Cour Pénale Internationale

International Criminal Court

Original: **English**

No.: **ICC-01/09-01/11**
Date: **24 January 2013**

THE PRESIDENCY

Before: **Judge Sang-Hyun Song, President**
Judge Sanji Mmasenono Monagen, First Vice-President
Judge Cuno Tarfusser, Second Vice-President

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

THE PROSECUTOR v.
WILLIAM SAMOEI RUTO AND JOSHUA ARAP SANG

Public

Joint Defence Application for a Change of Place where the Court Shall Sit for Trial

Source: **Defence for Mr. William Samoei Ruto**

Defence for Mr. Joshua Arap Sang

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

The Office of the Prosecutor
Fatou Bensouda, Prosecutor
Cynthia Tai, Trial Lawyer

Counsel for William Ruto
David Hooper QC
Kioko Kilukumi Musau

Counsel for Joshua Sang
Joseph Kipchumba Kigen-Katwa
Silas Chekera

Legal Representatives of the Victims
Wilfred Nderitu

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants (Participation/Reparation)

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Silvana Arbia

Counsel Support Section

Deputy Registrar
Didier Daniel Preira

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other
Trial Chamber V

I. INTRODUCTION

1. The defence for Mr. William Samoei Ruto and the defence for Mr. Joshua Arap Sang ("the defence") hereby apply jointly, pursuant to Articles 3(3) and 62 of the Rome Statute, and Rule 100 of the Rules of Procedure and Evidence ("Rules"), for a change of venue for the anticipated trial in this case. Specifically, the defence requests the trial be moved from the seat of the court in The Hague, The Netherlands, to either the Republic of Kenya ("Kenya"), or to the United Republic of Tanzania ("Tanzania"), whichever is more convenient.

2. In this respect, the defence joins and supports the application by the defence for Mr. Francis Kirimi Muthaura ("the Muthaura defence") on the same issue.[1]

II. PROCEDURAL HISTORY

3. On 26 November 2009, the Prosecutor filed a request for authorization to commence an investigation into the situation in the Republic of Kenya,[2] and on 31 March 2010, Pre-Trial Chamber II ("Pre-Trial Chamber") authorized, by majority, commencement of the investigation in relation to crimes against humanity within the jurisdiction of the Court.[3]

4. On 8 March 2011, the Pre-Trial Chamber, by majority decision, issued summonses to appear to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang ("the Suspects") on the basis that there were reasonable grounds to believe that the Suspects were criminally responsible for the crimes against humanity of murder, forcible transfer of population and persecution.[4]

5. Following the issuance the Summonses, on 7 April 2011, the Suspects voluntarily made an initial appearance before the Court. At the initial appearance, the

[1] *Prosecutor v. Muthaura and Kenyatta,* ICC-01/09-02/11-551, Defence Application for a change of place where the Court shall sit for Trial, 3 December 2012.
[2] *Situation in Kenya,* ICC-01/09-3 and its annexes.
[3] *Situation in Kenya,* ICC-01/09-19-Corr, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010.
[4] *Situation in Kenya,* ICC-01/09-30-Red.

Pre-Trial Chamber set the date for the start of the confirmation of charges hearing for 1 September 2011.[5]

6. Pending the confirmation of charges hearing, on 3 June 2011, the Pre-Trial Chamber, of its own motion, issued the *Decision Requesting Observations on the Place of the Proceedings for the Purposes of the Confirmation of Charges Hearing*, requesting the views of the parties in relation to the "desirability and feasibility of conducting the confirmation of charges hearing on the territory of the Republic of Kenya".[6]

7. On 13 June 2011, the defence submitted its comments.[7] The defence observed that, absent indications from the court as to why it was desirable to relocate the hearing, and absent the views of the government of Kenya on the matter, it was precluded from making any meaningful submissions on the issue.[8]

