

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 21 June 2013

TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding Judge
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 *ex parte*, filing party, Registry and Prosecution only

**Decision on request for review of Registry decision regarding appointment of
duty counsel representing the interests of three 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

Ms Cynthia Tai

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

Mr Herman von Hebel

Deputy Registrar

Victims and Witnesses Unit

Mr Patrick Craig

Detention Section

**Victims Participation and Reparations
Section**

Others

Mr Göran Sluiter

Trial Chamber V(A) (the 'Chamber')¹ of the International Criminal Court (the 'Court' or 'ICC'), in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, having considered Articles 43(6) and 68(1) of the Rome Statute (the 'Statute'), Rules 17 and 74(10) of the Rules of Procedure and Evidence (the 'Rules'), Regulation 73(2) of the Regulations of the Court (the 'Regulations') and Regulations 92 and 96 of the Regulations of the Registry, renders the following Decision on request for review of Registry decision regarding appointment of duty counsel representing the interests of three witnesses.

I. Procedural Background and Submissions

1. On 4 February 2013, the Chamber issued a decision regarding a request for it to order the Registry to appoint Mr Göran Sluiter ('Mr Sluiter') as duty counsel for three witnesses in this case ('4 February 2013 Decision'),² the procedural background of which is incorporated by reference in the present decision.³ In the 4 February 2013 Decision, the Chamber: (i) declined to take a position on the appointment of Mr Sluiter as duty counsel at that time, as this was a decision to be taken by the Registry,⁴ and (ii) ordered the Registry to report back to the Chamber with the status of its determination within 21 days.⁵
2. On 25 February 2013, the Registry filed a report with its decision as to Mr Sluiter's request to be appointed as duty counsel for the three witnesses ('Registry Decision').⁶ The Registry informed the Chamber that the three

¹ Where 'Chamber' is used in this decision it refers to both Trial Chamber V in its composition as until 21 May 2013 and to Trial Chamber V(A) as composed by the Presidency's Decision constituting Trial Chamber V(a) and Trial Chamber V(b) and referring to them the cases of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* and *The Prosecutor v. Uhuru Muigai Kenyatta*, 21 May 2013, ICC-01/09-01/11-745.

² Decision on the Urgent Request for Appointment of Duty Counsel on behalf of Three Witnesses, pursuant to Article 64(6)(f) of the Statute, 4 February 2013, ICC-01/09-01/11-584-Conf-Exp (reclassified to allow access to the Office of the Prosecutor on 20 February 2013).

³ See 4 February 2013 Decision, ICC-01/09-01/11-584-Conf-Exp, paras 1-8.

⁴ 4 February 2013 Decision, ICC-01/09-01/11-584-Conf-Exp, para. 11, p. 8.

⁵ 4 February 2013 Decision, ICC-01/09-01/11-584-Conf-Exp, p. 8.

⁶ Report on the Status of the Registrar's Determination under Regulation 73(2) of the Regulations of the Court, 25 February 2013, ICC-01/09-01/11-621-Conf-Exp.

witnesses had not informed the Victims and Witnesses Unit ('VWU') of any security concerns⁷ and that any security concerns which they have can be addressed directly to the VWU without need for legal assistance.⁸ As to the possibility of being appointed counsel to advise the witnesses as to their rights and obligations while giving testimony, the Registry noted that a witness familiarisation protocol has been developed to address such concerns without the need to be appointed duty counsel⁹ and that, as no self-incrimination issue under Rule 74(10) of the Rules has arisen, such appointment for this reason would be premature.¹⁰ The Registry rejected the request for appointment, concluding that it is not in a position to grant the application for appointment of a duty Counsel 'under Regulation 73(2) of the Regulations of the Court'.¹¹

