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No.: **ICC-01/09-01/11**
Date: **3 July 2013**

TRIAL CHAMBER V(A)

Before: **Judge Chile Eboe-Osuji, Presiding**
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

Defence Submissions on the Conduct of the Proceedings

Source: **Defence for Mr. William Samoei Ruto**

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

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Other

I. Introduction

1. Pursuant to the Trial Chamber's order ("the Order"),[1] the defence for Mr William Samoei Ruto ("Defence") hereby files these "submissions on the conduct of the proceedings".[2]

II. Submissions

(a) Opening statements

2. The Defence intends to make an opening statement of between 2 to 3 hours. No particular technical or logistical considerations are anticipated but, should that change, the Trial Chamber ("Chamber") and the Registry will be informed in good time.

(b) Prosecution witness order and material to be used with each witness

3. The Chamber directs the Office of the Prosecutor ("OTP") to provide a schedule listing the order in which it will call its first ten witnesses.[3] Bearing in mind the OTP's specific and unique disclosure obligations,[4] the fact that disclosure of all trial material was to be made by 10 June 2013,[5] and Mr. Ruto's fundamental rights to information regarding the nature, cause and content of the charges against him and adequate time for the preparation of his defence,[6] the Defence respectfully submits that two additional orders are necessary, namely that:

(i) the OTP be directed to provide, within a month of the date of this filing, a schedule indicating the order of all witnesses it intends to call at trial. Such an order was made in the *Katanga & Ngudjolo* case[7] and the Defence submits it was effective in facilitating efficient defence preparations as well as providing maximum notice to the Victims and Witnesses Unit. While such a schedule should be a true reflection of the OTP's intentions, the Defence accepts that the

[1] ICC-01/09-01/11-778.
[2] Order, p. 3.
[3] *Ibid*, para. 2(ii).
[4] E.g., Rome Statute ("Statute"), Article 67(2); Rules of Procedure and Evidence ("Rules"), Rules 76 and 77.
[5] ICC-01/09-01/11-762.
[6] Statute, Article 67(1)(a) & (b).
[7] ICC-01/04-01/07-1337, 27 July 2009.

OTP may require a degree of flexibility in the order it calls its later witnesses. Accordingly, the above request provides guidance to the Defence but need not straight-jacket the OTP, and a variation to its order of witnesses may be granted where necessary and upon good cause being shown; and

(ii) the OTP itemise what material (if any) it wishes to tender or show to each of its witnesses and this be served on the Defence at the same time as the document detailing the order of witnesses. Again, the Defence appreciates that a degree of flexibility needs to be built into the procedure and proposes that the OTP be permitted to use additional material already disclosed to the Defence with any witness upon a showing of good cause and provided such additions are made no later than 7 days prior to the witness' testimony.[8]

4. Neither of the two proposed additional directions would prejudice the OTP. Rather, the Defence submits such orders would be conducive to the fair and efficient conduct of proceedings.[9] The Defence further requests that it be permitted the opportunity to make submissions on the OTP's proposed witness order. The Defence observes that the order in which witnesses are called must, ultimately, be a matter within the purview of the Chamber's authority. The Defence requests leave to make submissions within a stipulated period regarding any proposed modifications to the OTP's witness order. The Defence fully accepts that the Chamber would have to be satisfied that any proposed amendment to the witness order by the Defence be in the interests of justice. Suffice to say, at this stage, in a case where the Defence is alleging that a clear attempt has been made by key OTP witnesses to fabricate evidence, it may be necessary that such witnesses are dealt with sequentially to avoid or reduce the

[8] The OTP now has leave to prepare its witnesses before they are called pursuant to the witness preparation protocol (ICC-01/09-01/11-524-Anx). The Defence submits that the OTP must, therefore, ensure, in accordance with the protocol, that the preparation sessions are completed "as early as possible", and certainly earlier than seven days before the giving of evidence.

[9] On the issue of linking witnesses to proposed exhibits, see the recent decision of the Special Tribunal for Lebanon in the case *The Prosecutor v. Ayyash et at.*, STL-11-01/PT/PTJ, Order on Joint Notice regarding the Legal Workflow System and Witness Entities, 10 June 2013.

risk of further alleged concoction and contamination of their accounts. This will also allow the Court scope to arrest or otherwise proceed against such witnesses under, *inter alia*, Article 70 of the Statute when they are within its jurisdiction, upon such an application being made by a party to proceedings or in the event such *proprio motu* action is deemed necessary by any Chamber of the ICC.

