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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

Prosecution submissions on the conduct of the proceedings

Source: **Office of the Prosecutor**

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

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Introduction

1. On 19 June 2013 Trial Chamber V(A) ("Chamber") issued its "Order requesting submissions on the conduct of the proceedings"[1] ("Order") directing the parties to submit their observations on the anticipated conduct of the proceedings and manner in which evidence shall be adduced at trial.

2. The Prosecution notes that similar decisions to this effect have been issued by Trial Chambers II and III in the Katanga case[2] ("Katanga decision") and in the Bemba case[3] ("Bemba decision") respectively, and submits that these decisions are instructive in addressing a number of the procedural issues raised by the Chamber's Order in the present case. The Prosecution submits that it would be of benefit to the conduct of the upcoming proceedings for the practices adopted in those cases to be broadly adopted by the Chamber for the present case, subject to the qualifications below, and any necessary adaptations that the Chamber deems necessary. Furthermore, several decisions in the Lubanga case address some of the procedural issues raised by the Chamber. The Prosecution will make specific references to the relevant decisions in these three cases where applicable.

Submissions

3. The Prosecution will address in turn the submissions requested from the Chamber in paragraphs 2(i) to 2(viii) of the Order. The Prosecution notes that paragraph 2(iii) of the Order is not directed to the Prosecution.

Opening statements

4. In response to paragraph 2(i) of the Order, the Prosecution confirms that it intends to make an opening statement at the commencement of trial and estimates that this will last approximately 90 minutes. The Prosecution intends to utilise presentation software as part of its opening statement, and will refer to a

[1] ICC-01/09-01/07-778.
[2] ICC-01/04-01/07-1665.
[3] ICC-01/05-01/08-1023.

number of photographs, maps and videos recordings. Accordingly, the Prosecution will require some technical assistance from Court Management Section ("CMS") – particularly in relation to the use of visual aids. In order to make the necessary technical arrangements, the Prosecution intends to explore with CMS, in advance of the commencement of trial, the possibility of displaying these visuals aids using a projector or a large screen.

Schedule of first ten witnesses

5. In response to paragraph 2(ii) of the Order, the Prosecution can indicate the running order of its first ten witnesses as follows[4]: P-0287, P-0452, P-0185, P-0536, P-0464 (expert witness), P-0326, P-0189, P-0438, P-0376 and P-0410. However, this proposed order of witnesses is subject to the logistical arrangements necessary to secure their attendance at Court, which are beyond the Prosecution's remit, and the ultimate discretion of the Chamber to determine the order of witnesses.

The Document Containing the Charges ("DCC")

6. In response to paragraphs 2(iv)(a) and (b) of the Order, the Prosecution confirms that in the interests of judicial economy, it has no objection to it being certified ahead of trial that the accused persons have read and understood the DCC in its entirety and that only the counts section of the DCC be read to the accused persons at the commencement of trial for the purposes of fulfilling the requirement of Article 64(8)(a) of the Statute.

Submissions on "no case to answer"

7. In response to paragraph 2(v) of the Order, the Prosecution submits that the Chamber has authority under the Statute to entertain "no case to answer" proceedings in the instant case. The authority to insert a "half-way" procedure aimed at determining whether the Prosecution has presented a "case to answer"

[4] The Prosecution has previously indicated to the Defence in *inter partes* communications this list of the first ten witnesses, though not with a running order.

derives, firstly (as noted by academic commentators) from the general authority enshrined in Article 64(3)(a).[5] Secondly, it can be considered inherent in the powers of the Chamber under Articles 64(2) and (6)(f) to entertain and rule on a "no case to answer" application from the Defence.[6] For the purposes of such an application, each count as alleged in the DCC should be addressed individually. Furthermore, the Prosecution submits that -- as envisaged by the Chamber in the Order -- the appropriate juncture for the submission of such an application would be at the conclusion of the Prosecution case.[7]

Self-incrimination

8. In response to paragraph 2(vi) of the Order, the Prosecution indicates that seven witnesses on the Prosecution's list of witnesses were interviewed pursuant to Article 55(2) of the Statute and Rule 112 of the Rules. These are witnesses P-0015, P-0016, P-0024, P-0028, P-0323, P-0356 and P-0534. The Prosecution therefore anticipates that, if and when these witnesses testify, the issue of self-incrimination may arise. In these circumstances Rule 74 will apply.

