

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/11
Date: 4 February 2013

TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding
Judge Christine Van den Wyngaert
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

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

Confidential *ex parte*, filing party and Registry only

**Decision on the Urgent Request for Appointment of Duty Counsel on behalf of
Three Witnesses, pursuant to Article 64(6)(f) of the Statute**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Counsel for William Samoei Ruto

Counsel for Joshua Arap Sang

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others
Göran Sluiter

Trial Chamber V ("Chamber") of the International Criminal Court ("Court") in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, having considered Article 64(6)(f) of the Rome Statute ("Statute") and Regulations 23 *bis*(3) and 73(2) of the Regulations of the Court ("Regulations"), renders the following Decision on the Urgent Request for Appointment of Duty Counsel on behalf of Three Witnesses, pursuant to Article 64(6)(f) of the Statute.

I. Procedural Background and Submissions

1. On 2 May 2012, the Chamber received a transmission from the Registry with annexes containing requests on behalf of two witnesses to appoint duty counsel to represent them.¹
2. On 1 June 2012, the Registry filed its observations on these submissions ("1 June 2012 Registry Response").²
3. On 6 June 2012, the Chamber received a transmission from the Registry with an annex containing a request on behalf of a third witness to be appointed duty counsel to represent him.³
4. On 5 September 2012, the Chamber issued a decision ("5 September 2012 Decision") whereby it: (i) ordered the Registry to determine in accordance with Regulation 73(2) of the Regulations if the three witnesses require urgent legal assistance; (ii) ordered the Registry, if urgent legal assistance is required, to determine in accordance with Regulation 73(2) of the Regulations whether the witnesses have

¹ Registry Transmission of Two Submissions Received on 27 April 2012, 1 May 2012, ICC-01/09-01/11-412-Conf-Exp with two confidential *ex parte* annexes (reclassified on 23 May 2012 as confidential *ex parte* Mr Sluiter, the Registry and the Office of the Prosecutor only).

² Registry's observations on the two submissions transmitted by the Registry on 1 May 2012 (ICC-01/09-01/11-412-Conf-Exp), 1 June 2012, ICC-01/09-01/11-421-Conf-Exp with confidential *ex parte* annex.

³ Registry's transmission of a submission received on 6 June 2012, 6 June 2012, ICC-01/09-01/11-423-Conf-Exp (reclassified on 8 June 2012 as confidential *ex parte* Mr Sluiter, Registry, Witness X and Office of the Prosecutor only).

secured legal assistance and (iii) ordered the Registry, if no legal assistance has been secured, to decide whether to appoint duty counsel.⁴

5. On 10 December 2012, Mr Göran Sluiter, on behalf of the three witnesses referenced in the aforementioned procedural history, filed the "Urgent Request for Appointment of Duty Counsel on behalf of Three Witnesses, pursuant to Article 64 (6) (f) of the Statute" ("Request").⁵
6. In the Request, Mr Sluiter: (i) alleges that the Registry, despite repeated requests to act, did not make any decision following the Chamber's orders in the 5 September 2012 Decision;⁶ (ii) argues that, in view of the Registry's refusal to act, the Chamber can appoint Mr Sluiter as counsel for the three witnesses under Article 64(6)(f) of the Statute;⁷ (iii) requests the Chamber to order the Registry to appoint Mr Sluiter as duty counsel for the three witnesses⁸ and (iv) requests the Chamber to order the Registry to disclose the 1 June 2012 Registry Response to Mr Sluiter.⁹
7. In Annex 1 of the Request, Mr Sluiter argues that the need for representation of the three witnesses exists because: (i) the witnesses have concerns about their safety, in particular with respect to errors allegedly made by the Victims and Witnesses Unit ("VWU") and the Office of the Prosecutor ("Prosecution") impacting on their right to protection;¹⁰ (ii) the witnesses have questions about their rights and obligations while giving testimony¹¹ and (iii) the witnesses require legal assistance in making submissions before the Court in relation to their pending asylum cases in The

⁴ Decision on the request for appointment of duty counsel, 5 September 2012, ICC-01/09-01/11-453-Conf-Exp.