5. As far as the Defence case (if reached) is concerned, the Defence submits that it is premature to propose procedures for the filing of a witness order and related notification of the material to be used with Defence witnesses, but ackowledges that the procedures adopted in the OTP case will inform those adopted and applied in the defence case. This, of course, is subject to the essential caveat that such procedures will have to reflect the quite different and limited disclosure obligations placed on the defence.

(c) Prosecution estimates on the questioning time of its witnesses

6. The Defence has no observations to make on the OTP's proposed time estimates for its examinations-in-chief. The OTP has had the obvious advantage of having met with its witnesses and is better able to assess the scope of their evidence and any factors that may necessitate an increase or reduction in the court time it is allocated. In contrast, the Defence is still reading the considerable volume of late disclosure relating to these very same witnesses[10] and is unable to make more specific submissions on this issue.[11]

[10] Between the 14 May Status Conference and 2 June, 21 Incriminating items, 5 PEXO items, and 14 Rule 77 items have been disclosed by the OTP. 4 of the 5 PEXO items relate to P-0015 and include information critical to the Defence, i.e. his health and security assessment and an investigator's report, all which were available to the OTP in August 2010. Since decision ICC-01/09-01/11-762 of 3 June 2013, 44 Incriminating items, 25 PEXO items, and 152 Rule 77 items have been disclosed to the Defence. With respect to the 25 PEXO items, 14 were in the OTP's possession before the Confirmation Hearing and as early as 2010. Similarly, with respect to the 152 Rule 77 items, 79 were in the OTP's possession before the Confirmation Hearing, some as early as 2009. This is information critical to the Defence as it includes various Investigator's reports of OTP witnesses and critical material related to Witness P-0015.

[11] The cumulative burden imposed on the Defence by the Prosecution's manner, volume and timing of disclosure places a great strain on the Defence's ability to properly review and evaluate disclosed materials (and less redacted versions thereof), formulate or amend investigation plans, and then conduct investigations or amend on-going investigations (see, e.g., ICC-01/09-01/11-T-22-Red-ENG WT, p. 19, line 20 to p. 21, line 25). This is especially so in a case where the Defence submits that a thorough examination of the credibility and motivations of the Prosecution's witnesses are central to the Chamber's ability to render judgment on the charges against the accused (see, e.g., ICC-01/09-01/11-692-Red, 25 April 2013, para. 44).

(d) Length of cross-examination of Prosecution witnesses

7. The Defence strongly opposes the imposition of any mechanical timeframes regarding the length of time necessary for cross-examination. The Defence contends that a critical aspect of this case is a deliberate attempt by key OTP witnesses to pervert the course of justice and otherwise obstruct the proper administration of justice by knowingly peddling lies as truth.

8. Whilst the veracity of the Defence's contentions in this regard will obviously be a matter to be adjudicated by the Chamber, such determinations require proper cross-examination upon which such a decision can safely be made. In essence, the Defence position is that artificial time constraints may limit the Defence in a manner than undermines this critical task. Whether orders, as such, are even necessary is by no means certain as counsel are obligated to ask only relevant and probative questions.[12] The Chamber has proper grounds and power to limit counsel if questions posed do not meet the two conditions of relevance or probative value. Indeed, the power of the Chamber is not fettered and it may properly limit any questions posed by a party, or order that counsel "move on", even if counsel were within any time period that may have been allotted or "ear marked" for cross-examination.

9. Notwithstanding the above, the Defence recognises that for trial management purposes, the Chamber may be assisted with an indication as to the time the defence may provisionally require for cross-examination. At this stage, much OTP evidence has not been reviewed or investigated by the Defence to the extent necessary to make fully informed submissions on this issue. Suffice to say that the Defence will attempt to take no longer in cross-examination than the time spent by the calling party "in-chief". On many occasions, especially with some crime base witnesses, the Defence anticipates it may be considerably shorter than the OTP. Sometimes – especially for key OTP witnesses that the Defence will

[12] Code of Professional Conduct for counsel, Article 24(2) & (5); Statute, Article 69(3); Rule 64.

contend are part of a conspiracy to pervert the course of justice and deliberately lie to the Chamber – the Defence may require considerably longer. At this stage of proceedings, however, the Defence requests that the Chamber plan for the same allotment of time to each cross-examining party as granted to the party calling the witness. The Defence will endeavour to give best estimates during trial and prior to the witness being cross-examined.

