

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **22 February 2013**

**TRIAL CHAMBER V**

**Before:**

**Judge Kuniko Ozaki, Presiding  
Judge Christine Van den Wyngaert  
Judge Chile Eboe-Osuji**

**SITUATION IN THE REPUBLIC OF KENYA**

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

***v.***

***WILLIAM SAMOEI RUTO AND JOSHUA ARAP SANG***

**Public**

**Common Legal Representative for Victims' Observations in Relation to the "Joint  
Defence Application for Change of Place Where the Court Shall Sit for Trial"**

**Source: Wilfred Nderitu, 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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**Legal Representatives of Victims**

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The Government of the Republic of Kenya;  
The Government of the United Republic  
of Tanzania

**Amicus Curiae**

**REGISTRY**

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International Criminal Tribunal for  
Rwanda

## I. PROCEDURAL HISTORY

1. On 1<sup>st</sup> February, 2013 Trial Chamber V made an Order requesting observations in relation to the “Joint Defence Application for change of place where the Court Shall Sit for Trial” from the Prosecutor, the Registry and the Legal Representatives of the Victims no later than 22 February, 2013 and invited the Kenyan and Tanzanian authorities and the ICTR to submit observations on this matter no later than 8<sup>th</sup> March, 2013.<sup>1</sup>

## II. LEGAL BASIS OF THE FILING AND AN OVERVIEW OF VICTIMS’ VIEWS

2. Pursuant to the above, the Common Legal Representative for the Victims (Victims’ Representative) respectfully makes the following submissions on specific issues regarding the application for change of place for the holding of the trial, including observations on logistics and security.
3. During the Victims’ Representative field mission conducted between 4<sup>th</sup> and 8<sup>th</sup> February 2013, the Victims’ Representative met with 94 victims admitted to participate in the trial and sought their views on whether the trials should be held at The Hague, Arusha - Tanzania or Kenya. 50 participants gave their views whilst the rest choose to abstain or were not ready to give their views. It was the opinion of the Victims’ Representative that some of views expressed may have carried an element of subjectivity in nature, and that some of the reasons for those views may not be established by or founded upon law, and cannot therefore, *stricto sensu*, be categorized as “legal”. Nevertheless, the Victims’ Representative considered it necessary to set out the views and concerns and the reasons therefor as faithfully as possible, in order to fully and clearly demonstrate to the Trial Chamber the victims’ concerns with regard to their security and wellbeing.

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<sup>1</sup> ICC-01/09-01/11-580

4. By way of methodology of obtaining the victims' views and concerns, the Victims' Representative firstly informed the groups of victims with whom he met about the Trial Chamber's Order, in particular the three venues (The Hague, Arusha, Tanzania, and Kenya) that were the focus of the Order as possible options for the trial. The Victims' Representative then gave to the victims an explanation of the issues (pros and cons) regarding each of the three locations, including victim and witness security, logistics and delay in commencement of the trial. In order not to influence the responses, it was clearly spelt out that the issues were non-exhaustive, and the victims were also given the opportunity to freely give their views irrespective of whether, in the Victims' Representative's opinion, such views were strictly considered by the Victims' representative as legitimate for the purpose of determining the choice of location.
  
5. The results of the victims' views are illustrated in Annex I, which demonstrates that 82% of the victims considered that the trials should continue to be held at The Hague, whilst 16% considered that the trials should be held in Arusha, Tanzania and 2% considered that the trials should be held in Kenya. Annex II is the breakdown of reasons given by victims who presented their views on their preferred venue for the trial. It is the majority view of the victims participating in this trial that the location of the trial should remain at The Hague. The reasons presented by the victims included those set out below.

