

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/09-02/11
Date: 15 November 2013

TRIAL CHAMBER V(b)

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

SITUATION IN THE REPUBLIC OF KENYA

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

PUBLIC REDACTED VERSION

Defence Submissions on the Conduct of Proceedings (ICC-01/09-02/11-775-Conf)

Source: Defence for Uhuru Muigai Kenyatta

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Fatou Bensouda, Prosecutor
Adesola Adeboyejo, Trial Attorney

Counsel for the Defence

Steven Kay QC
Gillian Higgins

Legal Representatives of the Victims

Fergal Gaynor

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Herman Von Hebel

Counsel Support Section

Deputy Registrar

Didier Daniel Preira

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section Other

I. INTRODUCTION

1. The Defence for President Uhuru Kenyatta (“Defence”) provides submissions pursuant to Trial Chamber V(b)’s (“Chamber”) 3 July 2013 “Order requesting submissions on the conduct of the proceedings” (“Order”).¹

II. SUBMISSIONS

(A) Opening Statements

2. The Defence intends to make an opening statement which will include the use of video footage. This statement will not exceed four hours. In the event of any additional technical or logistical considerations, the Defence will ensure timely preparations in liaison with the Registry.

(B) The Order of the Prosecution’s First Ten Witnesses

3. In the Order, the Chamber directed the Prosecution to provide a schedule listing the order in which it will call its first ten witnesses (“Witness Schedule”).²
4. The Defence submits that the Witness Schedule should be subject to review by the Defence in order to ensure sufficient and adequate time for the preparation of cross-examination, as the Defence may not have concluded investigations concerning witnesses whose statements have had significant redactions or whose identities have been more lately disclosed.

¹ ICC-01/09-02/11-769.

² ICC-01/09-02/11-769 , para. 2(ii).

5. In the interests of the administration of justice, the Defence requests that the Chamber issue an additional order requiring the Prosecution to serve, as an accompaniment to the Witness Schedule, an itemised list of all material which it intends to tender through or show to each of its witnesses.

(C) Prosecution Estimates as to the Questioning Time of its Witnesses and the Length of Cross-Examination of Each Witness

Prosecution Estimates for Examination-in-Chief

6. On 12 June 2013, the Defence was notified of the most recent estimates regarding the time required by the Prosecution to conduct the examination-in-chief of its trial witnesses.³ The Defence notes that the total time period required by the Prosecution to conduct its examination-in-chief will be altered as a result of its recent decision⁴ to withdraw its reliance on P-0005,⁵ P-0334⁶ and P-0426.⁷ The Defence has no observations to make regarding the Prosecution's proposed time estimates for its examinations-in-chief.

Length of Cross-Examination

7. As Defence investigations and the review of later unredacted Prosecution evidence are currently ongoing, the Defence is unable to provide definitive information as to the time required to conduct effective cross-examination of the Prosecution's trial witnesses.

³ ICC-01/09-02/11-596-Conf-AnxA.

⁴ ICC-01/09-02/11-773-Conf-AnxA.

⁵ The Prosecution had originally estimated that the examination-in-chief of this witness would take 6 hours, p. 2, ICC-01/09-02/11-596-Conf-AnxA.

⁶ The Prosecution had originally estimated that the examination-in-chief of this witness would take 5 hours, p. 2, ICC-01/09-02/11-596-Conf-AnxA.

⁷ The Prosecution had originally estimated that the examination-in-chief of this witness would take 5 hours, p. 3, ICC-01/09-02/11-596-Conf-AnxA.

8. The Defence foresees substantial challenges to the credibility and factual assertions made by a significant number of Prosecution witnesses, particularly those who are currently members of the Mungiki, have previously been members of the Mungiki, or have a previous or ongoing association with the Mungiki. The extent of the ongoing investigations and the preparation for the cross-examination of these witnesses, who are subject to protective measures, is inevitably taking a considerable amount of time.
9. The precise amount of time required to conduct the cross-examination of a witness is also dependent upon the manner in which the witness answers the questions posed, including whether or not he/she is evasive and/or seeks to obscure the truth. This assessment is also dependent upon whether interpretation and translation of the evidence is required. An assessment by the Defence of the Prosecution's interviews of the witnesses reveals a high degree of evasiveness and inconsistency, with witnesses particularly building a story based upon the questions asked, so that it later develops into a product the questioner is happy to accept.
10. In the circumstances, the Defence provides the Chamber with a best estimate of the time required to cross-examine the Prosecution's witnesses:

Fact Witnesses

P-0002	[REDACTED]
P-0003	[REDACTED]
P-0005	OTP WITHDRAWN
P-0011	[REDACTED]

P-0012	[REDACTED]
P-0118	[REDACTED]
P-0152	[REDACTED]
P-0217	[REDACTED]
P-0219	[REDACTED]
P-0232	[REDACTED]
P-0247	[REDACTED]
P-0334	OTP WITHDRAWN
P-0360	[REDACTED]
P-0363	[REDACTED]
P-0387	[REDACTED]
P-0388	[REDACTED]
P-0390	[REDACTED]
P-0414	[REDACTED]
P-0426	OTP WITHDRAWN
P-0427	[REDACTED]
P-0428	[REDACTED]
P-0429	[REDACTED]
P-0430	[REDACTED]
P-0485	[REDACTED]
P-0493	[REDACTED]
P-0494	[REDACTED]
P-0505	[REDACTED]
P-0506	[REDACTED]
P-0510	[REDACTED]
P-0513	[REDACTED]
P-0533	[REDACTED]

Expert Witnesses

Herve Maupeu	[REDACTED]
Lars Bromley	[REDACTED]

11. In the circumstances, and in order to prevent any risk of injustice to the Accused, the Defence requests that the Chamber refrain from imposing any rule aimed at regulating the precise time to be allotted for cross-examination.

(D) Document Containing the Charges

12. The Defence accepts that the counts section of the Document Containing the Charges can be read to President Kenyatta at the commencement of trial for the purpose of fulfilling the requirement of Article 64(8)(a) of the Statute.

(E) Submissions of No Case to Answer

13. With respect to the issue of whether “no case to answer” motions requesting dismissal of one or more counts at the conclusion of the Prosecution’s case should be allowed in the present case, the Defence adopts the arguments made on behalf of Mr William Ruto in the “Defence Submissions on the Conduct of the Proceedings” (“Ruto Conduct Submissions”).⁸

⁸ ICC-01/09-01/11-795, paras 12-18.

(F) The Order and Manner in Which Witnesses Should be Questioned

14. The Defence is directed to file submissions on its views on “the order, among the parties and participants, and manner in which witnesses should be questioned”.⁹
15. In respect of the order in which witnesses should be questioned during the presentation of the Prosecution’s case, the Defence submits that the Common Legal Representative for Victims (“Legal Representative”) may question the witnesses to the extent leave, if any, has been granted by the Chamber, and on completion of the Prosecution’s examination-in-chief. As the Legal Representative has in the conduct of the proceedings thus far chosen to support the Prosecution, the Defence must be given the right to cross-examine witnesses thereafter.
16. Following the questioning of a witness by the Defence, the Prosecution may request the Chamber’s leave to ask additional questions, provided that these are limited to issues which have been first raised during questioning by the Defence or the Legal Representative. If such additional questions are asked by the Prosecution, pursuant to Rule 140(2)(d) of the Rules of Procedure and Evidence (“Rules”), the Defence shall have the right to question the witness last.
17. During the Defence phase of the trial, the Defence will question the witness first, followed by the Prosecution. In the event that leave to question is granted, the Legal Representative may also question the witness. Pursuant to Rule 140(2)(d) of the Rules, the Defence shall have the right to question the witness last.

⁹ ICC-01/09-02/11-769, para. 2(viii)(a).