10. The above would be subject to the Chamber's overall power to manage proceedings. The course of action enjoined by the Defence will require the adoption of a pragmatic and flexible approach to what time is necessary on a witness by witness basis, in order to do justice and ensure a fair trial in this case.

(e) Document containing the charges (DCC)

11. The Defence agrees that: (a) lead defence counsel will certify, if requested, ahead of the commencement of trial that, to the best of his belief and upon instruction of the client, Mr. Ruto has read and understood the DCC in its entirety; and (b) that the counts section of the DCC (or a summary of that section, if the Chamber is content with that, in order to save time) be read to Mr. Ruto at the start of trial so as to fulfil the requirements of Article 64(8)(a) of the Statute.

(f) Provision should be made for "no case to answer" submissons

12. The Defence welcomes the Chamber having requested submissions on the issue of a "no case to answer" motion, which has never before been raised or discussed in any of the other three trials at this Court. The Defence submits that a Trial Chamber can, and should, entertain such a submission at either the close of the prosecution case, or, even later in the proceedings. For a "no case to answer" submission to succeed, the Defence submits that the appropriate test would be that there is no evidence upon which a reasonable tribunal of fact could be satisfied beyond a reasonable doubt of the guilt of the accused on the particular

charge in question.[13] Indeed, the Defence submits, if a Chamber, at the close of a prosecution case, were of the mind that there was no evidence upon which a reasonable tribunal of fact could be satisfied beyond a reasonable doubt of the guilt of the accused on a particular charge, then irrespective of any submission from the defence, it would be duty bound to raise the matter *proprio motu*, seek submissions, and if still of that mind, acquit the accused on that particular charge.

13. Neither the Statute nor the Rules make express provision for a "no case to answer" submission. However, the absence of an express provision in the Court's statutory framework is, the Defence submits, no bar to such a submission being made and considered by the Trial Chamber. The power to entertain and decide such a motion inevitably arises as part of the inherent function and power of the Court.[14] Allowing such a submission would fortify the fair trial safeguards underpinning the Statute and constitute an opportunity whereby the Trial Chamber could dismiss charges, or the case in totaility, in circumstances where it determined that wholly insufficient evidence had been led by the OTP.

14. In addition to the Court's inherent powers, various provisions in the Statute and Rules provide the necessary legal authority for a "no case to answer" submission:

> Article 64(2): "The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused […]."

[13] See, e.g., *Prosecutor v. Delalić et al.*, IT-96-21-A, Judgement (AC), 20 February 2001, para. 434 ("The test applied is whether there is evidence (if accepted) upon which a reasonable tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question."); *Prosecutor v. Bagosora et al*, ICTR-98-41-T, Decision on Motions for Judgement of Acquittal, 2 February 2005, para. 3; *Prosecutor v. Rwamakuba*, ICTR-98-44C-T, Decision on Defence Motion for Judgement of Acquittal, 28 October 2005, para. 5; *Prosecutor v. Ndindiliyimana et al*, ICTR-2000-56-T, Decision on Defence Motions for Judgement of Acquittal, 20 March 2007, para. 6.

[14] See ICC-02/05-03/09-410, para. 77 ("'inherent jurisdiction' is well-grounded in international law, which generally recognises that an international body or organisation 'must be deemed to have those powers which, though not expressly provided in the [constitutive instrument], are conferred upon it by necessary implication as being essential to the performance of its duties'") (footnotes omitted). See also paras. 75-76. In addition, see ICC-01/09-02/11-728, para. 74, where this Trial Chamber, when constituted as Trial Chamber V, accepted that it retained the inherent powers to stay or terminate proceedings, powers not specifically enumerated in the Statute, if the Chamber determines that the fundamental principles of a fair trial have been irrevocably breached.

Article 64(3): "Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall: (a) Confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings; […]."

Article 64 (6)(e): Provides for the protection of the accused by the Trial Chamber.

Article 64 (6)(f): Provides that the Trial Chamber can rule on any relevant matters.

Article 64(8)(b): "At the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner. […]."

Article 67: Provides for the rights of the accused and in particular his right "to a fair hearing" and the minimum guarantees of "[being] tried without undue delay" and "not to have imposed on him […] any reversal of the burden of proof or any onus of rebuttal."

