

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 5 September 2012

TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding Judge
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**

Confidential *ex parte* prosecution and Registry only

Decision on the request for appointment of duty counsel

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

The Office of the Prosecutor
Ms Fatou Bensouda

Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar
Ms Silvana Arbia, Registrar

Defence Support Section

Victims and Witnesses Unit
Ms Maria-Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Other
Mr Göran Sluiter

Trial Chamber V ("Trial Chamber" or "Chamber") of the International Criminal Court ("Court" or "ICC"), in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* ("Ruto and Sang case") hereby delivers the following Decision on the request for appointment of duty counsel.

I. Background

1. On 2 May 2012 the Chamber received the "Registry Transmission of Two Submissions Received on 27 April 2012" with annexes containing requests on behalf of two witnesses to be appointed duty counsel to represent them.¹
2. On 1 June 2012 the Registry filed its observations on these submissions.²
3. On 6 June 2012 the Chamber received the "Registry's transmission of a submission received on 6 June 2012" with an annex containing a request on behalf of a third witness to be appointed duty counsel to represent him.³

II. Relevant Provisions

4. In accordance with Article 21(1) of the Rome Statute ("Statute"), the Trial Chamber has considered Article 64(6)(f) Statute, Rule 17 of the Rules of Procedure of Evidence ("Rules") and Regulation 73(2) of the Regulations of the Court ("Regulations").

¹ ICC-01/09-01/11-412-Conf-Exp with two confidential *ex parte* annexes, reclassified on 23 May 2012 as confidential *ex parte* Mr Sluiter, the Registry and the Office of the Prosecutor only.

² Registry's observations on the two submissions transmitted by the Registry on 1 May 2012 (ICC-01/09-01/11-412-Conf-Exp), ICC-01/09-01/11-421-Conf-Exp and Conf-Exp-Anx1.

³ ICC-01/09-01/11-423-Conf-Exp, reclassified on 8 June 2012 as confidential *ex parte* Mr Sluiter, Registry, Witness X and Office of the Prosecutor only.

III. Submissions and Analysis

5. The three witnesses, identified in their filings as "Witness 1", "Witness 4" and "Witness X" base their requests for appointment of duty counsel on Article 64(6)(f). They submit that Regulation 73(2), the provision governing appointment of duty counsel by the Registrar, is not an appropriate basis for their request as one of the purposes of the appointment sought is to receive legal advice concerning the conduct of the Victims and Witnesses Unit ("VWU"). Reference is made to an oral decision in the case of *The Prosecutor v Thomas Lubanga* in which Trial Chamber I relied on Article 64(6)(f) when it ordered the Registrar to ensure that counsel was available for purposes of advising witnesses on matters relating to self-incrimination.⁴
6. Witnesses 1 and 4 submit that they have experienced a number of problems as regards "the scope and content of rules governing the Court's – especially the VWU's – duty to protect [their] safety".⁵ Witness 4 additionally submits that he is "increasingly concerned" about his safety and fears that mistakes are being made as regards his protection.⁶ Witness X submits that he has experienced problems "in respect of the scope and content of rules governing the Court's duty to protect" his safety.⁷ Witness X further submits that VWU terminated his participation in the protection program and that, as a result of this, "the attribution of responsibility for [his] protection is unclear".⁸

⁴ ICC-01/09-01/11-412-Conf-Exp-Anx1, para. 3, ICC-01/09-01/11-412-Conf-Exp-Anx2, para. 3 and ICC-01/09-01/11-423-Conf-Exp-Anx, para. 3.

⁵ ICC-01/09-01/11-412-Conf-Exp-Anx1, para. 5 and ICC-01/09-01/11-412-Conf-Exp-Anx2, para. 5.

⁶ ICC-01/09-01/11-412-Conf-Exp-Anx2, para. 6.

⁷ ICC-01/09-01/11-423-Conf-Exp-Anx, para. 5.

⁸ ICC-01/09-01/11-423-Conf-Exp-Anx, para. 5.

7. Witness 1 and Witness 4 submit that they are currently engaged in asylum proceedings in the Netherlands.⁹
8. Witness X submits that he is currently detained in the Netherlands which “raises complex issues in respect of [his] position in relation to [the] Court.”¹⁰
9. All three witnesses submit that they require independent legal advice concerning all of the abovementioned issues.¹¹
10. The three witnesses inform the Chamber that Mr Göran Sluiter has agreed to represent them for a short time on *pro bono* basis but that Mr Sluiter will require payment for his services going forward. The witnesses request the Chamber to appoint Mr Sluiter as duty counsel.¹² It is additionally submitted that although Mr Sluiter is not at present on the duty counsel roster, he has a pending application in that regard.¹³ Alternatively, the witnesses request the appointment as duty counsel of Mr Pestman, who is affiliated with Mr Sluiter’s practice.¹⁴
11. The Registry in its submissions provides an overview of the events it previously reported to the Pre-Trial Chamber and the latest developments with regard to four Kenyan witnesses currently residing in the Netherlands.¹⁵ Further, it reports on its prior contacts with Mr Sluiter with

⁹ ICC-01/09-01/11-412-Conf-Exp-Anx1, para. 6 and ICC-01/09-01/11-412-Conf-Exp-Anx2, para. 7.

