

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 9 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

Directions on the Schedule for the Testimony 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

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 ('ICC' or the 'Court'), in the case of *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, pursuant to Articles 64(6)(b), 69(2), 86, 93, 99(1) of the Rome Statute, and Rule 65 of the Rules of Procedure and Evidence, renders these Directions on the Schedule for the Testimony of Summoned Witnesses.

1. On 17 April 2014, the Chamber issued the 'Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation' ('Summons Decision'),¹ in which the Chamber:

- a. ordered the appearance of Witnesses 15, 16, 336, 397, 516, 524, 495 and 323 to testify before the Chamber 'by video-link or at a location in Kenya and on such dates and times as the Prosecutor or the Registrar (as the case may be) shall communicate to them';
- b. requested 'the assistance of the Government of Kenya in ensuring the appearance of the witnesses [...] using all means available under the laws of Kenya'; and
- c. directed '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(1)(d), 93(1)(l), 96 and 99(1) of the Statute.'

2. On 19 June 2014, the Chamber rendered the 'Decision on Prosecutor's Second Supplementary Request to Summon a Witness' (the 'Supplementary Summons

¹ ICC-01/09-01/11-1274-Corr2.

Decision'),² in which the Chamber extended the Summons Decision to also apply to Witness 604.

3. By an amended direction, given on 18 June 2014, the Chamber directed the Registry and the Office of the Prosecutor (the 'Prosecution') to consult with each other and report to the Chamber, by 25 June 2014, by way of written filing, on the mode which the Prosecution and Registry consider the most advisable for taking the testimony of the summonsed witnesses, indicating the relative advantages of that mode over the other.³
4. On 25 June 2014, the Registry filed the 'Registry Report on the consultations in relation to the summonses to appear for OTP Witnesses.'⁴ In the report, the Registry recommended that it is more desirable to take the testimony of the summonsed witnesses by way of video-link and not *in situ*.⁵ The video-link option, as recommended by the Registry, could be in the manner of an 'extended video-link'⁶, if necessary. The Registry's reasons for recommending the video-link option (even in the 'extended' mode, if necessary) rather than the *in situ* mode are that the video-link option will involve limited number of ICC staff and functionaries on location, limited financial implications, limited logistical implications, relatively limited security implications, limited witness management requirements. In comparison, the *in situ* option will involve high number of ICC staff and functionaries on location, high financial implications, high logistical implications,

² ICC-01/09-01/11-1377-Red.

³ Email communications from Trial Chamber V-A Communications sent on 18 June 2014 (14:50) and 24 June 2014 (14:44). The original direction of the Chamber was for the Registry and the Prosecution to file their report to the Chamber by 1 July 2014: see email communication from Trial Chamber V-A Communications sent on 13 June 2014 (18:05).

⁴ ICC-01/09-01/11-1407-Conf.

⁵ ICC-01/09-01/11-1407-Conf, para. 19.

⁶ The Registry submits that in the 'normal' video-link mode only the Courtroom Officer and an IT representative would be present at the location of the video-link. In the 'extended' mode, a representative of the Chamber, the Prosecution, both defence teams and the Victims' Counsel would be present in addition to the two persons present in the 'normal' mode; ICC-01/09-01/11-1407-Conf, para. 8.

high security implications, and high witness management requirements.⁷ In the result, the Registry recommended proceeding as follows:

- a. 'As of 15 September 2014, the "first appearance" of all nine witnesses will take place in a "normal" video-link set-up (i.e. presence of the Courtroom Officer and the respective witness)';
 - b. 'During the "first appearance", as suggested by the Office [of the] Prosecutor, Trial Chamber V (a) can establish a schedule for the witness testimony';
 - c. 'The witness testimonies would subsequently take place as per the "extended" video-link set-up however allowing necessary time, with a minimum of three weeks, for *inter alia* logistical and witness preparation.'⁸
5. On the same day, the Prosecution filed the 'Prosecution's observations on the implementation of Decision ICC-01/09-01/11-1274-Corr2',⁹ in which 'the Prosecution considers that the most efficient and effective method of taking the evidence of the witnesses in question would be by way of *in situ* hearings.'¹⁰ Based on this consideration, the Prosecution recommends that, apart from the initial appearances, the evidence of the summonsed witnesses be taken *in situ* and, if this is not feasible, the Prosecution suggests that the Chamber adopt the 'extended video-link' option.¹¹ The extended video-link option is an 'intermediate option which allows for the presence *in situ* of a limited number of "active observers" from the parties.'¹²

⁷ ICC-01/09-01/11-1407-Conf, section E, page 9.

