

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 20 November 2013

**TRIAL CHAMBER V(A)**

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

**Public**

**Decision on Common Legal Representative for Victims' Request to Participate in  
Hearings and Examine 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

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**

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**Registrar**

Mr Herman von Hebel

**Deputy Registrar**

**Victims and Witnesses Unit**

Mr Patrick Craig

**Detention Section**

**Victims Participation and Reparations  
Section**

**Others**

Trial Chamber V(A) (the ‘Chamber’)<sup>1</sup> of the International Criminal Court (the ‘Court’), in the case of *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, pursuant to Article 68(3) of the Rome Statute (the ‘Statute’) and Rule 91 of the Rules of Procedure and Evidence (the ‘Rules’), renders this Decision on Common Legal Representative for Victims’ Request to Participate in Hearings and Examine Witnesses.

## I. PROCEDURAL HISTORY

1. On 3 October 2012, the Chamber issued the Decision on victims’ representation and participation.<sup>2</sup>
2. On 9 August 2013, the Chamber issued the Decision on the Conduct of Trial Proceedings (General Directions) (‘Decision on the Conduct of Proceedings’).<sup>3</sup>
3. On 3 September 2013, the Chamber issued Decision No. 2 on the Conduct of Trial Proceedings (General Directions) (the ‘Second Decision on the Conduct of Proceedings’).<sup>4</sup>
4. On 14 November 2013, the Common Legal Representative for Victims (the ‘Legal Representative’) filed a request for authorisation to appear in court for the trial sessions scheduled to commence on 21 November 2013, and to examine Witness 464, Witness 469 and Witness 535 (the ‘Request’).<sup>5</sup>

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<sup>1</sup> 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.

<sup>2</sup> ICC-01/09-01/11-460.

<sup>3</sup> ICC-01/09-01/11-847-Corr.

<sup>4</sup> ICC-01/09-01/11-900.

<sup>5</sup> Common Legal Representative for Victims’ Request for Authorization of the Trial Chamber for him to Participate in the Session of the Trial Scheduled between 21 and 29 November 2013, and to Examine Prosecution Witnesses P-0464, P-0469 and P-0535, ICC-01/09-01/11-1099-Conf and ICC-01/09-01/11-1099-Red.

5. On 18 November 2013, the defence team for Mr Sang (the 'Sang Defence') filed its response (the 'Response').<sup>6</sup>
6. On that same date, the Chamber informed the Legal Representative that it does not consider the court session starting 21 November 2013 to be a 'critical juncture' within the meaning of the Decision on victims' representation and participation. The Chamber informed that the reasons for its decision, as well as other matters raised in the Request, would be addressed in a future written decision.<sup>7</sup>

## II. SUBMISSIONS

7. The Legal Representative seeks leave to appear in court during the forthcoming sessions scheduled to commence on 21 November 2013. This request is based on three reasons. First, he submits that it is highly desirable for him to personally highlight, both at an *ex parte* hearing and at public hearings, certain security concerns regarding participating victims residing in Kenya.<sup>8</sup> The Legal Representative submits that the designated legal officer of the Office of Public Counsel for Victims ('OPCV') has not yet been on mission to the field for this case, which limits the effectiveness and efficiency of the Legal Representative's appearance through that legal officer.<sup>9</sup>
8. Second, the Legal Representative submits that 'the voice of victims has hardly been heard since the giving of evidence by Witness P-0536', which in addition to security concerns, undermines the meaningful, rather than symbolic purpose of consistent victim participation in the proceedings.<sup>10</sup>

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<sup>6</sup> Sang Defence Response to Common Legal Representative for Victims' Request for Authorization of the Trial Chamber for him to Participate in the Session of the Trial Scheduled between 21 and 29 November 2013, and to Examine Prosecution Witnesses P-0464, P-0469 and P-0535, ICC-01/09-01/11-1101-Conf.

<sup>7</sup> E-mail from Trial Chamber V-A Communications to the Legal Representative at 15:06.

<sup>8</sup> Request, ICC-01/09-01/11-1099-Conf, para. 5.

