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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 Document

**Prosecution's Response to William Samoei Ruto's and
Joshua Arap Sang's "Joint Defence Request for Leave to Appeal
the Decision on Witness Preparation"**

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Court to:

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Introduction

1. On 2 January 2013, Trial Chamber V authorized pre-testimony meetings between witnesses and the party calling them under certain conditions (the “Decision”).¹ The Defence of William Samoei Ruto and Joshua Arap Sang (the “Defence”) seek leave to appeal the Decision.²
2. The Defence argues that the Trial Chamber erred when it departed from other ICC jurisprudence banning pre-testimony meetings (“First Issue”); that these meetings are incompatible with the rights of the Defence (“Second Issue”) and that the Trial Chamber erred when it did not hear the Defence on this matter and obliged the Defence to take and disclose witness statements and to video-record pre-testimony meetings (“Third Issue”).
3. The Prosecution submits that none of these issues is an appealable issue arising from the Decision. The First Issue constitutes a disagreement with the Chamber’s decision to authorise pre-testimony witness meetings; the Second Issue merely portrays an abstract and hypothetical concern and the Third Issue is mainly grounded on a misrepresentation of the Decision and the record of the proceedings. Further, and should the Chamber find that any of these issues arises from the Decision, the Prosecution argues that they do not meet the requirements for leave to appeal under article 82(1)(d).

Procedural Background

4. On 14 May 2012, the Trial Chamber issued its “Order scheduling a status conference”, requesting the Prosecution and the Defence to make written submissions on a number of issues. It also directed the parties to bring to the

¹ ICC-01/09-01/11-524.

² ICC-01/09-01/11-539.

Chamber's attention any additional issues for resolution before the commencement of the trial.³

5. On 28 May 2012, the Prosecution filed its submissions and stated that it intended to seek a ruling from the Chamber regarding the permissible scope of witness preparation and indicated that a motion would be filed to that effect.⁴
6. On 13 August 2012, the Prosecution filed its submissions on the permissible scope of witness preparation.⁵ On 4 September 2012, the Defence filed a joint response.⁶ On 12 September, the Registry provided its observations pursuant to regulation 24bis.⁷
7. On 2 January 2013, the Trial Chamber issued its Decision on witness preparation ("the Decision").⁸ The Trial Chamber stated that article 64 affords flexibility to the Chamber in managing the trial, and that the silence of the Statute on witness preparation does not mean that it is banned. The Chamber further considered the merits and potential risks of witness preparation and concluded that the latter could be properly addressed with adequate safeguards. In sum, the Chamber found that it was neither practical nor reasonable to prohibit pre-testimony meetings between the parties and the witnesses and that "judicious witness preparation aimed at clarifying a witness's evidence and carried out with full respect for the rights of the accused is likely to enable a more accurate and complete presentation of the evidence as well as to assist the Chamber in its truth finding function".⁹ The Chamber annexed a Protocol that regulates the pre-

³ ICC-01/09-01/11-413.

⁴ ICC-01/09-01/11-417.

⁵ ICC-01/09-01/11-446 and ICC-01/09-01/11-447.

⁶ ICC-01/09-01/11-452.

⁷ ICC-01/09-01/11-455.

⁸ ICC-01/09-01/11-534. The Decision was notified on 3 January 2013.

⁹ Decision, para.50.

testimony witness meetings. Judge Eboe-Osuji attached a partially dissenting opinion which endorsed the authorization of pre-testimony witness meetings.¹⁰

8. On 9 January 2013, the Defence sought leave to appeal the Decision (“Defence Application”).¹¹

Submissions

9. The Defence Application raises three purported issues:

- 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, the Chamber erred 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 (“First Issue”);¹²
- 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” (“Second Issue”);¹³
- The Chamber erred in requiring, without considering the unique position of the defence (which 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

¹⁰ Judge Eboe-Osuji agreed with the outcome of the Chamber’s decision but he considered it too narrow.