3. On 29 April 2013, Mr Sluiter filed the 'Urgent application for appointment of duty counsel – including five (5), confidential *ex parte* – Registrar and Prosecutor only, annexes' ('Request').¹² As annexes to the Request, Mr Sluiter provides documentation that he had unsuccessfully sought reconsideration of the Registry Decision¹³ and that the three witnesses whom he represents would like him to be appointed as their counsel.¹⁴
4. In the Request, Mr Sluiter requests the Chamber to review the Registry Decision and to appoint him as counsel for the three witnesses.¹⁵ Mr Sluiter alleges that the Registry erred in law by considering his appointment under the more restrictive standard of Rule 74(10) of the Rules instead of Regulation 73(2) of the Regulations of the Court, with the latter being the

⁷ Registry Decision, ICC-01/09-01/11-621-Conf-Exp, para. 4.

⁸ Registry Decision, ICC-01/09-01/11-621-Conf-Exp, para. 4.

⁹ Registry Decision, ICC-01/09-01/11-621-Conf-Exp, para. 5.

¹⁰ Registry Decision, ICC-01/09-01/11-621-Conf-Exp, para. 6.

¹¹ Registry Decision, ICC-01/09-01/11-621-Conf-Exp, para. 7.

¹² ICC-01/09-01/11-707-Conf-Exp (with five confidential *ex parte* annexes).

¹³ Request, ICC-01/09-01/11-707-Conf-Exp-Anx1; ICC-01/09-01/11-707-Conf-Exp-Anx2; ICC-01/09-01/11-707-Conf-Exp-Anx3.

¹⁴ Request, ICC-01/09-01/11-707-Conf-Exp-Anx5.

¹⁵ Request, ICC-01/09-01/11-707-Conf-Exp, paras 1, 30.

correct standard.¹⁶ Mr Sluiter also makes a number of other arguments which go to the necessity of appointing him as counsel and to an alleged abuse of discretion by the Registry, alleging that: (i) the VWU and Prosecution have made errors in the past which have increased the witnesses' fears for their security,¹⁷ (ii) the witnesses have expressed concerns with respect to their relocation, necessitating the need for counsel to be appointed,¹⁸ (iii) the Registry Decision has wrongfully given weight to the fact that the witnesses have violated their confidentiality undertaking in the ICC Protection Programme by exercising their right to apply for asylum,¹⁹ (iv) the witnesses need to receive advice on questions regarding their rights and obligations while giving testimony,²⁰ (v) the VWU is not able to adequately defend the witnesses' interests,²¹ (vi) recent developments in Kenya, particularly the dissemination of the witnesses' names in the Kenyan media, heighten the need to take appropriate action,²² (vii) the Registry Decision appears to have been driven by financial interests²³ and (viii) the witnesses insist on being represented by counsel while giving testimony in court.²⁴

5. On 3 May 2013, the Registry filed the 'Registrar's Observations in relation to Application ICC-01/09-01/11-707-CONF-EXP' ('Response').²⁵ In the Response, the Registry expresses the view that: (i) Mr Sluiter manifestly misconstrues the Registry Decision, which was taken under Regulation 73(2) of the Regulations,²⁶ (ii) the normal procedure when witnesses express safety concerns is to inform the VWU directly, and Mr Sluiter fails to

¹⁶ Request, ICC-01/09-01/11-707-Conf-Exp, paras 15-19; ICC-01/09-01/11-707-Conf-Exp-Anx1, p. 3.

¹⁷ Request, ICC-01/09-01/11-707-Conf-Exp, paras 27, 29; ICC-01/09-01/11-707-Conf-Exp-Anx1, pp 3-4.

¹⁸ Request, ICC-01/09-01/11-707-Conf-Exp-Anx1, p. 3.

¹⁹ Request, ICC-01/09-01/11-707-Conf-Exp, para. 28; ICC-01/09-01/11-707-Conf-Exp-Anx1, p. 4.

²⁰ Request, ICC-01/09-01/11-707-Conf-Exp-Anx1, pp 4-5.

