

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/09-02/11  
Date: 13 August 2013

**TRIAL CHAMBER V(B)**

**Before:** Judge Kuniko Ozaki, Presiding  
Judge Robert Fremr  
Judge Chile Eboe-Osuji

**SITUATION IN THE REPUBLIC OF KENYA**

***IN THE CASE OF  
THE PROSECUTOR V. UHURU MUIGAI KENYATTA***

**Public**  
**Victims' further observations on where the Court shall sit for trial**

**Source:** Common Legal Representative for Victims

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

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**REGISTRY**

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**Counsel Support Section**

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**Detention Section**

**Victims and Witnesses Unit**

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Section**

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## I. Introduction

1. The Common Legal Representative for Victims (“Legal Representative”) hereby provides his submissions pursuant to the “Order for further observations on where the Court shall sit for trial” of 29 July 2013 (“Order”).<sup>1</sup>

## II. Procedural History

2. In the Order, the Chamber referred to an application filed by the Defence for Francis Muthaura, requesting that the trial take place in Kenya or in Arusha, Tanzania. The Chamber also referred to the fact that the proceedings against Mr Muthaura have been terminated; and that the Trial Chamber has held that all pending requests or applications by the Muthaura Defence are moot.<sup>2</sup> The Trial Chamber directed the Prosecution, the Kenyatta Defence, the Registry and the Legal Representative to file their observations on (1) “the propriety of the Chamber considering the matter of the place for trial on its own”, and (2) “the issue whether the opening of trial and/or another appropriate portion of trial shall be held in Kenya or Tanzania”.<sup>3</sup>

## III. Submissions

*The propriety of the Chamber considering the matter of the place for trial on its own*

3. In summary, the Legal Representative submits that: (1) there is no request pursuant to Rule 100(2) of the Rules of Procedure and Evidence pending before the Presidency for a change in the place where the Court shall sit for trial; (2) the Trial Chamber cannot on its own submit a Rule 100(2) request or recommendation to the Presidency; (3) it is unnecessary for the Trial Chamber to

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<sup>1</sup> ICC-01/09-02/11-781.

<sup>2</sup> Order, para. 6.

<sup>3</sup> Order, para. 7.

consider whether it can rely on its inherent trial management powers to submit a recommendation to the Presidency, in light of the recent decision of a plenary session of the Judges on an identical issue in *Ruto & Sang*.<sup>4</sup>

4. Rule 100(2) provides that: “An application or recommendation changing the place where the Court sits may be filed at any time after the initiation of an investigation, either by the Prosecutor, the defence or by a majority of the judges of the Court. Such an application or recommendation shall be addressed to the Presidency. It shall be made in writing and specify in which State the Court would sit. The Presidency shall satisfy itself of the views of the relevant Chamber.”
5. It appears from the plain wording of this provision that a Rule 100(2) application or recommendation may be submitted to the Presidency only by the defence, the prosecution, or a majority of judges of the *Court*, rather than of the relevant Chamber. The Presidency is, however, obliged to seek the views “of the relevant Chamber”.
6. For this reason, the Trial Chamber, on its own, may not submit a Rule 100(2) application or recommendation to the Presidency for a change in the place where the Court shall sit for trial.
7. As far as the Legal Representative is aware, there is no valid request by the Kenyatta Defence or the Prosecutor under Rule 100(2) pending before the Presidency for a change in the place where the Court shall sit for trial.
8. The Kenyatta Defence, in a submission to the Trial Chamber (rather than to the Presidency) on 28 May 2012, said: “The Defence requests the trial to be held in Kenya for reasons of judicial economy and to ensure that the judicial process takes place within the territory affected”.<sup>5</sup> In a submission to the Trial Chamber of 6 February 2013, the Kenyatta Defence noted the Trial Chamber’s ruling that “any party wishing to change the place of trial has to submit a formal

<sup>4</sup> ICC press release ICC-CPI-20130715-PR931, 15 July 2013. Available at <[http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr931.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr931.aspx)> (accessed 13 August 2013)

<sup>5</sup> ICC-01/09-02/11-429, 28 May 2012, para. 24.

application to the Presidency which must then seek the views of the relevant Chamber.”<sup>6</sup> The Kenyatta Defence did not express any preference regarding the venue for trial, and said: “The Defence submits that Mr Kenyatta will respect and comply fully with any Order the Chamber may make concerning the venue of trial and any other order in relation to the current proceedings. The Defence has no other observations to make in respect of trial venue.”<sup>7</sup> The Kenyatta Defence observations filed on 12 August 2013 do not constitute a Rule 100(2) request.<sup>8</sup>

9. Absent a valid Rule 100(2) request by the Defence or the Prosecutor, it appears to be unnecessary for the Trial Chamber further to consider the question of trial venue.
10. This is particularly so as the Judges of the Court decided, in a plenary session, that the commencement of the trial against William Ruto and Joshua Arap Sang will take place at The Hague.<sup>9</sup> This decision rejected a joint defence request to hold hearings in Kenya or in Tanzania. Trial Chamber V(A) had previously recommended to the Presidency that it may be desirable to hold the commencement of the trial of that case, and other portions thereof, in Kenya or in Tanzania. The Presidency had obtained the agreement of Kenya and Tanzania that the Court could sit in those states. In light of this recent decision of the Judges of the Court in the *Ruto & Sang* case, it appears to be unlikely that the Judges of the Court would reach a different conclusion in the present case. This is particularly so as the Defence in the present case (unlike the Defence teams for both Mr Ruto and Mr Sang) has not made a Rule 100(2) application to the Presidency.

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<sup>6</sup> ICC-01/09-02/11-625, 6 February 2013, para. 4.

<sup>7</sup> *ibid*, para. 9.