<sup>9</sup> Request, ICC-01/09-01/11-1099-Conf, paras 5-6.

<sup>10</sup> Request, ICC-01/09-01/11-1099-Conf, para. 7.

9. Third, the Legal Representative argues that even though Witness 469 and Witness 535 are not registered as participating victims, their testimony will have a significant impact on victims' interests, because they are '*de facto* victims whose evidence may also assist the Trial Chamber in arriving at the truth, and which could be ultimately relevant in relation to the question of reparations'.<sup>11</sup> The Legal Representative adds that Expert Witness 464's testimony on the historical context of the post-election violence will also have an impact on the interests of victims.<sup>12</sup>
10. The Sang Defence opposes the Legal Representative's request to examine Witness 535 and Witness 469, but does not oppose his presence during the trial sessions.<sup>13</sup>
11. Although the time limit for responses, as set in Regulation 34 of the Regulations of the Court, has not yet expired, the Chamber decided on the question of attendance by the Legal Representative without receiving the views of the Office of the Prosecutor (the 'Prosecution') and the defence team for Mr Ruto given the imminence of the testimony and the potential need for travel arrangements being put in place. As discussed below, the Chamber has reserved its decision on examination of the witnesses on behalf of the Legal Representative and will receive the oral submissions of the parties before ruling.

### III. ANALYSIS AND CONCLUSIONS

12. The Chamber notes that the Legal Representative has requested confidentiality as regards several aspects of his Request. However, he has not given any factual or legal basis for the classification of such information pursuant to Regulation 23*bis* of the Regulations of the Court. The Chamber is mindful of its duty to protect the safety, physical and psychological well-being, dignity and privacy of witnesses. However, this duty should be balanced with a presumption in favour of the publicity of proceedings established by the Statute and the Rules. Taking into

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<sup>11</sup> Request, ICC-01/09-01/11-1099-Conf, para. 10.

<sup>12</sup> Request, ICC-01/09-01/11-1099-Conf, para. 11.

<sup>13</sup> Response, ICC-01/09-01/11-1101-Conf, para. 12.

account that there is a legitimate public interest in the scheduling and progress of the case in the matters dealt with in this decision, the Chamber has issued this decision as a public document. It therefore directs the Legal Representative to file a lesser redacted version of his Request, in line with the present decision.

13. The Chamber notes that after the Request was filed, the Prosecution informed the Chamber that only Witness 469 and Witness 535 will be heard during the upcoming trial session. The Chamber has therefore based its analysis on whether the testimonies of Witness 469 and Witness 535 can be considered as 'critical junctures involving victims' interests'.
14. The Chamber recalls that the Legal Representative shall attend trial in person only at critical junctures involving victims' interests, which thus far, is specified to include the following: (i) the opening statements; (ii) the testimony of the witnesses who are also victims represented by the Legal Representative; (iii) the presentation of views and concerns by victims in person, if any; (iv) oral submissions regarding an application for a ruling on no case to answer;; (v) closing statements; and (vi) any hearing on reparations to victims.<sup>14</sup>
15. The Chamber does not consider the testimonies of Witness 469 and/or Witness 535 to fall within any of the aforementioned instances. It is to be noted particularly that Witness 469 and Witness 535 are not dual-status witnesses.<sup>15</sup>
16. The Chamber also recalls that attendance may be granted upon specific request filed with the Chamber.<sup>16</sup> However, such a specific request should provide appropriate reasoning as to why the relevant hearing should be considered as a 'critical juncture' for which the physical presence of the Legal Representative is

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<sup>14</sup> ICC-01/09-01/11-460, para 71; ICC-01/09-01/11-900, para 31.

<sup>15</sup> Request, ICC-01/09-01/11-1099-Conf, para. 10.

<sup>16</sup> ICC-01/09-01/11-460, para 71; ICC-01/09-01/11-900, para. 31.

necessary, and therefore, representation by way of the OPCV would be insufficient to satisfy the interests of victims pursuant to Article 68(3) of the Statute.

