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Original: **English**

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

Sang Defence Submissions on the Conduct of the Proceedings

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 19 June 2013, Trial Chamber V(A) ordered the parties to make submissions on the conduct of the proceedings, by 3 July 2013.[1]

II. SUBMISSIONS

2. The defence for Joshua arap Sang ("defence") recognizes the Trial Chamber's inherent powers to regulate the conduct of the proceedings and requests that the Chamber retain a degree of flexibility in terms of the day to day trial management. Of course, the Chamber also has the power to intervene at all times and order the production of evidence that it considers necessary for the determination of the truth, in accordance with Article 64(6)(d) and Article 69(3) of the Stat ute. Within that framework, however, the defence hereby provides the following submissions, responding in the same order as the questions were presented by the Chamber in paragraph 2:

(i) Opening Statements

3. The defence intends to make an opening statement at the commencement of trial, estimated to take one hour. The defence anticipates that Mr Sang will also exercise his right under Article 67(1)(h) to make an unsworn statement as part of the opening address. The defence does not foresee any technical or logistical considerations that need to be taken into account.

(ii) Schedule of Witnesses

4. The defence welcomes the provision by the prosecution of a concrete indication of the first ten witnesses that it intends to call at trial. It would also be useful if the prosecution could indicate at this stage, the anticipated running order of all of its witnesses.[2] At a minimum, the prosecution should now be in a position to group their witnesses in some way, be it topically, linkage/crime-base,

[1] *Prosecutor v. Ruto and Sang,* ICC-01/09-01/11-778, Order requesting submissions on the conduct of the proceedings, 19 June 2013 ("Order").

[2] Two months before the start of trial in *Katanga,* the Trial Chamber ordered the prosecution to provide it with a document setting out the sequence in which it intends to call its witnesses at trial, together with an explanation as to why it intends to call the witnesses in that order. ICC-01/04-01/07-1337, Order on the submissions by the Defence on the Table of Incriminating Evidence and on the sequence of Prosecution witnesses, 27 July 2009, para 11.

expert/fact, etc, and communicate that to the Chamber and parties.[3] Though this may be subject to change depending on, *inter alia,* the witnesses' availability, such advance notice as to the general order of the prosecution case would allow the defence to plan and determine investigative priorities, allocate its own workload, and make appropriate travel logistics for counsel. It would also give the Chamber and the court a better indication of which portions of the case may be able to be held away from the seat of the court in The Hague.

5. Additionally, once the proceedings have commenced, the defence requests that the prosecution provide an updated running order every two weeks, indicating the next ten witnesses scheduled to testify. This running order would ideally be accompanied by a list of all exhibits that the prosecution intends to use with or introduce through each witness. This would maximize the defence's ability to prepare efficiently and thoroughly, as well as to determine in a timely manner which exhibits it may want to use in cross-examination of those witnesses.

(iii) Length of Time for Questioning

6. As for the prosecution's estimates of the time needed to question its witnesses, the defence simply expects that the prosecution will structure its questioning so as to be as efficient as possible. While the defence does not, at this time, see the need for the Chamber to impose time-limits for the questioning of each witness, the defence concurs with the *Bemba* Chamber's approach, namely that the Chamber has the duty, as set out in Article 64(2), "to ensure that proceedings are conducted expeditiously".[4] Consequently, the defence anticipates that the Chamber will ordinarily review the progress of the prosecution's case in order to prevent unnecessary delays and to maintain effective use of time, and to make any orders as the situation requires.

7. The defence foresees using at least as much time for the questioning of each witness, as the prosecution takes in its examination-in-chief of that witness. The defence requests that the defence teams be allowed to determine amongst themselves, on a witness-by-witness basis, which defence team will question the

[3] The *Bemba* Chamber encouraged the prosecution to "group certain witnesses by topic to ensure best use of time". ICC-01/05-01/08-T-30-ENG, p 8-9.
[4] *Prosecutor v. Bemba,* ICC-01/05-01/08-996, Order on the "Prosecution's Revised Order of its Witnesses at Trial and Estimated Length of Questioning", 4 November 2010, para. 4.

witness first. The defence also requests that the Chamber retain the flexibility to allocate unused time from one defence team to the other. This is necessary because the focus of the evidence of some of the witnesses is greater for one accused than the other.

8. It may also be appropriate to allocate the same amount of time for cross-examination as the amount of time required to present the prosecution case. That way, time unspent in relation to relation to the cross-examination of one witness, may be added to the time allocated for cross-examination of a more complex or detailed witness. Should the need arise to take longer than the allocated time, the defence could make an application to the Chamber, upon showing good cause. Despite all of the discussion of time allocations, the defence undertakes to structure its cross-examinations in as efficient and economical way as possible.

(iv) Indications regarding the Accused and the DCC

9. The defence does not object to certifying ahead of the commencement of trial that the accused read and understood the Document Containing the Charges in its entirety. Nor does the defence object to the counts section of the Document Containing the Charges being read to the accused at the commencement of trial for purposes of fulfilling the requirement of Article 64(8)(a) of the Statute.