8. The defence went on to oppose the proposed change of venue, arguing, among other things, that it was "concerned that the temporary relocation of the case for isolated components of the case [would] cause disruption in Defence preparation, and impede the ability of the Defence to effectively participate in the confirmation hearing".[9] Moreover, that it had adapted itself, in terms of systems and the recruitment of staff, to the hearings being conducted in The Hague.[10] The defence expressed further concerns that conducting the hearing in Kenya at that time, when many Kenyans were still unfamiliar with the ICC processes, would stir up emotions, and "could possibly be taken out of context and could present a distorted and unbalanced perspective of facts and events".[11]

9. The confirmation of charges hearing was subsequently held in The Hague, between 1 September and 8 September 2011. On 23 January 2012, the Pre-Trial Chamber issued its *Decision on the Confirmation of Charges*, confirming, by majority decision,

[5] *Prosecutor v. Ruto, Kosgey and Sang,* ICC-01/09-0l/11-T-1-ENG, 7 April 2011, pp. 9, 11-15, 17.
[6] *Prosecutor v. Ruto, Kosgey and Sang*, ICC-01/09-01/11-106, 3 June 2011.
[7] *Prosecutor v. Ruto, Kosgey and Sang*, ICC-01/09-01/11-122, Defence Observations on the Place of the Proceedings for the Purposes of the Confirmation of Charges Hearing, 13 June 2011.
[8] *Ibid*, paras 5 and 6.
[9] *Ibid*, para. 9.
[10] *Ibid*, para. 11.
[11] *Ibid*, paras 14 *et seq*.

some of the charges against William Samoei Ruto ("Ruto") and Joshua Arap Sang ("Sang").[12]

10. Following the confirmation proceedings, the Presidency, on 29 March 2012, referred the case against Ruto and Sang to Trial Chamber V ("Trial Chamber") for trial.[13]

11. Meanwhile, following confirmation proceedings in the case of the *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*,[14] ("Kenya 2 case") and a similar referral of that case to trial,[15] the Trial Chamber issued respective Orders scheduling status conferences in the Kenya 2 case, and the Kenya 1 case. The Chamber also invited the parties to file any written submissions on the proposed agenda by 28 May 2012.[16]

12. The parties duly complied. On 28 May 2012, the defence teams for Mr. Kenyatta and Mr. Muthaura filed their respective submissions on the agenda for the status conference in their case.[17] In its submissions, the Kenyatta defence requested that the trial be held in Kenya, "for reasons of judicial economy and to ensure that the judicial process takes place within the territory affected".[18]

13. The Muthaura defence, on the other hand, requested the Pre-Trial Chamber to consider the possibility of holding the trial in Kenya or, alternatively, in Arusha, Tanzania, at the premises of the International Criminal Tribunal for Rwanda,[19] arguing that the proposed change of venue would reduce the disruptions and

[12] *Prosecutor v. Ruto, Kosgey and Sang,* ICC-01/09-01/11-373, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012.
[13] *Prosecutor v. Ruto and Sang,* ICC-01/09-01/11-406, Decision constituting Trial Chamber V and referring to it the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang,* 29 March 2012.
[14] *Prosecutor v. Muthaura, Kenyatta and Ali,* ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012.
[15] *Prosecutor v. Muthaura and Kenyatta,* ICC-01/09-02/11-414, Decision referring the case of *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* to Trial Chamber V, 29 March 2012.
[16] *Prosecutor v. Ruto and Sang,* ICC-01/09-02/11-422, Scheduling Order and amended agenda for the status conference, 6 June 2012.
[17] *Prosecutor v. Muthaura and Kenyatta,* ICC-01/09-02/11-427, Defence Submissions on the status conference agenda items contained in the Trial Chamber's "Order scheduling a status conference" of 14 May 2012, 28 May 2012; ICC-01/09-02/11-429, Defence for Uhuru Muigai Kenyatta Submissions on Status Conference Agenda In Response to Trial Chamber Order dated 14 May 2012 (ICC-01/09-02/11-422), 28 May 2012.
[18] ICC-01/09-02/11-429, para. 24.
[19] ICC-01/09-02/11-427, para. 40.

strain that the trial would otherwise place on the accused.[20] Further, that the relocation could also reduce the costs relating to witness travel, reduce disruption to the victims, and ensure that the judicial process remains in, or in proximity to, the territory concerned.[21]