17. The Legal Representative has failed to provide reasoning as to why the testimonies of Witness 469 and Witness 535 should now be considered 'critical junctures' that require his physical presence in court.
18. As to the need for the Legal Representative to be 'at the seat of the Court in person' so as to make *ex parte* submissions, the Chamber considers that such submission can also be made in writing and does not require his presence in court during the upcoming hearings. Pursuant to Article 68(1) of the Statute, the Chamber encourages the Legal Representative to advance issues that may arise in relation to the security of victims so that they may be addressed as appropriate by the Court.<sup>17</sup>
19. Furthermore, examination of the witnesses with regard to any harm suffered as a result of the alleged crimes could be done through the OPCV representative.<sup>18</sup> As regards the question of examination of particular witnesses, the Chamber reminds the Legal Representative that '[i]f questioning is allowed by the Chamber, it will be conducted by the OPCV acting on behalf of the Common Legal Representative, except where the Chamber has authorised the Common Legal Representative to appear in person'. The Chamber recalls that the applicable procedure for examining witnesses, as delineated in the Decision on the Conduct of Proceedings, makes the examination of witnesses by the OPCV representative, on behalf of the Legal Representative, the rule during day-to-day proceedings.<sup>19</sup>

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<sup>17</sup> Public redacted version of the Decision on the Legal Representative's report on the withdrawal of victims, 14 November 2013, ICC-01/09-01/11-1098-Red2, paras 30, 31 and 37.

<sup>18</sup> The Chamber notes that as regards Witnesses P-487 and P-423, the Office of the Prosecutor examined the witnesses on the harm suffered. The Legal Representative could liaise with the OPCV so that, in the future, such examination is carried out by the OPCV representative, on behalf of the Legal Representative. Transcript of hearing on 23 October 2013, ICC-01/09-01/11-T-55-Conf-ENG ET, pages 39-44; Transcript of hearing on 7 November 2013, ICC-01/09-01/11-T-68-Conf,-ENG ET, pages 38-42.

<sup>19</sup> ICC-01/09-01/11-847-Corr, footnote 19. See also: ICC-01/09-01/11-460, para. 43.

20. The Chamber recalls that pursuant to the Decision on the Conduct of Proceedings, after the examination-in-chief, the parties will be given an opportunity to make oral submissions on the specific request of whether the Legal Representative, through the OPCV representative, may examine the witnesses concerned by the present application.<sup>20</sup> The Chamber will issue an oral ruling thereafter.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

**REJECTS** the Legal Representative's request to attend the session scheduled to commence on 21 November 2013;

**RESERVES** its decision on the request to examine Witnesses 464, 469 and 535; and

**DIRECTS** the Legal Representative, if he wishes to raise on an *ex parte* basis the matter referred to in his Request, to do so by way of a written submission.

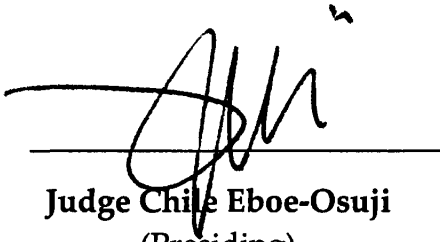
**DIRECTS** the Legal Representative to file a lesser redacted version of his Request no later than 16:00 on 22 November 2013.

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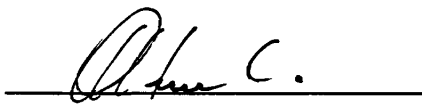
<sup>20</sup> ICC-01/09-01/11-847-Corr, paras 16 and 19. The Chamber notes that the defence team of Mr Sang has already filed written submission on the matter (ICC-01/09-01/11-1101-Conf).



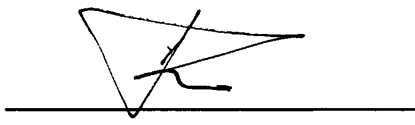
Done in both English and French, the version being authoritative.



**Judge Chile Eboe-Osuji**  
(Presiding)



**Judge Olga Herrera Carbuccia**



**Judge Robert Fremr**

Dated 20 November 2013

At The Hague, The Netherlands