

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/09-01/11
Date: 3 September 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 No. 2 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 (the ‘Statute’) and Rule 140(2)(b) of the Rules of Procedure and Evidence (the ‘Rules’), renders this Decision No. 2 on the Conduct of Trial Proceedings (General Directions).

I. BACKGROUND AND SUBMISSIONS

1. On 3 October 2012, Trial Chamber V issued the Decision on Victims’ Representation and Participation.¹
2. On 9 August 2013, the Chamber issued the Decision on the Conduct of Trial Proceedings (General Directions) (the ‘General Directions Decision’).²
3. On 12 August 2013, the Office for the Prosecutor (‘Prosecution’) filed its Second Submission on the Conduct of Proceedings.³
4. On 19 August 2013, the Chamber held a Status Conference, whereby the parties made oral submissions on a number of outstanding issues before the Chamber prior to the start of trial proceedings.⁴
5. On 21 August 2013, the Prosecution submitted Revised Time Estimates for Prosecution Witnesses⁵ pursuant to the General Directions Decision and the Prosecution’s undertaking at the Status Conference.⁶

¹ ICC-01/09-01/11-460.

² ICC-01/09-01/11-847-Corr.

³ Prosecution’s Second Submission on the Conduct of Proceedings, ICC-01/09-01/11-848.

⁴ ICC-01/09-01/11-T-24-CONF-ENG.

⁵ Prosecution’s Provision of its Revised Time Estimates for Prosecution Witnesses, ICC-01/09-01/11-864.

⁶ ICC-01/09-01/11-T-24-CONF-ENG, p. 32, lines 11-20.

Use of audiovisual material in opening statements

6. In its General Directions Decision, the Chamber held that the parties and the Common Legal Representative for Victims (the 'Legal Representative') were allowed to use audiovisual aids such as videos, photographs, and maps as needed, but were directed to disclose copies of the material to the Chamber, the other parties and the Legal Representative, no later than 5 September 2013, unless such material is stipulated on the Prosecution's list of evidence.⁷
7. At the Status Conference, the Chamber invited the parties to make submissions on the issue of using audiovisual aids during the opening statements.⁸
8. In its oral submission, the defence team for Mr Ruto (the 'Ruto Defence') submitted that the Chamber can adopt either of two approaches. The first approach envisions the Chamber ruling on the issue of admissibility at the outset, following the Prosecution's disclosure of the detailed documents they intend to use and the Chamber subsequently setting a deadline for the Defence to raise any objections. The second approach allows the Prosecution to use the audiovisual material without ruling on the issue of admissibility, but on condition that the Chamber clarify that the material is being used without prejudice to any question of admissibility. The Ruto Defence favours the first approach.⁹
9. The defence team for Mr Sang (the 'Sang Defence') submits that regardless of the approach chosen, it asks the Chamber to preserve the right of the Defence to challenge the admissibility of audiovisual material used later in the proceedings.¹⁰

⁷ General Directions Decision, ICC-01/09-01/11-847-Corr, para. 4.

⁸ ICC-01/09-01/11-T-24-CONF-ENG, p. 47, lines 20-25.

⁹ *Ibid.*, p. 48, lines 13-22.

¹⁰ *Ibid.*, p. 49, lines 2-5.

10. The Prosecution submits that the audiovisual material intended for use during oral statements will not be introduced as evidence and is merely needed by the Prosecution as an 'explanatory aid'.¹¹ According to the Prosecution, the general rule is that 'matters do not become evidence unless they are either properly submitted through a witness, or submitted through a Bar table motion, or some other means that the Statute may provide.'¹² The Prosecution argues that because the amount of audiovisual material intended for use will not be substantial, the Defence will not face an unreasonable burden of reviewing such material in the event it would like to raise an objection immediately prior to trial.¹³ Therefore, the Prosecution requests that the Chamber maintain its previous ruling whereby the Prosecution must disclose copies of the audiovisual material intended for use by 5 September 2013, as established in the General Directions Decision.¹⁴

11. The Chamber reiterates its order for the parties and the Legal Representative to disclose copies of the material they intend to use during their opening statements, unless that material is already on the list of evidence.¹⁵ The Chamber sees no need to modify this order. The parties and the Legal Representative are directed to make written objections, if any, in relation to that material no later than 16:00 hours on 6 September 2013.

Matters to put to a witness during cross-examination

12. With regard to the issue of whether a cross-examining party should put the material parts of its case before a witness on cross-examination, the Prosecution argues in its Second Submission on the Conduct of Proceedings that doing so is warranted by

¹¹ *Ibid.*, p. 49, lines 18-20.