⁸ ICC-01/09-01/11-1407-Conf, para. 24.

⁹ ICC-01/09-01/11-1405-Conf, with Annexes.

¹⁰ ICC-01/09-01/11-1405-Conf, para. 13.

¹¹ ICC-01/09-01/11-1405-Conf, para. 23.

¹² ICC-01/09-01/11-1405-Conf, para. 21.

6. On 8 July 2014, the Chamber held a status conference (the 'Status Conference'),¹³ and invited views from the parties and participants as regards, *inter alia*, the implementation of the Summons Decision. At the Status Conference all the parties and participants expressed their 'preference' for the summonsed witnesses to testify at *in situ* hearings rather than via video-link, as that was the better manner of hearing the testimony of witnesses.¹⁴ None of the parties, however, disputed, in other ways, the merits of the Registry's grounds for recommending the video-link option. The Prosecution, in particular, expressed the position that while their 'preference' is the *in situ* option, they have noted the recommendation and assessment of the Registry,¹⁵ and can live with whatever decision the Chamber makes on the matter.¹⁶ The Sang Defence aligned themselves with the position expressed by the Prosecution.¹⁷
7. During the Status Conference the Ruto Defence additionally suggested that the Prosecution may want to consult with the Government of Kenya in order to explore the possibility that the summonsed witnesses may now wish to appear voluntarily, without prejudice to the existing decision of the Chamber that the witnesses must be compelled to appear at the specified time and place should they continue to refuse to appear on a voluntary basis.¹⁸ The Sang Defence joined the Ruto Defence's proposal.¹⁹
8. In response, the Prosecution proposed to amend the request to the Government of Kenya so that it includes the option that the witnesses can be 'summoned to attend voluntarily in The Hague'. That request would include a particular date for the

¹³ See Order Scheduling a Confidential Status Conference, 23 June 2014, ICC-01/09-01/11-1387-Conf.

¹⁴ ICC-01/09-01/11-T-123-Conf-Eng, page 79, line 23- page 80, line 3; page 80, lines 23-24; page 81, lines 20-21; page 83, lines 1-4.

¹⁵ ICC-01/09-01/11-T-123-Conf-Eng, page 79, line 23- page 80, line 3.

¹⁶ ICC-01/09-01/11-T-123-Conf-Eng, page 80, lines 20-21.

¹⁷ ICC-01/09-01/11-T-123-Conf-Eng, page 80, line 23- page 81, line 2.

¹⁸ ICC-01/09-01/11-T-123-Conf-Eng, page 81, line 25- page 82, line 13.

¹⁹ ICC-01/09-01/11-T-123-Conf-Eng, page 85, lines 6-20.

witness to appear, followed by a fixed subsequent date to appear at a court in Kenya, should the witness not appear in The Hague.²⁰

9. The Sang Defence agreed in principle with the Prosecution's counter-proposal of providing the witnesses with an additional date to voluntarily appear in The Hague. However, it proposed that the witness should be given the option to either appear in The Hague or in Kenya.²¹
10. The Victims' Counsel objected to the Prosecution's counter-proposal, arguing that the same document cannot contain a summons for a forced appearance and at the same time for a voluntary one.²² The Victims' Counsel agreed, however, with the good sense of the Ruto Defence proposal, as long as this does not result in any delay receiving the testimony of summonsed witnesses.²³
11. Having considered the submissions of the parties, participants and the Registry, the Chamber accepts the assessment of the Registry that the better option in the circumstances is to take the testimony of the summonsed witnesses via video-link. The Chamber directs accordingly.
12. The Chamber notes, in particular, the observation of the Registry that taking the testimony of the summonsed witnesses by video-link will leave 'less of an ICC footprint' on location than the *in situ* option.²⁴ This is an argument of sensitivity that the Chamber finds persuasive in the circumstances. Considerations of sensitivity beckon the Chamber to take into account the security challenges that Kenya is generally known to be experiencing at this time. These challenges have repeatedly been cited successfully by the Ruto Defence, and generally accepted by the Prosecution, as a reason to excuse Mr Ruto from continuous presence at trial, in

²⁰ ICC-01/09-01/11-T-123-Conf-Eng, page 87, lines 8-13.

