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No.: **ICC-01/09-01/11**  
Date: **12 August 2013**

**TRIAL CHAMBER V(A)**

**Before:** Judge Chile Eboe-Osuji, Presiding Judge  
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**

**Prosecution's Second Submission on the Conduct of Proceedings**

**Source:** Office of the Prosecutor

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

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## INTRODUCTION

1. Pursuant to the Trial Chamber's "Order requesting submissions on the conduct of proceedings,"<sup>1</sup> the Prosecution hereby submits its additional observations within the meaning of Rule 134 of the Rules of Procedure and Evidence.

## SUBMISSIONS

### *Mode of Questioning of Witnesses*

2. The Prosecution takes note of the Chamber's comments in paragraph 18 of its Decision on the Conduct of Trial Proceedings (General Directions)<sup>2</sup> and will accordingly raise any applications or objections on the mode of questioning on a case-by-case basis as appropriate.

### *Rebuttal and Sur-rebuttal*

3. The Prosecution submits that it should be permitted to adduce evidence in reply following the conclusion of the Defence case, in order to refute, explain, or counteract evidence from the Defence which (i) the Prosecution could not have reasonably anticipated; and (ii) which is related to a significant issue in the case.<sup>3</sup> Similarly, the Defence should also be permitted to offer evidence in response to the Prosecution's rebuttal but only if it addresses new matters raised in the rebuttal.

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<sup>1</sup> Order requesting submissions on the conduct of the proceedings, ICC-01/09-01/11-778, para. 4.

<sup>2</sup> ICC-01/09-01/11-847 ('Directions Decision').

<sup>3</sup> See Prosecution's Observations on Rebuttal Evidence, ICC-01/04-01/07-2398, citing *inter alia* *Prosecutor v. Fatmir Limaj, Haradin Bala, Isak Musliu*, Decision on Prosecution's Motion to Admit Rebuttal Statements via Rule 92bis, Case no. IT-03-66-T, Trial Chamber II, 7 July 2005, p. 2, para. 6; *R. v. Krause*, [1986] 2 S.C.R. 466, par. 16 (Supreme Court of Canada); *Peals v. Terre Haute Police Department*, 535 F.3d 621, 630 (7th Cir. (U.S.) 2008); *Prosecutor v Halilovic*, Decision on Prosecution Motion to Call Rebuttal Evidence, Case No. IT-01-48-T, 21 July 2005, p. 3.

*A party must 'present its case' to relevant witnesses*

4. The Prosecution submits that the non-calling party should put the material parts of its case to any witness who may comment thereon.<sup>4</sup> This will ensure that witnesses are treated fairly. For example, if the non-calling party's position is that a witness is not being truthful on a particular issue, that *contention should be put to the witness*.<sup>5</sup> It will also expedite proceedings. For example, if the witness testifies that an accused occupied position "X" and the Defence case is that an accused occupied position "Y", this too should be put to the witness. Confronting witnesses in this manner will avoid having to recall them at a later time to deal with substantive aspects of the case.

*Prior Recorded Statement*

5. The Prosecution takes note of the Chamber's directions in paragraph 28 of its Directions Decision on the procedure to be followed by a party wishing to introduce into evidence a witness' prior recorded statement. In this regard, the Prosecution recalls that there may be instances where the calling party will seek leave to introduce into evidence a prior recorded statement of a witness who has become adverse or hostile.

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<sup>4</sup> ICC-01/04-01/06-1140 ('Lubanga Decision'), para. 32 ("The parties are under an obligation to put such part of their case as is relevant to the testimony of a witness, *inter alia*, to avoid recalling witnesses unnecessarily."); *Katanga Decision*, para. 73, ("Cross-examination allows the party not calling the witness to elicit all further relevant evidence as may be useful for the case of that party or necessary for the determination of the truth. It is therefore incumbent upon the cross-examining party to put all questions it may have for the witness during this occasion. In principle, the Chamber will not allow a party to re-call a witness if it already had the opportunity to cross-examine him or her."); *see also* Article 69(4), which recognizes the value of the "fair evaluation of the testimony of a witness."

<sup>5</sup> ICC-01/04-01/06-T-122, pp. 44-46 ("given that this is something potentially within your client's own knowledge, on the face of it something within your client's own knowledge, this ought to be put directly now, and it would be unfair on this witness for a suggestion to be made that he is lying about that when the allegation is never put to him"); ICC-01/04-01/06-T-337, pp. 47-48 ("if during the course of submissions to come, robust suggestions are to be made, either to the detriment of 0316 or to the detriment of this witness, which, in fairness, should have been put to this witness, you have a duty to do so whilst he is before the court."); *see also* Rule 90(H)(ii) of the ICTY Rules of Procedure and Evidence.

6. The Prosecution may also seek leave from the Chamber to introduce into evidence the prior recorded statements of witnesses who are unavailable to testify. Should such a situation arise, the Prosecution will provide full argument at that time.

*Notice under Regulation 55(2)*

7. As a matter of procedure, the Prosecution requests that Trial Chamber V(a) provide notice prior to or at the commencement of trial that it may change the legal characterization of the form of individual criminal responsibility of the accused William Samoei Ruto pursuant to Regulation 55 of the Regulations of the Court. The Prosecution submitted its reasons warranting such notice, based on the fact that, *inter alia*, the factual allegations as contained in the charges support the possibility of such re-characterization.<sup>6</sup> Providing such notice before or on the first day of trial will minimise any prejudice to the right of the Accused to have adequate opportunity to respond to and prepare for possible re-characterization.



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**Fatou Bensouda, Prosecutor**

Dated this 12<sup>th</sup> August 2013

At The Hague, the Netherlands

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<sup>6</sup> Prosecution's Submissions on the law of indirect co-perpetration under Article 25(3)(a) of the Statute and application for notice to be given under Regulation 55(2) with respect to William Samoei Ruto's individual criminal responsibility, ICC-01/09-01/11-433.