compatible with the rights of the accused, would advance materially the proceedings. Once the trial has finished, and the calling party has prepped witnesses before testimony throughout, it will be too late for the Appeals Chamber to remedy the situation, absent drastic measures. To consider and rule on the issue now, on the other hand, would ensure that the case can proceed with out the risk of evidential taint from prepping sessions at a late stage in the process.

Third Issue: Whether the Chamber erred in requiring, without considering the unique position of the defence (who does not have an obligation to take and/or disclose statements from witnesses) and without hearing the defence directly on the issue, both that (1) the calling party shall conduct its preparation session after

¹⁸ Decision, para. 41.

witness statements have been taken and disclosed to the opposing party, and (2) the calling party shall video record the preparation session

19. Without hearing the defence perspective, the Chamber included two points in its Protocol¹⁹ that do not adequately take into consideration the unique position of the defence versus the prosecution in terms of its disclosure obligations. Thus, this third issue arises directly from the Chamber's decision.
20. This obviously affects the fairness of the proceedings because it was done in the absence of input from one of the adversarial parties. In its response brief, the defence had argued that any Protocol adopted now should only be applicable to the prosecution as a calling party. The defence requested the Chamber not to rule on its applicability to the defence at this time. However, the Chamber went on to make the Protocol applicable with equal force to the defence and the prosecution.
21. Protocol #10 seems to imply that the calling party shall conduct its preparation session after witness statements have been taken and disclosed to the opposite party. But ordinarily at the ICC, the defence has no obligation to take or disclose witness statements. Does this Protocol now imply that the defence would only have the right to a witness prepping session if it first agreed to take and disclose witness statements? If so, this would unfairly force the defence to choose which procedure it wanted to adopt – the disclosure of witness statements so that it could prep its witnesses, or the freedom of not taking and disclosing witness statements, and therefore forfeiting the opportunity to prep its witnesses.
22. Likewise, Protocol #12 states that the defence must video record its witness prepping sessions. However, the defence does not ordinarily have an obligation to audio or video record witness interviews. Presumably this is because the accused has a right against self-incrimination, which could theoretically be breached if the defence were required to record and disclose witness prepping sessions.
23. In sum, this aspect of the Decision was arrived at in an unfair manner (ie, without hearing from the defence) and its consequences, if put into practice, would result in unfair proceedings for the accused.

¹⁹ Protocol, pg. 3-4.

24. This would impact on the time and preparation of the defence if they were now to have to take full and proper statements from all of its witnesses; something its current resources do not allow it do to. Alternatively, this would also impact the outcome of the trial, as it would greatly impact how the defence conducts its overall preparation for the case.
25. If these provisions of the Protocol are put into place, the entire investigatory process may be altered, and the defence may have to disclose more than what it is obligated to. Thus the appearance of a trial, which respects the rights of the accused, may be tainted.

IV. CONCLUSION AND RELIEF REQUESTED

26. The defence submits that it has fulfilled the criteria for leave to appeal these three issues and requests permission to brief the Appeals Chamber on them.



David Hooper, QC
On behalf of William Samoei Ruto
Dated this 9th day of January 2013
In The Hague



Joseph Kipchumba Kigen-Katwa
On behalf of Joshua Arap Sang
Dated this 9th day of January 2013
In Nairobi