14. On 7 November 2012, the Trial Chamber issued the *Decision on the defence request to change the place of the proceedings*.[22] The Chamber held that, in accordance with Rule 100 of the Rules, any party wishing to change the place of trial must submit a formal application to the Presidency, which must then seek the views of the relevant Chamber and consult the State where the Court may sit.[23]

15. The Trial Chamber went on to reject the Muthaura defence and Kenyatta defence requests, without prejudice to their respective rights to file an application with the Presidency pursuant to Rule 100 of the Rules.[24]

16. Following this decision, on 3 December 2012, the Muthaura defence filed with the Presidency, the *Defence Application for a change of place where the Court shall sit for Trial* ("Muthaura Application for Change of Venue"),[25] in which it advanced the same case it had made before the Pre-Trial Chamber and the Trial Chamber.

17. On 21 December 2012, the Presidency issued its *Decision on 'Defence Application for a change of place where the Court shall sit for Trial'*[26] ("the Presidency Decision on Change of Venue"). In this decision, the Presidency, in essence, ordered "the Chamber to seek the views of the parties on the application by the Defence for Mr. Muthaura, before deciding whether to recommend the Presidency to consult the relevant national authorities".[27]

18. On 17 January 2013, the Trial Chamber requested the Prosecutor, the Kenyatta defence, the Legal Representative of the Victims in the Kenya 2 case, and the

[20] *Ibid.*
[21] *Ibid,* para. 41.
[22] *Prosecutor v. Muthaura and Kenyatta,* ICC-01/09-02/11-522, Decision on the defence request to change the place of the proceedings, 7 November 2012.
[23] *Ibid*, para. 5.
[24] ICC-01/09-02/11-522, p. 5
[25] ICC-01/09-02/11-551.
[26] ICC-01/09-02/11-581.
[27] Ibid, para. 5.

Registry to submit observations on the possibility of the trial being held in Kenya, or alternatively in Arusha, Tanzania, including on questions of logistics and security, no later than 7 February 2013.[28]

III. APPLICABLE LAW

19. The Articles 3 and 62 of the Rome Statute, and Rule 100 of the Rules, provide for the official seat of the Court and the relocation of court proceedings to places other than the official seat.

20. Article 3(3) of the Statute provides:

> 1. The seat of the Court shall be established at The Hague in the Netherlands ("the host State").
>
> 2. […]
>
> 3. The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute.

21. Article 62 of the Statute provides that, unless otherwise decided, the place of the trial shall be the seat of the Court.

22. Rule 100 of the Rules sets out in more detail the procedure for a change of venue. It reads:

> 1. In a particular case, where the Court considers that it would be in the interests of justice, it may decide to sit in a State other than the host State.
>
> 2. 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.
>
> 3. The Presidency shall consult the State where the Court intends to sit. If that State agrees that the Court can sit in that State, then the decision to sit in a State other than the host State shall be taken by the judges, in plenary session, by a two-thirds majority.

[28] *Prosecutor v. Muthaura and Kenyatta,* ICC-01/09-02/11-602, Order requesting observations in relation to the 'Defence Application for change of place where the Court shall sit for Trial', 17 January 2013, paras 6-7.

IV. SUBMISSIONS

23. The defence applies for a change of place where the Court shall sit for trial, pursuant to Articles 3(3) and 62 of the Rome Statute, and Rule 100 of the Rules. In making this application, the defence is aware of the Presidency's *Decision on Change of Venue* in the Kenya 2 case, and the order for and by the Trial Chamber to seek the views of the parties.[29] Though the defence for Uhuru Kenyatta, the Prosecutor, the Registry and the Legal Representative for Victims in the Kenya 2 case have all been solicited for their views, the Trial Chamber has not sought the views of any party in the Kenya 1 case. Nevertheless, the two cases are inextricably linked in terms of their listing and it would be impractical to have the two trials heard in different places as far apart as The Hague and East Africa.

24. In any event, the defence now makes this application to the Presidency for a change of place of trial. The defence, mindful of the President's recent order in the Muthaura case, is ready to make further views known to the Chamber if the Chamber seeks them or is requested by the Presidency to seek them.