¹⁰ ICC-01/09-01/11-423-Conf-Exp-Anx, para. 6.

¹¹ ICC-01/09-01/11-412-Conf-Exp-Anx1, paras 5 – 6, ICC-01/09-01/11-412-Conf-Exp-Anx1, paras 5 – 7 and ICC-01/09-01/11-423-Conf-Exp-Anx, paras 5 – 6.

¹² ICC-01/09-01/11-412-Conf-Exp-Anx1, para. 7, ICC-01/09-01/11-412-Conf-Exp-Anx2, para. 8 and ICC-01/09-01/11-423-Conf-Exp-Anx, para.7.

¹³ See ICC-01/09-01/11-412-Conf-Exp-Anx1, para. 8.

¹⁴ ICC-01/09-01/11-412-Conf-Exp-Anx1, para. 8, ICC-01/09-01/11-412-Conf-Exp-Anx2, para. 9 and ICC-01/09-01/11-423-Conf-Exp-Anx, para. 8.

¹⁵ ICC-01/09-01/11-421-Conf-Exp, paras 4 – 38.

regard to Mr Sluiter's efforts to obtain payment for the assistance he provided to these witnesses.¹⁶

12. The Registry submits that Regulation 73(2) of the Regulations is not applicable to the three witnesses.¹⁷ To substantiate this view the Registry refers to a statement by the Appeals Chamber that "Regulation 73(2) [...] aims to harmonize the ends of a fair and expeditious trial with the rights of the accused or a person under charge."¹⁸

13. Regulation 73(2) of the Regulations provides that "[i]f any person requires urgent legal assistance and has not yet secured legal assistance, or where his or her counsel is unavailable, the Registrar may appoint duty counsel". This provision establishes that when "any person" requires urgent legal assistance, it is for the Registrar to appoint counsel for this purpose. The Chamber is not convinced by the Registry's argument that this provision does not apply to witnesses. The fact that the Appeals Chambers in its decision described the objective of Regulation 73(2) in relationship to an accused or a person under charge does not preclude the applicability of the norm to other persons. The Appeals Chamber was speaking then in the context of the question that it was called upon to answer on that occasion. It is therefore not to be taken to have intended to exclude resort to Regulation 73(2) in the context of the issue now before the Chamber. According to the plain text of Regulation 73(2), this provision is applicable to a person who (i) requires urgent legal assistance and (ii) has not yet secured legal assistance, in which case it is (iii) for the Registrar to decide whether to appoint counsel .

¹⁶ ICC-01/09-01/11-421-Conf-Exp, paras 54 – 55.

¹⁷ ICC-01/09-01/11-421-Conf-Exp, para. 57.

¹⁸ ICC-01/09-01/11-421-Conf-Exp, para. 59, referring to Reasons for the Appeals Chamber's Decision to Extend Time Limits for Defence Documents issued on 3 April 2007, 20 April 2007, ICC-01/04-01/06-871, para. 6.

14. Equally, the Chamber is not persuaded by the submissions of the three witnesses that the Registry cannot be relied upon to decide whether to appoint counsel in the present circumstances. In this regard the Chamber refers to Rule 17(2)(b)(i) of the Rules, which provides that with respect to witnesses the Victims and Witnesses Unit shall "[a]dvis[e] them where to obtain legal advice for the purpose of protecting their rights[...]".

15. On the basis of Rule 17(2)(b)(i) of the Rules and Regulation 73(2) it is for the Registry to determine whether to appoint counsel for the three witnesses for the purpose of protecting their rights in relation to their role as ICC witnesses. In this regard, the Chamber notes that representation for purposes of Witnesses 1 and 4's current asylum proceedings in the Netherlands is beyond the scope of the legal advice envisioned in Rule 17 and thus any appointment of counsel cannot extend to domestic proceedings in this regard. Likewise, in the case of Witness X an appointment cannot extend to the domestic proceedings regarding his detention in The Netherlands.


FOR THESE REASONS, THE CHAMBER

ORDERS the Registry to determine in accordance with Regulation 73(2) if the three witnesses require urgent legal assistance.

ORDERS the Registry, if urgent legal assistance is required, to determine in accordance with Regulation 73(2) whether the witnesses have secured legal assistance.

ORDERS the Registry, if no legal assistance has been secured, to decide whether to appoint duty counsel.

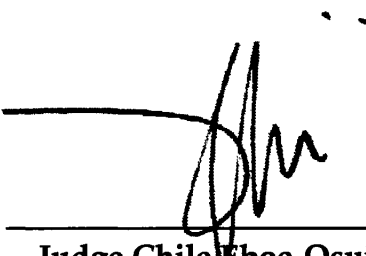
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki



Judge Christine Van den Wyngaert



Judge Chile Eboe-Osuji

Dated this 5 September 2012