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Criminal
Court

26 August 2013

Decision of the Plenary of Judges
on the Joint Defence Application for a Change of Place where the Court Shall Sit for Trial
in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*

I. Procedural history

1. On 24 January 2013, the Defence for Mr William Samoei Ruto and for Mr Joshua Arap Sang filed before the Presidency the "Joint Defence Application for a Change of Place where the Court Shall Sit for Trial" ("Joint Defence Application") requesting, pursuant to rule 100 of the Rules of Procedure and Evidence ("Rules"), to have the place of trial changed to the Republic of Kenya ("Kenya") or, alternatively, to Arusha, United Republic of Tanzania ("Tanzania"), using the facilities of the International Criminal Tribunal for Rwanda ("ICTR").[1]

2. On 1 February 2013, at the request of the Presidency,[2] the Trial Chamber sought observations on the Joint Defence Application from the Prosecution, the Registry, the Common Legal Representative for Victims, the Kenyan and Tanzanian authorities, and the ICTR.[3] Those observations were duly filed on 21 February 2013 by the Prosecution,[4] and by the Registry[5] and the Common Legal Representative for Victims on 22 February 2013.[6] On 8 March 2013, the Registry transmitted to the Chamber the favourable observations that it had received from Kenya and the Registrar of the ICTR.[7] The parties, Registry and the Common Legal Representative for Victims were "all favourable to the proposal that a

[1] ICC-01/09-01/11-567.
[2] Decision on "Joint Defence Application for a Change of Place where the Court Shall Sit For Trial", ICC-01/09-01/11-568.
[3] Order requesting observations in relation to the "Joint Defence Application for change of place where the Court Shall Sit for Trial", 1 February 2013, ICC-01/09-01/11-580.
[4] Prosecution Observations on the possibility of the trial being held in Kenya or, alternatively, in Arusha, Tanzania, 21 February 2013, ICC-01/09-01/11-615.
[5] Registry observations in relation to the "Joint Defence Application for change of place where the Court shall sit for Trial", 22 February 2013, ICC-01/09-01/11-617.
[6] Common Legal Representative for Victims' Observations in Relation to the "Joint Defence Application for Change of Place Where the Court Shall Sit for Trial", 22 February 2013, ICC-01/09-01/11-620.
[7] Report of the Registry on the request for observations in relation to the "Joint Defence Application for change of place where the Court Shall Sit for Trial", 8 March 2013, ICC-01/09-01/11-643.

portion of the trial be held away from The Hague", although the majority of the victims themselves considered that the trial should continue to be held at The Hague.[8]

3. The Trial Chamber submitted a recommendation to the Presidency on 3 June 2013[9] (reconfirmed on 21 June 2013)[10] stating that it may be desirable to hold the commencement of the trial and other portions thereof in Kenya, or alternatively, in Tanzania, and requested a more detailed feasibility study from the Registry, which was received on 18 June 2013 in respect of Kenya[11] and on 9 July 2013 in respect of the ICTR in Arusha.[12] Following correspondence, the governments of Kenya and Tanzania assured the Court of their full cooperation and support with regard to sitting on their territories.[13]

4. On 3 July 2013, the Presidency pursuant to rule 100(3) convened a plenary session of judges for 11 July 2013 to consider the Joint Defence Application.[14] On 10 July 2013, the Prosecution filed a second set of observations, intended to provide updated information further to its original observations of 21 February 2013.[15] In that filing, the Prosecution revised their earlier limited support for holding parts of the case in Kenya and expressed opposition to such a move.

5. The Plenary was duly convened on 11 July 2013, during which the Registry gave a presentation. The Plenary was attended in person by Judges Song (Chair), Monageng, Tarfusser, Kaul, Kuenyehia, Kourula, Ušacka, Trendafilova, Aluoch, Fernández de Gurmendi, Ozaki, Herrera Carbuccia, Fremr and Eboe-Osuji. Accordingly, with 14 judges attending, the two-thirds majority required for a decision to change the place of the proceedings was 10.