### **III. CORE OF THE SUBMISSIONS**

#### **A. Issues Against the Desirability of Holding Trials at Arusha, Tanzania, or in Kenya:**

##### **(i) Security**

6. Whilst the victims who preferred to have the trial held at The Hague understood that there could be greater victim participation and a more engaged citizenry if the location of the trial is moved to Tanzania or Kenya, it was their view that it would upset the

fragile atmosphere of peace and co-existence that has begun to develop in the areas affected by the 2007/8 post-election violence. In their view, conducting proceedings of the Court at a location within East Africa was in the first instance likely to create tension between victims and perpetrator communities living together which could cause victimisation to certain victims. One of the respondents who strongly preferred that the hearings be conducted at The Hague captured his disapproval of a venue within the region by remarking that if the trial was relocated to Kenya, there was the possibility that accused persons or their sympathisers could easily mobilise “truck loads” of supporters to attend the proceedings in Court. Such actions, he feared, would likely intimidate witnesses and victims. This view was in allusion to a common phenomenon in Kenya in the 1990s and early 2000s, where powerful individuals charged with criminal offences would mobilize scores of supporters ethnically or politically affiliated to them to attend court, in the hope that they would intimidate the presiding officer of the court to make decisions favourable to the person charged.

7. Many of the victims in this category explained that they continue to live in the perpetrator communities, with some of the actual perpetrators of violence being known to the victims. They explained that there is a “sense of security” that comes from having the trial heard as far as possible from Kenya specifically, that the geographical distance of the Court would ensure that justice is carried out, without impacting on their day to day activities in their communities. In addition, some victims expressed security concerns between the coincidence between the election date and the start of the trial dates as was expressed by the Victims’ Representative at the Status Conference.<sup>2</sup>

**(ii) Need to Ensure Deterrence of Future Violations**

8. It was felt by some of the victims that a trial held at The Hague was a form of endorsement of international criminal justice and acted as an effective deterrent against

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<sup>2</sup> Status Conference held on 14 February, 2013

future perpetration of crimes against humanity. They viewed the issue from the perspective that the holding of trials at the seat of the Court would not only bring stability and normalcy to Kenya, but also deter commission of similar crimes in future, as the Court would act like a watchdog and thus ensure non-repetition of such crimes. They therefore expressed the view and concern that if the venue of the trial were moved, this could upset such stability and lessen the deterrence of future violations. A victim in this category submitted that it was foreseeable that the transfer of the trial to Kenya could be used by local politicians to gain political mileage, and thus distract or water down the addressing of critical issues of justice and other needs of the victims both before the Court and through domestic mechanisms.

**(iii) Possible Interference with the Court Process**

9. Some victims expressed the view that if the venue for the trial were to be moved to a location within East Africa, in particular Kenya, the ability of persons to interfere with various court processes would increase. The Court being situated far way effectively insulates it from any form of coercion or interference. The Victims' Representative reports that a good number of the victims raised concerns that one of the accused in the case seeks an elective position to high office in government with access to state machinery and networks which could be used to frustrate, undermine or curtail the court process. It was further expressed that there could be inference with the judicial officers involved in the trial, evidence, witnesses and testifying victims if the seat of the Court was in East Africa and specifically in Kenya.

**iv. Delay**

10. The Victims' Representative drew the attention of the victims to the fact that should the location of the trial be moved, the start of the trials would have to be delayed to allow the court transfer personnel, documents and equipment to the new location and to also make adequate security and other logistical arrangements. Victims citing delay as their reason for objecting to a change of venue were of the opinion that there had already

been considerable delay in the start of the proceedings. In this regard, the Victims' Representative also wish to report that a number of victims have passed away since the occurrence of post-election violence, and also to underscore the deplorable living conditions that many other victims have had to endure over the last 5 years or so.

**B. Issues Relating to Desirability of Conducting the Trials at Arusha, Tanzania, or in Kenya:**

11. A small number of victims (16%) favoured the trial to be moved to Arusha, Tanzania. They considered that the proximity of the Court would allow them increased participation as they could occasionally attend Court sittings whereas, if the trial was held at The Hague, they would be unable to attend court proceedings due to the prohibitive costs of travel and accommodation. These victims also considered that the Court had been the subject of negative perceptions that it harboured an imperialist agenda, rather than being seen as an institution that sought to achieve justice for all. These victims felt that if the trial were to be held at Arusha, both the Court and the trial would be seen to bear an African identity. This group of victims also felt that an African presence would also increase the level of assimilation and dissemination of information about the Court, which would also be much more readily and regularly accessible to members of the public generally, and to the victim community specifically.
  
