

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 8 March 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

Decision concerning the start date of trial

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms Fatou Bensouda

Ms Cynthia Tai

Counsel for William Samoei Ruto

Mr Kioko Kilukumi Musau

Mr David Hooper

Counsel for Joshua Arap Sang

Mr Joseph Kipchumba Kigen-Katwa

Mr Silas Chekera

Legal Representatives of Victims

Mr Wilfred Nderitu

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Deputy Registrar

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V (“Trial Chamber” or “Chamber”) of the International Criminal Court, in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, having regard to Articles 64 and 67 of the Rome Statute and Rule 132 of the Rules of Procedure and Evidence, issues the following Decision concerning the start date of trial.

I. Background and Submissions

1. On 9 July 2012, the Chamber issued a “Decision on the schedule leading up to trial”, whereby it set the date for the commencement of trial for 10 April 2013.¹
2. On 14 February 2013, the Chamber held a status conference, at which the defence for Mr Ruto and the defence for Mr Sang (“Defence”) raised issues regarding the delayed disclosure of material by the Office of the Prosecutor (“Prosecution”) and the allegedly shifting nature of the Prosecution case, and discussed the possibility of an adjournment of the commencement of the trial.
3. In accordance with an order issued by the Chamber,² on 20 February 2013, the Defence filed its “Joint Defence Submissions on Impact of Delayed Prosecution Disclosure and Shift in Case on the Scheduled Start Date for Trial” (“Defence Submission”), with tables of disclosed documents as an annex.³ In this submission, the Defence requests the Chamber to vacate the 10 April 2013 date for the commencement of the trial in order to ensure effective defence preparation and submits June 2013 as a possible start date of the trial.⁴

¹ ICC-01/09-01/11-440.

² ICC-01/09-01/11-T-19-ENG, p. 24, lines 2 – 5.

³ ICC-01/09-01/11-613. A corrigendum was filed on the following day: Corrigendum of Joint Defence Submissions on Impact of Delayed Prosecution Disclosure and Shift in Case on the Scheduled Start Date for Trial, 21 February 2013, ICC-01/09-01/11-613-Corr.

⁴ ICC-01/09-01/11-613-Corr, para. 24.

4. On 25 February 2013, the Prosecution filed its response to the Defence Submission.⁵ The Prosecution agrees with the Defence that starting the trial in April as scheduled is untenable and submits a desirable start date of August 2013, immediately after the Court's summer recess.⁶ Both the Defence and Prosecution oral and written submissions can be set out in two categories: delayed disclosure and an alleged shift in focus of the case.
5. On 5 March 2013, the Chamber issued a decision regarding the request from the Prosecution to review the Registrar's decision regarding Witness 24.⁷ The Chamber instructed the Prosecution to consult with Witness 24 as soon as possible to determine whether he is still willing to continue to cooperate with the Court and ordered the Prosecution to decide whether or not to add Witness 24 to the Prosecution's list of witnesses no later than 12 March 2013. On 6 March 2013, the Chamber issued a decision on the disclosure of the identities of Witnesses 495, 524, 534 and 536.⁸ The Chamber, *inter alia*, directed the Prosecution to disclose the identities of or withdraw Witnesses 495 and 534 and disclose the identity of Witness 536 and also instructed the VWU to provide an updated report on Witness 524, all of which is to be complied with no later than 13 March 2013.

⁵ Prosecution's response to the "Joint Defence Submissions on Impact of Delayed Prosecution Disclosure and Shift in Case on the Scheduled Start Date for Trial", 25 February 2013, ICC-01/09-01/11-622, including Annex A, ICC-01/09-01/11-622-AnxA.

⁶ ICC-01/09-01/11-622, paras 2 and 14.

⁷ Decision on the request of the Prosecution for review of the Registrar's decision regarding Witness 24, ICC-01/09-01/11-635-Conf-Exp. A confidential redacted version was filed on 6 March 2013, ICC-01/09-01/11-635-Conf-Red. The dissenting opinion of Judge Eboe-Osuji was filed as ICC-01/09-01/11-635-Conf-Exp and ICC-01/09-01/11-635-Conf-Red.