II. Relevant Law

6. Article 3(1) of the Rome Statute ("Statute") provides: "[t]he seat of the Court shall be established at The Hague in the Netherlands ("the host State")".

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[8] Recommendation to the Presidency on where the Court shall sit for trial, 3 June 2013, ICC-01/09-01/11-763, paragraphs 5 and 10.
[9] Recommendation to the Presidency on where the Court shall sit for trial, 3 June 2013, ICC-01/09-01/11-763.
[10] 2013/PRES/00220-02.
[11] 2013/PRES/00220-01.
[12] 2013/PRES/00220-05 and 2013/PRES/00220-06.
[13] 2013/PRES/00245-03, 2013/PRES/00220-05 and 2013/PRES/00220-06.
[14] 2013/PRES/00220-04.
[15] Prosecution's Observations on the possibility of holding parts of the trial in Kenya or alternatively in Arusha, Tanzania, 10 July 2013, ICC-01/09-01/11-809-Conf.

7. Article 3(3) of the Statute provides: "[t]he Court may sit elsewhere, whenever it considers it desirable…".
8. Article 62 of the Statute provides: "[u]nless otherwise decided, the place of the trial shall be the seat of the Court".
9. Rule 100 of the Rules provides:

> 1. In a particular case, where the Court considers that it would be in the interests of justice, it may decide to sit in a State other than the host State.
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> 2. An application or recommendation changing the place where the Court sits may be filed at any time after the initiation of an investigation, either by the Prosecutor, the defence or by a majority of the judges of the Court. Such an application or recommendation shall be addressed to the Presidency. It shall be made in writing and specify in which State the Court would sit. The Presidency shall satisfy itself of the views of the relevant Chamber.
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> 3. The Presidency shall consult the State where the Court intends to sit. If that State agrees that the Court can sit in that State, then the decision to sit in a State other than the host State shall be taken by the judges, in plenary session, by a two-thirds majority.

III. Findings of the Plenary

10. The judges indicated that they were in principle in favour of bringing the proceedings of the Court closer to the affected communities and to where the alleged events occurred.
11. In considering whether the interests of justice would be served in the instant case by such a move, careful consideration was given to: the arguments of the parties, participants and Registry for and against holding proceedings away from the seat of the Court; the correspondence from Tanzania, Kenya and the ICTR; and the recommendation of the Chamber.
12. The judges also considered factors such as: security issues; the costs of holding proceedings outside The Hague; the potential impact upon victims and witnesses; the length and purpose of the proceedings to be held away from the seat of the Court; the potential impact on the perception of the Court; and the potential impact on other proceedings before the Court.

13. With respect to security, the judges considered the potential risks and whether those risks were acceptable or manageable. On costs, the judges considered whether the estimated costs of holding proceedings away from the Court were so unreasonable as to outweigh any potential benefits. The judges further considered the overall budgetary resources of the Court and whether there was sufficient information before them to reach an informed decision as to the costs of any such operation. With respect to the impact upon victims and witnesses, the judges considered whether any such testimony would be heard away from the seat of the Court, and, if so, its type and duration. With respect to the nature of the proceedings to be held away from the Court, the judges considered whether the length and purpose of such prospective proceedings (namely the opening statements) were in line with the Joint Defence Application to move the trial to Kenya or Tanzania and commensurate with the projected costs and objectives of the operation (namely, bringing the proceedings of the Court closer to the affected communities and to where the alleged events occurred). On the potential impact on the perception of the Court, the question was whether public understanding of the Court and its profile would benefit from holding proceedings away from the seat of the Court and whether proceedings might be politicised. Finally, on the potential impact on other proceedings currently before the Court, the judges considered the extent to which the Court could conduct and support proceedings taking place simultaneously at the seat of the Court in The Hague, the extent of any potential disruption to those proceedings caused by holding proceedings away from The Hague and the extent to which such disruption was acceptable or manageable.

14. Following extensive debate, votes were taken. With nine judges in favour of changing the seat of the Court to Kenya and five judges against[16]; and with nine judges in favour of changing the seat of the Court to Tanzania, four judges against and one judge abstaining;[17] the judges did not reach the required two-thirds majority necessary for a decision to change the seat of the Court.