18. At any stage during the trial, the Chamber has the power under Rule 140(2)(c) of the Rules to question witnesses as it considers appropriate. During the course of questioning, the Chamber must ensure the rights of the Accused are respected at all times.
19. The Defence adopts the arguments from the Ruto Conduct Submissions concerning the procedure to be adopted in relation to a non-dual status victim who has been granted permission to testify,¹⁰ and a witness called at first instance by the Trial Chamber.¹¹
20. The proposed order of questioning reflects the established practice adopted at the ICC in the case of *The Prosecutor v Jean-Pierre Bemba Gombo*.¹²

(G) Permissible Scope of Questioning by the Parties and Participants

21. These proceedings are clearly adversarial in their construction and practice, and should follow the rules adopted in adversarial systems of criminal justice. The Defence has a clear duty to ensure a client is properly represented and his case is put so that it is understood as to what is challenged. Accordingly, the Defence submits the following:
 - a. Generally, questioning should be upon matters relevant to the issues in the case;

¹⁰ “Where a non-dual status victim has been granted permission to testify, the CLR will question the witness first. The OTP may, thereafter, question the victim, followed by the [...] Defence...”, ICC-01/09-01/11-795, para. 25.

¹¹ “Where a witness is called at the first instance of the Trial Chamber, the Chamber will question the witness first; then, the OTP may question the witness, followed by the CLR, if granted leave; finally, the ...Defence...”, ICC-01/09-01/11-795, para. 26.

¹² *The Prosecutor v Jean-Pierre Bemba Gombo*, “Decision on Directions for the Conduct of the Proceedings”, 19 November 2010, ICC-01/05-01/08-1023, paras 7-15.

- b. In an examination-in-chief, leading questions upon contentious issues should not be permitted, but may be used in non-contentious matters as accepted by the other party;
- c. The party not calling the witness may ask questions related to the credibility of the witness and the reliability of the evidence presented;
- d. Leading questions may be put in cross-examination; and
- e. Questions should be clear and repeated only where a witness does not understand.

(H) The 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 (Rule 91(2) of the Rules)

22. The Defence adopts the arguments in the Ruto Conduct Submissions concerning the timing and manner in which the Legal Representative should request authorisation from the Chamber to question a witness or present evidence at trial.¹³ The Ruto Conduct Submissions rely on the directions set out in paragraphs 19 to 30¹⁴ and 82 to 91¹⁵ of the “Directions for the conduct of the

¹³ ICC-01/09-01/11-795, paras 27-28.

¹⁴ In *Katanga and Ngudjolo*, the Trial Chamber stated that the participation of non-dual status victims in proceedings by way of giving oral testimony is governed by the following conditions: (a) the Chamber will grant applications only on behalf of those victims whose testimony can make a genuine contribution to the ascertainment of the truth, and it is therefore important that the Legal Representative clearly explains the relevance of the proposed testimony of the victim in relation to the issues of the case and in what way it may help the Chamber to have a better understanding of the facts; (b) in determining whether and how the Legal Representatives are allowed to call their clients to testify, the Chamber will be guided by the overriding concern that this takes place in an expeditious manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial; (c) the Chamber may not allow the participation by victims to infringe on the right of the accused to be tried without undue delay; (d) the Chamber will allow Victims' Legal Representatives to call witnesses only to the extent that this does not in effect transform them into auxiliary prosecutors; (e) the Chamber will not allow victims to testify anonymously vis-à-vis the Defence; (f) the Chamber must ensure that the Defence has adequate time to prepare, therefore the participation by a victim may not be the cause of unfair surprise for the Defence; (g) Chamber will allow the Legal Representative to call one or more of their clients only after the Prosecution has concluded its case and insofar as it does not undermine the integrity of the proceedings. With respect to the timing and manner of any request from the Legal Representative to call a non-dual status victim, the Trial Chamber in *Katanga and Ngudjolo* ruled that he/she must file a written application to the Chamber before the completion of the Prosecution case, which must be accompanied by a signed statement of the victim, containing a comprehensive summary of the testimony that is to be given by the victim. If the Chamber grants the application, the attached statement shall count as disclosure in accordance with

proceedings and testimony in accordance with rule 140” in the case of *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*. The issue of the tendering of documentary evidence by the Legal Representative is addressed at paragraphs 98 to 101 of the “Decision on the Modalities of Victim Participation at Trial” in *Katanga and Ngudjolo*.¹⁶

regulation 54(f) of the Regulations. The application and the statement must be notified to the parties, who will have seven days to make observations. The Chamber will rule on the application and determine the appropriate moment for the victim to testify. Under no circumstances may the Legal Representatives apply redactions without the prior authorisation of the Chamber. See *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, “Directions for the conduct of the proceedings and testimony in accordance with rule 140”, 1 December 2009, ICC-01/04-01/07-1665-Corr, paras 19-29.