25. The defence reiterates that a change of venue from the seat of the court in The Hague to either Kenya or Tanzania is in the respective interests of all the parties concerned and is desirable in the interests of justice when all the necessary factors are considered.

26. From a defence perspective, a change of venue in this case is desirable in that conducting the trial in either Kenya or Tanzania would cause minimum disruption to the private and public lives of the defendants. The right of a defendant standing trial before a criminal court to private and family life, and to public and political life, is well entrenched in international human rights treaties and conventions.[30] The court must balance the need for a trial with their universally acknowledged

[29] ICC-01/09-02/11-581.
[30] See for instance, Article 5 of the Charter on Human Rights and Freedoms and Article 8 of the European Convention on Human Rights. Also see, *Prosecutor v Haradinaj et al*, No. IT-04-84-PT, *Decision on Defence Motion on Behalf of Ramush Haradinaj to Request Re-Assessment of Conditions of Provisional Release Granted 6 June 2005* (12 October 2005), on the right of persons under provisional release to a public and political life.

right to private and family life, and public life. Moving the trial to Kenya or Tanzania strikes this delicate balance.

27. Conducting the trial in The Hague would entail the defendants (three of whom are paying for their own defence) spending extended periods of time away from home and family and would cause undue disruption to their private and family lives, as well as to their public lives. It would mean taking the defendants away from the security and comfort of their homes, social network and support of friends and family, not to mention their work and other vocations, all of which would be deleterious to their physical, psychological and economic well being, and to that of their respective families. In the case of Ruto who holds public office, and as a matter of public record, is aspiring for higher office, it would also mean taking him away from exercising his public duty. A change of venue, on the other hand, would mitigate those disruptions and costs to the accused without detracting from the smooth running of the trial. There is a viable, alternative option, and that is to conduct the trial either in Kenya or Tanzania.

28. Besides, the conduct of the trial in Tanzania or Kenya would facilitate both prosecution and defence investigations, in particular during the course of trial, as they prepare for cross-examination, react to late disclosures, etc. There would be great benefit to the teams being closer to the locations of the alleged meetings and incidents. In addition, it could facilitate or even encourage a site visit by the Trial Chamber if deemed necessary, as in the *Katanga and Ngudjolo* case.[31]

29. The defence would like to highlight that while it opposed the idea of conducting the confirmation hearings in Kenya, preferring that the proceedings be held in The Hague at the seat of the Court,[32] the situation is now very different. The entire confirmation hearing was scheduled to last less than a month and the defendants could afford to be away their families and work commitments for that relatively short period of time. However, based on the indications by the Prosecution of the

[31] *Prosecutor v. Katanga and Ngudjolo,* ICC-01/04-01/07-3203-tENG, Decision on a judicial site visit to the Democratic Republic of the Congo, 27 January 2012, and ICC-01/04-01/07-3234, Enregistrement au dossier du procès-verbal du transport judiciaire en République démocratique du Congo, 6 February 2012.
[32] Para. 7.

number of witnesses it intends to call at trial and the breadth of its case,[33] and from the defence's own assessment of its defence case, the trial stage could run into years. The defendants cannot afford such a sustained disruption to their lives.

30. Further, the defence submits that a change of venue is also in the best interests of the witnesses. Not only would they not have to travel such long distances (Arusha being only 5 hours or so from Nairobi and with good flight connections) and be away from home for long periods, they would also be testifying in familiar human and physical settings. This in turn reduces or averts the physical and psychological exertions of travel and testifying in an unfamiliar environment. The Trial Chamber has recognized the difficulties witnesses face in testifying before a foreign court.[34]

31. Moreover, conducting the trial in Kenya or Tanzania would also occasion minimal disruptions to the private and family, and public lives of the witnesses as well as their work commitments. To the extent that this argument carries less weight for the prosecution, which might have relocated, or be attempting to relocate, some of its witnesses abroad, it applies with full force to defence witnesses, almost all of whom, it is anticipated, will be located in Kenya.