²¹ Request, ICC-01/09-01/11-707-Conf-Exp, para. 26; ICC-01/09-01/11-707-Conf-Exp-Anx1, p. 5

²² Request, ICC-01/09-01/11-707-Conf-Exp, paras 21-23; ICC-01/09-01/11-707-Conf-Exp-Anx1, pp 5-6.

²³ Request, ICC-01/09-01/11-707-Conf-Exp-Anx1, p. 6.

²⁴ Request, ICC-01/09-01/11-707-Conf-Exp-Anx3, p. 2.

²⁵ ICC-01/09-01/11-719-Conf-Exp.

²⁶ Response, ICC-01/09-01/11-719-Conf-Exp, para. 11 (first bullet point).

provide 'convincing justifications as to why this normal practice should be disregarded' in the present case,²⁷ (iii) in the absence of any VWU consultation, the 'extraordinary remedy of appointing a duty counsel cannot be contemplated',²⁸ (iv) the reference the Registry made to the witnesses breaching their confidentiality undertaking when applying for asylum was no more than 'an objective statement of fact', emphasising that the witnesses were not sanctioned for this breach,²⁹ (v) as to the rights and obligations the witnesses have while testifying, the witness familiarisation protocol developed by the VWU can address these kinds of issues without the need to appoint duty counsel,³⁰ (vi) the neutrality of the VWU prevents it from representing the interest of witnesses the way counsel can, but this fact does not prevent it from performing its mandate under the Statute,³¹ and (vii) the allegation that the Registry Decision was driven by financial concerns is without merit.³² The Registry concludes by affirming its decision not to appoint Mr Sluiter as counsel and asks that the Request be denied in totality.³³

6. The Prosecution did not file any response to the Request.

II. Analysis and Conclusions

7. Although the language used in the Request is not entirely consistent, thus creating ambiguity as to the relief sought,³⁴ the Chamber understands Mr Sluiter to be asking the Chamber to (i) reverse the Registry Decision and (ii)

²⁷ Response, ICC-01/09-01/11-719-Conf-Exp, para. 11 (third bullet point).

²⁸ Response, ICC-01/09-01/11-719-Conf-Exp, para. 13.

²⁹ Response, ICC-01/09-01/11-719-Conf-Exp, para. 14.

³⁰ Response, ICC-01/09-01/11-719-Conf-Exp, para. 16.

³¹ Response, ICC-01/09-01/11-719-Conf-Exp, para. 17.

³² Response, ICC-01/09-01/11-719-Conf-Exp, para. 19.

³³ Response, ICC-01/09-01/11-719-Conf-Exp, para. 22.

³⁴ Compare Request, ICC-01/09-01/11-707-Conf-Exp, para. 1 (asking for review of the Registry Decision) with Request, ICC-01/09-01/11-707-Conf-Exp, para. 30 (asking for the Chamber to order the Registry to appoint Mr Sluiter as duty counsel).

appoint him as counsel for the three witnesses if the Registry Decision is reversed.

8. As regards the standard of review of the Registrar's Decision, the Chamber will consider: (a) whether the Registrar made a manifestly unreasonable decision; and (b) whether the Registrar's Decision is affected by a material error of law or fact.³⁵
9. The Chamber notes that the three witnesses have asked for appointment of duty counsel for alleged security and other concerns.³⁶ However, as noted by the Registry, neither the Prosecution (as the calling party) nor the VWU were ever directly consulted regarding these concerns.³⁷ Regardless of the reason for not contacting the VWU, the Chamber notes that the VWU's mandate is to provide 'protective measures and security arrangements, counseling and other appropriate assistance for witnesses [...]'.³⁸ Given this mandate, the Chamber does not consider requiring a direct VWU consultation prior to appointing counsel in these circumstances to be a 'manifestly unreasonable' decision taken by the Registry.
10. Further, the Chamber notes that many of Mr Sluiter's arguments depend on an interpretation of the Registry Decision which goes beyond a plain reading of it. The Registry Decision clearly indicates that it was taken pursuant to Regulation 73(2) of the Regulations,³⁹ which, as the Chamber

³⁵ ICC-01/09-01/11-635-Conf-Exp, para. 19. *See also* Decision on disclosure issues, responsibilities for protective measures and other procedural matters, 24 April 2008, ICC-01/04-01/06-1311-Anx2 (as annexed to filing ICC-01/04-01/06-1311 of 8 May 2008), para. 82; Decision on the Urgent Requests by the Legal Representative of Victims for Review of Registrar's Decision of 3 April 2012 regarding Legal Aid, 23 April 2012, ICC-01/04-01/07-3277, para. 9 (in the context of decisions regarding the composition of defence teams).