¹² *Ibid.*, p. 49, lines 20-23.

¹³ *Ibid.*, p. 50, lines 1-8.

¹⁴ *Ibid.*, p. 50, lines 21-24.

¹⁵ General Directions Decision, ICC-01/09-01/11-847-Corr, para. 4.

fairness to the witness and judicial economy. In particular, proceedings are expedited because it avoids the need to recall the witness at a later time.¹⁶

13. At the Status Conference, the Chamber requested from the Prosecution clarification on whether: (i) the questions the Prosecution would wish the cross-examiner to put to the witness relate only to questions as to credibility of that witness himself or herself, or (ii) other matters would need to be put to the witness, although he or she may not have testified in-chief on those matters.¹⁷

14. The Prosecution also suggests that the rationale of judicial economy which underpins the need for a non-calling party to present all matters relevant to its case on cross-examination, relates to the separate issue of allowing rebuttal and sur-rebuttal, especially as it may reduce the incidence or extent of cases in rebuttal and sur-rebuttal.

15. In response to the Legal Representative's submission,¹⁸ the Prosecution adds that, unless it is necessary, a non-calling party should be barred from recalling a witness to establish substantive aspects of its case; 'there would have to be something new and unanticipated which would give rise to the recalling of that witness...'.¹⁹

16. The Ruto Defence submits that the need to present all matters relevant to its case on cross-examination can have a negative impact on the Chamber's ability to ascertain the veracity of the witness.²⁰

17. The Sang Defence accepts the Prosecution's submission in part. A cross-examiner should confront a witness by questioning his or her credibility at first opportunity on

¹⁶ Prosecution's Second Submission on the Conduct of Proceedings, ICC-01/09-01/11-848, p. 4.

¹⁷ ICC-01/09-01/11-T-24-CONF-ENG, p. 35, lines 7-14.

¹⁸ See *infra*, para. 18.

¹⁹ ICC-01/09-01/11-T-24-CONF-ENG, p. 46, lines 2-3.

²⁰ *Ibid.*, p. 38, lines 16-17.

cross-examination, rather than at a later time by recalling the witness.²¹ The Sang Defence, however, objects to the requirement of raising all matters relevant to its case on cross-examination which it anticipates the witness can comment on. If the Defence were obligated to present all matters relevant to its case on cross-examination, it would increase the likelihood that subsequent witnesses will adjust their testimony accordingly.²² The Sang Defence also submits that granting the Prosecution's request would undermine the Prosecution's duties under Article 54 of the Statute.²³ The Sang Defence further submits that an unfair burden is placed on the Defence when it must confront a witness with all matters relevant to its case, which it anticipates the witness can comment upon; it would require an advance assessment of those matters which a particular witness can comment on and limits the way the Defence could choose to shape its cross-examination.²⁴

18. The counsel of the Office of Public Counsel for Victims (OPCV), acting on behalf of the Legal Representative, submits that he agrees with the oral submissions of the Prosecution but adds that in the interest of ascertaining truth and justice, a non-calling party should not be completely barred from recalling a witness later in the proceedings to deal with substantive matters.²⁵

19. The Chamber appreciates the need to explore with witnesses during cross-examination all issues relating to their credibility. A basic rule of fairness requires that such questions be put to the witness by any cross-examiner inclined to make an issue out of them later in the case. The Chamber will therefore expect the cross-examining party to confront a witness with all questions relating to his or her credibility at first opportunity when the witness is on the stand.

²¹ *Ibid.*, p. 43, lines 10-12.

²² *Ibid.*, p. 41, lines 11-14.

²³ *Ibid.*, p. 41, lines 15-21.

²⁴ *Ibid.*, p. 41, lines 22-25; p. 42, lines 4-6.

²⁵ *Ibid.*, p. 43, lines 18-20; p. 44, lines 1-5.

20. As regards other matters which may be explored in cross-examination, the Chamber will allow questions that sensibly go beyond the scope of the examination-in-chief. The non-calling party will be allowed to reasonably question the witness on matters that relate to aspects of the cross-examiner's case, when the party can expect the witness to have knowledge thereof, and irrespective of whether those matters were previously discussed in the examination-in-chief, provided the questions are appreciably relevant.²⁶ The Chamber will decide whether a given line of questioning is reasonable on a case-by-case basis. The Chamber is of the view that it is within the cross-examining party's discretion to determine whether a given issue should, or need not be explored with the witness. The Chamber stresses, however, that its refusal to require a cross-examiner to cross-examine any witness in any particular manner must carry no expectation that a cross-examiner may freely seek the recall of any witness whom he or she had not fully questioned on an earlier occasion.

