

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 9 August 2013

TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding
Judge Olga Herrera Carbuccion
Judge Robert Fremr

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
*THE PROSECUTOR v. WILLIAM SAMOEI RUTO and JOSHUA ARAP SANG***

Public

Decision on the Conduct of Trial Proceedings (General Directions)

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr Anton Steynberg

Counsel for William Samoei Ruto

Mr Karim Khan
Mr David Hooper
Mr Essa Faal
Ms Shyamala Alagendra

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

Mr Herman von Hebel

Deputy Registrar

Victims and Witnesses Unit

Mr Patrick Craig

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V(A) (the ‘Chamber’) of the International Criminal Court (the ‘Court’), in the case of *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, pursuant to Article 64(3)(a) of the Rome Statute, renders this Decision on the Conduct of Trial Proceedings (General Directions). Further decisions may be issued in due course, as the need arises, giving other general or specific directions on the conduct of the trial proceedings.

I. BACKGROUND

1. On 19 June 2013, the Chamber issued an ‘Order requesting submissions on the conduct of the proceedings’, in which it indicated that it intended to give directions on the conduct of proceedings at trial, including directions on the order and manner in which evidence shall be submitted within the meaning of Rule 140 of the Rules of Procedure and Evidence (the ‘Rules’), and requested submissions from the parties and the Common Legal Representative for Victims (the ‘Legal Representative’) on a number of issues to which such directions would relate.¹
2. On 3 July 2013, the Prosecution,² the Defence for Mr Ruto (the ‘Ruto Defence’),³ the Defence for Mr Sang (the ‘Sang Defence’)⁴ and the Legal Representative⁵ filed their submissions pursuant to the Chamber’s order.
3. The Chamber has considered the submissions of the parties and the Legal Representative. It has also had regard to the practice of other Trial Chambers of this Court.

¹ ICC-01/09-01/11-778.

² Prosecution submissions on the conduct of the proceedings, ICC-01/09-01/11-794.

³ Defence Submissions on the Conduct of the Proceedings, ICC-01/09-01/11-795.

⁴ Sang Defence Submissions on the Conduct of the Proceedings, ICC-01/09-01/11-796.

⁵ Submissions of the Common Legal Representative for Victims Pursuant to the “Order Requesting Submissions on the Conduct of the Proceedings” Issued on 19 June 2013, ICC-01/09-01/11-797. A corrigendum of this document was subsequently filed, ICC-01/09-01/11-797-Corr.

II. DIRECTIONS

Opening statements

4. The opening statements from each party will be presented in the following order: (1) Prosecution, (2) Legal Representative, (3) Ruto Defence, (4) Sang Defence. Each of the parties and the Legal Representative are granted approximately two hours. It is not necessary for each of them to use the entirety of their allocated time. The Ruto Defence and Sang Defence may choose to re-distribute the combined time allowed for defence opening statements and allocate the time amongst themselves as they see fit. Any statements from the accused persons should be made within the allotted time. The parties and the Legal Representative are permitted to use audiovisual aids such as videos, photographs, and maps as needed. They are directed to disclose to the Chamber, the other parties and the Legal Representative, no later than 5 September 2013, copies of the material they intend to use, unless such material is on the Prosecution's list of evidence.

Procedure for reading of charges

5. As agreed by the parties,⁶ only the Charges section of the Document Containing the Charges⁷ will be read out at the opening of the trial for the purposes of fulfilling the requirement of Article 64(8)(a) of the Statute.
6. The Ruto Defence and the Sang Defence are directed to ensure that the accused persons they represent have read and understood the Document Containing the Charges in its entirety and to file a certified declaration to this effect by no later than 29 August 2013. The declaration shall be filed under the general heading in the form attached as Annex A to this Decision.

⁶ ICC-01/09-01/11-797, para. 6; ICC-01/09-01/11-795, para. 11; ICC-01/09-01/11-796, para. 9.

⁷ ICC-01/09-01/11-533-AnxA-Corr, pp. 40-54.

Procedure for objections to conduct of proceedings

7. The Chamber recalls its Order of 19 June 2013 directing any party intending to raise any objections or observations at the commencement of trial within the meaning of Rule 134 of the Rules to submit a written notice setting out the content and grounds for any such objection or observation.⁸ Any Notice of Objection or Observation should be filed by 12 August 2013 with responses, if any, to be filed by 26 August 2013.
8. The Chamber takes note of the 'Defence request regarding the first eight witnesses to be called by the Prosecution',⁹ in which the Ruto Defence seeks modification of the 26 August 2013 deadline for responses to Rule 134 motion notifications so that responses to its request are filed on an expedited basis. However, as the request in question is not presented as a Notice of Objection or Observation within the meaning of Rule 134 of the Rules, the Chamber considers that the deadlines set out in its Order of 19 June 2013 do not apply to responses to the request.