¹⁵ First, the Trial Chamber in *Katanga and Ngudjolo* set out a number of guidelines governing situations in which a Legal Representative wishes to question witnesses called by other parties. First, where the Legal Representative wishes to question a witness in relation to matters that pertain to a potential order on reparations in accordance with Article 75 of the Statute, he/she shall make a written application to that effect, which shall: (a) be notified to the parties; (b) provide a written note of the questions; (c) explain the precise purpose and scope of the questions and include any relevant documents that will be used for questioning; (d) indicate on behalf of which (group of) victim(s) the questions are being put; (e) be filed as early as possible in order to allow the Chamber to determine whether it is appropriate for the Defence to make observations; (f) be filed as early as possible (under normal circumstances the Chamber will consider only those applications received at least seven days before the witness' first appearance) in order to allow the Chamber to determine whether it is appropriate for the Defence to make observations. Second, when the Legal Representative knows in advance that he/she has certain specific questions for a particular witness, unrelated to issues of reparation, he/she shall notify the Chamber and the Prosecution about this in a written application, at least seven days before the witness appears for the first time. The application, which the Chamber may decide to reclassify so as to allow the notification to the Defence in accordance with Rule 91(3)(a), shall indicate which questions the Legal Representative proposes to ask and explain how they relate to the interests of the victims. If, after examination-in-chief by the party calling the witness, the Chamber is of the view that the matters raised in the proposed question(s) of the victims have not been sufficiently addressed by the witness, it may authorise the Legal Representative to put the question(s) before cross-examination commences, or it may choose to put the question itself. Third, when the Legal Representative does not know in advance that he/she has certain specific questions for a particular witness (i.e. where an unforeseen issue arises during examination-in-chief that directly pertains to the interests of the victims), the Victims' Legal Representatives may submit a question to the Chamber, which may decide to put it to the witness, if it considers this necessary for the ascertainment of the truth or to clarify the testimony of the witness. Fourth, with respect to the scope of the Legal Representative's questioning, he/she is allowed to ask questions of fact that go beyond matters raised during examination-in-chief, subject to the following conditions: (a) questions may not be duplicative or repetitive to what was already asked by the parties; (b) questions must be limited to matters that are in controversy between the parties, unless the Legal Representative can demonstrate that they are directly relevant to the interests of the victims represented; (c) the Legal Representative may ask only questions pertaining to credibility/accuracy of testimony where he/she can demonstrate that the witness gave evidence that goes directly against the interests of the victims represented; (d) the Legal Representative may not put questions pertaining to possible reparations unless specific authorisation has been granted by the Chamber. Finally, with respect to the mode of questioning to be employed by the Legal Representative, the Trial Chamber in *Katanga and Ngudjolo* stated that, save for situations in which he/she has been directly authorised to challenge credibility and/or accuracy, the Legal Representative shall conduct their questioning in a neutral manner and avoid leading or closed questions. See *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, “Directions for the conduct of the proceedings and testimony in accordance with rule 140”, 1 December 2009, ICC-01/04-01/07-1665-Corr, paras 82-91.

¹⁶ In *Katanga and Ngudjolo*, the Trial Chamber ruled that, in order for the Legal Representative to be entitled to tender documentary evidence, he/she must make a written application to the Chamber showing how the documents are relevant and contribute to the determination of the truth. The application and the evidence must be notified to the parties and other participants for their observations. If the evidence is closely linked to the testimony of a named witness, the application must be submitted in sufficient time prior to said witness' testimony to allow the Chamber and the parties to take proper note of the application's content. In any other

(I) The Procedure for the Use of Material During Questioning (Including Advance Notification Thereof and Procedure Objections)