32. There are also other far reaching and lasting benefits. Having the trial in East Africa should give all the parties, and especially the Court, a better understanding of the geographical and social context surrounding the case. It is well documented that conducting trials in the region where such crimes were allegedly committed greatly assists entrenching the legacy of the court. In the present context, it should give the people of Kenya a sense of ownership of the judicial process and should render the proceedings more directly relevant. As argued in the Muthaura *Application for Change of Venue*, it would afford the people of Kenya and perhaps the entire region, if not the Continent, the opportunity to observe the international justice system working in Africa, and indeed in the very country or region most affected by the case.[35] It gives Kenyans the opportunity to be fully appraised of the proceedings in a manner that the best efforts of Court's outreach programmes

[33] *Prosecutor v. Ruto and Sang,* ICC-01/09-01/11-540, Prosecution's Provision on materials pursuant to Decision ICC-01/09-01/11-440, 9 January 2013.
[34] *Prosecutor v. Ruto and Sang,* ICC-01/09-01/11-524, Decision on Witness Preparation, 2 January 2013, para 37; Partially Dissenting Opinion of Judge Eboe-Osuji, paras 8 and 9.
[35] ICC-01/09-02/11-522, para. 16.

could never match. In this manner, it would also be giving full effect to the old adage that justice must not only be done but must be seen to be done.

33. Indeed, observing a properly functional judicial system of the nature of the International Criminal Court *in situ* would also accelerate the peace and reconciliation process in Kenya, and serve as an example both locally and for Africa generally. Moreover, it would give full meaning to the defendants' right to a public trial, as it would be much more accessible to the people.

34. Other international criminal tribunals have been faced with the question of change of venue, and their observations are persuasive. In deciding whether to move the trial of the former Liberian President, Charles Taylor, from seat of the Special Court for Sierra Leone in Freetown, Sierra Leone, to The Hague, for security reasons, the President of the Court acknowledged that *in situ* trials "allow[ed] better access for the public, local media, and victims and witnesses", such that despite his confidence in the Outreach and Press and Public Affairs Sections of the Court to communicate meaningfully to people in the country and sub-region about the court processes, "some of this direct and personal public access [resulting from *in situ* trials] would be sacrificed".[36]

35. The benefits of *in situ* trials, the defence notes, also find favour among reputable international non-governmental human rights organizations such as Human Rights Watch.[37]

36. With respect to the other practical and logistical considerations relevant to the determination of a change of venue, the defence concurs with the arguments in the Muthaura *Application for Change of Venue*, namely that both Kenya and Tanzania have fairly advanced infrastructure and public amenities, including international travel and communication systems to make the intended relocation feasible.[38] Tanzania in particular has readily available facilities having hosted the International Criminal Tribunal for Rwanda for nearly two decades.

[36] *Prosecutor v. Taylor,* SCSL-03-01-PT-108, President's Order Changing Venue of the Proceedings, 19 June 2006, para. 7.
[37] See, http://www.hrw.org/en/news/2011/04/06/icc-qa-first-appearance-kenya-suspects#_Toc289785922.
[38] ICC-01/09-02/11-522, para. 19.

37. Moreover, the government of Tanzania has reportedly shown an interest in hosting proceedings of the International Criminal Court in relation to the Kenyan cases in the past.[39]

V. RELIEF REQUESTED

38. The defence requests the Presidency to ask the Trial Chamber to receive observations from the Prosecutor, the Legal Representative of the Victims and, in particular, the Registry, on the possibility of the trial being held in Kenya, or alternatively in Arusha, Tanzania.

39. Ultimately, and for all the foregoing reasons, and subject any necessary consultations under Rule 100(3), the defence requests the Presidency, pursuant Rule 100(2), to change the place where the Court shall sit for trial in this case to Kenya or to Tanzania, whichever is more convenient when all the necessary factors are considered.

David Hooper, QC
On behalf of William Samoei Ruto
Dated this 24th day of January 2013
In London

Joseph Kipchumba Kigen-Katwa
On behalf of Joshua Arap Sang
Dated this 24th day of January 2013
In Nairobi

[39] http://www.hirondellenews.com/content/view/12451/289/