Duration of Prosecution case

9. The Prosecution has submitted estimates of the length of time it requires to question each of its witnesses.¹⁰ It also indicated that it would call 46 witnesses and would require 413 hours in total for the examination-in-chief of those witnesses.¹¹ As a result

⁸ Order requesting submissions on the conduct of the proceedings, ICC-01/09-01/11-778, para. 4.

⁹ 19 July 2013, ICC-01/09-01/11-818 with an annex.

¹⁰ Annex A to Prosecution's provision of materials pursuant to Decision ICC-01/09-01/11-440, 9 January 2013, ICC-01/09-01/11-540-Conf-AnxA-Red.

¹¹ Prosecution's provision of materials pursuant to Decision ICC-01/09-01/11-440, 9 January 2013, ICC-01/09-01/11-540, para. 3.

of subsequent changes,¹² there are currently 42 witnesses whom the Prosecution intends to call.

10. Having compared practice and experience in the other cases before the Court,¹³ the Chamber is of the view that the Prosecution's estimates appear excessive. At the next status conference to be held, the Chamber will seek the parties' and participants' views on this issue, with a view to reducing the Prosecution's estimates.

Scheduling of Prosecution witnesses

11. In accordance with the Chamber's Order of 19 June 2013,¹⁴ the Prosecution has already provided a list of the first ten witnesses it expects to call.¹⁵ The Prosecution is further directed to provide, prior to the commencement of trial, an updated list of witnesses listing all witnesses in the expected order of call.¹⁶ The updated witness list should also delete any withdrawn witnesses¹⁷ and include revised estimates of examination time should the Chamber order reductions during or after the forthcoming status conference. In addition, the Prosecution is directed to file updated summaries¹⁸ of the main facts on which each witness is expected to testify. The summaries must include a statement showing the relevance of the testimony relative to the charges. The deadline for the filing of the updated witness list and the summaries is one week before to the commencement of trial.

¹² ICC-01/09-01/11-560-Conf-Red; ICC-01/09-01/11-577-Conf-Red; ICC-01/09-01/11-597-Conf; ICC-01/09-01/11-762; ICC-01/09-01/11-811-Conf-Red.

¹³ In *Lubanga* the Prosecution used approximately 177 hours for its examination-in-chief of 36 witnesses (an average of 4.9 hours per witness). In *Katanga and Ngudjolo* the Prosecution was granted an average of 4.5 hours for examination-in-chief of its witnesses. See ICC-01/04-01/07-1665-Corr, pp. 4-5, paras 7-8. In *Bemba* the Prosecution used approximately 228 hours for its examination-in-chief of 40 witnesses (an average of 5.7 hours per witness).

¹⁴ ICC-01/09-01/11-778.

¹⁵ ICC-01/09-01/11-794, para. 5.

¹⁶ A decision on the Ruto Defence request ICC-01/09-01/11-818 will be given in due course.

¹⁷ It is noted that five fact witnesses have been withdrawn by the Prosecution since its witness list was filed on 9 January 2013.

¹⁸ In accordance with the Chamber's Decision on the schedule leading up to trial, ICC-01/09-01/11-440, para. 13 the Prosecution filed initial witness summaries on 9 January 2013: ICC-01/09-01/11-540-Conf-AnxB-Red.

12. After the commencement of trial, the Prosecution is directed to provide, by email addressed to Trial Chamber V(A) Communications, regular witness schedules on a monthly basis, beginning one month after the commencement of evidence of the first witness.

Examination of witnesses

13. The party calling the witness shall examine that witness first. Cross-examination by the other party or parties shall follow.
14. The Defence teams are encouraged to avoid cross-examination on grounds already covered by a prior cross-examiner. The order in which the Defence teams conduct their cross-examination of Prosecution witnesses will alternate every witness, unless they agree otherwise.
15. Following cross-examination, the calling party will have the opportunity to re-examine the witness in relation to matters which were raised for the first time in cross-examination.
16. Where an application has been made and leave granted, in accordance with the procedure set out below, the Legal Representative¹⁹ may ask questions of a particular witness after the Prosecution has finished its examination-in-chief or cross-examination, as the case may be.
17. The Chamber may ask questions to the witness at any stage of the testimony, including before the questions from the calling party.

