



Original: English

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

Date: 10 December 2012

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

**Sang Defence Response to
Prosecution's Submission of the Charges
against William Samoei Ruto and Joshua Arap Sang**

Source: Defence for Mr. Joshua Arap Sang

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

The Office of the Prosecutor

Fatou Bensouda, Prosecutor

Cynthia Tai, Trial Lawyer

Counsel for William Ruto

David Hooper QC

Kioko Kilukumi Musau

Counsel for Joshua Sang

Joseph Kipchumba Kigen-Katwa

Philemon K.B. Koech, Joel Kimutai Bosek

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Silvana Arbia

Counsel Support Section

Deputy Registrar

Didier Daniel Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The defence for Mr. Joshua Arap Sang (the “defence”) hereby raises several objections to the content of the modified Charges section¹ of the prosecution’s Updated Document Containing the Charges.² The defence recognizes that according to the Court’s statutory instruments, and as reaffirmed by the Trial Chamber, it is the prosecution’s responsibility to articulate the charges.³ However, the prosecution’s modified Charges do not accurately reflect the findings of the Pre-Trial Chamber in its Decision on the Confirmation of the Charges⁴ and so the defence takes this opportunity, in accordance with the Chamber’s Order, to raise objections relating to:

- i. The use of the word “including” when referring to geographic locations in the Charges;
- ii. The overly broad span of dates relating to the crime bases in the Charges;
- iii. The inclusion of the allegation of six people being killed in Kimumu and the allegation of thirty people being killed in Langas, which are not findings made by the Pre-Trial Chamber;
- iv. The omission of the dates of the alleged preparatory meetings from the Charges;
- v. The general use of Article 25(3)(d) as the mode of liability applicable to Mr. Sang, where the Pre-Trial Chamber expressly found him liable according to the more specific mode of liability requiring an intentional contribution found in Article 25(3)(d)(i); and
- vi. The inclusion of other categories of alleged contributions by Mr. Sang, which were not expressly found by the Pre-Trial Chamber.

II. SUBMISSIONS

¹ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-486, Prosecution’s Submission of the Charges against William Samoei Ruto and Joshua Arap Sang, 28 November 2012 (“Charges”).

² *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-448, Prosecution’s Updated Document Containing the Charges pursuant to Trial Chamber’s Order (ICC-01/09-01/11-439), 21 August 2012 (“Updated DCC”).

³ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-475, Order regarding the content of the charges, 20 November 2012 (“Order”), para. 4.

⁴ *Prosecutor v. Ruto, Kosgey and Sang*, ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012 (“Confirmation Decision”).

2. The defence raised many of these objections during the *inter partes* consultations on the Updated DCC during July and August this year.⁵ The prosecution however failed to take the defence concerns on board. Thus, the defence raises the objections again, for ultimate resolution by the Trial Chamber.

Geographic Scope of the Charges

3. The prosecution errantly uses the word “including” when referring to geographic locations in its Charges. The defence objected to this practice during the confirmation of charges hearing and in its brief following confirmation. In the Confirmation Decision, the Pre-Trial Chamber stated:

99. With regard to the term 'including' the Chamber considers, on the basis of the Prosecutor's submissions at the confirmation of charges hearing and in the Amended DCC, that the use of the expression "in locations including Turbo town, the greater Eldoret area (Huruma, Kiambaa, Kimumu, Langas, and Yamumbi), Kapsabet town, and Nandi Hills town" shall be understood as encompassing exclusively these locations. This does not mean, however, that the Prosecutor is correct, in principle, in using this broad formulation, which might have an impact on expanding the parameters of his case before the Trial Chamber. To the contrary, the Prosecutor should provide a proper degree of specificity in his document containing the charges, which refers to the precise locations of the alleged incidents where crimes took place. Therefore, the Chamber will only assess the evidence with respect to the events that according to the Prosecutor's allegations took place in the locations explicitly referred to in the Amended DCC.

4. The defence submits that the prosecution's Charges should reflect the specificity required by this finding of the Pre-Trial Chamber. The Prosecutor should not be allowed to expand the parameters of her case before the Trial Chamber. Therefore, the “introduction paragraph” under each of the Counts in the modified Charges should be redrafted to exclude the word “including”, and read as follows:

“...supporters of the Party of National Unity in the locations of Turbo town, the greater Eldoret area (Huruma, Langas, Yamumbi and Kiambaa), Kapsabet town and Nandi Hills town in Uasin Gishu and Nandi Districts, Republic of Kenya”.

5. Only then would it be clear, specifically and concisely, on the face of the Charges, which places the alleged conduct took place. Indeed it is trite law that the defence must have definitive notice of the geographic scope of the allegations that it faces.

⁵ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-448-AnxC, Updated DCC, 21 August 2012.