¹¹ ICC-01/09-01/11-539.

¹² Application, para.1 (i), referring to Decision, para.50. See also para.10.

¹³ Application, para.1 (ii), referring to Decision, para.50. See also para.15.

to the opposing party, and (2) the calling party shall video-record the preparation session (“Third Issue”).¹⁴

10. The Appeals Chamber has held that “only an issue may form the subject-matter of an appealable decision. [...] An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. It may be legal or factual or a mixed one.”¹⁵ In deciding whether to authorize appeal in the instant litigation, the Trial Chamber is not called to determine whether pre-testimony witness meetings, taken *in abstracto*, may involve considerations of fairness and/or expeditiousness. Rather, the Chamber must determine whether the Defence has met its burden to identify a concrete appealable issue arising from the Decision and the manner in which the Trial Chamber has regulated pre-testimony meetings in the protocol. The Prosecution submits that the Defence has failed to meet this burden. None of the issues advanced in the Defence Application arises from the Decision: the First Issue is a mere disagreement with the Chamber’s decision to authorise pre-testimony witness meetings; the Second Issue sets forth an abstract and hypothetical concern; and the Third Issue is premised on a misrepresentation of the Decision and the record of the proceedings. Further, should the Trial Chamber find that the issues arise from the Decision, the Prosecution submits that they do not meet the requirements for leave to appeal under article 82(1)(d).

(a) *The First Issue*

11. With respect to the First Issue, the Defence merely challenges the Chamber’s overall ruling, namely the authorization to conduct pre-testimony meetings, and

¹⁴ Application, para.1 (iii). Note that the Defence does not indicate the relevant pages of the Protocol. See also para.19.

¹⁵ ICC-01/04-168 OA3, paras. 9. ICC-02/04-01/05-367, para.22; ICC-02/05-02/09-267, p. 6; ICC-01/04-01/06-2463, para. 8; ICC-01/09-02/11-27, para. 7. See also, ICC-01/04-01/06-1433 OA11, (Dissenting Opinion of Judge Song), para. 4, specifying that “[a] decision “involves” an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made.”

argues that the Trial Chamber (a) improperly departed from prior ICC jurisprudence and (b) erroneously stated that the prohibition of this practice was neither practical nor reasonable.¹⁶ The Defence submits that this issue affects the fairness of the proceedings because it allows the calling party to inadvertently or otherwise influence the content of a witness's testimony just before he or she takes the stand.¹⁷ Further, the Defence also submits that the issue also impacts on the expeditiousness because those meetings may lead to disclosure of additional evidence,¹⁸ and that intervention of the Appeals Chamber is imperative because the safeguards afforded by the Chamber are retrospective in effect and cannot undo a harm already caused.¹⁹

12. The Prosecution submits that the First Issue constitutes a mere disagreement with the Chamber's overall conclusion that pre-testimony meetings with witnesses are permitted within the framework of the Rome Statute and that it has the discretion to set rules for the conduct of this trial regardless of the procedures adopted by other Trial Chambers. Further, the Chamber's statement that the prohibition of these meetings "is neither practical nor reasonable" was not essential to the Decision and only summarised the Chamber's views after a thorough consideration of the various advantages and drawbacks of this practice.²⁰ Even if the Defence believes that the prohibition *is* practical and reasonable, it has been consistently stated by the jurisprudence of this Court that a mere disagreement or conflicting opinion does not constitute an appealable issue.²¹

13. Further, there is no impact on the fairness because the safeguards envisaged in the protocol appropriately address the Defence submissions and concerns – as the Chamber has already indicated in the Decision. In particular, the Chamber stated

¹⁶ Application, paras.1(i) and 10.

¹⁷ Application, para.11.

¹⁸ Ibid., para.12.

¹⁹ Ibid., para.14.

²⁰ Decision, para.50.

