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TRIAL CHAMBER V(B)

Before: Judge Kuniko Ozaki, Presiding Judge
Judge Robert Fremr
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

***IN THE CASE OF
THE PROSECUTOR V. UHURU MUIGAI KENYATTA***

Public

Prosecution submissions on the conduct of the proceedings

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Introduction

1. The Prosecution hereby submits its observations on the anticipated conduct of the proceedings and the manner in which evidence shall be adduced at trial, pursuant to the Chamber's 3 July 2013 "Order requesting submissions on the conduct of the proceedings" ("Order").¹
2. The Prosecution notes that decisions on these issues have been rendered in the *Katanga*² and *Bemba*³ cases, and submits that these decisions are instructive in addressing a number of the procedural issues raised by the Chamber's Order. The Prosecution submits that the practices emanating from those cases should be broadly adopted by the Chamber in this case, subject to the qualifications below and any adaptations that the Chamber deems necessary. Several decisions in the *Lubanga* case, to which the Prosecution will make specific reference, are similarly instructive.

Submissions

3. The Prosecution will address in turn the issues listed in paragraphs 2(i) to 2(viii) of the Order (excluding paragraphs 2(ii) and (iii)).

I. Opening statements

4. The Prosecution will make an opening statement at the commencement of trial and estimates that this may last up to three hours. The Prosecution intends to use visual aids and presentation software as part of its opening statement and will refer to a number of photographs, maps and video recordings. Accordingly, the Prosecution will require some technical assistance from the Court Management Section ("CMS"), particularly in relation to the use of visual aids. The Prosecution will organise with CMS

¹ ICC-01/09-02/11-769.

² See ICC-01/04-01/07-1665-Corr ("*Katanga* decision").

³ See ICC-01/05-01/08-1023 ("*Bemba* decision").

for all the necessary technical arrangements to be complete, to ensure that the opening statements are delivered within the stated time projection.

II. Article 64(8)(a) procedure

5. The Prosecution has no objection to the counts section of the Second Updated Document Containing the Charges (“DCC”)⁴ being read to the Accused at the commencement of trial for the purpose of fulfilling the requirements of Article 64(8)(a). The Prosecution suggests that, if this procedure is adopted, the Chamber should certify before the commencement of trial that Mr Kenyatta has read and understood the DCC in its entirety.⁵

III. “No case to answer” motions

6. The Prosecution submits that, despite the lack of an express provision in the Statute, the Chamber has the authority to entertain “no case to answer” proceedings.
7. The authority to insert a “half-way” procedure aimed at determining whether the Prosecution has presented “a case to answer” derives primarily (as noted by academic commentators) from the general authority under Article 64(3)(a).⁶ The Chamber’s inherent power to entertain and rule on a “no case to answer” application from the Defence derives from Article 64(2) and (6)(f) and Rule 134.⁷ For the purposes of such an application, each count

⁴ ICC-01/09-02/11-732-AnxA-Corr-Red.

⁵ See ICC-01/09-01/11-778, para. 2(iv), where the Chamber seeks an indication from both parties whether they would object to the Chamber certifying ahead of the commencement of trial that the accused has “read and understood the Document Containing the Charges in its entirety”.

⁶ See Sluiter, Friman, Linton, Zappala and Vasiliev (eds), *International Criminal Procedure: Rules and Principles* (OUP, 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”) (citations omitted).

⁷ The Trial Chamber’s inherent authority to make any order necessary to ensure fair and expeditious proceedings has been affirmed by the Appeals Chamber in the *Lubanga* case. See ICC-01/04-01/06-1486, paras 76-83; see also ICC-02/05-03/09-410, paras 75-77.

as alleged in the DCC should be addressed individually. As the Chamber envisages in its Order, the appropriate juncture for such a submission would be at the conclusion of the Prosecution case.⁸

8. The Prosecution submits that in the event the Chamber permits a “no case to answer” motion and such a motion is filed, then prior to any determination on its merits the Chamber should hear submissions from the parties on the relevant test governing the Chamber’s decision-making process.

IV. Self-incrimination

9. Fourteen witnesses on the Prosecution’s list of witnesses to be relied upon at trial⁹ were interviewed pursuant to Article 55(2) and Rule 112: P-0011, P-0012, P-0118, P-0152, P-0217, P-0219, P-0428, P-0429, P-0430, P-0493, P-0494, P-0505, P-0506 and P-0510. The Prosecution anticipates that the issue of self-incrimination may arise when these witnesses testify. In these circumstances Rule 74 will apply.