Rule 134 (Motions relating to the trial proceedings): "(1) Prior to the commencement of the trial, the Trial Chamber on its own motion, or at the request of the Prosecutor or the defence, may rule on any issue concerning the conduct of the proceedings. […]."

15. The approach of the *ad hoc* tribunals on the issue of the defence making a submission of no case to answer is also instructive.[15] Initially, the legal framework of the ICTY and the ICTR did not contain a specific provision for mid-trial acquittals, though such a rule was subsequently added to the Rules of Procedure and Evidence.[16] However, even before the adoption of Rule 98*bis* at the ICTY in July 1998, motions to dismiss counts were filed on the basis of Rule 54, which allows a Trial Chamber to "issue orders…for the preparation or conduct of the trial."[17] In the *Blaskić* case, a motion to dismiss based on Rule 54 was filed and then overtaken by the adoption of Rule 98*bis,* a rule which, because of its narrower criteria, the defence in that case did not want to invoke. The ICTY

[15] Given the similarity of the issue under discussion with that faced by the *ad hoc* tribunals, the Defence submits that this is a situation where "it is useful to consider the relevant jurisprudence of the ICTY and the ICTR" (see ICC-01/04-01/06-1433 OA11, para. 78).
[16] ICTY Rules of Procedure and Evidence, Rule 98*bis* (Judgement of Acquittal), adopted 10 July 1998; ICTR Rules of Procedure and Evidence, Rule 98*bis* (Motion for Judgement of Acquittal).
[17] *Prosecutor v. Tadić*, IT-94-1-T, Decision on the Defence Motion to Dismiss Charges, 13 September 1996.

Trial Chamber ruled on the basis of the new rule while observing that "*the Trial Chamber could grant the request of the accused and order the dismissal of some of the counts of the indictment solely on the basis of Rule 54, only if it deemed that the Prosecution has so clearly failed to satisfy its obligations as the prosecuting party, that, commencing with this stage of the proceedings, it is no longer even necessary to review the Defence evidence regarding the counts covered in the Motion*."[18] In relying on the new Rule 98*bis* rather than on its Rule 54 powers, the Trial Chamber acted on the principle *generalibus derogant specialia*, whereby the specific rule supersedes the general law or principle. But the power to intervene solely on the basis of Rule 54 was accepted.

16. The Defence submits that this Chamber should exercise its judicial discretion to permit the Defence, if it chooses, to make a submission of "no case to answer" in this case.[19] Such a submission, where appropriate, promotes trial efficiency and expedition as well as secures the rights of the accused. No party or victim can be other than well-served. The alternative, to let charges stand and trial continue when the OTP's evidence, taken at its highest, cannot sustain a conviction, would, the Defence submits, be wholly contrary to the fair trial rights of an accused and the proper administration of justice.

17. The existence of a confirmation stage at this Court does not preclude the making of a "no case to answer" submission. The evidentiary standard to be met at confirmation ("sufficient evidence to establish substantial grounds to believe") is, of course, lower than that applicable to "no case to answer" motions. Further, it is logical and to be expected that there may be circumstances where the quality

[18] *Prosecutor v. Blaškić*, IT-95-14, Decision of Trial Chamber I on the Defence Motion to Dismiss, 3 September 1998.

[19] This position finds support in academic commentaries. See, e.g., *International Criminal Procedure: Principles and Rules*, ed. Göran Sluiter, Håkan Friman, Suzannah Linton, Salvatore Zappalà, Sergey Vasiliev, 2013, p. 450 ("Now that the adversarial structure of the Court's criminal trial appears to be consolidated, however, Trial Chambers of the Court could entertain 'no case to answer' motions by using their general authority under Article 64 of the ICC Statute and Rule 134 of the ICC RPE"); *The Trial Proceedings on the International Criminal Court, ICTY and ICTR Precedents*, by Karin N. Calvo-Goller, Martinus Nijhoff Publishers, 2006, p. 287, with reference to Article 64(6)(f) in footnote 1402 ("The Statute and Rules of Procedure and Evidence of the ICC do not contain provisions on the procedure to follow for a judgement of acquittal. As the Court has the power to "rule on any other relevant matter", it may, in appropriate cases, decide on such motions").

of prosecution evidence viewed at the trial stage has been wholly different to the view taken of it at confirmation, where the OTP may rely upon anonymous summary evidence and need not call a single *viva voce* witness. Such a view may follow, for example, in a case where a confirming witness recants his testimony and/or the OTP decides not to rely on the witness at trial.[20] If the clear, overwhelming view of the Chamber is that the prosecution case has collapsed, without the defence case even having begun, then justice is not served by permitting a case to stagger on to its inevitable conclusion.