¹⁹ The reference to the Legal Representative in this and following paragraphs includes reference to the Office for Public Counsel for Victims which will, in accordance with the Chamber's ruling in ICC-01/09-01/11-460, appear on behalf of the Legal Representative during the day to day proceedings.

18. The Chamber takes note of the Prosecution's request for submissions on the mode of questioning and the Chamber's directions on this subject.²⁰ The Chamber does not find it necessary to issue general directions on the matter at this stage. The matter will be dealt with on a case by case basis during trial, as and when a clear need arises to do so.
19. When the Legal Representative wishes to examine a witness, he is directed, as a general practice, to apply to the Chamber, by means of a filing, notified to the parties, seven days in advance. In the event of unexpected changes to the witness schedule or unanticipated issues raised during testimony, the seven-day period can be altered as necessary. The application of the Legal Representative should provide reasons for separate questioning apart from the questioning by the Prosecution and include an outline of areas for examination. Documents proposed to be used during the examination, or references thereto, where appropriate, should also be provided at this time, in accordance with the regular procedure for parties discussed below. After the examination-in-chief the parties will be given an opportunity to make oral submissions, without the witness being present, and the Chamber will issue an oral ruling on the application.
20. The Chamber recalls its general guidance on the scope and mode of questioning by the Legal Representative provided in its 'Decision on victims' representation and participation'.²¹
21. If the Legal Representative seeks to present evidence, he shall provide reasons for a separate presentation of evidence apart from the case presentation by the Prosecution. If leave is granted for presentation, such evidence shall be presented at the end of the

²⁰ ICC-01/09-01/11-794, para. 32.

²¹ ICC-01/09-01/11-460, paras 75-76.

Prosecution case. Further guidance on the modalities of such presentation will be issued in due course as appropriate.

Use of documents during witness examination

22. The party calling a witness is directed to provide to the Chamber, parties and participants, no later than five days before the scheduled hearing, a list of documents which the party intends to use for the purposes of its examination-in-chief. Exceptionally, if good cause is shown for the later provision, and the documents concerned are limited in number and volume, parties may seek leave of the Chamber to provide the aforementioned list after the five days before testimony deadline has passed. The list may be provided by email addressed to Trial Chamber V(A) Communications.
23. The calling party is directed to indicate whether it wishes to tender any of the documents into evidence. Objections by other parties, if any, shall be filed no later than two days before the examination, or made orally where appropriate.
24. As regards documents to be used during cross-examination that are not already in evidence, the party intending to make use of such documents shall provide a list of the documents, and, where the documents are not already part of the case record, copies thereof, to the Chamber, the other parties and participants, no later than 24 hours before the commencement of cross-examination.
25. The foregoing is without prejudice to the usual disclosure obligations that are ordinarily comprised in the procedural laws of this Court.

Introduction of evidence through a witness

26. Each item of evidence shall, in principle, be introduced by the tendering party through a witness, whose testimony has a connection with that item of evidence. The opposing party may make oral submissions, in addition to the objections previously made in accordance with the procedure set out above.

'Bar table' applications

27. The party tendering evidence without it being introduced by a witness shall submit an application accompanied by a table, providing a short description of the content of each document, averment of its authenticity, an indication of the reason for not tendering the document through a witness (if that is the case), an index of the most relevant portions of the document, as well as a description of its relevance and intended probative value. Before submitting the application, the tendering party shall first seek the consent of the opposing party to tender the document through this method or an indication of the opposing party's objection (and the grounds for any such objection). Such applications shall be preferably filed before the commencement of trial. The Chamber takes note of the 'Prosecution's Application for Admission of Documents from the Bar Table Pursuant to Article 64(9)',²² which does not follow the procedure set out in this decision. The Prosecution is directed to re-file its application in the format described above. The re-filing shall re-start the running of the time limit for responses, which shall also follow the procedure set out in this decision.

²² The document was notified on 22 July 2013, ICC-01/09-01/11-819 and Confidential Annex A.

Introduction of prior recorded testimony

28. When a party wishes to introduce prior recorded testimony in accordance with Rule 68(b) of the Rules, it shall file an application to that effect at least 21 days before the witness is scheduled to appear. The application shall be accompanied by a copy of the prior recorded statement indicating precisely which passages the party calling the witness wishes to enter into evidence. If these passages contain references to other material that is available to the party calling the witness, they shall equally be attached to the application. The other party and the Legal Representative shall have ten days following the notification of the application to raise any objections.

