

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 22 November 2013

TRIAL CHAMBER V(A)

Before:

**Judge Chile Eboe-Osuji, Presiding
Judge Olga Herrera Carbuca
Judge Robert Fremr**

SITUATION IN THE REPUBLIC OF KENYA

***IN THE CASE OF
THE PROSECUTOR***

v.

WILLIAM SAMOEI RUTO AND JOSHUA ARAP SANG

Public

Lesser redacted public version of the 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.

Source: Wilfred Nderitu, Common Legal Representative for Victims

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

The Office of the Prosecutor

Fatou Bensouda
Anton Steynberg

Counsel for the Defence

for William Samoei Ruto:

Karim AA Khan, QC, David Hooper, QC
Shyamala Alagendra

For Joshua arap Sang

Joseph Kipchumba Kigen-Katwa
Caroline Buisman

Legal Representatives of Victims

Wilfred Nderitu

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Orchlon Narantsetseg

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Fiona McKay

I. LEGAL BASIS FOR THE FILING

1. In its Decision on Victims' Representation and Participation of 3 October 2012¹, Trial Chamber V stated that:

“The Common Legal Representative will have primary responsibility for being the point of contact for the victims whom he/she represents, to formulate their views and concerns and to appear on their behalf at critical junctures of the trial.”²

2. The question as to what amounts to “critical junctures” was not conclusively decided upon in the said Decision, but was the subject of further discussion in Decision No. 2 on the Conduct of Trial Proceedings (General Directions) of 3 September 2013.³ In the latter Decision, without laying down an exhaustive list of what amounted to “critical junctures”, Trial Chamber V(A) stated that in “other moments at trial” the Common Legal Representative (“the CLR”) would be required to request participation by filing an application to that effect with the Trial Chamber.⁴
3. Prior to the Decision of 3 September 2013⁵, the CLR, through the officer of the Office of the Public Counsel for Victims (“the OPCV”) designated to him, had at a Status Conference held on 19th August 2013 requested from the Trial Chamber for a clarification on the definition of “critical junctures” in which the CLR could make representations in instances beyond opening and closing statements. Drawing upon

¹ ICC-01/09-01/11-460

² Para. 42

³ ICC-01/09-01/11-900

⁴ Para. 29

⁵ ICC-01/09-01/11-900

the submissions made by him and the ensuing Decision, the CLR understands “other moments at trial” to mean such moments during the trial that may turn out to be critical, but which are unforeseeable and as such can only be determined on a case-by-case basis, through the determination of his request for participation addressed to the Trial Chamber.

4. The CLR accordingly seeks leave to appear in court during the forthcoming session scheduled to take place from Thursday, 21 November 2013 until Friday 29 November 2013, and provides the grounds in the succeeding paragraphs of this Request as the basis for such participation.

II. CORE OF THE SUBMISSIONS

i. Emerging Security Concerns of Victims:

5. The CLR has, [REDACTED], informed the [REDACTED] of certain security concerns regarding participating victims residing in Kenya, including direct threats against some of them. Given the stage of the proceedings, the CLR considers it highly desirable to highlight some of these concerns in an *ex parte* hearing (and, to the extent possible, public hearings) before the Trial Chamber, particularly due to their likelihood to impact heavily on continued victim participation in the proceedings. The CLR submits that such a hearing requires him to be at the seat of the Court in person, as the security concerns have been the subject of an ongoing ‘conversation’ between the CLR, his staff in the field and various sections of the Court. In addition to the foregoing, the CLR submits that the officer designated to him by the OPCV has not yet been on mission to the field within the context of this case. This latter

issue is attributed to the architecture of the victim representation system envisaged by the Decision of 3 October 2012⁶.