18. It is recognised that "no case to answer" submissions are not the time for a general weighing of issues of credibility and the like, which should be left to the deliberations at the end of the case.[21] However, there are circumstances where it can be appropriate to do so, as expressed in the *Kordić* case: "*The test that the Chamber has enunciated - evidence on which a reasonable Chamber could convict - proceeds on the basis that generally the Chamber would not consider questions of credibility and reliability in dealing with a motion under Rule 98*bis*, leaving those matters to the end of the case. However, there is one situation in which the Chamber is obliged to consider such matters; it is it is where the Prosecution's case has completely broken down, either on its own presentation, or as a result of such fundamental questions being raised through cross examination as to the reliability and credibility of witnesses that the Prosecution is left without a case*."[22] Similarly, in the ICTR case of *Augustin Ngirabatware*, the ICTR Trial Chamber noted "*Rule 98*bis*, as both Parties agree, does not require an evaluation of the credibility or reliability of the Prosecution evidence. But if the Prosecution's case has completely broken down such that no case remains, the*

[20] In the *Prosecutor v. Kenyatta*, the Prosecution decided not to rely upon OTP Witness 4 at the trial stage, whose evidence the Prosecution admitted "was essential on the issue of [former accused] Mr Muthaura's criminal responsibility and, in fact, [the individual] was the only direct witness against" the former accused (ICC-01/09-02/11-664-Red2, para. 9.) Also of note, *Prosecutor v. Karemera et al*, ICTR-98-44-T, Decision on the Prosecution Motion to Reopen its Case and on the Defence Motion to File Another Rule 98*bis* Motion, 19 April 2008, para. 4; *Prosecutor v. Karemera et al*, ICTR-98-44-T, Decision on Mathieu Ngirumpatse's Motion for Judgement of Acquittal, 16 June 2008, para. 7.

[21] See *Prosecutor v. Milošević*, IT-02-54-T, Decision on Motion for Judgement of Acquittal: Application of Rule 98*bis*, 16 June 2004, para. 13(3).

[22] *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-T, Decision on Defence Motions for Judgement of Acquittal, 6 April 2000, para. 28.

Chamber may consider that the evidence obviously lacks credibility and reliability, and therefore enter a judgement of acquittal."[23]

(g) The order in which witnesses should be questioned

19. Subject to any additional specific orders of the Presiding Judge under Regulation 43 of the Regulations of the Court and the Chamber's power under Rule 140(2)(c) to question witnesses as it considers appropriate, the Defence submits that oral evidence at trial should be presented as set out below. The Defence understands that the Chamber shall ensure that the rights of the accused are respected at all times and will give the parties the opportunity to explore any new issues raised by the Chamber to the extent necessary.[24]

20. Rule 140(2) identifies who shall be given an opportunity to question a witness but not the order in which witnesses may be questioned by a party.[25] The Defence observes that trial fairness and trial expediency may be best served if the party calling the witness, and who is therefore most familiar with that witness, is permitted to question that witness first ("examination-in-chief").[26]

21. During the OTP case, if the Common Legal Representative ("CLR") is granted leave to question a witness,[27] the CLR may question the witness to the extent leave has been granted, on completion of the OTP's examination-in-chief.[28] The same procedure shall be followed during the defence cases save that the CLR shall question the witness after the OTP's cross-examination.[29]

[23] *Prosecutor v. Ngirabatware*, ICTR-99-54-T, Decision on Defence Motion for Judgement of Acquittal, 14 October 2010, para 24.
[24] ICC-01/05-01/08-1023 ("*Bemba* Directions"), para. 7.
[25] Rule 140 only states that the Trial Chamber has a right to question a witness before or after a witness is questioned by a party referred to in Rule 140(2)(a) or (b), and that the Defence shall have a right to be the last to examine a witness.
[26] ICC-01/04-01/06-T-104-ENG ET WT, 16 January 2009 ("*Lubanga* Oral Decision"), p. 37.
[27] See *infra*, paras. 27 to 28 for the Defence's submissions on the timing and manner in which the CLR should request authorisation from the Trial Chamber in order to question a witness or present evidence at trial.
[28] ICC-01/04-01/07-1665-Corr ("*Katanga* Directions"), Section II.A, para. 18; *Bemba* Directions, para. 8.
[29] *Katanga* Directions, Section II.C, paras. 37 & 42; *Bemba* Directions, para. 11.