Length of the Prosecution's case

21. In the Status Conference, the Chamber invited the parties to make submissions on the issue of the length of the Prosecution's case and the average time a Prosecution witness will be called to the stand.²⁷

22. The Prosecution initially submitted that the estimated total time for the examination of prosecution witnesses is an average of 413 hours for 46 witnesses²⁸ and subsequently submitted a revised estimate of 294-300 hours for 40 witnesses.²⁹ In its oral submission, the Prosecution argues that while in earlier cases before the Court, the length of the

²⁶ Rule 140(2)(b) of the Rules provides that a witness can be questioned on relevant matters related to his testimony, and his credibility, but also "other relevant matters".

²⁷ ICC-01/09-01/11-T-24-CONF-ENG, p. 26, lines 6-7.

²⁸ ICC-01/09-01/11-540-Conf-AnxA-Red.

²⁹ *Ibid.*, p. 27, lines 11-12. See also Annex A to Prosecution's Provision of its Revised Time Estimates for Prosecution Witnesses, ICC-01/09-01/11-864-Conf-AnxA.

Prosecution's case consisted of a lesser average, 'one should be cautious in drawing parallels between cases which obviously each have their own merits'³⁰ and points to the fact that the case at bar is more complex than earlier cases because it concerns two accused who were allegedly involved in a number of incidents amidst a network—in contrast to dealing with solely one incident, and one accused who is part of a well-defined hierarchy.³¹ The Prosecution also submits that artificial limits on the testimony of a witness, which is otherwise relevant and important, may undermine the establishment of truth which is an essential goal of the proceedings.³²

23. The Ruto Defence and the Sang Defence made no submissions on this matter and only noted that it should be left to the Prosecution.³³

24. The Legal Representative requests that the Chamber take into account the interests of the victims when determining the length of time allocated to the Prosecution's case. In the event that the Chamber grants the Legal Representative permission to examine Prosecution witnesses, the Legal Representative requests that it be granted one quarter of the time estimates given to the Prosecution.³⁴

25. The Chamber takes note of the Prosecution's effort to shorten its case to 294-300 hours. According to the Chamber's calculations, the Prosecution's suggestion amounts to a total of between 1029-1050 hours for the Prosecution case, using the multiplier of 3.5. This multiplier is premised upon: (i) each Defence team using the same aggregate amount of time for cross-examination as the Prosecution for its examination-in-chief, and (ii) the Legal Representative and the Chamber combined using for their questions in aggregate 50% of the time of the examination-in-chief. The Chamber emphasises

³⁰ ICC-01/09-01/11-T-24-CONF-ENG, p. 29, lines 2- 4.

³¹ *Ibid.*, p. 29, lines 2-11.

³² *Ibid.*, p. 27, lines 19-21.

³³ *Ibid.*, p. 30, line 23—p. 31, line 1; p. 31, lines 14-16.

³⁴ *Ibid.*, p. 32, lines 2-8.

that this calculation shall not be understood as an authorisation to use the time indicated in full. Rather, the Chamber may impose limits to the time for questioning and require the questioner to only use as much time as is necessary to explore matters of relevance to the case, even if it amounts to less than the above-mentioned estimates.

26. The Chamber is also cognisant of the Prosecution's assertion that the complexity of the case warrants longer time estimates for trial in comparison to other cases tried in the Trial Chambers of the Court. Regardless of any variations in the particular circumstances of earlier cases, the Chamber remains of the view that lessons learnt from those earlier cases should result in the reduction—not increase—in the time it takes to conduct the case for the Prosecution. The Chamber is therefore of the view that the average time of examination of each witness in this case should be shorter than that in other trials before the Court. The Chamber recalls that Trial Chamber V allowed witness preparation in the present case.³⁵ Trial Chamber V considered that witness preparation was 'likely to enhance the efficiency, fairness and expeditiousness of the present trial.'³⁶ Witness preparation should therefore have a significant effect on the duration of the examination of a witness by the calling party. For this reason, the Chamber is of the view that the time estimates in the present case should be shorter than those in other cases.

27. The total time which the Chamber grants to the Prosecution to complete its case is 588 hours. This calculation is premised upon the examination in chief of the Prosecution's witnesses³⁷ lasting for an average of four hours and multiplied by 3.5, as indicated earlier.