12. As indicated above, only 2% of the victims (one respondent) expressed views in favour of the trial being conducted at a location within Kenya. The respondent was of the opinion that this was only in this way that the whole truth about the circumstances leading to their status as victims would be established, and that it was only in this way that there would be true national healing.

**C. Victims' Representative's Observations**

- i. **"A Proper Assessment of the Interests of Justice":**

13. The Victims' Representative wishes to also make observations regarding the issue at hand in addition to the views and concerns of the victims themselves, which he has presented for consideration by the Court in the earlier part of these submissions. The Victims' Representative acknowledges the inevitable variance that may exist between views and concerns raised by the victims and those that he sets out below, but respectfully submits that his views be considered alongside those of the victims, in order that the Court may make "a proper assessment of the interests of justice"<sup>3</sup>.

**ii. "Meaningful" as Opposed to "Merely Symbolic" Representation of Victims:**

14. It is the Victims' Representative that a change of the place for trial to Arusha, Tanzania, would greatly mitigate the challenges faced by him in attempting to facilitate a meaningful participation by, and representation of, victims within an extremely limited budget, particularly having regard to the number of victims he represents, and the number of field visits expected to be made by him and his Team in order to ensure effective representation. A venue closer to the Victims' Representative's work station than the seat of the Court at The Hague would enable the Victims' Representative attend such junctures of the proceedings as Status Conferences in person.

15. As a case in point is the Victims' Representative inability to travel to the seat of the Court for the Status Conference held on 14 February, 2013, a situation which undoubtedly could have been different were the proceedings being conducted, say, at Arusha. The direct representation of the victims through the Victims' Representative, as opposed to representation by proxy through the Office of the Public Counsel for Victims (OPCV) would then be enhanced, and the value addition of such representation cannot be gainsaid. As submitted during the Status Conference, the new representation arrangement between the Victims' Representative and the OPCV which is, so to speak,

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<sup>3</sup> ICC-01/09-01/11-580, Order requesting observations in relation to the "Joint Defence Application for change of place where the Court Shall Sit for Trial", paragraph 4.



work-in-progress, presents unique and unprecedented challenges which have a serious adverse impact on Counsel-Client relationship, trust, communication and expectations. If the place of trial is maintained at The Hague, these challenges will inevitably have to be surmounted experimentally, and at the expense of effective and meaningful participation and representation of the victims.

16. Recalling Trial Chamber V's "Decision Appointing a Common Legal Representative of Victims" of 23 November, 2012 in which the Chamber expressed its view that victims should benefit from the highest quality of representation possibly including making such appearances in the courtroom that are necessary in the circumstances,<sup>4</sup> the Victims' Representative considers that a change in the location of the venue to East Africa, where the Victims and the Victims' Representative reside, would enable most meaningful participation for victims as opposed to purely symbolic participation as both the Victims and the Victims' Representative could regularly attend court proceedings where victim's interests are affected.

**iii. Access to Justice and "the Interests of Justice":**

17. With regard to the principles of victim participation and representation, it is submitted that the demands of affected communities in general, and the views and concerns of the victims of the case in particular (as the most affected and interested participants in the proceedings), will be better served through holding the trial at a venue closer to where the crimes were committed, from where the victims can follow the proceedings more closely. Victims in particular, and the public in general, will want to see for themselves how the Court interprets laws, determines rights of victims and the accused, and punishes those bearing the greatest responsibility for gross human rights violations. Challenges in maintaining accessibility to the proceedings for victims and the public will be kept to the barest minimum, as will costs related to recording and televising of

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<sup>4</sup> ICC-01/09-01/11-479

the proceedings and preparation of audio and video summaries by local broadcasting stations.

18. It is a fundamental principle of criminal procedure that crimes should be tried at the locality where they were committed. The invocation of complementarity provisions is an exception to this principle, when the national jurisdiction is unwilling or unable to prosecute crimes committed within its territory.<sup>5</sup> It is submitted that even where the Court exercises jurisdiction in pursuance of complementarity provisions, this does not dispense with the need to conduct a trial as close as possible to the locality where crimes were committed, if this is in the interests of justice. Such interests will include location of witnesses or evidence, travel costs for victims and witnesses and judicial expenditure, which include the cost of visiting the *loci in quo*, if necessary.