22. Subsequent questioning pursuant to Rule 140(2)(b) may be conducted by the parties not calling the witness ("cross-examination"). For the avoidance of doubt, during the OTP case, any defence cross-examination would occur after any permitted questioning conducted by the CLR. In this regard, the Ruto Defence will have the opportunity to cross-examine the witness first, followed by the defence for Mr. Sang. The defence teams may agree among themselves to change the order in which they cross-examine witnesses called by other participants. During the defence cases, any OTP cross-examination will occur immediately following the relevant defence teams's examination-in-chief. As indicated above, any permitted questioning by the CLR would take place after the OTP's cross-examination. Any cross-examination of a witness by the defence team not calling the witness will take place after the OTP's cross-examination and any permitted questioning by the CLR, as the case may be.

23. Following cross-examination and any permitted CLR questioning, the party calling the witness may ask further questions of the witness.[30]

24. The defence should always have the right to be the last to examine a witness pursuant to Rule 140(2)(d). During the OTP case, this right shall be exercised by the Ruto Defence first followed by the defence team for Mr. Sang. During the defence cases, this right shall be exercised by the defence team calling the witness.

25. Where a non-dual status victim has been granted permission to testify,[31] the CLR will question the witness first.[32] The OTP may, thereafter, question the victim, followed by the Ruto Defence and then the defence for Mr. Sang.[33]

[30] *Lubanga* Oral Decision, p. 37; *Katanga* Directions, Section IV.C, para. 77.
[31] See *infra*, paras. 27 to 28 for the Defence's submissions on the timing and manner in which the CLR should request authorisation from the Trial Chamber in order to question a witness or present evidence at trial.
[32] *Katanga* Directions, Section II.B, para. 31.
[33] *Katanga* Directions, Section II.B, para. 32.

26. Where a witness is called at the instance of the Trial Chamber, the Chamber will question the witness first; then, the OTP may question the witness, followed by the CLR, if granted leave; finally, the Ruto Defence followed by the defence for Mr. Sang will be given the opportunity to question the witness.[34]

(h) The timing and manner in which the CLR should request authorisation from the Chamber in order to question a witness or present evidence at trial

27. Three different circumstances are raised in relation to the presentation of evidence in proceedings by the CLR. The first, relates to a request to call a non-dual status victim as a witness, the second is the questioning of other witnesses called in the case, either by the OTP, defence or judges, and the third is the submission of documentary evidence. A central consideration to all three circumstanes is that the CLR is not prosecutor *bis* and should not become an "auxiliary prosecutor".[35]

28. The Defence submits that the timing and manner of a request by the CLR to call a non-dual status victim or to question other witnesses called by the parties or the judges was properly addressed in the *Katanga* Directions, with the first circumstance being dealt with at paragraphs 19 to 30 and the second at paragraphs 82 to 91. For the avoidance of doubt, any applications made by the CLR in execution of the first and second circumstances shall include copies of any documents that will be used for the questioning of the witness by the CLR.[36] The Defence submits that the *Katanga* Trial Chamber likewise appropriately addressed the third circumstance (CLR tendering of documentary evidence) at paragraphs 98 to 101 of its "Decision on the Modalities of Victim Participation at Trial".[37] The Defence understands that those modalities operated throughout that trial and proved workable and submits should be adopted in the present case.

[34] *Katanga* Directions, Section II.A, paras. 43-44.
[35] *Katanga* Directions, Section II.B, para. 22.
[36] The Defence observes that specific reference is only made to the provision of documents at *Katanga* Directions, Section IV.E, para. 84.
[37] ICC-01/04-01/07-1788-tENG, 22 January 2010.

(i) The procedure for the use of material during questioning (including advance notification thereof and procedure for objections)

29. The following submissions do not touch on Ringtail/E-court protocols or any of the other technical aspects that underlie the production of material at the Court in compliance with Regulation 52 of the Regulations of the Registry and the provision of material or visual aids to the Registry. Nor do these submissions deal with the notification of documents by the CLR, which is addressed in the preceding section.