6. The above two facts necessarily limit the effectiveness and efficiency of the CLR's appearance through the designated officer of the OPCV. In relation to the second issue, the CLR nevertheless wishes to bring it to the attention of the Trial Chamber that there have already been preliminary discussions between him, the designated officer and the Principal Counsel in the OPCV aimed at enhancing the capacity of the designated officer through arrangement of a field mission or field missions.

ii. Desirability of Examining Witnesses in Order to Maintain a 'Meaningful' Rather Than 'Purely Symbolic' Ongoing Participation in the Proceedings

7. It will be recalled that the CLR examined Prosecution Witness P-0536 in person in October 2013. The CLR had earlier also indicated an intention to examine several other Prosecution witnesses who, like P-0536, were dual status witnesses. However, those witnesses later intimated for various reasons that they were no longer willing to testify. As a result of this, the voice of victims has hardly been heard since the giving of evidence by Witness P-0536. This position was fortified by the fact that a number of subsequent Prosecution witnesses were called to testify on matters which, in the opinion of the CLR, did not impact victims' interests.
8. The CLR submits strongly that there is an urgent need to have the voice of victims not only heard, but heard constantly, 'loudly' and in a meaningful manner in the proceedings, particularly in this case which has had an unprecedented number of challenges, which have also been varied in form, but all of which have the potential

⁶ ICC-01/09-01/11-460

of drastically affecting victims' interests to their detriment. These challenges include but are not limited to the security concerns already alluded to above, and other security concerns brought to the Trial Chamber's attention in the past, claims of intimidation and bribery of witnesses (including the case at the High Court of Kenya filed by Mr. Walter Barasa, challenging his arrest and surrender to the Court), the threat by Kenya (and other African states) regarding possible withdrawal from being States Parties to the Rome Statute, the request for deferral of the proceedings, questions regarding excusal of the Accused persons, hearing schedules which run for only a few weeks at a time (and the related question of frequent adjournments), lopsided media coverage domestically, and changing political dynamics in the country affecting perceptions about, and actual level of participation by participating victims on account of their ethnicity or political affiliation. In this regard, the CLR reports that a number of participating victims have been in contact with him complaining about what they perceive to be a low level of participation in the proceedings by them, and expressing unmet expectations.

9. As a result of the re-scheduling of the proceedings from time to time, it has become increasingly difficult for the CLR to reasonably anticipate when his intervention in person may be called for. There is fear that the momentum generated by the examination of Prosecution Witness P-0536 by the CLR in person at the commencement of the trial is in danger of being lost, as victims (as well large sections of the Kenyan public) came to associate the CLR with the face of victims in the case due to the wide media reporting at the time. Given that the forthcoming session is the last one in the case before the Court goes for its end of year recess, this loss of momentum is likely to be aggravated, and victim apathy is likely to increase. This likely loss of momentum, again, would be largely attributable to the current victim representation system which expects the CLR to be largely based in the field

even as the trial progresses. The convergence of such apathy and the renewed security concerns on the part of victims has the potential of compounding and seriously affecting sustained victim participation in the proceedings.

iii. The Testimony of Prosecution Witnesses P-0464, P-0469 and P-0535 Will Significantly Impact Victims' Interests

10. Based on the Prosecutor's summary of the evidence to be adduced by the witnesses she intends to call⁷, it is clear that Prosecution Witnesses P-0469 and P-0535, who are expected to be called during the forthcoming session, are crime-based witnesses who will give evidence that has direct relevance to the charges and which significantly touches on victims' interests. [REDACTED], both Witness P-0469 and Witness P-0535 [REDACTED] whose evidence may also assist the Trial Chamber in arriving at the truth, and which could also be ultimately relevant in relation to the question of [REDACTED]. [REDACTED].
11. With regard to Prosecution Witness P-0464, an expert witness, the historical context of the post-election violence which he is expected to testify on also has a significant impact on the interests of victims, and for that reason the CLR would want to examine him in person.

III. PRAYER SOUGHT

12. Accordingly, the Common Legal Representative respectfully requests the Trial Chamber to authorize him to participate in the forthcoming session of the trial, and to examine Prosecution Witnesses P-0464, P-0469 and P-0535.

Respectfully submitted,

⁷ ICC-01/09-01/11-898-Conf-AnxB

A handwritten signature in purple ink, appearing to read 'Wilfred Nderitu', with a long horizontal flourish extending to the right.

WILFRED NDERITU
Common Legal Representative for Victims

Dated this 22th day of November 2013

At Nairobi, Kenya