³⁶ *See* Request, ICC-01/09-01/11-707-Conf-Exp-Anx5.

³⁷ *See* Request, ICC-01/09-01/11-707-Conf-Exp-Anx2, p. 3.

³⁸ Article 43(6) of the Statute. *See also* Regulations 92 and 96 of the Regulations of the Registry.

³⁹ Registry Decision, ICC-01/09-01/11-621-Conf-Exp, para. 7. *See also* Request, ICC-01/09-01/11-707-Conf-Exp-Anx2, p. 2. Regulation 73(2) of the Regulations provides:

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

has previously held, is the correct provision to consider in these circumstances.⁴⁰ The Chamber is therefore not persuaded by Mr Sluiter's argument that the Registry was in fact applying a narrower standard which limited counsel appointments only to situations covered by Rule 74(10) of the Rules.⁴¹ The Chamber is likewise not persuaded that the fact that the witnesses applied for asylum formed part of the basis for the Registry Decision. The Registry expressly denies that it took this fact into account, and the Chamber sees no reason to doubt these assurances. As to financial considerations, the Chamber considers that there is nothing wrong with keeping such considerations in mind as long as they do not constitute the overriding consideration. The Chamber is not persuaded that financial concerns were the overriding consideration for the Registry Decision. As such, the Chamber does not consider the arguments made by Mr Sluiter demonstrate identifiable error(s) arising from the Registry Decision, much less a 'material error of law or fact' which justifies reversing the decision.

11. For these reasons, and pursuant to Regulation 73(2) of the Regulations, the Registry's Decision is upheld upon review and the relief sought in Mr Sluiter's request is rejected. However, given the security and other concerns the three witnesses express in their statements to the Chamber,⁴² and recalling the Chamber's obligation to 'take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of

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.

⁴⁰ 4 February 2013 Decision, ICC-01/09-01/11-584-Conf-Exp, para. 9; Decision on the request for appointment of duty counsel, 5 September 2012, ICC-01/09-01/11-453-Conf-Exp, para. 13.

⁴¹ Rule 74(10) of the Rules provides that 'If an issue of self-incrimination arises in the course of the proceedings, the Chamber shall suspend the taking of the testimony and provide the witness with an opportunity to obtain legal advice if he or she so requests for the purpose of the application of the rule'.

⁴² See Request, ICC-01/09-01/11-707-Conf-Exp-Anx5.

victims and witnesses',⁴³ the VWU is directed to liaise with the three witnesses with a view to addressing their concerns as appropriate.

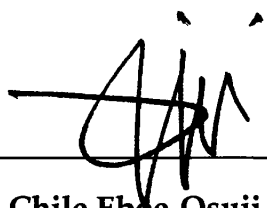
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the relief sought in the Request;

DIRECTS the VWU to liaise with the three witnesses concerned with a view to discussing any protection concerns; and

DIRECTS the VWU to report back to the Chamber on the status of these consultations within 21 days of the present decision.

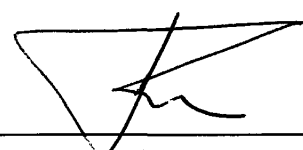
Done in both English and French, the English version being authoritative.



Judge Chile Ebue-Osuji, Presiding



Judge Olga Herrera Carbuca



Judge Robert Fremr

Dated 21 June 2013

At The Hague, The Netherlands

⁴³ Article 68(1) of the Statute.