Temporal Scope of the Charges

6. It is correct that generally speaking, the Pre-Trial Chamber found that attacks took place against specific groups of the Kenyan civilian population, namely perceived PNU supporters in the four locations referred to in the counts, between 30 December 2007 and 16 January 2008.⁶ However, within that range of dates, the Pre-Trial Chamber also made very specific findings giving specific dates within which specific crimes were committed in specific locations. More particularly, the Chamber gave specific cut off dates after which it found no sufficient evidence to establish substantial grounds to believe that crimes had occurred in those locations. Despite this, the prosecution however persists in drafting the Charges giving an open ended cut off date falling within the general temporal jurisdiction of 30 December 2007 to 16 January 2008 for all the locations. This is contrary to the limitations expressed in the Confirmation Decision with respect to the specific locations. The Charges should therefore be restricted accordingly.

7. With respect to **murder**, the Pre-Trial Chamber found sufficient evidence to show substantial grounds to believe that murder may have occurred:
 - i. In Turbo Town, on 30 December 2007, but not after 31 December 2007;⁷
 - ii. In greater Eldoret area, from 1 January 2008 to 4 January 2008, but not after 4 January 2008;⁸ and specifically
 - a. In Langas on 1 January 2008;⁹
 - b. In Yamumbi on 1 January 2008;¹⁰
 - c. In Kiambaa on 1 January 2008;¹¹
 - d. In Huruma on 4 January 2008;¹² and
 - e. Note there was no finding at all on Kimumu;¹³
 - iii. In Kapsabet town, between 30 December 2007 and 16 January 2008;¹⁴
 - iv. In Nandi Hills town, from 30 December 2007 to 2 January 2008.¹⁵

⁶ Confirmation Decision, para. 174.

⁷ Confirmation Decision, para. 225.

⁸ Confirmation Decision, para. 228.

⁹ Confirmation Decision, para. 231.

¹⁰ Confirmation Decision, para. 232.

¹¹ Confirmation Decision, para. 233-4.

¹² Confirmation Decision, para. 236.

¹³ The defence argues that absent a specific finding in the Confirmation Decision, Kimumu should not remain a location in the greater Eldoret area within which the accused can be charged with murder.

¹⁴ Confirmation Decision, para. 238.

8. With respect to **deportation or forcible transfer**, the Pre-Trial Chamber found sufficient evidence to show substantial grounds to believe that it may have occurred:
- i. In Turbo Town, on 31 December 2007, but not after 31 December 2007;¹⁶
 - ii. In the greater Eldoret area (encompassing Huruma, Kiambaa, Kimumu, Langas and Yamumbi), from 1 January 2008 to 4 January 2008, but not after 4 January 2008;¹⁷
 - iii. In Kapsabet town, from 30 December 2007 to 16 January 2008;¹⁸ and
 - iv. In Nandi Hills town, from 30 December 2007 to 2 January 2008.¹⁹
9. With respect to **persecution**, the Pre-Trial Chamber found sufficient evidence to show substantial grounds to believe that Network perpetrators severely deprived PNU supporters of their rights:
- i. In Turbo town, on 31 December 2007;
 - ii. In the greater Eldoret area, from 1 January 2008 to 4 January 2008;
 - iii. In Kapsabet town, from 30 December 2007 to 16 January 2008; and
 - iv. In Nandi Hills town, from 30 December 2007 to 2 January 2008.²⁰
10. The Charges should reflect these findings with the clarity and specificity required of the prosecution's main accusatory instrument.

Unsubstantiated Allegations of Numbers of People Murdered in Kimumu and Langas

11. In the Charges, the prosecution alleges that six people were killed in Kimumu. However, this allegation exceeds the scope of the confirmed charges and is thus impermissible. In fact, the Pre-Trial Chamber did not make a finding that there was sufficient evidence that murder had occurred at all in Kimumu, despite going in detail into the number of deaths as alleged in every other part of the greater Eldoret area.

¹⁵ Confirmation Decision, para. 241.

¹⁶ Confirmation Decision, para. 249.

¹⁷ Confirmation Decision, para. 254.

¹⁸ Confirmation Decision, para. 259.

¹⁹ Confirmation Decision, para. 264.

²⁰ Confirmation Decision, para. 274.

12. Similarly, in the Charges, the prosecution alleges that 30 people were killed in Langas, yet no such finding can be found in the Confirmation Decision. That allegation should also fail for the same reasons as above.

Omission of Dates of Alleged Preparatory Meetings

13. The prosecution case is structured primarily around several alleged preparatory meetings which were attended by Mr. Ruto and/or Mr. Sang, among others, in the lead up to the 30 December 2007 election in Kenya. The findings in relation to preparatory meetings are discussed in detail in Section V of the Confirmation Decision. The Pre-Trial Chamber relied extensively on these meetings to establish the existence of an “organization” as one of the necessary elements of proving crimes against humanity.²¹ In that context, the defence considers the dates of the meetings to amount to “facts and circumstances”, which must be pleaded with specificity in the Charges. The defence submits that the meetings are examples of “the nature of the conduct” and/or the “manner in which the conduct took place”, which the Trial Chamber found should be included in the Charges section of the DCC.²²
14. The prosecution should therefore list with certainty the dates of all the alleged core preparatory meetings. It is not sufficient to simply incorporate them by reference to the body of the Updated DCC, as the prosecution has done in its modified Charges.