⁸ Decision on the disclosure of the identities of Witnesses 495, 524, 534 and 536, ICC-01/09-01/11-638-Conf-Exp. A confidential redacted version was filed on 6 March 2013, ICC-01/09-01/11-638-Conf-Red.

Submissions on Delayed Disclosure

6. The Defence argues that the Prosecution has failed to disclose a significant volume of materials prior to the 9 January 2013 deadline, despite having the bulk of the material in its possession prior to the confirmation of charges hearing.⁹ The Defence also argues that the Prosecution has constantly requested the extension of various deadlines for disclosure after or on the day of the deadline, which forced a delay in the disclosure even if the Trial Chamber ultimately rejected the request.¹⁰
7. Further, the Defence argues that full disclosure is still to be effected in respect of five witnesses¹¹ and expresses concern that the Prosecution has indicated it may later seek to “re-add” witnesses withdrawn from its witness list.¹² The Defence also submits that at the time the schedule for trial was drawn up, the full extent of the Prosecution case was unknown and the number of witnesses the Prosecution intends to call is far higher than the Defence anticipated.¹³ The Defence argues that the effect of redactions and the subsequent lifting of these redactions results in a time-consuming process as the Defence has to review the materials anew when they are disclosed with lesser redactions.¹⁴ Further the Defence submits that one of the three expert reports was served in French and that the translation is two weeks late.¹⁵
8. The Prosecution argues that it has conducted its disclosure in accordance with the deadlines ordered by the Chamber¹⁶ and in a continuous flow during all stages of the proceedings.¹⁷ Further, the Prosecution submits that it has sought to provide the Defence with appropriate remedies to mitigate the potential prejudice arising from

⁹ ICC-01/09-01/11-613-Corr, para. 4.

¹⁰ ICC-01/09-01/11-613-Corr., para. 5.

¹¹ ICC-01/09-01/11-613-Corr., para. 6, and ICC-01/09-01/11-T-19-ENG ET, p. 10.

¹² ICC-01/09-01/11-613-Corr., para. 6.

¹³ ICC-01/09-01/11-613-Corr, para. 3.

¹⁴ ICC-01/09-01/11-613-Corr, para. 11.

¹⁵ ICC-01/09-01/11-613-Corr., para. 18.

¹⁶ ICC-01/09-01/11-622, para. 2.

¹⁷ *Ibid.*, para. 5. See Annex A, ICC-01/09-01/11-622-AnxA.

authorised delay of full disclosure.¹⁸ The Prosecution argues that as the threshold of its burden of proof at the trial stage is higher than at the confirmation stage, it is self-evident that the Prosecution may continue its investigation and offer more evidence after the confirmation hearing.¹⁹

Submissions on Alleged Shift in Focus of the Case

9. The Defence submits that the Prosecution's emphasis on meetings and events which took place in 2005, including a referendum that was held that year and events relating thereto, as well as in 2006 and early in 2007, has increased since the confirmation stage of the proceedings.²⁰ The Defence also submits that the Prosecution's allegations included in the pre-trial brief, which was filed on 9 January 2013,²¹ relate to facts which post-dated the post-election violence in Kenya.²² The Defence also asserts that the number of preparatory meetings in which the accused are alleged to have participated increased in comparison with the confirmation stage.²³

10. The Defence further submits that other allegations changed since the confirmation stage: the alleged perpetrators of the charged crimes,²⁴ the targeted groups²⁵ and the places where the crimes were allegedly committed.²⁶ However, the Defence does not

¹⁸ *Ibid.*, para. 67.

¹⁹ *Ibid.*, para. 13.

²⁰ ICC-01/09-01/11-T-19-ENG, p. 13, line 20 to p. 14, line 23; p. 16, line 24 to p. 17, line 7; ICC-01/09-01/11-T-19-ENG, p. 17, lines 20 to 24; ICC-01/09-01/11-613-Corr, para. 20.