³⁵ Decision on witness preparation, 26 August 2013, ICC-01/09-01/11-524.

³⁶ *Ibid.*, para. 35.

³⁷ There are currently 42 witnesses on the Prosecution's list. See Decision on the Prosecution's Requests to Add New Witnesses to its List of Witnesses, 3 September 2013, ICC-01/09-01/11-899-Conf.

28. On the basis of 4.5 hours of daily sitting,³⁸ the Prosecution case is expected to be completed within approximately 131 hearing days, which equates to approximately seven months.

Critical junctures involving victims' interests

29. In the Decision on Victims' Representation and Participation, the Chamber held that '[t]he procedure for victim participation will be based on common legal representation', which will include both the Legal Representative and the OPCV acting on the Legal Representative's behalf.³⁹ The OPCV's primary responsibility will be to act as 'the interface between the Common Legal Representative and the Chamber in day-to-day proceedings', and, to that end, it will be allowed to attend hearings on behalf of the Legal Representative, during which it may be permitted to intervene and question witnesses.⁴⁰ According to the decision, 'at critical junctures involving victims' interests, notably opening and closing statements, the Legal Representative may make [...] representations in person.'⁴¹ The Chamber specified that in other moments at trial, the Legal Representative is required to request participation by filing with the Chamber.

30. At the Status Conference, the counsel of the OPCV, acting on behalf of the Legal Representative, requested from the Chamber clarification on the definition of 'critical junctures' whereby the Legal Representative could make representations in instances beyond opening and closing statements. The Legal Representative submits that the Decision on Victims' Representation and Participation should not be construed as

³⁸ Regulation 64(1) of the Regulations of the Registry.

³⁹ ICC-01/09-01/11-460, para. 41.

⁴⁰ *Ibid.*, para. 43.

⁴¹ *Ibid.*, para. 71.

exhaustively defining the instances when the Legal Representative could be present in the courtroom. In an effort to timely intervene in proceedings pursuant to the victims' requests, the Legal Representative seeks guidance. He further submits that 'critical junctures' should include hearings that feature expert testimony, the accused's testimony and the testimony of witnesses who directly impact the personal interests of the victims. The Legal Representative further submits that because, at times, the subject matter of Status Conferences extends beyond the purview of routine procedural issues, the Trial Chamber should determine on a case-by-case basis which of those conferences also constitute critical junctures involving victim's interests.⁴²

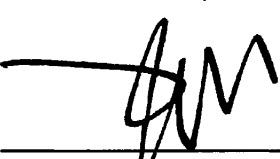
31. The Chamber takes note of the Legal Representative's submissions, particularly his efforts to ascertain when his attendance would be significant to his representation of the victims. The Chamber considers that it is not possible at this stage to define exhaustively the notion of 'critical junctures' by providing a comprehensive set of specific criteria. But, 'critical junctures' will include the following: (i) the opening statements, (ii) the testimony of the witnesses who are also victims represented by the Legal Representative, (iii) if any, the presentation of views and concerns by victims in person, (iv) oral submissions regarding an application for a ruling on no case to answer, (v) closing statements, and (vi) any hearing on reparations to victims. The Chamber invites the Legal Representative to seek the Chamber's leave to attend other hearings if necessary.

⁴² ICC-01/09-01/11-T-24-CONF-ENG, p. 88, lines 5-25; p. 89, lines 1-5.

Protection information sheet

32. In order to minimise the frequency of closed or private sessions for purposes of mentioning protected information that occur few and far between in the course of testimony of one witness, the parties are directed to make use of the Protected Information Sheet (PIS) in the form attached as Annex to the present decision. One PIS is to be completed for each item of isolated protected information. The party or participant tendering the form, is to prepare the PIS only in one copy. The form shall be shown to the witness while on the witness stand, the Bench and to counsel for each party or participant for viewing. If the witness acknowledges familiarity with the indicated information, the PIS will be entered on the record of trial. The information will thereafter be referred to in the further testimony of the witness, and for other purposes, by its PIS serial number. The PIS will only be used when it is more convenient to use it without undue need to go into private or closed session to discuss isolated items of protected information. In other instances, the Chamber will continue to use closed or private sessions when it is safer or more convenient to do so. When the Chamber is of the view that it is safer or more convenient to go into closed session, the PIS system will not be used.

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



Judge Chile Eboe-Osuji
(Presiding)

Judge Olga Herrera Carbuccion

Judge Robert Fremr

Dated 3 September 2013

At The Hague, The Netherlands