

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 3 June 2013

**TRIAL CHAMBER V(A)**

**Before:** Judge Chile Eboe-Osuji, Presiding  
Judge Olga Herrera Carbuccia  
Judge Robert Fremr

**SITUATION IN THE REPUBLIC OF KENYA**

**IN THE CASE OF  
*THE PROSECUTOR v. WILLIAM SAMOEI RUTO and JOSHUA ARAP SANG***

**Public**

**Recommendation to the Presidency on where the Court shall sit for trial**

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

**The Office of the Prosecutor**

Ms Fatou Bensouda

Ms Cynthia Tai

**Counsel for William Samoei Ruto**

Mr Karim A. A. Khan

Mr David Hooper

Mr Kioko Kilukumi Musau

Ms Shyamala Alagendra

**Counsel for Joshua Arap Sang**

Mr Joseph Kipchumba Kigen-Katwa

Mr Silas Chekera

**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**

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**Registrar**

Mr Herman von Hebel

**Deputy Registrar**

**Victims and Witnesses Unit**

Mr Patrick Craig

**Detention Section**

**Victims Participation and Reparations  
Section**

**Others**

**Trial Chamber V(A)** (“Chamber”<sup>1</sup>) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, having regard to Articles 3, 62, 64(2) and 68 of the Rome Statute (“Statute”) and Rule 100 of the Rules of Procedure and Evidence, issues this Recommendation to the Presidency on where the Court shall sit for trial.

## **Background and Submissions**

1. On 24 January 2013, the defence teams for Mr Ruto and Mr Sang (“Defence”) filed with the Presidency a “Joint Defence Application for a change of place where the Court shall sit for Trial”,<sup>2</sup> referring to a similar application having been filed and considered in the case of *The Prosecutor v. Uhuru Muigai Kenyatta* and arguing that it would be “impractical to have the two trials heard in different places as far apart as The Hague and East Africa”.<sup>3</sup> The Defence contended that a change of venue 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.”<sup>4</sup>
2. On 24 January 2013, the Presidency issued a decision requesting the Chamber to receive observations on the change of venue from the parties, participants, and the Registry, as well as any national authority that the Chamber deemed appropriate.<sup>5</sup>
3. On 1 February 2013, the Chamber issued an Order requesting observations in relation to the “Joint Defence Application for change of place where the Court shall

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<sup>1</sup> Where “Chamber” is used in this Recommendation, it refers to both Trial Chamber V in its composition as until 21 May 2013 and to Trial Chamber V(A) as composed by the Presidency’s “Decision constituting Trial Chamber V(a) and Trial Chamber V(b) and referring to them the cases of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* and *The Prosecutor v. Uhuru Muigai Kenyatta*”, 21 May 2013, ICC-01/09-01/11-745.

<sup>2</sup> ICC-01/09-01/11-567.

<sup>3</sup> *Ibid.*, para. 23.

<sup>4</sup> *Ibid.*, para. 25.

<sup>5</sup> Decision on “Joint Defence Application for a change of place where the Court shall sit for Trial”, 24 January 2013, ICC-01/09-01/11-568.

sit for trial" ("Order").<sup>6</sup> The Order requested observations from the Office of the Prosecutor ("Prosecution"), the Common Legal Representative for Victims, and the Registry on the possibility of the trial being held in Kenya or Tanzania, and invited observations from i) the Kenyan authorities on the possibility of the trial being held in Kenya, and ii) the Tanzanian authorities and the International Criminal Tribunal for Rwanda ("ICTR") on the possibility of the trial being held at the premises of the ICTR in Arusha, Tanzania.

4. On 21 February 2013, the Prosecution submitted its observations pursuant to the Order.<sup>7</sup> The Prosecution states that, in principle, it favours bringing the trial as close as possible to the victims and it acknowledges that one way to do this is by holding the trial in the region where most victims reside and/or where the crimes occurred.<sup>8</sup> However, the Prosecution identifies several concerns with holding the trial in Kenya or Arusha, including the security challenges that holding the trial in Kenya or Arusha would bring, particularly regarding attempts to interfere with trial witnesses as the Court has no infrastructure in place there to ensure the security of trial witnesses.<sup>9</sup> Further, the Prosecution highlights its concern that some witnesses and victims may be unwilling to testify in the region,<sup>10</sup> and that it is important for the trial not to be delayed due to the logistical implications resulting from a change of location.<sup>11</sup> The Prosecution suggests that holding portions of the trial in Kenya or Arusha could strike the right balance between bringing the trial as close as possible to the affected region and the need to protect witnesses.<sup>12</sup>

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<sup>6</sup> ICC-01/09-01/11-580.

