



Original: **English**

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

Date: **18 July 2014**

Date of public redacted version: **11 December 2017**

TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding
Judge Olga Herrera Carbuccia
Judge Robert Fremr

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
*THE PROSECUTOR v. WILLIAM SAMOEI RUTO and JOSHUA ARAP SANG***

**Public redacted version of
Order for Observations on Procedure for Depositions**

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*, pursuant to Articles 68(1) and 93(1)(b) of the Rome Statute (the ‘Statute’), Regulations 24, 28 and 34 of the Regulations of the Court, issues this ‘Order for Observations on Procedure for Depositions’.

Background

1. On 18 June 2014, the Office of the Prosecutor (the ‘Prosecution’) filed the ‘Prosecution’s request for observations on the mode of testimony of witnesses P-0019 and P-0028, and related relief’ (the ‘Request’),¹ in which it submits that it has requested the assistance of the authorities of a certain state to secure the testimony of Witnesses 19 and 28 (hereafter referred to as the ‘depositions’) for the purpose of subsequently introducing their testimony into the record of the trial.² The Prosecution requests:

- (i) the Chamber’s authorisation to disclose to the defence teams of Mr Ruto and Mr Sang (the ‘Defence’) information on the present location of each of the two witnesses, by means of submitting a lesser redacted version of the Request;
- (ii) that the Chamber order the parties and participants to submit their observations on the procedure for the depositions, including the appropriate conduct of the depositions;
- (iii) that the time limits for the filing of such observations and any response by the Prosecution be shortened; and

¹ ICC-01/09-01/11-1372-Conf-Exp, with confidential *ex parte* Annexes A-D. A confidential redacted version was filed as ICC-01/09-01/11-1372-Conf-Red.

² Request, ICC-01/09-01/11-1372-Conf-Red, para. 1.

- (iv) that the Chamber subsequently rule on the appropriate conduct of the depositions of Witnesses 19 and 28.³
2. On 20 June 2014, the Chamber directed the Victims and Witnesses Unit ('VWU') to make observations on the disclosure sought by the Prosecution under (i) above.⁴
 3. On 24 June 2014, the VWU filed its observations pursuant to the Chamber's direction (the 'Observations').⁵
 4. On 27 June 2014, the Prosecution filed the 'Prosecution's Response to the VWU's "Observations on Disclosure of Information regarding Witnesses 19 and 28", and provision of additional information on mode of testimony' ('Prosecution Response'),⁶ in which the Prosecution submits, *inter alia*, that the competent authorities are not only willing to facilitate the depositions, but also prepared to enable the Chamber to hear the evidence of the two witnesses directly. The Prosecution requests the Chamber, in addition to the relief sought in the Request, to:
 - (i) authorise it to file a confidential lesser-redacted version of the Prosecution Response, disclosing the country of residence of the witnesses; and
 - (ii) after the disclosure, order the parties and participants to submit their consolidated observations, if any, on the procedure proposed by the Prosecution in the Request, as supplemented by the Prosecution Response, including the appropriate conduct of proceedings.⁷

³ Request, ICC-01/09-01/11-1372-Conf-Red, paras 3-4, 35.

⁴ Order for Observations on Disclosure of Information regarding Witnesses 19 and 28, ICC-01/09-01/11-1379-Conf-Exp.

⁵ Victims and Witnesses Unit's Observations on Disclosure of Information regarding Witnesses 19 and 28, ICC-01/09-01/11-1393-Conf-Exp.

⁶ ICC-01/09-01/11-1411-Conf-Exp. A confidential redacted version was filed as ICC-01/09-01/11-1411-Conf-Red.

⁷ Prosecution Response, ICC-01/09-01/11-1411-Conf-Red, para. 13.

5. On 27 June 2014, the VWU requested the Chamber's leave to reply to the Prosecution Response.⁸
6. On 30 June 2014, the Chamber granted leave to reply in relation to a specific issue and set a time limit of seven days.⁹
7. On 4 July 2014, the VWU informed the Chamber that it did not intend to file a reply and only reaffirmed its position presented in the Observations.¹⁰
8. On 10 July 2014, the Chamber directed the Prosecution to file submissions on the assistance that the Prosecution intends to seek from the competent authorities, and, in particular, on whether it intends to maintain its request for assistance in the conduct of depositions and whether, in view of the information provided in the Prosecution Response, it intends to seek assistance in summoning the witnesses to testify directly before the Chamber.¹¹
9. On 14 July 2014, the Prosecution filed the 'Prosecution Clarifications regarding the Mode of Examination of Witnesses P-0019 and P-0028' ('Prosecution Clarifications').¹²

Submissions

10. The Prosecution submits that in relation to the proceedings for the depositions of Witnesses 19 and 28 it has requested the competent authorities:
 - (i) to allow the parties to participate during the depositions of the witnesses;

⁸ Email from the VWU sent on 27 June 2014 at 17:46.

⁹ Email from Trial Chamber V-A Communications sent on 30 June 2014 at 16:12.

¹⁰ Email from the VWU sent on 4 July 2014 at 14:16.

¹¹ Order for Clarification on Mode of Examination of Witnesses 19 and 28, ICC-01/09-01/11-1426-Conf.

¹² ICC-01/09-01/11-1434-Conf-Exp. A confidential redacted version was filed as ICC-01/09-01/11-1434-Conf-Red.