²¹ ICC-01/09-01/11-540-Conf-AnxD-Red. An updated pre-trial brief was filed on 26 February 2013, ICC-01/09-01/11-625-Conf-AnxB.

²² ICC-01/09-01/11-613-Corr, para. 21.

²³ ICC-01/09-01/11-T-19-ENG, p. 17, line 25 to p. 18, line 6; ICC-01/09-01/11-613-Corr, para. 22.

²⁴ ICC-01/09-01/11-T-19-ENG, p. 16, lines 18 to 24; ICC-01/09-01/11-613-Corr, para. 23.

²⁵ ICC-01/09-01/11-T-19-ENG, p. 17, lines 8 to 12; ICC-01/09-01/11-613-Corr, para. 23.

²⁶ ICC-01/09-01/11-T-19-ENG, p. 18, lines 7 to 12; ICC-01/09-01/11-613-Corr, para. 23.

provide further details of these alleged changes to the Prosecution case and only contends that it will require additional time to evaluate and investigate.²⁷

11. The Prosecution submits that references to events that occurred prior to the post-election violence were already made in the most crucial witness statements disclosed to the Defence prior to the confirmation hearing²⁸ and that those events are relevant to elements of the Prosecution case.²⁹ With regard to the increased number of alleged preparatory meetings, the Prosecution argues that the additional evidence does not change the scope of the case and, rather, that it supports the allegation that the accused participated in planning meetings, which was confirmed by the Pre-Trial Chamber.³⁰
12. The Prosecution contends that the scope of the case remains the same as confirmed by the Pre-Trial Chamber and contained in the updated Document Containing the Charges.³¹

II. Analysis and Conclusion

13. The Chamber notes the Defence argument that the Prosecution has made little effort to disclose a significant volume of materials prior to the 9 January 2013 deadline. It is evident from the parties' submissions that of all incriminatory material disclosed after the confirmation hearing approximately 70%³² was disclosed only in January 2013 or even later. The Chamber accepts that some of these materials may have become available for disclosure only towards the end of the time limit set by the

²⁷ ICC-01/09-01/11-613-Corr, para. 23.

²⁸ ICC-01/09-01/11-T-19-ENG, p. 24, lines 21 to 25.

²⁹ ICC-01/09-01/11-622, para. 13.

³⁰ ICC-01/09-01/11-622, para. 11.

³¹ ICC-01/09-01/11-622, para. 10.

³² ICC-01/09-01/11-622-AnxA, p. 2; ICC-01/09-01/11-613-AnxA, p. 2.

Chamber. However, the disclosure of a large amount of materials close to the scheduled commencement of trial puts a significant burden on the Defence's preparation. The Chamber recalls that it has emphasised the need for disclosure to take place expeditiously and the fact that the 9 January 2013 deadline was the *final* deadline for *full* disclosure.³³

14. As regards the delayed disclosure, the Chamber notes that the identities of and materials related to 9 witnesses were disclosed to the Defence after the deadline of 9 January 2013.³⁴ As of the date of this decision, the identities and unredacted materials of a further five witnesses remain undisclosed.³⁵ While the delay was authorised by the Chamber on the grounds of security considerations, the Chamber accepts the Defence position that the number of witnesses subject to delayed disclosure represents a significant proportion of the total number of witnesses the Prosecution intends to rely on at trial.³⁶ In addition and as already noted with concern by the Chamber,³⁷ the need for delayed disclosure of many of these witnesses arose from delays on the part of the Prosecution in referring their security situation to the Victims and Witnesses Unit for assessment and implementation of protective measures as appropriate.

15. As a result of the above mentioned delays, the Defence was in a position to start conducting its investigations relating to a significant part of the disclosed material only recently and for some of it the Defence is still unable to investigate. The

³³ ICC-01/09-01/11-440, para. 7; Annex A to Decision on the protocol establishing a redaction regime, 27 September 2012, ICC-01/09-01/11-458, paras 1-3, Decision on second prosecution application for authorisation of non-standard redactions, 3 December 2012, ICC-01/09-01/11-493, para. 6.

