

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

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

Date: 19 March 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

Under Seal (with Annex)

Trial Chamber V and OPCV (Orcholon Narantsetseg) only

**Request of the Common Legal Representative for Victims to Submit a Response to the
Joint Defence Submissions on Legal Basis for the Accused's Presence at Trial via
Video-Link**

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

Counsel for the Defence

Legal Representatives of Victims

Legal Representatives of Applicants

Wilfred Nderitu

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**Office of Public Counsel for
Victims**

**Office of Public Counsel for the
Defence**

Orchlon Narantsetseg

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Defence Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Fiona McKay

No. ICC-01/09-01/11

2/7

19 March 2013

I. INTRODUCTION

1. Pursuant to Article 68(3) of the Statute and Regulation 24 (2) of the Regulations of the Court, the Common Legal Representative for Victims requests the Chamber's permission to present the views and concerns of victims on the 'Joint Defence Submissions on Legal Basis for the Accused's Presence at Trial via Video-Link' which was filed by the Defence on 28 February 2013.¹ The Common Legal Representative submits that this is a matter that has a direct bearing on the personal interests of the victims accepted to participate in the case. Recent political developments in Kenya necessitate the Common Legal Representative's request that the views and concerns of victims be considered before the Chamber takes a decision on the Defence's Request.

II. PROCEDURAL HISTORY

2. On 23 January 2012 Pre-Trial Chamber II issued its Decision Confirming Charges against Mr. Ruto and Mr. Sang pursuant to Article 61(7)(a) and (b) of the Statute.²
3. On 14 February 2013, during a Status Conference and following the Defence teams' oral request, Trial Chamber V granted the Defence leave to make written submissions on the legal basis and modalities of attendance at trial via video link by the two accused. On 28 February 2013 the Defence filed their submissions (Defence Submissions).

III. FACTUAL AND LEGAL BASIS FOR THE FILING

4. This request is filed pursuant to Article 68(3) and Regulation 24(2) of the Regulations of the Court which permits views and concerns of the victims to be presented as long as they are not prejudicial to or inconsistent with the rights of the accused.

¹ ICC-01/09-01/11-629

² ICC-01/09-01/11-373

5. The Common Legal Representative submits that this request is not prejudicial to or inconsistent with the rights of the accused under trial, but would in fact enhance the broader ends of justice.
6. The Trial Chamber in its Decision on Victims' Representation and Participation of 3 October 2012 ruled that 'the Common Legal Representative may file responses to documents but must first demonstrate that the subject matter at issue is directly related to the interests of victims'.³ The Common Legal Representative therefore makes the submissions below with regard to the Joint Defence Submissions on the Legal Basis for the Accused's Presence at Trial via Video-Link.
7. The Common Legal Representative classifies this filing as "Under Seal" in accordance with Regulation 23 *bis* of the Regulations of the Court and submits to the Chamber that it is important that victims' views on this issue be heard for the reasons articulated in the Annex "Under Seal". If the Chamber accedes to the request for presentation of views, the Common Legal Representative requests the Trial Chamber to make an Order re-classifying the Annex to "Public". On the other hand, if the Trial Chamber does not allow the Common Legal Representative to submit a response, no prejudice shall have been suffered by the Defence as the contents of this Request and of the annex are "Under Seal".

IV. SUBMISSIONS

8. The Common Legal Representative wishes to refer to his Observations in Relation to the "Joint Defence Application for Change of Place Where the Court Shall Sit for Trial" ("the Observations") made on 22 February 2013⁴ where he notified the Trial Chamber that victims were apprehensive as to the likelihood of non-cooperation with the ICC by two of the accused in the two Kenya cases, who were then seeking elective high office in the General Elections of 4 March 2013. At the time of making the Observations, the Common Legal Representative's

³ ICC-01/09-01/11-460 par 72

⁴ ICC-01/09-01/11-620

understanding was that the victims who gave their views on the application for change of place of trial contemplated a situation where the accused would be personally present in the courtroom, whatever the venue of the trial. This understanding was borne of the fact that the giving of testimony via video link is something that remains largely unknown in the traditional model of criminal trial, and more so in Kenya where the victims reside. At any rate, the question of the accused's "presence" at the trial via video-link was not explored during the mission.