Self-incrimination

29. The Registry is directed to make all necessary arrangements to provide independent legal advice from a qualified lawyer to witnesses who do not participate in the proceedings as victims and who may incriminate themselves during their testimony. The party calling such witnesses are directed to notify, as soon as practicable, the Victims and Witnesses Unit (the 'VWU') and the Chamber if they believe that a witness may give self-incriminating statements during his or her testimony. If the witness considers that he or she requires assurance under Rule 74(3)(c) of the Rules, the advising lawyer shall seize the Chamber with a relevant application, notifying the Prosecution thereof. The Prosecution shall present to the Chamber its views on the matter in such time as to allow the Chamber to rule before the commencement of the witness's testimony.

Protective measures

30. The Chamber recalls the general principle of publicity in this Court's proceedings, which can be derived from Articles 67(1) and 64(7) of the Statute,²³ and points out that protective measures shall be considered to be an exception to this principle. The parties are directed to make applications for protective measures with respect to witnesses in such time as to enable the consultation with the VWU and the responses to the application, pursuant to Rule 87(1) and (2) of the Rules, as well as the Chamber's ruling on the application before the commencement of testimony of the witness concerned, and, in any event, no later than one month before the commencement of testimony. In exceptional cases, upon good cause shown, applications for protective measures that are not filed within this timeframe, including applications by witnesses themselves,²⁴ may be considered. The application shall be filed confidentially, but not *ex parte*. The information which the applying party seeks to withhold from the other party shall be provided in an *ex parte* annex to the application, if it contains information that could jeopardise an ongoing investigation.

Agreed facts

31. The Chamber takes note of the parties' agreements as to facts which are not contested.²⁵ In the interests of avoiding the unnecessary presentation of evidence and of judicial economy, the parties are directed to continue to seek agreement on any additional facts which are not contested.

²³ Article 67(1) of the Statute provides that '[i]n the determination of any charge, the accused shall be entitled to a public hearing [...]'. Article 64(7) of the Statute provides that 'The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence'.

²⁴ After the completion of witness preparation or after the time when such preparation is allowed (ICC-01/09-01/11-524-Anx, para. 11), the VWU shall be responsible for conveying the witness's request for protective measures to the Chamber and to the parties.

²⁵ ICC-01/09-01/11-451 and ICC-01/09-01/11-653.

Motions of 'no case to answer'

32. The Chamber will, in principle, permit the Defence to enter submissions, at the close of the case for the Prosecution, asserting that there is no case for it to answer at the end of the Prosecution's presentation of evidence. The Chamber will in due course give both its reasons for permitting this manner of procedure and further guidance as to procedure and applicable legal test.

Site visit

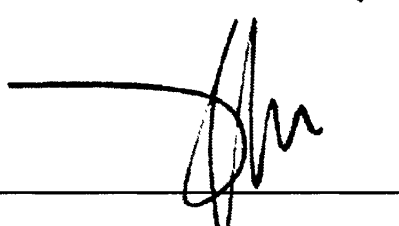
33. The party intending to request the Chamber to undertake a site visit shall file its application no later than at the end of the defence case. If a party considers that a site visit should take place prior to the defence case, it shall file its application no later than two working days after the end of the prosecution case. In such an application, the party shall specify the locations which, in its view, the Chamber should visit and the purpose of visiting those locations. The relevance of information that the party intends to obtain during such a visit to the issues in the present case shall also be specified.

Transcripts of hearings

34. The parties are directed to propose public redacted versions of any confidential transcripts no later than two weeks after the conclusion of the witness testimony. Requests for corrections to the transcript shall be submitted, within five working days from the notification of the edited version of the transcript, to the responsible person within the Registry. The requests shall be based on the edited version of the transcript and contain a table providing: (i) full reference of the transcript, date and the case name, (ii) the passage extracted from the edited version of the transcript, containing the discrepancies to be reviewed, (iii) pages and lines of the passage from the edited

version of the transcript, (iv) time stamp of the passage from the real time version of the transcript, and (v) the language originally used by the speaker.

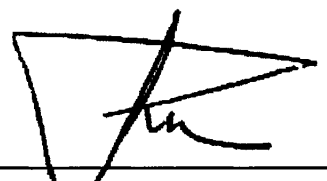
Done in both English and French, the English version being authoritative.



Judge Chile Eboe-Osuji
(Presiding)



Judge Olga Herrera Carbuccia



Judge Robert Fremr

Dated 9 August 2013

At The Hague, The Netherlands