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[16] In relation to holding proceedings in Kenya; Judges Monageng, Kuenyehia, Kourula, Trendafilova, Aluoch, Ozaki, Herrera Carbuccia, Fremr and Eboe-Osuji voted in favour. Judges Song, Tarfusser, Kaul, Ušacka and Fernández de Gurmendi voted against.

[17] In relation to holding proceedings in Tanzania; Judges Monageng, Tarfusser, Kuenyehia, Trendafilova, Aluoch, Ozaki, Herrera Carbuccia, Fremr and Eboe-Osuji voted in favour. Judges Song, Kaul, Kourula and Fernández de Gurmendi voted against. Judge Ušacka abstained.

IV. Views of the judges in favour of holding proceedings away from the seat of the Court

15. The judges in favour of holding the opening statements away from the seat of the Court were of the opinion that the interests of justice would be served by bringing the proceedings as close as possible to the affected communities and to the location bearing the closest connection to the case. They considered further that the initiative would give the affected communities a sense of ownership of the proceedings and demonstrate the way in which the Court functions, which would in turn further the Court's outreach programmes and help dispel criticisms that the Court is foreign to Africa.
16. In seeking to grant the application in part (by limiting its duration and scope to the commencement of the trial) the judges noted that there would be no adverse consequences to other proceedings before the Court in The Hague and considered that the opening statements of the case would best capture the substance of the trial, i.e. what the Prosecution sought to prove and what the Defence sought to argue. As such, it was more valuable to hold the opening statements close to the affected communities, as they were the very essence of the case and the proceedings from which the general public would be able to glean the most information, as opposed to, for example, hearing testimony on limited aspects of the case at a later stage in the proceedings.
17. Further, the judges considered that the costs associated with the move were not so unreasonable as to outweigh the benefits of the proposal, considering them to be warranted or acceptable in the particular circumstances of the case.
18. In relation to security, the judges found that the risks were manageable or acceptable. They questioned whether the submissions of the Prosecution, revising their earlier limited support, contained any novel information that ought to influence negatively the decision of the Plenary. They considered that the question that had been conveyed to the victims concerned moving the entire trial to Kenya or Tanzania (as opposed to the commencement of the proceedings), something that was not ultimately recommended by the Chamber to the Presidency or tabled for discussion or decision at the plenary session. In this vein, the judges noted that the victims themselves would not be called to give evidence in either Nairobi or Arusha since the opening statements were limited to addresses by the Prosecution, the Defence, the Legal Representatives of the Victims and possibly expert witnesses. Moreover, the judges noted that the Kenyan and Tanzanian authorities and the

ICTR had pledged their assistance and support to the Court and had the capacity to hold the proceedings on their territories or premises respectively, therefore cooperation and logistics presented no bar to holding proceedings in those countries.

19. In deliberating whether the Court proceedings might be subject to politicisation, negative press coverage or anti-ICC demonstrations, the judges noted that such concerns were not unique to holding proceedings away from the seat of the Court in Kenya or in Tanzania, but also arose in The Hague and could be managed. Further, the judges were confident that the Chamber in question would be able to control any possible disruptions that might arise during courtroom proceedings away from the seat of the Court.
20. The judges observed that it was not extraordinary to hold proceedings nearer the affected communities and that life should be given to rule 100; it should not be defeated by factors which would often be at play. Further, the judges in favour considered that approval of the proposal would not necessarily entail its automatic implementation, but would be subject to a continuous appraisal of the security situation.