30. The Defence's proposals for the advance notification by the OTP of the materials it wishes to use or show to OTP witnesses during examination-in-chief are set out in paragraph 3(ii) above. Separately, the OTP shall, at least 7 working days before the testimony of the witness, provide copies of the documents it intends to use during questioning to the Chamber, the defence and the CLR.[38]

31. The Defence submits that the ordinary rules of litigation should be followed with the defence being able to make objections to the use or admission of such materials at any point from their notification until the point of proposed admission. The defence should not be curtailed in their ability to make objections by rigid procedural rules which fail to take account of the fact that defence investigations are still on-going and that the defence teams are struggling to get a march on the considerable amount of late disclosed material.[39] This vital defence work, investigative or otherwise, may reveal lines of objection not previously appreciated. Plus, the reality of litigation is that objections can sometimes only be made in court where, for example, it transpires that the witness is not qualified to speak to a particular item.

32. Proceedings before this court are adversarial. On this basis, no party should be required to signpost its cross-examination in advance. During the OTP case, the

[38] *Bemba* Directions, para. 16(i).
[39] *Supra*, footnote 10.

Defence submits that use may be made by the defence teams of any document that is already in evidence. This includes the transcripts of witnesses who have already testified before the Court, subject to applicable protective measures.[40] The Defence further submits that for all material the defence teams propose to use in cross-examination (whether or not it is in evidence) such material be notified, plus copies provided, to the OTP, CLR, judges and witness immediately prior to the commencement of cross-examination.

33. Again, the Defence submits that it is premature to propose procedures for the notification of any material to be used with Defence witnesses, both in examination-in-chief and cross-examination, during the defence case – in the event that there is one. The Defence ackowledges, however, that the procedures adopted in the OTP case will inform, with any necessary modifications, those adopted during any defence case.

(j) The procedure for admission of material tendered through witnesses as evidence in the case (including assignment of evidence numbers)

34. As to documentary evidence generally, Trial Chamber II observed, in the *Katanga* Directions, at paragraphs 95-97:

> 95. In principle, each item of documentary evidence shall be introduced by the tendering party during a hearing. The opposing party shall have the opportunity to comment upon it.
>
> 96. If lengthy documents are tendered, the party tendering it shall clearly identify which passages it wants to submit into evidence.
>
> 97. If there is an inherent correlation between an item of documentary evidence and a particular witness, the party calling that witness may introduce the item through that witness. However, in such case, the item may not be referred to prior to its introduction by the witness.

35. Documents and other material tendered through a witness should be provided with evidence (or EVD) numbers at the time of their admission. Objections to

[40] *Katanga* Directions, Section V.C, para. 107.

material being tendered should be taken at the point when it is sought to have it admitted. This allows the Chamber to better appreciate the relevance and context of the material.

36. Based on the foregoing, only admitted exhibits will receive an EVD number. If there is an objection to an exhibit being tendered the proposed exhibit will be assigned a 'marked for identification' ("MFI") number until the Chamber rules on the matter. Accordingly, an item will only be included as an exhibit in the case record if it receives an EVD number.[41]

37. The Defence understands that the production of video and audio recordings through a witness has met with problems in other cases. The Defence further understands that it has been the practice that such material is presented from counsels' bench rather than through the court officer.[42] However, it has proved insufficient for a party just to play such material and hope that it is wholly intelligible, irrespective of whether it is in a working language of the Court, or rely on contemporaneous translation through the court interpreters. A transcript should be produced, and where possible agreed, and where a translation is necessary that should be done by the translation service of the Registry as provided for in Regulation 58 of the Regulations of the Registry.

38. In relation to the numbering of videos and video excerpts, the Defence proposes: if a video recording is admitted into evidence in its entirety, the entire recording will receive an EVD number, subject to any objections. If only a portion of a video recording is admitted into evidence, then the complete video will receive an MFI number and the portion (the extract) will receive a separate EVD number, unless there are objections, in which case the extract will receive a separate MFI number until the issue is determined by the Chamber.[43]

[41] ICC-01/04-01/06-2432, paras. 1-5.
[42] ICC-01/04-01/07-1134, para 16.
[43] ICC-01/04-01/06-2432, para. 6.

(k) Procedures for the admission of other material as evidence in the case (other than through witnesses)

39. Trial expediency as well as the efficient management of the proceedings may best be served if a party submitting documentary or other material evidence which is not a record of testimonial evidence by a witness, such as audio or video recording ("non-witness related material"), be permitted to do so from the Bar table. The Defence submits that there should be no requirement for non-witness related material to be introduced through a witness for the purposes of authentication, without prejudice to the need to provide for a proper foundation.