- (ii) to allow the parties to ask questions;
- (iii) to allow the parties to show items of evidence to the witnesses;
- (iv) to permit the Legal Representative for Victims to be present 'to observe the process';
- (v) to allow, subject to any direction of the Chamber, the presence of a representative of the Registry and the Chamber;
- (vi) that a formal record be kept;
- (vii) that the depositions be audio- or video-recorded;
- (viii) that facilities be available for the witnesses to testify in their preferred language and for translation if necessary; and
- (ix) to be able to seek protective measures.¹³

11. In relation to the procedure for depositions, the Prosecution submits that the authorities confirmed their willingness to execute the Prosecution's request for assistance.¹⁴ In the Prosecution Response, the Prosecution submits that the authorities also confirmed that, once Witnesses 19 and 28 have been summonsed to appear, it will be possible for them to testify directly before the Chamber, either *in situ*, which is preferred by the Prosecution, or, in the alternative, by video-link.¹⁵ Further, in the Prosecution Clarifications, the Prosecution advises that the authorities would be prepared to facilitate the taking of evidence directly by the Chamber.¹⁶

12. The Prosecution submits that if the Chamber decides to participate in the execution of the request, the Chamber will be able to direct all matters regarding the

¹³ Request, ICC-01/09-01/11-1372-Conf-Red, paras 22-25.

¹⁴ Request, ICC-01/09-01/11-1372-Conf-Red, para. 13; Prosecution Clarifications, ICC-01/09-01/11-1434-Conf-Red, paras 10-15.

¹⁵ Prosecution Response, ICC-01/09-01/11-1411-Conf-Red, paras 9-11.

¹⁶ Prosecution Clarifications, ICC-01/09-01/11-1434-Conf-Red, para. 10.

depositions, including the adjudication of objections and decisions on the admission of evidence.¹⁷

13. As the competent authorities are prepared to facilitate the requested assistance on the basis of the original request, the Prosecution submits that it is not necessary at this stage for the Chamber itself to issue summonses to the witnesses to appear before the Court pursuant to Articles 93(1)(d) and 93(1)(l) of the Statute.¹⁸ The Prosecution proposes to advise the authorities that the parties would be able to participate in the depositions from 11 to 29 August 2014.¹⁹
14. The Prosecution contends that the Defence and the Legal Representative for Victims should have an opportunity to express views on the proposed course of action. In particular, such observations should concern, firstly, the legality and appropriateness of the proposed course of action; and secondly the appropriate conduct of the proceedings.²⁰
15. As regards the requested disclosure of the present location of the witnesses, the VWU submits that [REDACTED].²¹

Analysis

16. The Chamber considers that the parties and participants should be provided with an opportunity to make observations on the appropriate conduct of the depositions of Witnesses 19 and 28, with specific reference to the questions: (i) whether there is objection to the features of the depositions proposed by the Prosecution, and the

¹⁷ Prosecution Clarifications, ICC-01/09-01/11-1434-Conf-Red, para. 13(c). This information was provided in response to the Chamber's enquiry whether, in view of the information provided in the Prosecution Response, the Prosecution intends to seek assistance in summoning the witnesses to testify directly before the Chamber.

¹⁸ Prosecution Clarifications, ICC-01/09-01/11-1434-Conf-Red, para. 15.

¹⁹ Request, ICC-01/09-01/11-1372-Conf-Red, para. 20.

²⁰ Request, ICC-01/09-01/11-1372-Conf-Red, paras 3, 28.

²¹ Observations, ICC-01/09-01/11-1393-Conf-Exp, paras 4-5.

extent of any such objection; (ii) whether the Chamber (composed as such, or whether one of its members) may direct the depositions, including the adjudication of objections and decisions on admission of evidence; and (iii) whether there is need for a prior ruling of the Chamber on these matters.

17. As regards the Prosecution's request for authorisation to disclose information about the present location of the witnesses, the Chamber considers it preferable that no disclosure takes place [REDACTED].²² In order to ensure that the Defence and the Legal Representative for Victims are able to make meaningful observations on the features of the depositions, based on all relevant information, the time limit for observations will not start running until the disclosure of country of residence takes place.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

DIRECTS the Prosecution to file lesser redacted versions of the Request (ICC-01/09-01/11-1372-Conf-Red), the Prosecution Response (ICC-01/09-01/11-1411-Conf-Red) and the Prosecution Clarifications (ICC-01/09-01/11-1434-Conf-Red) as soon as the necessary arrangements regarding [REDACTED] have been made;

DIRECTS the Defence and the Legal Representative of Victims to file, no later than 7 days after the day of notification of the lesser redacted versions of the Request, the Prosecution Response and the Prosecution Clarifications, observations, if they have any, on *inter alia*:

- (i) the legality and appropriateness of the course of action proposed by the Prosecution,
- (ii) the appropriate conduct of the depositions of Witnesses 19 and 28,

²² See *supra*, para. 15.

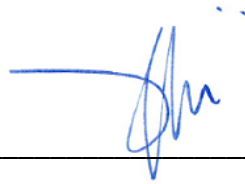
(iii) the Chamber's direct involvement (in its regular composition, or through one of its members) in the depositions,

(iv) the need for the Chamber's ruling on the appropriate conduct of the depositions;

DIRECTS the Prosecution to file any response to those observations within two days from receipt; and

DIRECTS the VWU to seek, as soon as possible, reclassification of its filing ICC-01/09-01/11-1393-Conf-Exp as confidential.


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



Judge Chile Eboe-Osuji
(Presiding)



Judge Olga Herrera Carbuccia



Judge Robert Fremr

Dated 18 July 2014

At The Hague, The Netherlands