V. Views of the judges opposed to holding proceedings away from the seat of the Court

21. The judges opposed to holding the opening statements in the case away from the seat of the Court were also, as a matter of principle, in favour of holding proceedings closer to the affected communities and events.
22. However, concerns were raised that a survey of the views of the interested communities had not been sought in the instant case. Moreover, the judges considered whether the security of the proceedings could be guaranteed in the light of the cooperation pledges made by the Kenyan authorities. The judges were acutely concerned that holding proceedings away from the seat of the Court, in Kenya particularly, would be against the express will of some of the participants, given that a large majority of victims had maintained that holding the trial in Kenya may be inimical to their sense of security and preferred it to be held in The Hague; whilst the Prosecution, in their revised submission, were opposed to holding proceedings in Kenya amidst security fears, e.g. witness tampering, intimidation concerns and risks to information security.
23. It was recalled that making proceedings simpler and less costly were some of the justifications given during the Rome Conference for holding proceedings away from the

seat of the Court and "one the most convincing justifications of such a change is always that relevant evidence is otherwise not available or that the task of the Trial Chamber to find the truth is more likely to be achieved there."[18] It was noted that holding opening statements (not exceeding five weekdays) in the case away from the Court would not satisfy any such justifications. Rather than making savings to the budget (e.g. by not bringing a large number of witnesses to The Hague), conducting proceedings in either Arusha or Nairobi would entail considerably higher costs than holding proceedings in The Hague.

24. In the specific circumstances of the case, the judges were not persuaded that holding the opening statements in Arusha or Nairobi was the best solution, due to an acute risk of politicisation surrounding the commencement of the Court's proceedings in the case and of ensuing negative press coverage or anti-ICC demonstrations. It was noted that holding these types of proceedings on the territory of a state of which one of the accused is the sitting Deputy President was unprecedented. The judges were of the opinion that it might be preferable to hold other proceedings in the case away from the seat of the Court at a subsequent stage in the proceedings, for example evidence hearings. As such, they favoured commencing the trial in The Hague without prejudice to the possibility of holding proceedings in the aforementioned locations at a later stage, following a new security assessment.
25. Furthermore, it was noted that the Defence were requesting a different result altogether to that being contemplated by the Plenary; they had requested holding the entire trial in either Kenya or Arusha as opposed to solely the opening statements; as such the judges would be *proprio motu* taking a decision to hold five days of opening statements away from the seat of the Court.
26. Finally, it was observed that the possibility of holding proceedings away from the seat of the Court was not a rule but an exception which should be interpreted narrowly; article 3(3) of the Statute making it clear that the seat of the Court is ordinarily in The Hague. Considering all the circumstances, the opposing judges concluded that it was not in the interests of justice to hold the opening statements in either Nairobi or Arusha.

[18] Commentary on the Rome Statute of the International Criminal Court, Otto Triffterer (ed.), Second Edition, article 62, paragraph 11.

VI. Separate Opinion of Judge Ozaki

27. Judge Ozaki, while sharing some of the concerns expressed by the judges who opposed holding proceedings away from the seat of the Court, especially with regard to the risk of politicisation of the proceedings and the security of victims and witnesses, nevertheless voted for holding proceedings either in Kenya or Tanzania. In her view, the Plenary should in principle refrain from overriding case-specific assessments made by the Chamber, given that the Chamber itself is most familiar with the details of the case. The role of the Plenary should in principle be confined to an assessment affecting the functioning of the Court as a whole, such as budgetary matters and impact on other proceedings.

VII. Separate Opinion of Judge Eboe-Osuji

28. As the presiding judge in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, that gave rise to the question before the Plenary, I feel an obligation to issue a separate opinion in this matter.
29. First, it needs to be clearly stated that nine out of the 14 judges present and voting during the Plenary voted in support of the recommendation to commence the case either in Nairobi (as the preferred location) or Arusha (as the alternative location). That makes for more than a simple majority of the judges voting in favour. Among them were all the judges in the case (i.e. Judges Fremr, Herrera Carbuccia, and Eboe-Osuji). They were joined by six other colleagues in alternatively supporting the recommendation to commence the trial either in Nairobi[19] or Arusha.[20] And among the judges voting in favour were the following two members of the Presidency: Vice President Monageng (who voted for the recommendation to commence the trial in either Nairobi or Arusha) and Vice President Tarfusser (who voted for the recommendation to commence the trial in Arusha only, but not in Nairobi).
30. The nine judges who voted for the alternative recommendations were clearly motivated by the principle that as far as it is possible to do so, it is best to bring justice closer home to the people whose lives have been affected by the events that form the subject-matter of the judicial inquiry. It is that principle that motivated the locating of the Nuremberg Tribunal

