

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 27 November 2014

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***

Confidential

**Decision on the Application by the Legal Representative of Victims requesting
Leave to Appear in Court and Question Witness 658**

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

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V(A) (the 'Chamber') 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(2) and (3) of the Rules of Procedure and Evidence (the 'Rules'), renders this Decision on the Application by the Legal Representative of Victims requesting Leave to Appear in Court and Question Witness 658.

I. PROCEDURAL HISTORY AND SUBMISSIONS

1. On 3 October 2012, the Chamber issued the Decision on Victims' Representation and Participation (the 'Participation Decision').¹
2. On 9 August 2013, the Chamber issued the Decision on the Conduct of Trial Proceedings (General Directions) (the 'Decision on the Conduct of Proceedings'),² followed by Decision No. 2 on the Conduct of Trial Proceedings (General Directions) on 3 September 2013 (the 'Second Decision on the Conduct of Proceedings').³
3. On 17 November 2014, the Common Legal Representative of Victims (the 'Legal Representative') filed an application requesting leave to appear in Court and question Witness 658 pursuant to Rule 91(3)(a) of the Rules (the 'Request').⁴
4. On 19 November 2014, the Office of the Prosecutor (the 'Prosecution') filed a response supporting the Request.⁵

¹ Decision, ICC-01/09-01/11-460.

² Decision on the Conduct of Proceedings, ICC-01/09-01/11-847-Corr.

³ Second Decision on the Conduct of Proceedings, ICC-01/09-01/11-900.

⁴ Application by the Legal Representative for Victims requesting Leave to Appear in Court and Question Witness P-658 pursuant to Rule 91 (3) (a), ICC-01/09-01/11-1654-Conf (the 'Request').

⁵ Prosecution's response to the "Application by the Legal Representative for Victims requesting Leave to Appear in Court and Question Witness P-658 pursuant to Rule 91(3)(a)", ICC-01/09-01/11-1668-Conf.

5. On 21 November 2014, the defence team for Mr Sang (the 'Sang Defence') filed a response objecting to the Request in its entirety.⁶ At this time, the defence team for Mr Ruto (the 'Ruto Defence') has not filed a response, but in light of the impending testimony of Witness 658, the Chamber considers it appropriate to decide on the matter without having heard from the Ruto Defence.

II. SUBMISSIONS

6. The Legal Representative requests the Chamber's leave to attend part of the upcoming trial session in person and to question Witness 658 about his participation in the attacks in Eldoret that formed part of the post-election violence in 2007-2008.⁷ In support, he submits that Witness 658's testimony constitutes a critical juncture in the proceedings.⁸ To that effect, the Legal Representative notes that Witness 658 is among the few witnesses that could 'be in a position to testify to the specific aspects of conduct of the direct perpetrators that are relevant to the crimes in question, specifically the shared intention and commonality in purpose',⁹ and, as such, he may be vital to the establishment of the truth concerning the conduct of the direct perpetrators during such attacks.¹⁰
7. The Legal Representative further submits that his attendance at trial and his examination of Witness 658 is in the interest of the victims, namely to know the truth regarding the implementation and intended outcome of the crimes they were subjected to.¹¹ He proposes a series of questions and states that as his questioning would not go to the individual responsibility of the accused, the

⁶ Sang Defence Response to Application by the Legal Representative for Victims requesting Leave to Appear in Court and Question Witness P-658 pursuant to Rule 91(3)(a), ICC-01/09-01/11-1687-Conf.

⁷ Request, ICC-01/09-01/11-1654-Conf, para. 7.

⁸ Request, ICC-01/09-01/11-1654-Conf, para. 12.

⁹ Request, ICC-01/09-01/11-1654-Conf, paras 9-10.

¹⁰ Request, ICC-01/09-01/11-1654-Conf, para. 10.

¹¹ Request, ICC-01/09-01/11-1654-Conf, paras 16-17.

examination will not pose any prejudice to the Defence¹² and would not overlap with the Prosecution's questions.¹³

8. The Prosecution does not contest the attendance and participation by the Legal Representative in the interest of open participation by the victims¹⁴ and, to the extent that it does not overlap with the Prosecution's questioning.¹⁵
9. The Sang Defence notes that the interests of victims are represented by the Office of Public Counsel for Victims (the 'OPCV'). A representative of the OPCV, when granted permission by the Chamber, will ask questions to the witness. The Sang Defence states that the attendance of the Legal Representative in the courtroom is limited to critical junctures involving the victims' interests, including when a witness enjoys dual status, and submits that this is not such an occasion.¹⁶
10. The Sang Defence further submits that, in any event, the Legal Representative has not shown why questioning on behalf of the victims cannot be done through the OPCV.¹⁷ It observes that questions by the Prosecution should address the Legal Representative's concerns, and that adding to those questions would unnecessarily lengthen the proceedings; without advancing the victims' case with respect to reparations.¹⁸