³⁴ Witnesses 15, 16, 32, 336, 356, 376, 397, 516 and 535. See decisions ICC-01/09-01/11-531-Conf-Red, ICC-01/09-01/11-543-Conf, ICC-01/09-01/11-564-Conf-Red, ICC-01/09-01/11-589-Conf-Red.

³⁵ ICC-01/09-01/11-564-Conf-Red, ICC-01/09-01/11-569-Conf-Red, ICC-01/09-01/11-635-Conf-Red, ICC-01/09-01/11-637-Conf-Red, ICC-01/09-01/11-638-Conf-Red.

³⁶ ICC-01/09-01/11-613-Corr, para. 6.

³⁷ Decision on first prosecution application for delayed disclosure of witnesses identities, 4 January 2013, ICC-01/09-01/11-531-Conf-Red, para. 33; Decision on the second and third Prosecution requests for delayed disclosure of witness identities, 23 January 2013, ICC-01/09-01/11-564-Conf-Red, para. 33.

Chamber accepts that the Defence will require additional time for these resulting investigations.

16. As regards other disclosure-related issues raised by the Defence, the Chamber takes note of the Prosecution's declaration that most of those issues are being resolved *inter partes*.³⁸

17. Turning to the question of the alleged shift in focus of the case, the Chamber notes that the Defence acknowledges that the referendum in 2005 was already discussed at the confirmation stage. The Defence's objection seems to be directed against the addition of a number of witnesses to testify about that event and the fact that the importance of the referendum only became clear in January 2013.³⁹ The Chamber takes note of the Prosecution's declaration that it "may not require each witness to testify about the full extent of his or her knowledge"⁴⁰ about the events pre-dating the temporal scope of the charges. However, the Defence does not know at this stage to what extent the Prosecution intends to explore these facts with its witnesses. The Defence must thus base its preparation on the entire transcripts of interviews disclosed by the Prosecution. The Chamber therefore agrees with the Defence that the late notice of the weight the Prosecution attaches to the referendum in 2005 and to other events falling outside of the temporal scope of the charges, as well as the large number of witnesses whom the Prosecution intends to question about those events, place an additional and unforeseen burden on the Defence.

18. In view of the foregoing considerations, the Chamber considers that it is important to ensure that the accused have adequate time for the preparation of the defence. It is therefore appropriate to grant the Defence additional time to continue its

³⁸ ICC-01/09-01/11-622, footnote 4.

³⁹ ICC-01/09-01/11-613-Corr, para. 20. See also, Sang Defence Observations on Agenda Items for 14 February 2013 Status Conference, ICC-01/09-01/11-591, para. 13.

⁴⁰ ICC-01/09-01/11-622, para. 13.

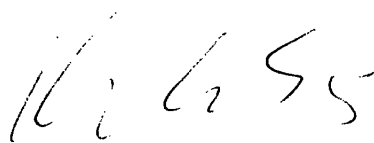
investigations and prepare for trial. This necessitates postponing the commencement of trial. However, the Chamber is of the view that the postponement need not be as long as requested by the Defence, considering that the Chamber issued decisions on the disclosure of the remaining 5 witnesses on 6 March 2013. The Chamber considers it sufficient to vacate the trial date until 28 May 2013, which should give the Defence adequate additional time to prepare for trial.

FOR THE FOREGOING REASONS, THE CHAMBER:

VACATES the trial commencement date of 10 April 2013; and

SETS the new date for start of trial for 28 May 2013.

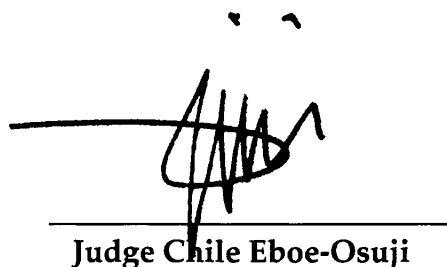
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding Judge



Judge Christine Van den Wyngaert



Judge Chile Eboe-Osuji

Dated 8 March 2013

At The Hague, The Netherlands