40. The Defence submits that the parties be allowed to offer non-witness related material from the Bar table into evidence at appropriate times during the trial and to file a motion at the end of their respective cases concerning residual non-witness related material not already admitted.[44] In this regard, the Defence proposes that the Chamber adopts the procedure on the filing of Bar table motions utilized by Trial Chamber II in the *Katanga & Ngudjolo* case.[45] The *Katanga & Ngudjolo* procedure requires the tendering party to send the proposed materials in advance to the opposing party along with a table conforming to a specified format, so that the opposing party may enter its observations in the table, thus indicating to the tendering party whether it objects, agrees to, or takes no position on the admissibility of the materials within a reasonable time. Notwithstanding this procedure, the parties also remain free to object orally, where appropriate.

41. An indication of how the *Katanga & Ngudjolo* procedure worked in practice can be seen in Trial Chamber II's "Decision on the Prosecutor's Bar Table Motions"[46] where specific documents are extensively evaluated following "*[…] the three-step approach adopted by Trial Chamber I. Accordingly, the Chamber will first assess the*

[44] This procedure would be limited to the parties. Proposals for the procedure to be followed by the CLR for the admission of non-witness evidence are made in section (h) above.
[45] *Katanga* Directions, Section V.B, paras 101-102.
[46] ICC-01/04-01/07-2635.

relevance of the material, then determine whether it has probative value and finally weigh its probative value against its potentially prejudicial effect".[47] The decision deals with different categories of material, including open source, official documents, private documents, videos and United Nations reports.

(l) *Whether recourse should be had to Rule 68 of the Rules (admission of prior recorded testimony) and the procedure to be followed*

42. Article 69(2) of the Statute underlines the primacy of the principle of orality; witnesses must appear before the Trial Chamber in person and give their evidence orally.[48] However, Article 69(2) provides for exceptions to this principle. Such an exception is laid out in Rule 68.

43. Given the foregoing, the Defence recognises that recourse may be made to Rule 68 during these proceedings but submits that recourse should only be made in exceptional circumstances or with the agreement of the parties. The Defence notes the Appeals Chamber's guidance that a Trial Chamber must ensure that any deviation from the principle of orality "is not prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally".[49]

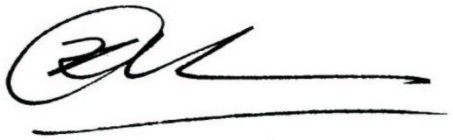
44. In relation to the procedure to be followed, the Defence proposes that when a party intends to submit as evidence the "prior recorded testimony" of a witness called to testify, this intention shall be made known in writing to the other parties within a reasonable period prior to the relevant witness' first court appearance. Following receipt of such notice, the other parties shall, where relevant, notify the moving party in writing of any intention to object. The ensuing oral submissions should in principle take place at the beginning of the questioning and after having ensured that the witness does not object to the submission of the previously recorded testimony in accordance with Rule 68(b)

[47] ICC-01/04-01/07-2635, para 14 citing to the following decisions of Trial Chamber I in the *Lubanga* case: ICC-01/04-01/06-1399, para. 27-32; ICC-01/04-01/06-1981, para. 33; ICC-01/04-01/06-2135, para. 21; ICC-01/04-01/06-2589-Corr, para. 27; ICC-01/04-01/06-2596-Conf, para. 25; ICC- 01/04-01/06-2595-Conf, para. 39.
[48] ICC-01/05-01/08-1386, para. 76.
[49] ICC-01/05-01/08-1386, para. 78.

of the Rules. The "prior recorded testimony" may be admitted as evidence and accordingly receive an EVD number following consideration by the Chamber of any objections raised.

45. Save for the above general recognition that recourse might be had by the parties to Rule 68 and the procedure to be followed for its use, the Defence does not offer any views on the criteria to be used to determine whether audio or video recorded testimony, statements, transcipts or other documents qualify as "prior recorded testimony" for the purposes of Rule 68 or the circumstances in which recourse should be had to the Rule. The Defence submit that these are matters that should be addressed at trial on a case by case basis.

Respectfully submitted,



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Lead Counsel for Mr. William Samoei Ruto

Dated this 3rd Day of July 2013
At Nairobi, Kenya