V. In-court protective measures

10. The Prosecution intends to file applications for in-court protective measures for a number of witnesses. The Prosecution is still determining precisely which witnesses will be the subject of these applications, but anticipates it will be in a position to file its first application, covering its first ten witnesses, at least 30 days before the commencement of the trial.¹⁰

VI. Order and manner in which witnesses should be questioned

⁸ See, e.g., Rule 98bis of the ICTY Rules of Procedure and Evidence (“At the close of the Prosecutor’s case, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgement of acquittal on any count if there is no evidence capable of supporting a conviction.” (emphasis added)).

⁹ ICC-01/09-02/11-773-Conf-AnxA.

¹⁰ On the Defence’s right to have time to respond to applications for in-court protective measures, see ICC-01/04-01/06-T-88, p. 57.

11. The Prosecution refers the Chamber to the *Katanga* and *Bemba* decisions with respect to the order and manner of questioning of witnesses,¹¹ and requests that the Chamber adopt the same approach in this case. The Prosecution submits that the party calling the witness should examine the witness first (“examination-in-chief”), followed by the non-calling party (“cross-examination”¹²), and then by the calling party again in order to re-examine the witness in relation to any matters raised during cross-examination (“re-examination”). The Prosecution acknowledges that Rule 140(2)(d) confers upon the Defence the right to be the last to examine a witness. However, in order to ensure an expeditious and fair hearing, such examination should be within clear boundaries and limited to matters raised during re-examination.
12. If the Legal Representative wishes to question a witness, the Prosecution submits that the procedure outlined below in paragraph 19 should apply. If leave is granted, this questioning should take place after the Prosecution’s examination-in-chief during the Prosecution phase of the case and after the Prosecution’s cross-examination during the Defence phase of the case.¹³ If a victim has been granted permission to testify, the Legal Representative should question the witness first, followed by the Prosecution and the Defence, in that order.¹⁴
13. If the Chamber decides to call a witness of its own under its Article 64(6)(d) and 69(3) powers, the Chamber should question the witness first, followed by the Prosecution, the Legal Representative (if leave to question is

¹¹ *Katanga* decision, paras 15-18; *Bemba* decision, paras 7-11; see also ICC-01/04-01/06-T-104, p. 35-38.

¹² This terminology was used in the *Katanga* case. See, e.g., *Katanga* decision, para. 15.

¹³ *Katanga* decision, para. 18; *Bemba* decision, paras 8, 11. The Prosecution reserves its right to re-examine the witness on issues raised by the Legal Representative’s questioning.

¹⁴ *Katanga* decision, paras 31-32.

granted), and the Defence, in that order.¹⁵ If a party makes a request to the Chamber for the Chamber to call a witness, the Prosecution suggests that the same party should be required to question the witness first.

14. These observations are without prejudice to the Chamber's prerogative under Rule 140(2)(c) to question witnesses during their testimony,¹⁶ and any specific orders of the Presiding Judge under Regulation 43 of the Regulations of the Court.

15. Examination-in-chief by all parties and participants should be conducted in a non-leading manner,¹⁷ except where parties agree, before the witness' testimony, that specific issues are not in dispute.¹⁸

VII. Permissible scope of questioning

16. Questioning during examination-in-chief should be restricted to "relevant and/or contested issues".¹⁹ To expedite the trial, cross-examination should be limited to matters raised during examination-in-chief and issues that go towards a witness' credibility and reliability.²⁰ "Closed questions" should be permissible during cross-examination.²¹ Re-examination should be limited to matters raised during cross-examination, and by the Legal Representative and the Chamber where applicable.²²

17. In order to ensure expeditious proceedings and out of fairness to the witness, the Prosecution submits that the non-calling party should put the material parts of its case to any witness who may reasonably be expected to

¹⁵ *Katanga* decision, paras 43-44.

¹⁶ See ICC-01/04-01/06-2360.

¹⁷ *Katanga* decision, para. 66; *Bemba* decision, para. 15; ICC-01/04-01/06-T-104, p. 36.

¹⁸ For example, background details of a witness.

¹⁹ *Bemba* decision, para. 12; see also *Katanga* decision, para. 62.

²⁰ *Katanga* decision, para. 69; *Bemba* decision, para. 13; ICC-01/04-01/06-1140, para. 32.

²¹ *Katanga* decision, paras 74; ICC-01/04-01/06-2127, para. 23.

²² *Katanga* decision, para. 77; *Bemba* decision, para. 14; ICC-01/04-01/06-T-104, p. 36.

be in a position to comment thereon.²³ For example, if the non-calling party's position is that a witness is not being truthful on a particular issue, that contention should be put to the witness.²⁴ Or, if the witness testifies that an accused occupied position "X" and the Defence case is that he in fact occupied position "Y", this too should be put to the witness. If this is not done, either the calling party or the Chamber may subsequently be compelled to request the witness to be recalled to deal with substantive aspects of the case with which he or she was not confronted.