In-court protective measures

9. In response to paragraph 2(vii) of the Order, the Prosecution confirms that it intends to make applications for in-court protective measures for a number of witnesses. The Prosecution is still determining precisely which witnesses will be the subject of these applications, but anticipates that it should be in a position to file its first application, covering a number of witnesses referred to in paragraph 5 at least 30 days before the commencement of the trial.[8]

Order, among the parties and participants, in which witnesses should be questioned

[5] See Sluiter, Friman, Linton, Vasiliev and Zappala (eds.), *International Criminal Procedure* (2013), p. 430.
[6] The Trial Chamber's inherent authority to make any order necessary to ensure fair and expeditious proceedings has been affirmed by the Appeals Chamber in the Lubanga case. See ICC-01/04-01/06-1486, paras. 76-82.
[7] See for example, see Rule 98 *bis* of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia – "*At the close of the Prosecutor's case*, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgement of acquittal on any count if there is no evidence capable of supporting a conviction." [Emphasis added]
[8] On the right of the Defence to have time to respond to applications for in-court protective measures, see Lubanga, ICC-01/04-01/06-T-88, page 57.

10. In response to paragraph 2(viii)(a) of the Order, the Prosecution refers to the Katanga and Bemba decisions on directions,[9] and requests that the Chamber adopts the same approach in the present case. As such, the Prosecution submits that the party calling the witness should examine the witness first ("examination-in-chief), followed by the opposing parties ("cross examination"). As there are two Defence teams in the present case, the Prosecution submits it should be left to the respective teams to determine the order in which they cross-examine any Prosecution witness, or whether one Defence team can conduct the cross-examination on behalf of both accused.

11. The Prosecution submits, however, that the Chamber should exercise its discretion to curtail repetitious cross-examination by both Defence teams on the same issues. Where the first Defence team has questioned a witness on a particular subject, questions by the second Defence team on that subject should ordinarily be limited to those necessary for clarification of any areas of ambiguity. The Prosecution submits that this general approach is consistent with the the Katanga decision[10] and the principles of judicial economy, expeditious proceedings and the duty to protect of witnesses from harm to their psychological well-being and dignity that may result from unfairly repetitious questioning.

12. Following cross-examination, the Prosecution submits that, where applicable, the calling party should have the opportunity to examine the witness again ("re-examination") in relation to any fresh matters raised during the cross-examination. In accordance with Rule 140(2)(d) the Defence shall have the right to be the last to examine a witness. However, the Prosecution submits that in order to ensure judicial economy, an expeditious hearing and fairness to all parties, such examination should take place within clear boundaries and ordinarily be limited to fresh matters raised during questioning by an opposing party.

[9] Katanga decision, paras. 15-18; Bemba decision, paras. 7-11; See also Lubanga, ICC-01/04-01/06-T-104, page 35 onwards.
[10] *Ibid.*, para. 72.

13. Where the Common Legal Representative seeks to question a witness, the Prosecution submits that the procedure outlined below at paragraph 15 should apply. Where granted, this questioning, with a presumption that it be conducted in a neutral non-leading manner,[11] should take place after the Prosecution's examination-in-chief of its witnesses during the Prosecution phase of the case, and conversely, after the Prosecution's cross-examination of any Defence witness during the defence phase of the case.[12] Again, this is subject to the Defence right to be the last to examine a witness.