**iv. Formation of Linkages with Other Victim Support Providers:**

19. The criminal justice system is usually limited to providing retributive justice for persons held criminally responsible for gross human rights violations. The Rome Statute through the Trust Fund for Victims provides a unique ability to provide other forms of justice to victims of violations. However, the efforts carried out by the Court must be complemented by other stakeholders that can enhance other forms of justice and assistance to victims such as compensation, psychosocial support and developing sustainable livelihoods for victims. With the location of the Court being in Arusha there is likely to be increased engagement with the Court by organizations that can provide the above mentioned support. Such linkages are important as the mandate of the Common Legal Representative does not go beyond legal representation, yet there are needs beyond legal participation and representation that victims are in need of.

**v. Creation of Awareness and Support for the Court:**

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<sup>5</sup> Article 17 (1) of the Rome Statute of the International Criminal Court  
No. ICC-01/09-01/11

20. There is need for the Court to be innovative in the implementation of measures that ensure effective addressing of impunity, and prosecution of international crimes through adoption of alternative means that bring justice closer to the people living where or close to where crimes were committed. This in turn results in the creation of better awareness of, and support for, the Court's processes by government, non-state actors, the legal profession, the press, and the public, including victims' organizations. Holding the trial closer to where the crimes were committed allows for close monitoring of the legal process by legal-sector organizations. In the instant case, it is submitted that this will have the likely effect of further dispelling the notion that the Court is a 'Western imposition' on African states.

**vi. Impetus for the Proposed International Crimes Division of the High Court of Kenya**

21. The Court is an international institution that "shall be complementary to national criminal jurisdictions"<sup>6</sup>. Unlike the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), the Court does not have primary jurisdiction over national authorities but plays a subsidiary role and supplements the domestic investigation and prosecution of the most serious crimes of international concern.<sup>7</sup> The Kenyan judiciary is in the process of establishing an International Crimes Division (ICD) of the High Court which shall try cases stemming from the 2007 post-election violence as well as other crimes under international law. If the trial is moved closer to Kenya, it will generate impetus towards creating a credible institution with the capacity to prosecute other post-election violations that are not being handled by the Court. The bench of the ICD and its supporting institutions such as the Office of the Director of Public Prosecutions could

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<sup>6</sup> The Preamble and Article 1 of the Rome Statute of the International Criminal Court

<sup>7</sup> Benzing Markus (2003) *The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity* Max Planck Yearbook of United National Law, (Netherlands) Koninklijke Brill N.V Vol. 7 p.591 - 623

potentially benefit from skills exchange programmes and technical assistance from the Court. The Victims' Representative submits that an efficient and effective ICD in place will be instrumental in achieving the Court's complementarity principle in trying other perpetrators of the post-election violence who are not currently before the Court.

**vii. Building and Developing Capacity of Regional Institutions:**

22. Regarding developing regional institutional capacity, the Victims' Representative underscores, from the outset, the need for credible institutions with capacity to effectively address impunity. Having the Court sitting for trial within the region, closer to where the crimes were committed, will act as a model and stimulus for the establishment of such institutions. The Victims' Representative submits that a venue within the region will therefore better "guarantee lasting respect for and the enforcement of international justice"<sup>8</sup> and thus serve one of the more important components of the broader ends of justice: sustainable justice. This increased institutional capacity in the region therefore has desirable longer-term results for peace and reconciliation, the rule of law, and the entire justice system in the region. It is worth recalling that in Eastern and Central Africa, several countries have been the subject of international criminal justice, including Kenya, Uganda, the Democratic Republic of Congo, Rwanda, Central African Republic, the Sudan and Chad.

23. The Victims' Representative submits that justice requirements require the taking of a broader view of the interests of justice, which transcends immediate justice requirements of the case of *The Prosecutor –versus- William Samoei Ruto and Joshua arap Sang*. Guaranteeing lasting respect for, and the enforcement of, international justice does from one perspective go beyond the *Ruto and Sang* case, yet, on the other hand, the Court is only able to achieve such respect and enforcement of international justice

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<sup>8</sup> Preamble, Rome Statute of the International Criminal Court

through adoption of mechanisms and procedures that must find life in individual cases involving accused persons before the Court.