Liability of Joshua Sang – Must be under Article 25(3)(d)(i)

15. The Pre-Trial Chamber expressly found that there was sufficient evidence to establish substantial grounds to believe that Mr. Sang “intentionally contributed to the commission of crimes and his contribution was made with the aim of furthering the criminal activity or criminal purpose of the group” led by Mr. Ruto.²³ This, it is underlined, is the precise wording of Article 25(3)(d)(i). The Pre-Trial Chamber continued its analysis of Mr. Sang’s liability under Article 25(3)(d)(i) in paragraph 364 of the Confirmation Decision, concluding that Mr. Sang “aimed at furthering not only the criminal purpose of the group but also its criminal

²¹ Confirmation Decision, para. 197.

²² Order, para. 11.

²³ Confirmation Decision, para. 353.

activity”.²⁴ At no point did the Pre-Trial Chamber consider Mr. Sang’s liability under Article 25(3)(d)(ii). It is thus improper for the prosecution to charge Mr. Sang under the more general Article 25(3)(d) mode when the Pre-Trial Chamber made express findings limiting his liability to Article 25(3)(d)(i). The prosecution should therefore draft the Charges in a way that reflects this finding by the Chamber.

16. If during the proceedings, the Trial Chamber decides pursuant to Regulation 55 that a legal re-characterization of the facts going to the mode of liability is necessary, it would give notice to the parties and hear submissions at that time.

Alleged Contributions of Joshua Sang

17. In the Confirmation Decision, the Pre-Trial Chamber considered, discussed, and listed the facts and circumstances underlying the alleged contributions of Mr. Sang to the crimes charged. The Pre-Trial Chamber listed his intentional contributions at paragraph 355 of the Confirmation Decision, wherein the Chamber found that there were substantial grounds to believe that Mr. Sang:

by virtue of his position within Kass FM as a key broadcaster, intentionally contributed to the commission of the crimes against humanity referred to above by:

- (i) placing his show Lee Nee Emet at the disposal of the organisation;
- (ii) advertising the meetings of the organisation;
- (iii) fanning the violence through the spread of hate messages explicitly revealing desire to expel the Kikuyus;
- (iv) broadcasting false news regarding alleged murders of Kalenjin people in order to inflame the atmosphere in the days preceding the elections; and
- (v) broadcasting instructions during the attacks in order to direct the physical perpetrators to the areas designated as targets.

18. This is an exhaustive list of the categories of contributions for which the Pre-Trial Chamber determined the prosecution had adduced sufficient evidence to find substantial grounds to believe that Mr. Sang could be liable of the crimes charged. There is no indication by the Pre-Trial Chamber that these were examples of much wider types of contributions. Paragraph 355 therefore fixes and delimits the scope of Mr. Sang’s alleged participation in the crimes for purposes of trial.

²⁴ See also, Confirmation Decision, paras. 366-7.

19. It is therefore surprising to the defence that the prosecution, in its modified Charges, lists additional types of contributions allegedly made by Mr. Sang, for which there is no support in the Confirmation Decision.
20. In particular, under the heading 'Criminal Responsibility of the Accused' of the Charges,²⁵ with respect to Mr. Sang, the prosecution added the following allegations, which do not appear at paragraph 355 (or explicitly elsewhere) of the Confirmation Decision:
 - i. Sub-paragraph (i), which alleges that Mr. Sang "broadcast propaganda against PNU supporters prior to the attacks";
 - ii. Sub-paragraph (ii), which alleges that Mr. Sang "broadcast preparatory meetings and event locations and organized fundraising events that financed the attacks"; and
 - iii. Sub-paragraph (vi), which alleges that Mr. Sang, "called on perpetrators to begin the attacks".
21. The defence submits that these are not simple recharacterizations of the Pre-Trial Chamber's findings, but impermissible extensions of the findings. For example, there is no factual finding in the Confirmation Decision that Mr. Sang organized fundraising events that financed the attacks. As these allegations exceed the scope of the Pre-Trial Chamber's findings, they should not remain as part of the Charges.

III. CONCLUSION AND RELIEF REQUESTED

22. For the all the reasons above, the defence requests the Trial Chamber to direct the prosecution to draft the Charges section of the Updated DCC in a way that reflects the concerns listed above and does not exceed the findings in the Confirmation Decision.

²⁵ Charges, p. 2.



Joseph Kipchumba Kigen-Katwa
On behalf of Joshua Arap Sang
Dated this 10th day of December 2012
In Nairobi