[19] Together with the three judges in the case, Judges Aluoch, Kuenyehia, Kourula, Monageng, Ozaki and Trendafilova had voted in favour of commencing the trial in Nairobi.
[20] Together with the Judges in the Kenya Cases, Judges Aluoch, Kuenyehia, Monageng, Ozaki, Tarfusser and Trendafilova had voted in favour of commencing the trial in Arusha.

in Germany, the IMTFE in Tokyo, the Special Court for Sierra Leone in Freetown, the ICTR in Arusha (as close as reasonably possible to Rwanda, when it was considered imprudent to locate that tribunal in Rwanda itself). And, indeed, the same principle is implicated in the allowance made in article 3(3) of the Statute that the ICC may sit elsewhere than at The Hague. It is precisely the same principle that motivated the judges of Trial Chamber V(a) to recommend that the trial of the present case be commenced in Nairobi or, alternatively, Arusha.

31. It is highly to be regretted that the votes of five judges (including that of the President of the Court), who did not vote in favour of either of the alternative recommendations, were able to deny the two-thirds majority—i.e. the 10 votes—actually needed to approve the recommendation.

32. And just as regrettable are the reasons advanced by the five judges who did not vote in favour, thereby defeating the recommendation. The more notable of those arguments are reviewed below.

Concerns about Politicisation of the Case

33. Concerns were expressed that holding the trial in Kenya carries a high risk of 'politicisation' of the case, considering the social and political influence of the accused and his principal in the government of Kenya (the country they now run as Deputy President and President), and given their evident interest in the frustration or abortion of the trial, however achieved. Even assuming that this argument is reasonable enough to override the juristic values of commencing the trial in Kenya (a proposition that is respectfully disputed), it still fails to explain why the judges who were moved by it did not vote for Arusha in Tanzania as the alternative venue. Beyond that consideration, grave doubts exist that the fear of the risk of 'politicisation' of the trial in Kenya is a reasonable basis to reject the idea of commencement of the trial even in Kenya. This is for the simple reason that the case by its very nature has already been 'politicised'. It is a case that arose out of how the politics of a nation had been played. People have a view and they express those views and have been expressing them long before the cases were initiated at this Court. And they have continued to express views, notwithstanding that the proceedings have all along been taking place here at The Hague. Take for example, an 'Open Letter' to the President of the Court by one Gladwell Otieno—purportedly written 'For Kenyans for Peace with Truth and Justice'—just two days ahead of the Plenary. It contained adverse commentary against

(a) a decision of Trial Chamber V(a) that granted the accused excusal from continuous presence at trial; and, (b) the recommendation of Trial Chamber V(a) that the case be commenced in Kenya. The author of the letter severely criticised the excusal decision and urged the rejection of the recommendation, arguing, among other things, that holding any part of the trial in Nairobi carries a risk of politicisation. The paradox in all of that is, of course, that the author of the 'Open Letter' was precisely engaged in the act of 'politicisation' of the case, by writing an *open letter* to the authorities of the Court in an on-going case and in relation to a decision pending before the Court.

34. That is not to say that close observers or other people with interest are forbidden from holding or expressing views about the case. Freedom of speech is a fundamental human right recognised as such in international law. But there are procedures laid down in the Rules about how non-parties may intervene in an on-going case and express their views in an orderly manner. To avoid recourse to those or analogous procedures in seising the Court of important views, but to express those views in the extra-judicial manner of an 'Open Letter' is precisely to engage in politicisation of a pending case. Quite significantly, the author of the Open Letter engaged in that politicisation when no part of the case was being conducted anywhere but at the seat of the Court here at The Hague.