²¹ ICC-01/09-01/11-T-123-Conf-Eng, page 89, line 25- page 90, line 7.

²² ICC-01/09-01/11-T-123-Conf-Eng, page 91, line 23- page 92, line 9.

²³ ICC-01/09-01/11-T-123-Conf-Eng, page 92, lines 15-24.

²⁴ ICC-01/09-01/11-1407-Conf, para. 19.

order that he may assist in the management of those challenges. The Chamber has no reason to doubt that the Government of Kenya will adequately secure the Chamber's taking of the evidence of the summonsed witnesses *in situ*. Nevertheless, considerations of sensitivity impel the Chamber to refrain from placing additional security demands upon the Government of Kenya at this time, by virtue of an *in situ* hearing of the testimony of the summonsed witnesses.

13. The Chamber further directs that the hearing will proceed in the manner of the regular video-link mode, and not the 'extended video-link'²⁵ mode, in light of the comparative advantages of the regular video-link mode in the saving of costs and time.
14. As regards the modalities of the appearance, the Chamber is not persuaded to accept at this time a recommendation or suggestion (to the extent that it might have been made) of having a 'first appearance' by the witnesses, followed by their subsequent substantive attendance to give the actual testimony. The Chamber is not persuaded that such a procedure will pose neither difficulty for witness protection nor undue inconvenience for the witnesses concerned.
15. In order to enable the preparation of summonses for the witnesses, the Chamber requires the parties' assistance in setting up a schedule for testimony.
16. The Chamber takes note of the parties' and participants' submissions, made at the Status Conference, regarding the possibility of requesting a voluntary appearance of the witnesses. The Chamber recalls that in its Summons Decision it considered the unsuccessful attempts which the Prosecution had made to obtain the voluntary cooperation of those witnesses.²⁶ Those attempts persuaded the Chamber that the

²⁵ See ICC-01/09-01/11-1407-Conf, para. 8.

²⁶ Summons Decision, ICC-01/09-01/11-1274-Corr2, para. 191. See also Supplementary Summons Decision, ICC-01/09-01/11-1377-Red, para. 21.

summonses were necessary to obtain the testimony of the witnesses.²⁷ However, the Chamber sees some merit in continuing to revisit with the witnesses (with the cooperation of the Government of Kenya) the possibility of voluntary appearance of the witnesses in The Hague or at the video-link location in Kenya; provided that the exploration of that possibility is not understood to detract from the summonses decision of the Chamber which requires the concerned witnesses to appear at a place and time to be indicated by the Chamber 'by way of compulsory measure as necessary'.²⁸

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

DIRECTS that the testimony of the summonsed witnesses, pursuant to the Summonses Decision and the Supplementary Summons Decision, will be taken by way of video-link in the normal mode;

DIRECTS the Prosecution to prepare, in consultation with the Ruto Defence, the Sang Defence and the Victims' Counsel, a schedule of evidence of the summonsed witnesses, including dates of commencement of testimony for each witness, for an initial hearing period of 1 September to 2 October 2014, and submit the schedule no later than 16 July 2014; and

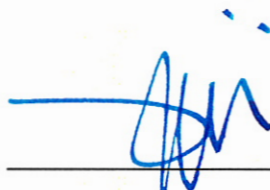
ENCOURAGES the Prosecution to continue to explore with the cooperation of the Government of Kenya the possibility of voluntary appearance of the witnesses in The Hague or at the video-link location in Kenya; provided that the exploration of that possibility is not understood to detract from the summonses decision of the Chamber

²⁷ Summons Decision, ICC-01/09-01/11-1274-Corr2, para. 181. Judge Herrera Carbuccion 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.

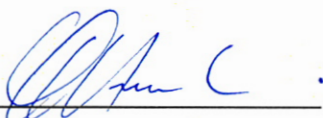
²⁸ Summons Decision, ICC-01/09-01/11-1274-Corr2, page 77.

which requires the concerned witnesses to appear at a place and time to be indicated by the Chamber 'by way of compulsory measure as necessary'.

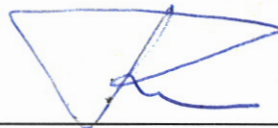
Done in both English and French, the English version being authoritative.

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Judge Chile Eboe-Osuji
(Presiding)

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Judge Olga Herrera Carbuca

A blue ink signature, appearing to be 'Robert Fremr', written over a horizontal line.

Judge Robert Fremr

Dated 9 July 2014

At The Hague, The Netherlands