<sup>8</sup> ICC-01/09-02/11-784.

<sup>9</sup> *supra*, n.4

*The issue whether the opening of trial and/or another appropriate portion of trial shall be held in Kenya or Tanzania*

11. The Legal Representative on 7 February 2013 informed the Trial Chamber that that 97.4% of a representative sample of 155 victims consulted at that time preferred that the ICC should conduct the trial of this case in The Hague, rather than in Kenya or in Tanzania.<sup>10</sup>
12. More recently, in a series of meetings conducted in late July and early August 2013, the Legal Representative and his field staff sought the views of 142 victims and asked them to state whether they preferred the ICC to hold the trial of the present case in Kenya, Tanzania or The Hague.<sup>11</sup> The victims unanimously expressed a preference for the trial to be conducted in The Hague. That is to say, 100% of the 142 victims consulted oppose the holding of this trial in Kenya or in Tanzania. Furthermore, there was no support for the holding of *any* part of the trial in Kenya or in Tanzania, even though this would be geographically closer to the victims.<sup>12</sup> The victims' principal concern is that witnesses and others participating in the trial would be more likely to be subject to intimidation and other inappropriate influence if the trial were to take place in Kenya or in Arusha.
13. For these reasons, the Legal Representative submits that the trial should be held in The Hague.

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<sup>10</sup> ICC-01/09-02/11-629, para 8.

<sup>11</sup> a/8281/11, a/8447/11, a/8448/11, a/8490/11, a/8495/11, a/8502/11, a/8503/11, a/8505/11, a/8506/11, a/8507/11, a/8509/11, a/8510/11, a/8531/11, a/8534/11, a/8535/11, a/8537/11, a/8546/11, a/8550/11, a/8578/11, a/8579/11, a/8580/11, a/8596/11, a/8606/11, a/8609/11, a/8610/11, a/8612/11, a/8613/11, a/8614/11, a/8615/11, a/8616/11, a/8619/11, a/8620/11, a/8624/11, a/8669/11, a/8670/11, a/8688/11, a/8692/11, a/8693/11, a/8694/11, a/8701/11, a/8793/11, a/9060/11, a/9061/11, a/9064/11, a/9069/11, a/9070/11, a/9071/11, a/9072/11, a/9074/11, a/9075/11, a/9076/11, a/9081/11, a/9082/11, a/9083/11, a/9084/11, a/9085/11, a/9086/11, a/9087/11, a/9088/11, a/9089/11, a/9090/11, a/9096/11, a/9097/11, a/9098/11, a/9103/11, a/9103/11, a/9104/11, a/9108/11, a/9109/11, a/9111/11, a/9136/11, a/9139/11, a/9140/11, a/9141/11, a/9143/11, a/9153/11, a/9184/11, a/9185/11, a/9187/11, a/9192/11, a/9193/11, a/9194/11, a/9208/11, a/9209/11, a/9210/11, a/9211/11, a/9214/11, a/9215/11, a/9216/11, a/9217/11, a/9220/11, a/9221/11, a/9223/11, a/9224/11, a/9227/11, a/9229/11, a/9230/11, a/9251/11, a/9258/11, a/9279/11, a/9280/11, a/9283/11, a/9285/11, a/9289/11, a/9294/11, a/9295/11, a/9297/11, a/9298/11, a/9299/11, a/9300/11, a/9309/11, a/9311/11, a/9322/11, a/9326/11, a/9329/11, a/9330/11, a/9331/11, a/9334/11, a/9335/11, a/9336/1, a/9337/11, a/9342/11, a/9352/11, a/9365/11, a/9369/11, a/9370/11, a/9373/11, a/9374/11, a/9379/11, a/9380/11, a/9382/11, a/9383/11, a/9387/11, a/9388/11, a/9389/11, a/9390/11. a/9391/11, a/9392/11, a/9394/11, a/9398/11, a/9406/11, and a/9408/11.

<sup>12</sup> The victims consulted reside in towns and villages located in the Western Region, the Nyanza Region and the Rift Valley Region in Kenya.

*Site visit*

14. The Legal Representative wishes to clarify that while the victims of the present case are strongly opposed to the holding of the trial in Kenya, they support the concept of a site visit by the Trial Chamber to relevant locations in Kenya.<sup>13</sup>
15. The Legal Representative sought the views of victims in meetings in June, July and August 2013 as to whether the Trial Chamber should carry out a site visit in Kenya.<sup>14</sup> By very large majority, the victims who were consulted support this idea. They believe that it would be useful for the Trial Chamber and its staff to visit relevant locations in Naivasha and Nakuru, in order to see for themselves the locations where the crimes were committed, those locations relative to other relevant locations, and to understand better the context in which the post-election violence took place. The Defence has also expressed support for a site visit.<sup>15</sup> There are advantages to a site visit taking place at a relatively early stage of the trial, in order properly to understand the evidence of witnesses who will testify about a variety of locations in Naivasha, Nakuru, Nairobi and elsewhere in Kenya.

Respectfully submitted,



**Fergal Gaynor**  
**Common Legal Representative of Victims**

Dated this 13<sup>th</sup> of August 2013

At Nairobi, Kenya

<sup>13</sup> For the procedure ordered by the Trial Chamber for its site visit in the *Katanga* case, see: ICC-01/04-01/07-3203-tENG, 27 January 2012.

<sup>14</sup> The Legal Representative's predecessor also argued in favour of a site visit to Kenya: ICC-01/09-02/11-426 28 May 2012, paragraph 19.

<sup>15</sup> "The Defence submits that a visit to key sites before the proceedings commence will assist the Trial Chamber to decide upon important issues in the case": ICC-01/09-02/11-429, 28 May 2012, para. 21.