35. It is therefore a fallacy to imply that politicisation has thus far been avoided in the case and that the way to avoid exposure to politicisation is by avoiding going to Kenya to conduct any part of the trial. But, even when the case is politicised while taking place at The Hague or elsewhere in accordance with article 3(3) of the Statute, the sensible approach is that expressed as follows by the ICJ: '[T]he circumstance that others may evaluate and interpret these facts in a subjective or political manner can be no argument for a court of law to abdicate its judicial task.'[21] In other words, the prospect of politicisation of a judicial inquiry 'can be no argument for a court of law to abdicate its judicial task', when the judicial task includes not only the judicial inquiry itself but also giving effect to the desirability of conducting the entire judicial inquiry or parts of it in a location that is closest to the people and the place that bears the strongest link to the events that are the subject-matter of the judicial inquiry.

[21] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p 136 at paragraph 58.

Concerns about Non-Violent Demonstrations

36. A related concern that was raised during the Plenary was that to hold the trial in Kenya would expose the trial to demonstrations. In particular, the 'Open Letter' contained both that suggestion and an allusion to precedents of such demonstrations in the past in relation to judicial inquiries in Kenya. In their change of position that was, for the first time, communicated a day after the 'Open Letter', the Prosecution also argued that no part of the trial should be conducted in Kenya, because of the risk of demonstrations. It is notable, that the Prosecution did not press any point that the demonstrations would be violent. Indeed, the *ex parte* annex to their filing clearly states that there is no expectation of violence. Their main concern rather was that there was a *moderate* risk that these demonstrations *could* prove too intimidating to members of the Prosecution team.
37. Without a doubt, the risk of demonstrations was allowed unduly to preoccupy consideration in the course of the Plenary, notwithstanding the absence of any suggestion that the demonstrations would be anything but peaceful. It is an unreasonable outcome in the decision of the Plenary. It is a common feature of judicial inquiries into events of high social significance that citizens engage in peaceful demonstrations. The phenomenon is not at all unique to Kenya. It happens in some of the most robust democratic societies, including Canada, the UK and the US. Indeed, the processes of the ICC have not been spared such spectacles here at The Hague in other cases, where there is often constant drumming and chanting and carrying of placards when certain cases are in progress. But justice continued in its march. It is thus strange to use the risk of peaceful demonstrations as a reason to avoid commencing the trial in Kenya. It is just as strange that international prosecutors would be so psychologically intimidated by peaceful demonstrations outside the courthouse as to be unable to do their job.

Concerns about Trying a Deputy President in His Own Country

38. Perhaps the most curious concern expressed by one of the judges who voted against the recommendations was the undesirability of trying a Deputy Head of State in his own country. What makes this undesirable was not clearly explained. But it could only mean one of two things in context: (a) that it is below the dignity of the Deputy Head of State to be tried in his own country, or (b) that such a trial will not augur well for the sense of security of vulnerable victims and witnesses.

39. The first reason does not require extended commentary to explain that it would be an entirely illegitimate consideration, including in particular its very contradiction of the idea of complementarity as the fundamental basis of this Court's jurisdiction.
40. The second reason is also unfounded for a number of reasons including these. First, the argument is similarly contradictory of the idea of complementarity, as it would mean in theory that a Rome Statute State Party would never be in a position to prosecute its political leaders for crimes within the jurisdiction of this Court. And, secondly, as a practical matter, the members of Trial Chamber V(a) had clearly explained during the Plenary that the hearing in Nairobi would take place in an initial pilot period of only five days: during which only opening statements would be made and only expert witnesses who are not vulnerable witnesses would be heard within the remaining time. For that reason, any concern about witness insecurity should be entirely unfounded.
41. In any event, the concerns about trying a Vice-President in his own country do not explain the failure to vote in favour of the commencement of the trial in Arusha, Tanzania.

