

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

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

Date: 18 July 2014

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***

Confidential

**Decision on Prosecution's Submission of Schedule of Evidence of Summoned
Witnesses**

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 James Stewart
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
Ms Caroline Buisman

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

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

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*, having regard to Articles 64(6)(b), 69(2), 86, 93, 99(1) of the Rome Statute, Rule 65 of the Rules of Procedure and Evidence and Regulation 73 of the Regulations of the Court, issues this 'Decision on Prosecution's Submission of Schedule of Evidence of Summoned Witnesses'.

I. Procedural history and submissions

1. On 17 April 2014, the Chamber ordered the appearance of eight prosecution witnesses by way of summonses ('Summons Decision').¹ On 19 June 2014, a summons was issued for a ninth witness (collectively, the 'Nine Witnesses').²
2. On 9 July 2014, the Chamber issued the 'Directions on the Schedule for the Testimony of Summoned Witnesses',³ the procedural background of which is incorporated by reference in the present decision. In this decision, the Chamber, *inter alia*: (i) rejected the Office of the Prosecutor's ('Prosecution') proposal to have a 'first appearance' by all Nine Witnesses, followed by their subsequent substantive attendance to give the actual testimony and (ii) directed the Prosecution to prepare, in consultation with the defence teams for Mr Ruto and Mr Sang (together, the 'Defence') and the Legal Representative of Victims, a schedule of evidence of the summoned witnesses, including dates of commencement of testimony for each witness, for an initial hearing period of 1 September to 2 October 2014.⁴

¹ Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, 17 April 2014, ICC-01/09-01/11-1274-Corr2.

² Decision on Prosecutor's Second Supplementary Request to Summon a Witness, 19 June 2014, ICC-01/09-01/11-1377-Red (confidential version notified same day).

³ ICC-01/09-01/11-1424-Conf.

⁴ ICC-01/09-01/11-1424-Conf, page 9.

3. On 16 July 2014, the Prosecution filed the 'Prosecution Submission of Schedule of Evidence of Summoned Witnesses' (the 'Submission').⁵
4. The Prosecution submits the following tentative schedule and dates for the initial session (the 'Tentative Schedule'):
 - (i) Witness 604 – Estimate of five days. 1 September to 5 September.
 - (ii) Witness 495 – Estimate of five to six days. 5 September to 12 September.
 - (iii) Witness 516 – Estimate of five to six days. 12 September to 19 September.
 - (iv) Witness 524 – Estimate of five to six days. 19 September to 26 September.
 - (v) Witness 323 – Estimate of five days. 26 September to 2 October.⁶
5. The Prosecution explains that the Tentative Schedule is submitted on the basis that Witness 19 and Witness 28 will not be called to testify prior to this session in view of concerns raised by the Defence.⁷
6. The Prosecution submits that the Chamber's decision not to schedule a first appearance or provisional appearance dates for the summoned witnesses would result in a number of specified 'practical consequences'.⁸ Given these practical consequences, the Prosecution noted that the Tentative Schedule would likely be subject to considerable change, notwithstanding the Prosecution's attempts to build in a degree of flexibility.⁹

⁵ Prosecution Submission of Schedule of Evidence of Summoned Witnesses, 16 July 2014, ICC-01/09-01/11-1439-Conf (with annex).

⁶ Submission, ICC-01/09-01/11-1439-Conf, para. 6.

⁷ Submission, ICC-01/09-01/11-1439-Conf, para. 10.

⁸ Submission, ICC-01/09-01/11-1439-Conf, para. 11.

⁹ Submission, ICC-01/09-01/11-1439-Conf, para. 12.

II. Discussion

7. The Chamber emphasises at the outset that it is the Prosecution who is calling the Nine Witnesses and who bears primary responsibility for the logistical arrangements surrounding their testimony. The Chamber notes the 'practical consequences' raised in paragraph 11 of the Submission, and considers these matters as not beyond the witness management abilities of the Prosecution, even in the circumstances, and taking into account the common sense indicated in the suggestions of the Ruto Defence¹⁰ with an eye to ensuring that the testimony of witnesses are heard during the 1 September to 2 October segment. To the extent that the Prosecution raises these consequences as a means of re-opening the issue of holding a first appearance for all Nine Witnesses, this request has already been ruled upon by the Chamber and no arguments have been advanced which would merit reconsideration of that ruling.
8. With these points in mind, the Chamber provides only the following guidance in response to the Submission and the Tentative Schedule:
 - (i) The Registry is directed to implement the Chamber's direction to it in the Summons Decision¹¹ on the basis of the Tentative Schedule and any other necessary practicalities, including, as may be required, facilitating the arrangements specified in sub-paragraphs (ii) and (iii) below;

¹⁰ Annex A of the Submission, ICC-01/09-01/11-1439-Conf-AnxA, page 3.

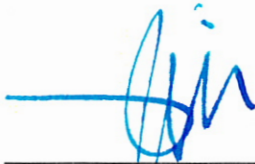
¹¹ Summons Decision, ICC-01/09-01/11-1274-Corr2, page 78 ('DIRECTS the Registry to prepare and transmit, in consultation with the Prosecutor, the necessary subpoenas to the concerned witnesses (with or without the assistance of the Government of Kenya) as well as the necessary cooperation request to the relevant authorities of the Republic of Kenya in accordance with articles 93(l)(d), 93(1)(1), 96 and 99(1) of the Statute, in accordance with this decision'). Judge Herrera Carbuca ratifies her dissenting opinion. However, in the current circumstances the majority's Summons Decision prevails and is being implemented, unless otherwise decided by the Appeals Chamber. Thus, she accepts the majority opinion for this specific case.

- (ii) The Victims and Witnesses Unit (the 'VWU') is to conduct its familiarisation and assessment work for the Nine Witnesses to the extent possible;
- (iii) In consultation with the Prosecution, the Registry should make arrangements so that duty counsel can be appointed on short notice should the need for one arise with respect to any of the Nine Witnesses; and
- (iv) As soon as the Prosecution concludes that there is a substantial likelihood that any of the Nine Witnesses will not appear in response to the summons, it is to inform the Chamber promptly.

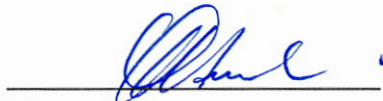
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

DIRECTS the Registry, Prosecution and VWU to proceed in accordance with paragraph 8 of the present decision.

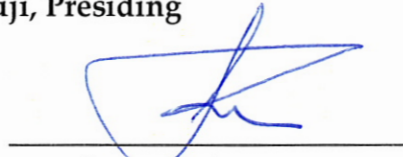
Done in both English and French, the English version being authoritative.



Judge Chile Eboe-Osuji, Presiding



Judge Olga Herrera Carbuccion



Judge Robert Fremr

Dated 18 July 2014

At The Hague, The Netherlands