18. These observations are without prejudice to the Chamber's power to rule on the relevance of questions put to witnesses by any party.

VIII. Timing and manner in which the Legal Representative should request authorisation from the Chamber in order to question a witness or present evidence at trial

19. The Prosecution endorses the procedures outlined in the *Katanga* and *Bemba* decisions with respect to the Legal Representatives' questioning of witnesses.²⁵ In particular:

- a) The Legal Representative should notify the Chamber and the Prosecution through a written application at least seven days before the date of the witness' appearance in court, indicating the proposed questions to be asked, topics to be covered, or evidence to be

²³ ICC-01/04-01/06-1140, para. 32 ("The parties are under an obligation to put such part of their case as is relevant to the testimony of a witness, *inter alia*, to avoid recalling witnesses unnecessarily."); *see also* Article 69(4), which recognises the value of the "fair evaluation of the testimony of a witness".

²⁴ ICC-01/04-01/06-T-122, pp. 44-46 ("given that this is something potentially within your client's own knowledge, on the face of it something within your client's own knowledge, this ought to be put directly now, and it would be unfair on this witness for a suggestion to be made that he is lying about that when the allegation is never put to him"); ICC-01/04-01/06-T-337, pp. 47-48 ("if during the course of submissions to come, robust suggestions are to be made, either to the detriment of 0316 or to the detriment of this witness, which, in fairness, should have been put to this witness, you have a duty to do so whilst he is before the court."); *see also* Rule 90(H)(ii) of the ICTY Rules of Procedure and Evidence.

²⁵ *Katanga* decision, paras 82-91; *Bemba* decision, paras 17-20.

presented and explaining their relevance to the interests of the victims.²⁶ The Prosecution should be allowed three days to respond. If the Chamber considers that Defence observations are necessary, the application should be reclassified and the Defence given three days to respond;²⁷

- b) If the Chamber decides, after the examination-in-chief of a witness, that the Legal Representative's proposed questions have not been addressed sufficiently by the calling party, the Chamber may authorise the Legal Representative to put questions to the witness before cross-examination;²⁸
- c) If issues not anticipated by the Legal Representative and related to the interests of the victims arise during the course of a witness' examination-in-chief, the Legal Representative may submit questions to the Chamber, which may decide to put them to the witness, or to permit the Legal Representative to do so.²⁹

20. If the Legal Representative wishes to call victims to testify at trial, he should submit a written application before the end of the Prosecution case, accompanied by a statement of the proposed victims. The parties should be given the opportunity to make observations on any such application.³⁰

IX. Procedure for the use of material during questioning

21. The Prosecution proposes that the calling party should submit a list of any material it intends to use during its examination-in-chief to the Chamber, the non-calling party and the Legal Representative in advance of the

²⁶ *Katanga* decision, para. 87; ICC-01/05-01/08-1005, para. 39.

²⁷ *Katanga* decision, para. 87.

²⁸ *Katanga* decision, para. 88.

²⁹ *Katanga* decision, para. 89.

³⁰ *Katanga* decision, paras 19-29; ICC-01/04-01/07-1788-tENG, paras 81-93.

witness' testimony. This list should be notified to the non-calling party to allow for sufficient time to prepare its questioning. The Prosecution submits that the deadline set forth in the *Bemba* decision of no less than seven days before the scheduled start of the witness' testimony is appropriate, unless the volume of material is extraordinarily large.³¹ The document list should specify the level of confidentiality of the documents intended to be used.³² If the Legal Representative wishes to tender any material during his questioning, the Prosecution proposes the Chamber adopt the process followed in the *Katanga* case.³³

22. If the non-calling party has any objections to the calling party's use of any materials, it should make written or oral observations no more than three days after receipt of the list referred to in the preceding paragraph. This procedure is without prejudice to a parties' right to raise new or altered objections in court.
23. The non-calling party should inform the Chamber, Court Officer and the calling party, no less than three days before the scheduled hearing, of all items it intends to use with the witness during cross-examination, and provide the items in electronic format. In light of the reactive nature of cross-examination, the Prosecution proposes that the Chamber grant leave to use material that has not been communicated by the non-calling party on a case-by-case basis.
24. If the calling party seeks to use any material for the purpose of refreshing the memory of a witness during examination-in-chief, the Prosecution submits that the approach adopted in the *Katanga* decision is apposite.³⁴

³¹ *Bemba* decision, para. 16(i).

³² *Bemba* decision, para. 29; ICC-01/05-01/08-1470, para. 15; ICC-01/05-01/08-2141, para. 21.