14. The Prosecution submits that these observations on the order of questioning are without prejudice to the Chamber's prerogative under Rule 140(2)(c) to put questions to a witness during their testimony before the Court.[13]

Timing and manner in which the Common Legal Representative should request authorisation from the Chamber in order to question a witness or present evidence

15. In response to paragraph 2(viii)(b) of the Order, the Prosecution refers to the Katanga and Bemba decisions,[14] in particular:

    a. The requirement that the CLR notify the Chamber and the Prosecution at least seven days in advance through a written application, indicating the proposed questions to be asked or evidence to be presented, and explaining how this relates to the interests of the victims. If the Chamber considers that Defence observations are necessary, that the application will be reclassified and the Defence given three days to respond;[15]

    b. Where the Chamber decides, after the examination-in-chief of a witness, that the proposed questions have not been sufficiently addressed by the

[11] Lubanga, ICC-01/04-01/06-2127, para. 30.
[12] Bemba decision, paras. 8 and 11.
[13] Lubanga, ICC-01/04-01/06-2360.
[14] Katanga decision, paras. 87-89; Bemba decision, paras. 17-20.
[15] Katanga decision, para. 87.

calling party, the Chamber may authorize the CLR to put questions to the witness before cross-examination by the opposing party;[16]

c. Where issues not anticipated by the CLR arise during the course of a witness' examination-in-chief, and that relate to the interests of the victims, the CLR may submit question(s) to the Chamber, which may decide to put such question(s) to the witness.[17]

Procedure for the use of material during questioning, including objections

16. In response to paragraph 2(viii)(c) of the Order, where a party seeks to use any material during that party's examination-in-chief of a witness, the Prosecution proposes that the party should be required to submit a list in advance to the Chamber, parties and participants specifying which items it intends to use during that examination.

17. In order to provide the opposing party with sufficient time to prepare its own questioning of the witness, the Prosecution submits the deadline set-forth in the Katanga decision of no less than three days before the scheduled hearing is appropriate, unless the volume of material is particularly large.[18]

18. If the opposing party has any objections to the use of any materials with that particular witness, it should be required to submit its observations in writing no less than two days after receipt of the list referred to in the preceding paragraph.

19. Where a party seeks to use any material in the course of cross-examining the opposing party's witness, the Prosecution proposes that the party cross-

[16] *Ibid.*, para. 88.
[17] *Ibid.*, para. 89.
[18] Katanga decision, paras. 103-104; Bemba decision, para. 16(i); See also Regulation 52(2) of the Regulations of the Registry.

examining be permitted to put any document already in evidence, including the transcripts of witnesses who have already testified, to that witness.[19]

20. Where a cross-examining party knows in advance that it will be using a particular item during cross-examination, and that item is not already in evidence, that party must inform the Chamber, Court Officer and the opposing party no less than three days before the scheduled hearing, providing the item in electronic format.[20]

21. Where a party seeks to use any material for the purposes of refreshing the memory of a witness during their examination-in-chief, the Prosecution submits that the approach adopted in the Katanga decision is appropriate to the present case.[21] There, such material may be put to a witness in order to refresh their memory where:

    a. The document in question, including prior statements, notes, recordings or any other contemporaneous record, contains the personal recollection of the witness, and

    b. Copies of the document have been made available to the opposing party, who may rely on the parts of the document referred to by the witness during cross-examination.[22]

22. Finally, where a witness during the course of their examination-in-chief deviates from his or her prior recorded statement and refreshing their memory has not clarified the issue, the calling party should then be permitted to confront that witness with their prior statement and, with the leave of the Chamber, to cross-examine him or her regarding any discrepancies.

[19] Katanga decision, para. 107. The Prosecution notes the requirement that where a party intends to use the transcript of a witness who has already testified, that this use remains subject to any applicable protective measures.
[20] *Ibid.*, para. 108 – the Katanga decision requires that provision of the item be in accordance with Regulation 52(2) of the Regulations of the Registry; Bemba decision, para. 16(ii).
[21] This is notwithstanding the Chamber's 'Decision on Witness Preparation' (ICC-01/09-01/11-524).
[22] Katanga decision, para. 109.

