



Original: English

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

Date: 6 February 2013

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 Observations on Agenda Items
for 14 February 2013 Status Conference**

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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Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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Other

I. INTRODUCTION

1. The Trial Chamber has scheduled a pre-trial Status Conference to be held on 14 February 2013 at 14:30.¹ The Chamber has ordered for the defence to submit observations on the following,² by no later than 6 February 2013:
 - (i) whether the conditions listed in the summons to appear issued by the Pre-Trial Chamber are sufficient and adequate for the purposes of the trial;

and
 - (ii) whether there are any practical, financial and/or legal matters to be dealt with for the accused to be able to attend trial at the seat of the Court, including the modalities of the Accused's stay on the territory of the Host State during the trial.³
2. The Chamber also stated that the defence may submit any other urgent issue that requires the immediate attention of the Chamber.⁴
3. In response, the defence for Mr Joshua Arap Sang ("the defence") make the below observations and submissions.

II. OBSERVATIONS ON SUMMONS AND HOST STATE CONSIDERATIONS

4. Mr Sang has no comments on the conditions listed in the summons to appear issued by the Pre-Trial Chamber as they currently obtain. He will continue to comply with the conditions therein.
5. There are however a few issues, which the defence would like to raises on behalf of Mr Sang with respect to practical and financial matters relevant to his attendance at trial, and the modalities of his stay on the territory of the Host State during trial.

¹ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-586, Order Scheduling a Status Conference, 1 February 2013.

² *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-575, Order for Observations on Issues Related to the Commencement of Trial, 30 January 2013 ("Order for Observations").

³ Order for Observations, para. 2.

⁴ Order for Observations, para. 3.

6. The Court would be aware that Mr Sang is on Legal Aid. Furthermore, the Court should also be aware that the Legal Aid budget, including the salaries of counsel, legal assistant and case managers, has been drastically reduced by approximately a third since June 2012. Additionally, the Counsel Support Section has made it clear that the costs of traveling to and from The Hague (where the trial is to take place) and Nairobi (where the client is based and where investigations are ongoing) will only be covered for Counsel and Associate Counsel.
7. Given this substantial reduction in the defence budget and the income of team members, some of whom have been forced to buy their own air tickets to Nairobi, the theatre of the alleged crimes, and where client and most of the team members are based, this issue will likely prove detrimental to the effectiveness of Mr Sang's defence team. The defence will continue engage the CSS on the matter and hopes to arrive at a suitable arrangement. The defence however would like the Chamber to be aware of the potential impact that these budget cuts, and CSS's restrictions on how team funds are used, could have on the fair trial rights of the accused in the future.
8. Furthermore, with respect to Mr Sang who is on Legal Aid, and out of custody, the defence submits that the Court has an obligation to cover all legitimate expenses associated with his court attendances, in particular, round-trip travel fares for court sessions, accommodation and basic living expenses in The Hague while the trial is in session. In the past, Mr Sang has covered these expenses himself, with assurances from the Immediate Office of the Registry that all reasonable expenses would be reimbursed. However, to date, he has not been refunded the expenses he incurred in relation to his attendance at the June 2012 Status Conference. The Immediate Office of the Registry has not given the defence any explanation for this delay. Last week, the defence wrote to the Immediate Office of the Registry to inquire as to whether a more suitable and long-term arrangement could be put in place and still awaits the Registry's proposal.
9. Additionally, Mr Sang, through the Trial Chamber, would like the Registry to liaise with the Host State to modify his usual Visa conditions, which restrict his

movements within The Netherlands to The Hague area. The defence submits that when the trial is in session, and Mr Sang is expected to remain in the country for an extended period of time, this restriction on his movement would be unduly burdensome. Therefore, the defence requests the Registry to arrange for Mr Sang to be able to travel freely within a 60km radius of The Hague, and that he be allowed to travel elsewhere in The Netherlands upon notification to the Host State. These proposed conditions, the defence submits, strike a balance between any security concerns the Host State might have and Mr Sang's interests.

III. OTHER URGENT ISSUES REQUIRING THE ATTENTION OF THE CHAMBER

10. The defence has identified several other issues, which in its submission, require resolution by the Chamber prior to the start of trial.
11. The Chamber will be aware of a confidential notification filed by the defence today. The defence wishes to make itself available to the Chamber during a closed session to deal with any issues arising from that notification, if necessary.
12. The defence also alerts the Chamber to two unresolved issues that it has raised on an *inter-partes* basis with the prosecution. These issues relate to:
 - (i) the impact of the withdrawal of prosecution witnesses on the prosecution's Pre-Trial Brief; and
 - (ii) the prosecution's insistence on alleging in its Pre-Trial Brief that Mr Sang was present at a 30 December 2006 planning meeting of the Network, when the Pre-Trial Chamber did not confirm that Mr Sang was present at that meeting.

If continuing discussions with the prosecution in relation to these issues are not fruitful, then the defence will have to make formal filings for resolution by the Chamber.

13. Additionally, the defence is concerned about the volume of evidence that the prosecution intends to lead, which far pre-dates the temporal scope of the charges.

For instance, based on the summaries of anticipated viva voce evidence provided by the prosecution, it is clear that they intend to call no less than fourteen witnesses who will testify about the 2005 referendum period, including the conduct of the accused during that period. This significantly broadens the background of the allegations against the accused and places an onerous investigative burden on the defence very close to the start of trial. The defence intends to ask the Chamber to restrict the introduction of this evidence into the record.

14. Furthermore, the defence intends to seek an order to the effect that once the prosecution has disclosed the identity of a witness to the defence, the prosecution must disclose all information pertaining to assistance provided to that witness, including protective measures, from either the prosecution or the VWU. The defence submits that such assistance may have a bearing on the credibility of such witnesses, and thus is disclosable as potentially exculpatory material.
15. The defence will also be asking the Chamber to order the prosecution to give the "running order" of its first five witnesses. Given the piecemeal nature of the disclosures made by the prosecution, the defence will need to prioritize its efforts on the first few witnesses that the prosecution intends to call.
16. Lastly, for logistical and planning purposes, the defence would like an indication from the Chamber as to how it intends to alternate between hearing the Kenya 1 and Kenya 2 cases.



Joseph Kipchumba Kigen-Katwa
On behalf of Joshua Arap Sang
Dated this 6th day of February 2013
In Nairobi