9. It is submitted that a change from the classical model to the proposed mode of participation by the accused affects the interests of all parties and participants, including (and in particular) the interests of the victims. The Common Legal Representative submits that allowing the accused to attend trial through communication technology alternatives would in the first place drastically diminish the evidentiary value of the testimony to be given. Secondly, the authority of the Court over the accused persons as persons subject to the Court's jurisdiction would also be severely whittled down. The essence of criminal proceedings and of the process of discovery of the truth is assured and fully appreciated through the physical presence in the courtroom of the accused, where he meets his accuser and other participants in the proceedings.
10. In further reference to paragraph 8 of this Request, and of paragraphs 6, 7 and 9 of the Observations⁵, the Common Legal Representative submits that subsequent to the just concluded presidential election and in view of its outcome⁶ some victims have indicated a heightened skepticism about the smooth running of the court proceedings, and expressed fears that the state machinery could be employed to delay, subvert or completely derail the process of justice. Attendance at the trial via video-link by an accused person essentially implies that the accused is 'effectively beyond the control of the court in the trial

⁵ ICC-01/09-01/11-620

⁶ One of the accused in this case William Samoei Ruto was declared Vice-President elect by the Independent Electoral and Boundaries Commission on 9th March 2013, with Mr. Uhuru Kenyatta, an accused in Case 2 being declared the President elect. (http://www.iebc.or.ke/index.php/media-center/press-releases/item/declaration-of-persons-elected-president-and-deputy?category_id=7)

jurisdiction and whatever powers a judge may have over such a person, they are certainly extra territorial.⁷

11. Quite apart from the reasons above, the Common Legal Representative submits that manifold delays may occur through direct failure of technology or indirectly as a result of absence or other situations affecting those operating such technology, particularly when use of the technology is adopted as the *modus operandi*. Such expected delays are likely to lead to frequent adjournments and frustration to the participants, including victims, and the delays are an injustice to the victims who expect an expeditious conclusion of the trial.
12. Closely linked to the delays in trial is the question of reparations. While the victims have been advised that the reparation phase is a post-trial phase and that it will become operative if a conviction is achieved, the Common Legal Representative submits that delays in concluding the trial interfere with the prompt participation in the reparations programme, if available to them, and they have a legitimate expectation in this regard.
13. The Common Legal Representative takes note of the reasons cited by the Defence in seeking to attend trial via video-link⁸ but respectfully submits that the Core Legal Texts of the Court do not provide a legal basis for such a modality. The arguments of the Defence do not meet the threshold of exceptional circumstances that have previously informed the decisions of various chambers to allow witness participation by video link. Moreover, the Defence attempts to analogously apply laws and decisions relating to and primarily intended for witnesses to accused persons. Accordingly, the Common Legal Representative submits that no basis has been shown why the Court should depart from the time-honoured procedure of courtroom attendance by an accused person. It is further submitted that the proposed procedure would be not be in the best interests of the participating victims, or in the broader interests of justice.

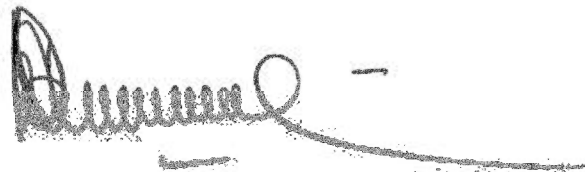
⁷ R V. Young, 2000 SKQB 419 in outlining factors considered before granting Crown's application to have evidence of a witness heard by video conference.

⁸ ICC-01/09-01/11-629 par 13

IV. RELIEF SOUGHT

14. For the foregoing reasons, the Common Legal Representative requests the Trial Chamber to permit him to file, on behalf of the victims of the case, a substantive response to the Defence Submissions.

Respectfully submitted,

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

WILFRED NDERITU
Common Legal Representative for Victims

Dated this 19 March 2013

At Nairobi, Kenya