The Desirability of Hearing Witnesses in Situ

42. Yet another concern expressed was that it would have been more desirable if the contemplated proceedings in situ had been geared toward 'substantive' proceedings, which one assumes would envisage the testimonies of factual witnesses instead of opening statements and expert witnesses' testimonies. One difficulty with that concern is that it is necessarily irreconcilable with the earlier noted fears expressed about requiring vulnerable witnesses to testify in hearings in a territory under the political control of the accused. The opposing dialectics of the two concerns must make it impossible ever to hold any hearing in situ in cases in which political leaders are on trial.
43. A further difficulty with the concern is its subjective value judgement: that a hearing in situ comprising opening statements of the parties and possibly also expert testimony is either not 'substantive' or sufficiently substantive to justify the in situ hearing for purposes of bringing the proceedings closer to the people and the place most closely connected to the judicial inquiry. This is a highly doubtful proposition. To the contrary, it may be considered that opening statements comprise a concise, yet comprehensive, overview of the entire case from the perspectives of the parties making those statements. This is so, not only in terms of the narratives of the case, but also the evidence expected to be called in the case. When contrasted with proceedings comprising the actual testimonies of percipient

witnesses who will testify only to the very narrow and limited facts that they perceived, it is difficult to accept that proceedings mostly comprising opening statements are not sufficiently substantive to justify the in situ hearing for purposes of bringing the proceedings closer to the people and the place most closely connected to the events.

This is 'not the ideal case' for in situ proceedings

44. In light of the various arguments that the minority of judges raised against the recommendations, one of the five judges who voted against the alternative recommendations further argued that this is 'not the ideal case' for the in situ hearing recommended. The problem with that argument is that it is difficult to envisage a case of this Court in which one or more arguments could not be raised against conducting the trial at a particular place—including at the seat of the Court itself. Hence, there will never be an 'ideal case' that may be heard in part or in whole in situ.

The Prosecution's Change of Position

45. It was obvious that the Prosecution's late change of position had weighed on the mind of the judges who voted against the proposal. This is evident in the repeated concerns expressed to the effect that with the Prosecution changing their position, it then appeared that it was only the judges who were in favour of commencing the trial in Nairobi, or words to that effect.

46. But, this is problematic for a number of reasons. Before exploring those reasons, it is important to note the change of position and how it was communicated to the Plenary.[22] It is to be noted that in their initial submissions filed on 21 February 2013, the Prosecution's ultimate position was expressed as follows:

> [O]ne suggestion may be to hold portions of the trial in Kenya or Arusha, Tanzania, such as the opening/closing statements, the unsworn oral statement pursuant to Article 67(1)(h), the testimonies of the two Accused (should they choose to proceed therewith), and/or the testimonies of international experts. Hearings of this nature could strike the right balance between bringing the trial as close as possible to the affected region and thus satisfy the public interest in the case, and the need to protect witnesses.[23]

[22] In describing how the change of position was communicated to the Plenary, no effort is made to inquire into how and when the change of position was first communicated to the Presidency, such as culminated in the filing on the eve of the Plenary.

[23] Prosecutor's Observations on the possibility of holding parts of the trial in Kenya or alternatively in Arusha, Tanzania, dated 21 February 2013, paragraph 6.

47. This submission remained on the record of this Court until the close of business on 10 July 2013—being the eve of the Plenary. That is to say, the Defence whose motion was under consideration by the Plenary, following the recommendation of Trial Chamber V(a), was entitled to rely on that position that the Prosecution had left so clearly on the record up until the close of business on the day before the Plenary that was scheduled to commence at 10am 1 July 2013. But, by the morning of the Plenary the judges' bundles of documents for the Plenary had been updated with a new filing by the Prosecution. In the new filing, the Prosecution now changed their position, registering unequivocal opposition to conducting any part of the hearing in Kenya. As they put it:

> Given the present context in Kenya ... the Prosecution is now of the view it may not be in the interest of justice that any part of the trial be held in Kenya.[24]