III. ANALYSIS AND CONCLUSIONS

11. The Chamber recalls that ordinarily, in day-to-day proceedings, the OPCV acts on behalf of the Legal Representative before the Chamber.¹⁹ Nonetheless, at critical junctures involving victim's interests, the Legal Representative may

¹² Request, ICC-01/09-01/11-1654-Conf, para. 19.

¹³ Request, ICC-01/09-01/11-1654-Conf, para. 20.

¹⁴ ICC-01/09-01/11-1668-Conf, para. 3.

¹⁵ ICC-01/09-01/11-1668-Conf, para. 4.

¹⁶ ICC-01/09-01/11-1687-Conf, paras 3-4.

¹⁷ ICC-01/09-01/11-1687-Conf, para. 6.

¹⁸ ICC-01/09-01/11-1687-Conf, para. 8.

¹⁹ Participation Decision, ICC-01/09-01/11-460, para. 43.

seek leave to make representations in person by filing a request with the Chamber.²⁰

12. In the Second Decision on the Conduct of Proceedings, the Chamber clarified that the meaning of 'critical junctures' includes the following:

(i) the opening statements, (ii) the testimony of the witnesses who are also victims represented by the Legal Representative, (iii) if any, the presentation of views and concerns by victims in person, (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.²¹

13. The Chamber notes that Witness 658's testimony does not fall within any of the aforementioned categories. However, the Chamber also notes that the categories are not exhaustive and that the Legal Representative may make a specific request to attend any hearing.²² As set out by the Chamber in a previous decision concerning participation and examination by the Legal Representative, '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 necessary'.²³ The Chamber analyses such specific requests on a case-by-case basis, against the backdrop of the subject matter of the hearing and other relevant circumstances.

14. In light of the expected topics to be discussed during, and relevance of, Witness 658's testimony, the Chamber considers that the Legal Representative's presence in court is warranted. Of note, the Chamber recalls that it *proprio motu* ordered Mr Ruto to be present throughout Witness 658's testimony because of the subject matter of the hearing.²⁴ The Chamber has

²⁰ Participation Decision, ICC-01/09-01/11-460, para. 71.

²¹ Second Decision on the Conduct of Proceedings, ICC-01/09-01/11-900, para. 31.

²² Second Decision on the Conduct of Proceedings, ICC-01/09-01/11-900, para. 31.

²³ Decision on Common Legal Representative for Victims' Request to Participate in Hearings and Examine Witnesses, 20 November 2013, ICC-01/09-01/11-1107, para. 16.

²⁴ Transcript of hearing on 7 March 2014, ICC-01/09-01/11-T-101-CONF-ENG ET, page 2, lines 9-17. See the Chamber's 'Reasons for the Decision on Excusal from Presence at Trial under Rule 134*quater*', 18 February 2014, ICC-01/09-01/11-1186, paras 77 and 79.

further taken into account that the Legal Representative has not appeared in court since 25 June 2014. For these reasons, the Chamber uses its discretion to allow the Legal Representative to participate in person and grants the Legal Representative's request to appear in Court.

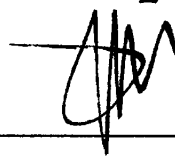
15. The Chamber then turns to the Legal Representative's request to question Witness 658. The Chamber notes that submissions on a request to ask questions to a witness on behalf of the victims are normally made after the Prosecution finished its examination of a witness, after which the Chamber decides on such an application. The Chamber therefore defers its decision on the second part of the request until after the Prosecution will have finished its examination-in-chief of Witness 658.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the Legal Representative's request to attend the hearings throughout Witness 658's testimony;

RESERVES its decision on the request to examine Witness 658.

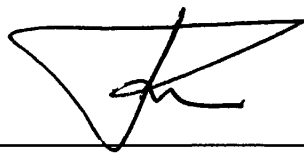
Done in both English and French, the English version being authoritative.



Judge Chile Eboe-Osuji
(Presiding)



Judge Olga Herrera Carbuca



Judge Robert Fremr

Dated 27 November 2014

At The Hague, The Netherlands