24. Two weeks ago (on 8<sup>th</sup> February 2013), the “Extraordinary African Chambers” was inaugurated within Senegal’s judicial system, to investigate and prosecute crimes committed during the presidency of Hissène Habré in Chad between 1982 and 1990. This is the first time that a former African leader is being tried within the territory and judicial system of another African country. Victims will be allowed to participate in those proceedings. It is the Victims’ Representative submission that although the present circumstances envisage a situation where the trial will be conducted within the Court’s judicial system, holding the trial on African soil *per se* will be a precursor to, and have a knock-on effect on, the establishment within the region of judicial institutions similar to the Extraordinary Chambers which will also integrate victim participation into their proceedings.

**viii. As to Whether the Trial Should be Held in Kenya:**

25. The Victims’ Representative notes that the investigation into the Situation in the Republic of Kenya was commenced through a request by the Prosecutor to the Court for authorisation of an investigation pursuant to Article 15 to authorise the commencement of an investigation into the situation in the Republic of Kenya in relation to the post-election violence of 2007-2008.<sup>9</sup> The Victims’ Representative is further aware of reports by the Office of the Prosecutor to the effect that the Government of the Republic of Kenya has not fully cooperated in the course of the conducting investigations in preparation for trial in respect of confirmed crimes, and also takes notice of concerns that have been raised as to the safety and security of Prosecution witnesses. The Victims’ Representative is equally cognisant of statements of denial by the Government of the Republic of Kenya with regard to the Prosecutor’s claims of non-cooperation.

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<sup>9</sup> ICC-01/09-3

26. It is beyond the practical ability of the Victims' Representative to make an accurate assessment as to the truth of the Prosecutor's claims regarding non-cooperation and/or the security of witnesses, but the fact is that such claims have been made and (without taking any position on the issue) it is submitted that they need to be taken seriously. That said the Victims' Representative's attention has not been drawn to the existence of circumstances justifying the holding of the trial within the territory of the Republic of Kenya. Accordingly, it is submitted that it would be inadvisable to hold the hearing in Kenya in the light of the claims made by the Prosecutor, coupled with the historical circumstances that brought the Kenya cases within the Court's jurisdiction.

#### IV. CONCLUSION

27. In the final analysis and on the basis of victims' views and concerns received, and the Victims' Representative's submissions, it is observed that holding the trial in Kenya may be inimical to the victims' sense of security, as expressed by a huge majority of the victims. The remaining viable options are therefore for the trial to be held either at The Hague or at Arusha, Tanzania.

28. The Victims' Representative is cognisant that majority of the Victims prefer the cases to be held at The Hague. However, having an appreciation of the victims' views vis-à-vis the overarching principles of access to justice for victims as well as other interests of justice, it is the Victims' Representative's opinion that the Court's ultimate decision should involve more than a merely numerical approach, and should take into account both qualitative and quantitative aspects of all issues raised, bearing in mind the need for meaningful as opposed to merely symbolic participation by, and representation of, victims in the case. If the location of the trial is at Arusha, Tanzania, the victims in this case would be able to obtain increased levels of participation and access to justice with increased transparency in the court's processes, affordability to attend court, and

possible impetus to strengthening other judicial institutions and formation of linkages with other victims support providers, while at the same time having their security, safety and protection ensured.

29. Finally, in making the observation on victims' security above, the Victims' Representative wishes to clearly state that he is alive to the provisions of Article 68(3) of the Rome Statute as to ensuring that victims views and concerns are not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Accordingly, it is emphasized that no aspersion should be understood to have been made in respect of either of the accused persons in this case, particularly in connection with the issues of mobilization of "truck loads" and access to state machinery and networks to undermine the court process in paragraphs 6 and 9 of these Observations.

**ACCORDINGLY**, the Common Legal Representative for Victims respectfully submits that the Trial Chamber do consider changing the venue of the trial to Arusha, Tanzania.

Respectfully submitted,

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

**WILFRED NDERITU**

**Common Legal Representative for Victims**

Dated this 22 February, 2013

At Nairobi, Kenya