Procedure for admission of material tendered through witnesses as evidence in the case, including assignment of evidence numbers

23. In response to paragraph 2(viii)(d) of the Order, the Prosecution submits that where there is an inherent link between an item of evidence and the testimony of a particular witness, the calling party may introduce the item into evidence through that witness.[23]

24. As regards the procedure for tendering material through a witness, the calling party should first, through questions, be required to demonstrate the link between the witness and the material. Once this step has been satisfied the material can be put to the witness for authentication or identification. If a witness has properly authenticated the material then it may be given an EVD number. If the witness is simply identifying or commenting on the material then it may be given an identification number.[24]

Procedure for admission of other material as evidence in the case

25. In response to paragraph 2(viii)(e) of the Order, the Prosecution submits that, in order to avoid the need to call an inordinately large number of witnesses to tender documentary evidence, material other than a written record of the testimonial evidence of a witness may be tendered without being introduced by a witness.[25]

26. The Prosecution is in the process of preparing a motion for the admission of certain documentary evidence for the bar table and anticipates that this will be filed with the Chamber during the week commencing 15 July 2013. In deciding whether or not to grant any bar table application, the Prosecution submits that

[23] *Ibid.*, para. 97.
[24] In the Lubanga case these were referred to as MFI numbers ("Marked for Identification").
[25] Katanga decision, paras. 98-101.

factors outlined in Lubanga[26] and in the Katanga decision,[27] whilst not exhaustive, are nonetheless instructive.

27. Regarding the procedure to be followed, the Prosecution proposes that the party seeking admission of the documentary evidence should be required to file a written application, providing an explanatory table containing a short description as to content of each item, an index of the most relevant portions (if the item is large), as well as a brief explanation of its relevance and probative value.[28]

Whether recourse should be had to Rule 68 of the Rules and the procedure to be followed

28. In response to paragraph 2(viii)(f) of the Order, the Prosecution submits that in certain circumstances, recourse to Rule 68 could be beneficial to the interests of justice, as it aids the judicial economy of the proceedings by allowing for the introduction of evidence in an efficient yet fair manner. The Prosecution again makes reference to the procedure set down in the Katanga decision, and proposes that this procedure be adopted in the instant case, subject to any modifications that may be deemed necessary.[29]

29. First, where a party seeks to introduce evidence pursuant to Rule 68(a), the Prosecution submits that the party should be required to file a written application.[30]

30. Second, the party seeking to introduce the evidence pursuant to Rule 68(b)[31] should be required to file an application 21 days prior to the date of the witness' appearance in Court. This application should include a copy of the prior recorded testimony sought to be introduced and references to the exact passages that the party seeks to have admitted into evidence. In the event that those passages

[26] ICC-01/04-01/06-1084, para. 7; ICC-01/04-01/06-1399.
[27] Katanga decision, para. 100.
[28] *Ibid.*, para. 101.
[29] *Ibid.*. paras. 92-94.
[30] The Prosecution notes that the Katanga decision did not rule on the procedure applicable for admission of evidence through Rule 68(a).
[31] Katanga decision, paras. 92-94.

contain references to other material available to the calling party which is also sought to be introduced, this material should also be annexed to the application. The application should also contain a description of any additional topics that the calling party wishes to question the witness on, which go beyond confirming, clarifying or emphasizing the passages of the prior recorded testimony that are sought to be entered into evidence. The other parties should have ten days following the notification of the application to respond.

31. The above submissions are without prejudice to the Prosecution requesting, where the interests of justice require, the admission of a witness' prior statement as evidence pursuant to *inter alia* Articles 64(9)(a), 69(2) and 69(3) of the Statute, and the Chamber's authority to freely assess any such evidence under Rule 63(2) of the Rules.

Other matters

32. Finally, the Prosecution notes that the Chamber has not requested the parties to provide observations on the mode of questioning witnesses. In this regard, the Prosecution intends to advocate for the adoption of the procedure followed in the Lubanga and Katanga cases, whereby "closed questions" are permissible in cross-examination, and requests an opportunity to provide observations in this regard should the Chamber deem it necessary to issue directions on this subject.

Fatou Bensouda, Prosecutor

Dated this 3rd day of July 2013

At The Hague, the Netherlands