³³ See ICC-01/04-01/07-1788-tENG, paras 98-101.

³⁴ This is notwithstanding the Chamber's "Decision on witness preparation" (ICC-01/09-02/11-588).

Under that precedent, such material may be put to a witness in order to refresh their memory where:

- a) The item, including prior statements, notes, recordings or any other contemporaneous record, contains the personal recollection of the witness; and
- b) Copies of the item have been made available to the non-calling party, which may rely on the parts of the item referred to by the witness during cross-examination.³⁵

25. Finally, if a witness deviates from his or her prior recorded statement during the course of examination-in-chief and refreshing his or her memory does not clarify the issue, the calling party should be permitted to confront the witness with his or her prior statement and, with the leave of the Chamber, to ask closed questions on any discrepancies.

X. Procedure for admission of material tendered through witnesses as evidence in the case

26. The Prosecution submits that where there is a demonstrable link between an item of evidence and the testimony of a particular witness, the calling party may introduce the item into evidence through that witness.

27. Procedurally, the calling party should question the witness to demonstrate his or her link to the material. Once this criterion has been satisfied, the material may then be put to the witness for authentication or identification. If a witness has properly authenticated the material, the Chamber may admit it and order that an evidence (“EVD”) number be assigned. If the

³⁵ *Katanga* decision, para. 110.

witness is simply identifying or commenting on the material, then it may be given an identification number.³⁶

28. Objections to material being admitted into evidence should be made when admission is sought. The Prosecution suggests that only admitted exhibits receive an EVD number. If there is an objection to an exhibit being tendered the proposed exhibit should be assigned an identification number until the Chamber rules on the admissibility of the exhibit.³⁷

XI. Procedure for admission of other material as evidence in the case

29. The Chamber should allow material other than a written record of the testimonial evidence of a witness to be tendered without being introduced by a witness.³⁸ This will circumvent the need for parties to call an inordinately large number of witnesses to tender documentary evidence. The Prosecution suggests that “bar table” motions, employed in other cases, are an appropriate vehicle to seek submission of such material. In deciding whether or not to grant any bar table application, the factors outlined in the *Lubanga* case³⁹ and in the *Katanga* decision,⁴⁰ while not exhaustive, are instructive.

30. Procedurally, the party seeking admission of materials *via* the bar table should file an explanatory table containing a short description of the content of each item, an index of the most relevant portions (if the item is large) and a brief explanation of its relevance and probative value.⁴¹ If the opposing party objects to the admission of any item, it should file its observations in writing, explaining the basis for the objection.

³⁶ In the *Lubanga* case these were referred to as Marked for Identification (“MFI”) numbers.

³⁷ ICC-01/04-01/06-2432.

³⁸ *Katanga* decision, paras 98-100.

³⁹ ICC-01/04-01/06-1981; ICC-01/04-01/06-1084, para. 7; ICC-01/04-01/06-1399.

⁴⁰ *Katanga* decision, para. 100; ICC-01/04-01/07-2635, para. 14.

⁴¹ *Katanga* decision, para. 101.

XII. Recourse to Rule 68 and the procedure to be followed

31. The Prosecution submits that, in certain circumstances, recourse to Rule 68 may enhance judicial economy by allowing for the introduction of evidence in an efficient and fair manner. The Prosecution proposes that the procedure set down in the *Katanga* decision⁴² be adopted in this case, subject to any modifications that the Chamber deems necessary.
32. Specifically, the party seeking to introduce evidence pursuant to Rule 68(a) should be required to file a written application. The party seeking to introduce the evidence pursuant to Rule 68(b) should be required to file an application 21 days prior to the date of the witness' appearance in Court. This application should include a copy of the prior recorded testimony sought to be introduced and references to the passages that the party seeks to have admitted into evidence. If those passages contain references to other material available to the calling party that is also sought to be introduced, this material should be annexed to the application. The application should also contain a description of any additional topics about which the calling party wishes to question the witness that go beyond confirming, clarifying or emphasising the passages of the prior recorded testimony sought to be admitted into evidence. The other parties should have ten days following the notification of the application to respond in writing.⁴³

⁴² *Katanga* decision, paras 92-94.

⁴³ *Katanga* decision, para. 93.

33. The above submissions are without prejudice to the Prosecution requesting, where the interests of justice require, the admission of a witness' prior statement as evidence pursuant to, *inter alia*, Article 64(9)(a), 69(2) and 69(3), and the Chamber's authority to freely assess any such evidence under Rule 63(2).



Fatou Bensouda,
Prosecutor

Dated this 25th day of July 2013
At The Hague, The Netherlands