<sup>7</sup> ICC-01/09-01/11-615.

<sup>8</sup> *Ibid.*, para. 2.

<sup>9</sup> *Ibid.*, para. 3.

<sup>10</sup> *Ibid.*, para. 4.

<sup>11</sup> *Ibid.*, para. 5.

<sup>12</sup> *Ibid.*, para. 6.

5. On 22 February 2013, the Common Legal Representative for Victims in this case filed his observations pursuant to the Order.<sup>13</sup> The Common Legal Representative and his team ascertained the views and concerns of 50 victims admitted to participate in the trial.<sup>14</sup> 82% of the victims consider that the trial should continue to be held at The Hague<sup>15</sup> for reasons of security,<sup>16</sup> fears of victims' and witnesses' intimidation<sup>17</sup> and in order to avoid delays.<sup>18</sup> In addition, the Common Legal Representative presents his own view that the Chamber should consider changing the venue of the trial to Arusha, Tanzania, arguing that this would facilitate meaningful participation by, and representation of, victims within an extremely limited budget.<sup>19</sup> He also argues that moving the trial closer to Kenya would generate impetus towards creating the proposed International Crimes Division of the High Court of Kenya.<sup>20</sup>
6. On 22 February 2013, the Registry filed its observations pursuant to the Order.<sup>21</sup> The Registry gives a detailed account of the logistical and security issues relevant to a change of venue. The Registry highlights some relevant considerations including: i) the likely increase of the interest of international media and the local and regional coverage,<sup>22</sup> ii) the lack of facilities in the ICTR courtroom to provide for the possibility of having voice and facial distortion for protected witnesses,<sup>23</sup> and iii) the fact that if the trial in the case of *Prosecutor v. Jean-Pierre Bemba Gombo* is still taking

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<sup>13</sup> Common Legal Representative for Victims' Observations in relation to the "Joint Defence Application for change of place where the Court shall sit for Trial", ICC-01/09-01/11-620.

<sup>14</sup> The Common Legal Representative met with 94 victims, of whom only 50 gave their views while the rest chose to abstain or were not ready to give their views, *ibid*, para. 3.

<sup>15</sup> ICC-01/09-01/11-620, para. 5.

<sup>16</sup> *Ibid.*, para. 6.

<sup>17</sup> *Ibid.*, paras 6 and 9.

<sup>18</sup> *Ibid.*, para. 10.

<sup>19</sup> *Ibid.*, para. 14.

<sup>20</sup> *Ibid.*, para. 21.

<sup>21</sup> Registry Observations in relation to the "Defence Application for change of place where the Court shall sit for Trial," ICC-01/09-01/11-617.

<sup>22</sup> *Ibid.*, para. 19.

<sup>23</sup> *Ibid.*, para. 24.

place at the Court, freelance interpreters would need to be recruited.<sup>24</sup> The Registry suggests that, in the event that the trial is to take place away from the seat of the Court, the proceedings should be held in Arusha at the ICTR.<sup>25</sup> Further, the Registry suggests that any proceedings away from the Court should be limited to two relatively short periods of three to four weeks maximum during which the opening statements and specific witnesses could be called to testify.<sup>26</sup>

7. Further, the Registry draws the Chamber's attention to the Agreement of Privileges and Immunities, which Kenya has not signed or ratified and which Tanzania has signed but not ratified.<sup>27</sup>
8. On 11 March 2013, the Registry submitted a report containing five confidential annexes containing official correspondence between the Court and the authorities of Kenya and Tanzania and the ICTR. The correspondence includes: i) a letter which the Registry received on 12 February 2013 from the Attorney General of Kenya stating that the Kenyan Government has no objections to the change of the trial venue to Nairobi or Arusha and that the Court would receive the full cooperation of the Government of Kenya;<sup>28</sup> and ii) a letter which the Registry received on 5 March 2013 from the Registrar of the ICTR stating that the ICTR is willing and able to provide cooperation to the ICC to the extent that its downsizing activities allow, in light of its expiring mandate.<sup>29</sup> As of the date of its report, the Registry had not received a reply from the Tanzanian authorities.<sup>30</sup>

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<sup>24</sup> *Ibid.*, para. 11.