⁵ ICC-01/09-01/11-502-Conf-Exp, with two confidential *ex parte* annexes.

⁶ Request, ICC-01/09-01/11-502-Conf-Exp, paras 5-8.

⁷ Request, ICC-01/09-01/11-502-Conf-Exp, paras 11-12.

⁸ Request, ICC-01/09-01/11-502-Conf-Exp, para. 17(a).

⁹ Request, ICC-01/09-01/11-502-Conf-Exp, para. 17(b).

¹⁰ Annex 1 of the Request, ICC-01/09-01/11-502-Conf-Exp-Anx1, p. 2.

¹¹ Annex 1 of the Request, ICC-01/09-01/11-502-Conf-Exp-Anx1, p. 2.

Netherlands.¹² On the third point, Mr Sluiter emphasises that he is seeking appointment only to make submissions to the Chamber that are related to the witnesses's domestic asylum cases, and is not seeking to be appointed for representation in the asylum procedure vis-à-vis the Dutch authorities.¹³

8. On 12 December 2012, the Registry responded to the Request ("12 December 2012 Registry Response").¹⁴ Therein, the Registry: (i) determines that the three witnesses do not require legal assistance within the meaning of Regulation 73(2) of the Regulations to the extent that representation is sought for asylum proceedings in The Netherlands;¹⁵ (ii) submits that the three witnesses are under the care of the VWU and that such witnesses are to raise all security concerns about their safety directly with the VWU, which then consults with the calling party,¹⁶ (iii) observes that the Prosecution, the calling party in this case, was not informed of the concerns raised in the Request¹⁷ and, therefore, (iv) submits that the Registry is not in a position to grant the relief sought in the Request.¹⁸

II. Analysis and Conclusions

9. The Chamber notes Regulation 73(2) of the Regulations¹⁹ and recalls that this provision applies in the context of considering whether to appoint duty counsel for these three witnesses.²⁰

¹² Annex 1 of the Request, ICC-01/09-01/11-502-Conf-Exp-Anx1, p. 3.

¹³ Annex 1 of the Request, ICC-01/09-01/11-502-Conf-Exp-Anx1, pp 2-3.

¹⁴ Registrar's Observations on Request ICC-01/09-01/11-502-Conf-Exp, 12 December 2012, ICC-01/09-01/11-508-Conf-Exp.

¹⁵ 12 December 2012 Registry Response, ICC-01/09-01/11-508-Conf-Exp, paras 3, 9.

¹⁶ 12 December 2012 Registry Response, ICC-01/09-01/11-508-Conf-Exp, paras 7-8.

¹⁷ 12 December 2012 Registry Response, ICC-01/09-01/11-508-Conf-Exp, paras 7-8.

¹⁸ 12 December 2012 Registry Response, ICC-01/09-01/11-508-Conf-Exp, para. 10.

¹⁹ "The Registrar may appoint duty counsel if a person requires legal assistance and has not yet secured that assistance, or when his or her counsel is unavailable and has consented to the appointment of duty counsel. The Registrar shall take into account the wishes of the person, the expertise of duty counsel, the geographical proximity of, and the languages spoken by, the counsel. Decisions taken pursuant to this subregulation may be reviewed by the relevant Chamber."

²⁰ 5 September 2012 Decision, ICC-01/09-01/11-453-Conf-Exp, para. 13.