²¹ ICC-01/04-168 OA3, para. 9; ICC-01/05-01/08-532, para.17; ICC-02/05-02/09-267, para.22; ICC-01/04-01/06-1557, para.30; ICC-01/04-01/07-2035, para.25; ICC-02/05-03/09-179, para.27.

that the risk that witness preparation becomes an improper rehearsal of in-court testimony which might negatively affect the reliability of the evidence at trial can be addressed by the use of cross-examination, clear guidelines establishing permissible and prohibited conducts (set out in the protocol), video recording of preparation sessions as well as by the applicable professional standards requiring counsel to act in good faith and banning intentional witness interference.²² It is the burden of the Defence to explain why and how the fairness of proceedings remains affected despite these safeguards.

14. In addition, and with respect to the possible disclosure of information arising from the meetings, the Chamber also noted that it is preferable for the parties to have this information in advance rather than when the witness is on the stand.²³ Indeed, as experience in prior trials has shown, new evidence spontaneously elicited at trial by a witness and not contained in his or her statement has led to delays in the proceedings.²⁴ Further, the Chamber will ensure that the Defence is not prejudiced by this additional information.²⁵

(b) The Second Issue

15. In the Second Issue, the Defence argues that pre-testimony meetings with witnesses up until 24 hours before their testimony are not compatible with a full respect for the rights of the accused.²⁶ The Defence claims that it is not fair for the accused to receive late or rolling disclosure as the trial progresses as the accused should have this information from the outset and during the investigation process.²⁷ Late disclosure may result in lengthy adjournments²⁸ and a late

²² Decision, paras.44-47.

²³ Decision, para.42.

²⁴ See ICC-01/04-01/07-T-112-Red-ENG, p.1, ln.14 to p.6, ln.14. In that case, after the witness elicited the new incriminatory evidence not contained in his statement, the trial was adjourned a few days to allow the parties to provide submissions on the admissibility of that information and proper course of action. After the parties were heard, the Trial Chamber issued an oral ruling.

²⁵ Decision, para.42.

²⁶ Application, para.1(ii); para.15.

²⁷ Ibid., para.16.

²⁸ Ibid., para.17.

intervention of the Appeals Chamber will not allow remedying the risk of evidential taint.²⁹

16. The Prosecution submits that the Second Issue at this stage does not arise from the Decision and constitutes “an abstract question or a hypothetical concern.”³⁰ Although the Chamber did concede the possibility that pre-testimony witness meetings may lead to disclosure of additional evidence in the days prior to the witness’ testimony,³¹ the Chamber should not be asked to speculate on an impact that is unknown at this stage and may never materialize.³²
17. Further, and should the Trial Chamber find that there is an appealable issue arising from the Decision, the Prosecution submits that it does not meet the requirements for leave to appeal. First, in the event of disclosure of additional evidence arising from a pre-testimony meeting, and according to the Decision’s own terms, the Chamber would ensure that the Defence is not prejudiced by the potential use of this material at trial.³³ And to the extent that the issue turns on the difference between late disclosure (shortly before the witness testifies) versus no disclosure at all (hearing the evidence for the first time when the witness is on the stand), it is difficult to perceive how disclosure, even if late, has an adverse effect on fairness such that nondisclosure would be preferable. In addition, and as noted above, evidence not contained in a witness statement and spontaneously elicited by a witness in Court may also cause delay in the proceedings.³⁴
18. Moreover, the intervention of the Appeals Chamber at this stage will not materially advance the proceedings as the trial has yet to start and it is unknown whether additional evidence will arise and will be disclosed in these pre-

²⁹ Ibid., para.18.

³⁰ ICC-01/05-01/08-532, para.17. ICC-01/05-01/08-75 para.11, ICC-02/04-01/05-367, para.22; ICC-01/09-01/11-301 para.34, ICC-01/09-02/11-406, paras.50, 61.

³¹ Decision, para.42.

³² ICC-01/04-01/07-2035, para.26.

³³ Decision, para.42.