48. This new Prosecution filing, as it were, was received by the Registry at 6.28pm on 10 July 2013. The procedural flaws in this are as follows. First, in the best case scenario, a filing done so late would have left the Defence practically without an opportunity to react to the new filing before the Plenary scheduled to commence at 10am the next morning. Second, the deprivation of this opportunity to the Defence is even more acute. This is because the Registry's dissemination of the filing through the usual Court Management-Court Records email communication system occurred only at 1.25pm on 11 July 2013. That is more than three hours after the commencement of the Plenary. That is to say, it is possible that this was the first opportunity that the Defence would have had to learn that the Prosecution had filed new submissions objecting to the conduct of any part of the hearings in Kenya. And, finally, one of the annexes containing the crux of the reasons for the Prosecutor's change of position was filed *ex parte*—meaning it was provided only to the Chamber, and was not to be provided to the Defence nor to any other person or entity that may have been cast in a bad light—as was indeed the case—in the discussion conducted in the annex. It is truly difficult to avoid a view of what had occurred as an instance of ambush in legal proceedings, regardless of any question of an intention to do so. It is a method with no legitimate place in any proceedings of an international criminal court of this calibre. In the circumstances, the late filing should not have been received into the proceedings of the Plenary.

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[24] Prosecutor's Observations on the possibility of holding parts of the trial in Kenya or alternatively in Arusha, Tanzania, dated 10 July 2013, paragraph 11.

49. A further difficulty with the timing of the Prosecutor's very late change of positions was its timing. It did not occur until the period following the Open Letter discussed earlier. It is particularly noted that the author of the Open Letter had taken issue with 'recent and potentially forthcoming decisions by the trial chamber'. As noted earlier, the first of what bothered the author was the decision on Mr Ruto's request for excusal from continuous presence at trial. The second was obviously the recommendation of the Trial Chamber viewing as desirable the commencement of the trial in Kenya. The author of the Open Letter opposed the two dispensations, having clearly considered them as inuring to the advantage of Mr Ruto.

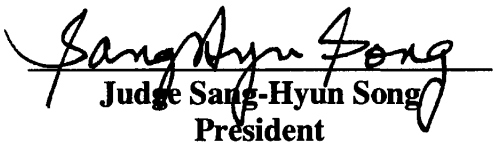
50. The problem that the Open Letter poses for the Plenary begins with the unity of the Prosecution's change of position with the position expressed by the author of the Open Letter. No reason appears, of course, to support any supposition that this was something more than pure coincidence. But extreme care was surely called for on the part of the Prosecution in light of the constant complaint of the Defence in this case that it may be that the Prosecution has been allowing itself to be influenced by the preference of certain interests that have stood in opposition to the political ambitions of the accused in the context of Kenyan politics. Such complaints are not ameliorated by any coincidence in the Prosecutor's change of position in this matter; coming right on the heels of the Open Letter authored by an individual who had also appeared as a petitioner before the Supreme Court of Kenya in a case seeking to nullify the election of the accused in the political office that he now occupies in Kenya.[25] Especially as regards the opposition of the author of the Open Letter to the decision on the excusal from continuous presence, are the Defence, in line with their earlier complaints, not entitled to complain that the author of the Open Letter, having failed to defeat the accused's political ambitions in the political or legal arenas of Kenya, might now be seeking to use the processes of this Court to achieve what could not be achieved in Kenya—i.e. precisely the frustration of the accused in his ability to discharge the functions of the office to which he has been elected against the obvious wishes of the author of the Open Letter? The processes of this Court must not be allowed exposure to such questions. It is for that reason that (a) people in the position of the author of the Open Letter need to be careful in the manner in which they intervene in the

[25] See Judgment of the Supreme Court of Kenya in Petition No 5 of 2013 (as consolidated with Petition Nos 3 and 4 of 2013). In Petition No 4, the author of the Open Letter together with one other person are listed as petitioners against Uhuru Kenyatta and William Samoei Ruto as respondents.

processes of this Court; and (b) the Prosecution need to be careful in the appearances that recommend themselves in the choices and manner of action that they take in these cases.

VIII. Conclusion

51. In light of the foregoing, the conclusion of the Plenary was not to change the place of the proceedings in the case at the present time. The commencement of the trial against William Samoei Ruto and Joshua Arap Sang will take place at the seat of the Court in The Hague.



Judge Sang-Hyun Song
President