10. Turning to the Request, the Chamber notes that the Registry has made a determination that Mr Sluiter may not be appointed by this Court to represent these three witnesses in asylum proceedings in The Netherlands.²¹ This finding is consistent with the Chamber's instruction in the 5 September 2012 Decision,²² and Mr Sluiter does not appear to contest this finding in his correspondence with the Registry.²³ The Chamber understands that asylum representation is not the subject of the present Request; rather, the representation issue raised by Mr Sluiter concerns whether he may be appointed to represent these three witnesses concerning matters that are related to their status as witnesses in proceedings before this Court.
11. As indicated in the 5 September 2012 Decision, the Chamber considers that this determination is fundamentally one that is to be made by the Registry.²⁴ The Chamber has previously considered arguments by Mr Sluiter to act under Article 64(6)(f) of the Statute and sees no reason to depart from its previous reasoning that "the Chamber is not persuaded by the submissions of the three witnesses that the Registry cannot be relied upon to decide whether to appoint counsel in the present circumstances."²⁵ The Registry indicates in the 12 December 2012 Registry Response that certain consultations need to occur before determining that legal assistance is required within the meaning of Regulation 73(2) of the Regulations. Accordingly, the Chamber orders the Registry to arrange for such consultations forthwith in order to expeditiously resolve the issue.
12. As for the request to access the 1 June 2012 Registry Response, the Chamber notes that this Registry submission addresses a variety of sensitive matters which go

²¹ 12 December 2012 Registry Response, ICC-01/09-01/11-508-Conf-Exp, paras 3, 9.

²² 5 September 2012 Decision, ICC-01/09-01/11-453-Conf-Exp, para. 15.

²³ Annex 1 of the Request, ICC-01/09-01/11-502-Conf-Exp-Anx1, p. 2.

²⁴ 5 September 2012 Decision, ICC-01/09-01/11-453-Conf-Exp, para. 15.

²⁵ 5 September 2012 Decision, ICC-01/09-01/11-453-Conf-Exp, para. 14.

beyond responding to Mr Sluiter's previous filings. However, the Chamber notes that pages 14-20 of the 1 June 2012 Registry Response specifically concern Mr Sluiter's previous filings and that basic principles of adversarial litigation demand that these submissions be given to Mr Sluiter in some form. Pursuant to Regulation 23 *bis*(3) of the Regulations, the Chamber partially grants Mr Sluiter's request and orders the Registry to provide Mr Sluiter with pages 14-20 of the 1 June 2012 Registry Response. Prior to reclassifying its submission, the Registry may make any redactions to pages 14-20 which are necessary to ensure the confidential information of protected witnesses. Should Mr Sluiter obtain the consent of any of the witnesses, on whose behalf he is acting, that the confidential information may be disclosed to Mr Sluiter, then the Registry is accordingly directed to submit a lesser redacted version of the 1 June 2012 Registry Response to permit disclosure to Mr Sluiter of personal information regarding that particular witness. In that case, Mr Sluiter is to be reminded that he may share the concerned information with only the particular witnesses and only to the extent that the information pertains to that particular witness personally and to no other.

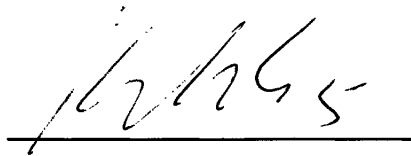
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

DECLINES to take a position on the appointment of Mr Sluiter as duty counsel at this time;

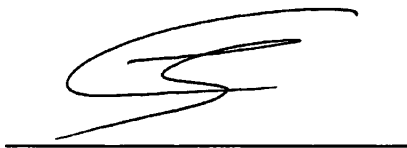
ORDERS the Registry to report back to the Chamber with the status of its determination under Regulation 73(2) of the Regulations within 21 days of the present decision and

ORDERS the Registry to reclassify the 1 June 2012 Registry Response (ICC-01/09-01/11-421-Conf-Exp) as specified in paragraph 12 of the present decision.

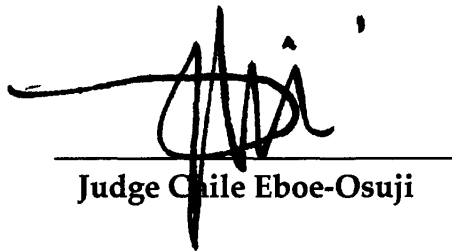
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding



Judge Christine Van den Wyngaert



Judge Chale Eboe-Osuji

Dated 4 February 2013

At The Hague, The Netherlands