23. The Defence's proposals for advance notification by the Prosecution of the materials it wishes to tender or show to each of its witnesses are set out above at paragraph 5.
24. The Defence proposes that the Prosecution shall, at least seven working days before the testimony of the witness, provide copies of the documents it intends to use during the questioning to the Chamber, the Defence and the Legal Representative. Further, with respect to the material that the Defence intends to use in cross-examination, the Defence proposes to notify and provide copies of the same to the Chamber, Prosecution and Legal Representative immediately prior to the start of cross-examination. The Defence submits that it is entitled to consider the precise scope and remit of cross-examination during the initial questioning by the Prosecution and any questioning by the Legal Representative. The Defence further submits that it has a right to consider what disclosure of its materials to make thereafter, as this time is required to decide upon the final strategy for questioning the witness.
25. With respect to the procedure for objections, the Defence submits that crucial investigations are still ongoing. In the circumstances, the Defence should be able to make objections to the use or admission of materials at any point from their notification until the point of proposed admission. The Defence adopts the arguments from the Ruto Conduct Submissions in this regard, particularly in

circumstance, which in principle should not arise until the close of the Defence case, the application must be filed as soon as possible. The *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, "Decision on the Modalities of Victim Participation", 22 January 2010, ICC-01/04-01/07-1788-tENG, paras 98-101.

circumstances where investigations may reveal lines of objection not previously appreciated at the point of the notification of the material in question.¹⁷

(J) The Procedure for Admission of Material Tendered Through Witnesses as Evidence in the Case (Including Assignment of Evidence Numbers)

26. The Defence adopts the approach set out in the Ruto Conduct Submissions.¹⁸ The Defence submits that documents and other material tendered through a witness should be assigned an evidence number (“EVD”) at the time of their admission. Objections to material being admitted into evidence should be taken at the point at which admission is requested.
27. In the event that there is an objection to an exhibit being tendered, the proposed exhibit will be assigned a ‘marked for identification’ (“MFI”) number until the Chamber rules on the matter.

(K) Other Procedures for Admission of Other Materials as Evidence in the Case (Other Than Through Witnesses)

28. The Defence adopts the approach in the Ruto Conduct Submissions, which advocates a system by which parties are entitled to offer non-witness related material from the Bar table into evidence at appropriate times during the trial, and to file a motion at the end of their respective cases concerning residual non-witness related material not already admitted.¹⁹ The Defence proposes that the Chamber adopts the procedure on the filing of Bar table motions utilized by Trial Chamber II in *Katanga and Ngudjolo*.²⁰ This procedure requires the

¹⁷ ICC-01/09-01/11-795, para 31.

¹⁸ ICC-01/09-01/11-795, paras 35-36.

¹⁹ ICC-01/09-01/11-795, paras 39-41.

²⁰ In *Katanga and Ngudjolo*, the Trial Chamber ruled that when a party wishes to submit several documents into

tendering party to send the proposed materials in advance to the opposing party along with a table conforming to a specified format, so that the opposing party may enter its observations in the table, thus indicating to the tendering party whether it objects, agrees to, or takes no position on the admissibility of the materials within a reasonable time. The parties may also object orally as appropriate. This procedure would be limited to the parties. Proposals for the procedure to be followed by the Legal Representative for the admission of non-witness evidence are set out in Section H above.

(L) Rule 68 and the Admission of Prior Recorded Testimony

29. The Defence notifies the Chamber that at this stage in the proceedings, the Defence intends to reserve the right to make submissions on the applicability of Rule 68 concerning the admission of prior recorded testimony and the procedure to be followed at trial on a case-by-case basis.

evidence without going through a witness, the tendering party shall submit a table, providing for each document: a short description of its content; an index of the most relevant portions; and a demonstration of its relevance and probative value. The Chamber further stated that before submitting the application, the tendering party shall send it to the opposing party, which may enter its observations in the table in relation to each document. It is the responsibility of the tendering party to ensure that the opposing party is given sufficient time to formulate its observations. However, the tendering party may request that the observations are submitted within a reasonable time frame. See *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, “Directions for the conduct of the proceedings and testimony in accordance with rule 140”, 1 December 2009, ICC-01/04-01/07-1665-Corr, paras 101-102.

Respectfully submitted,



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Steven Kay QC and Gillian Higgins

On behalf of Uhuru Muigai Kenyatta

Dated this 15th day of November 2013

At London, England