(v) Whether "no case to answer" motions should be allowed

10. Certainly, "no case to answer" motions requesting dismissal of one or more counts at the conclusion of the prosecution's case should be allowed. In fact, such motions are essential to promoting trial fairness and efficiency, and there is no prejudice that could arise to any party or participant. The fact that there is no express provision at the ICC, comparable to that of Rule 98*bis* of the ICTY/R and Rule 98 of the SCSL does not bar the judges of the ICC from hearing a "no case to answer" motion, at the appropriate time. The defence is entitled to pursue this form of relief if the prosecution's case, even taken at its highest, following the presentation of the evidence, is not sufficient to sustain a conviction on one or more of the counts. To continue to hear a defence case in such circumstances, would be an injustice, contrary to the rights of the accused to a trial without delay, and a waste of court resources.

(vi) Indication of Self-Incrimination of Prosecution Witnesses

11. The defence does not have any comment, other than to recommend that witnesses who may incriminate themselves should be afforded the opportunity to be advised by an independent lawyer, prior to giving testimony.[5]

(vii) Indication of In-Court Protective Measures for Prosecution Witnesses

12. The defence does not have any comment, expect to request the prosecution to file any such applications well in advance of the anticipated testimony of the relevant witnesses, and with as few redactions as possible. This will allow the defence to respond meaningfully to the application, on a case-by-case basis, rather than simply presenting generalized objections.

(viii)(a) Order in which the Witnesses should be Questioned

13. During the prosecution case, the order for questioning witnesses should be: first the prosecution, then the Common Legal Representative ("CLR"), and finally the defence (in accordance with Rule 140(2)(d)). As stated above, the defence teams should be given the flexibility to determine, amongst themselves, the order of their cross-examination, on a witness-by-witness basis.

(viii)(b) Authorization for CLR to question a Witness or Present Evidence

14. Should the CLR wish to question a witness or present evidence, this should be done with maximum notice to the Chamber and to the parties, and with full disclosure of materials sufficiently in advance of that witness's anticipated evidence. The CLR is not a second prosecutor, and the role of the victims' representative should be exercised with that in mind. Any questioning of witnesses by the CLR, especially during the trial phase, should be with the main purpose of assisting the Trial Chamber in ascertaining the truth, and not with an eye toward reparations. Questions under Article 75 should arise only in the event of a conviction and therefore do not have any place in the current proceedings.

15. In most other respects, the defence takes guidance from the Katanga Trial Modalities Decision, paragraphs 87 to 91. The defence suggests that if the CLR wants to put questions to a particular witness, these should be notified through a

[5] See, for example, Katanga Modalities Decision, paras 52-57. This was also the practice used by the defence during the confirmation of charges hearing.

written application, at least ten days before the witness appears for the first time, such that the defence have a meaningful time to respond to the application. The relevance of the proposed questions to the interests of the victims should be made clear.

16. The defence submits that all questions should be neutral in nature and should be limited to eliciting facts about matters that are in controversy between the parties.

(viii)(c) Procedure for use of Material during Questioning

17. The defence submits that the modalities as set out in the Katanga Modalities Decision in paragraphs 103 to 108 would be appropriate to adopt in this case, with the caveat that the materials submitted by the defence three days prior to the defence's cross-examination of a witness should not be made available to the prosecution, especially given that the protocol in this case allows the prosecution to meet with its witnesses until the time of his or her testimony.

(viii)(d) *Procedure for Admission of Material Tendered as Evidence*

18. The defence submits that evidence numbers should be assigned as and when the material is admitted into evidence, either through a witness or through a bar table motion.

(viii)(e) *Procedure for Admission of Other Material as Evidence*

19. The defence submits that the modalities as set out in the Katanga Modalities Decision in paragraphs 95-102 would be appropriate to adopt in this case.

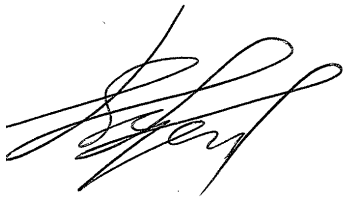
(viii)(f) *Recourse to Rule 68 – Admission of Prior Recorded Testimony*

20. A central purpose of calling a witness to testify *viva voce* is for the Trial Chamber and the parties to be able to observe the witness as he or she is giving evidence. The demeanor of a witness and the ease with which the testimony is rendered, can be an indication of the truthfulness of the content. An excessive resort to Rule 68 admissions would deny the triers of fact the opportunity to fully assess the witnesses' credibility. That said, there may be occasions wherein it is appropriate to allow such admissions. The defence therefore suggests that this be handled by way of written application, sufficiently in advance of that witness's anticipated

testimony, with sufficient time for the opposing party to respond.[6]

V. CONCLUSION

21. The defence respectfully files the above submissions for consideration with respect to the conduct of the proceedings.



Joseph Kipchumba Kigen-Katwa
On behalf of Joshua arap Sang
Dated this 3rd day of July 2013
In Nairobi

[66] Katanga Modalities Decision, para. 92 (suggesting the application be made 21 days in advance of the witness's appearance for the first time).