³⁴ See above para. 14.

testimony witness meetings and whether its use will be allowed by the Chamber. If this eventually happens and the Defence finds that its rights are unduly prejudiced, it may choose to re-litigate the matter at that stage.

(c) The Third Issue

19. The Third Issue seems to encompass three sub-issues. The Defence submits that it was not heard and that, as a result, the Chamber included two points in the protocol (taking and disclosure of witness statements and video-recording of pre-testimony meetings) that do not take into consideration its particular position.³⁵ The Defence argues that this issue affects the fairness of the proceedings because it was done in the absence of its input³⁶ and because it imposes on them an obligation to take and disclose witness statements and to video-record the pre-testimony meetings.³⁷ According to the Defence, the issue would also impact the expeditiousness and outcome of the trial as the Defence would have to take proper statements from all witnesses and alter its overall preparation for the case.³⁸

20. The Prosecution submits that the three sub-issues do not arise from the Decision. First, and contrary to the Defence submissions, the Defence was heard on this matter. On 4 September 2012 it provided submissions responding to the Prosecution's request of pre-testimony witness meetings.³⁹ Second, the Decision does not impose any obligation on the Defence to take and disclose witness statements; it only deals with pre-testimony meetings with witnesses called by one party, and not with any meetings conducted with witnesses in the course of the investigations which are neither subject to recording nor disclosure. As noted by the Chamber, "the aim of an investigation is to obtain evidence [and] the

³⁵ Application, paras.1(iii) and 19.

³⁶ Ibid., para.20,23.

³⁷ Ibid., paras.21-22.

³⁸ Ibid., paras.24-25.

³⁹ See ICC-01/09-01/11-452.

purpose of witness preparation is to enhance the efficacy of the proceedings”.⁴⁰ Hence, and considering that these two sub-issues are predicated on a misrepresentation of the Decision and the record of the proceedings, they do not constitute appealable issues.⁴¹ Third, the fact that the Defence requested – and the Chamber rejected - that the protocol (and the video-recording of pre-testimony witness meetings) only be applied to the Prosecution does not constitute an appealable issue, but a mere disagreement with the Chamber’s decision.⁴² Thus, this third sub-issue does not arise from the Decision.

21. Further, and should the Chamber find that this issue (or any of its sub-issues) arises, the Prosecution submits that it does not meet the requirements for leave to appeal. The Decision does not impact on the fairness and expeditiousness or in the outcome of the trial because the Chamber did not impose any obligation on the Defence to take and disclose witness statements. As noted above, the Decision and protocol only deal with pre-testimony witness meetings and not meetings conducted in the course of the investigation.⁴³ Hence, the Defence does not have to take and disclose statements or modify the “overall preparation for the case”.⁴⁴ Further, and as noted above, the Defence was heard in this matter and its request that the protocol be only applied to the Prosecution was considered and expressly rejected by the Chamber.⁴⁵ The fact that the Chamber did not agree with the Defence does not render the Decision unfair.

⁴⁰ Decision, para.41.

⁴¹ ICC-01/09-02/11-406, para.46; ICC-01/04-01/07-15, para.15; ICC-01/04-01/07-1732, paras.15,17-18; ICC-01/04-01/10-487, paras.32-33; ICC-01/04-01/07-1088, paras.33-35; ICC-01/04-535, paras.26-29; ICC-01/04-01/10-106, p.6.

⁴² ICC-01/05-01/08-532, para.17. ICC-01/05-01/08-75 para.11, ICC-02/04-01/05-367, para.22; ICC-01/09-01/11-301 para.34, ICC-01/09-02/11-406, paras.50, 61.

⁴³ See above, para.17.

⁴⁴ A contrario, Application, para.24.

⁴⁵ See Decision, para.49.

Relief sought

22. For the reasons set out above, the Prosecution requests that the Trial Chamber reject the Defence's Application.



Fatou Bensouda,
Prosecutor

Dated this 14th day of January 2013

At The Hague, The Netherlands