<sup>25</sup> *Ibid.*, para. 30.

<sup>26</sup> *Ibid.*, para. 31.

<sup>27</sup> *Ibid.*, paras 2-4.

<sup>28</sup> ICC-01/09-01/11-643-Conf-Anx4.

<sup>29</sup> ICC-01/09-01/11-643-Conf-Anx5.

<sup>30</sup> ICC-01/09-01/11-643, para. 6.

## **Analysis and recommendation**

9. Article 3(3) of the Statute provides: “[t]he Court may sit elsewhere [than in The Hague], whenever it considers it desirable, as provided in this Statute.”
10. The Chamber acknowledges the importance of security for victims and witnesses in these proceedings and the need to ensure a fair and impartial trial free of any undue influence. However, at the same time, the Chamber also notes the proposed benefits of moving the trial to Kenya as a means of bringing justice closer to victims and the affected communities in Kenya. The Chamber also underscores the significance of holding the trial close to the locality where the alleged crimes were committed. The Chamber is of the view that all these considerations need to be taken into account. Therefore, the Chamber considers that the holding of the commencement and other portions of the trial particularly in Kenya would strike the right balance. The Chamber has given serious consideration to the pledge of support from the Government of Kenya in its decision to recommend that part of the trial be held in that country. The Chamber notes that the parties, the Registry and the views of the Common Legal Representative for Victims himself are all favourable to the proposal that a portion of the trial be held away from The Hague. The Chamber will at the relevant time re-visit the possibility of holding portions of the trial in Kenya, subject to security and logistical considerations, and taking into consideration the rights of the accused to a fair and expeditious trial as well as the victims’ views and concerns.
11. The Chamber is of the view that holding portions of trial in Kenya would best serve the purposes identified above. However, the Chamber considers that Tanzania, which was also recommended by the parties, could also serve as an appropriate venue, although to a lesser degree. The Chamber notes in this regard that it did not receive any response from the Tanzanian authorities and it is thus unable to

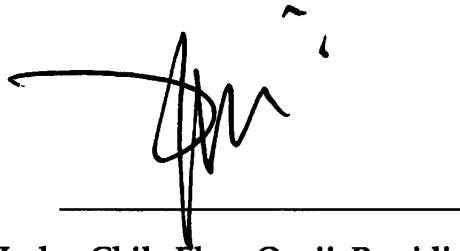
determine whether the authorities would be prepared to provide support if the Chamber were to sit in Tanzania. Notwithstanding the foregoing, the Chamber recommends that Tanzania should continue to be explored as a very good alternative for the hearings, in view of the availability of ready-made international standard court facilities at the ICTR and its Residual Mechanism. To that end, renewed efforts should be made for purposes of generating a reaction from the Government of Tanzania.

12. In order to facilitate an expeditious further examination of the proposal to hold portions of the trial in Kenya or, alternatively, in Tanzania, the Chamber has requested the Registry to explore practical aspects of the proposal and prepare a feasibility study.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY:**

**Notifies** the Presidency, after seeking and obtaining observations from the parties and participants, as well as from the Government of Kenya and the Registrar of the ICTR, that it may be desirable to hold the commencement of trial and other portions thereof, to be determined at a later stage, in Kenya or, alternatively, in Tanzania, subject to the considerations discussed in paragraphs 10 and 11 above.

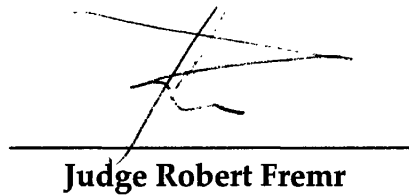
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**Judge Chile Eboe-Osuji, Presiding Judge**

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**Judge Olga Herrera Carbuccion**

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**Judge Robert Fremr**

Dated this 3 June 2013

At The Hague, The Netherlands