

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 24 April 2013

**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**

**Order on the request for leave to appeal the "Decision on the request of the  
Prosecution for review of the Registrar's decision regarding Witness 24"**

**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 Mr Ruto**  
Mr Karim A. A. Khan  
Mr David Hooper  
Mr Kioko Kilukumi Musau

**Counsel for Mr Sang**  
Mr Joseph Kipchumba Kigen-Katwa  
Mr Silas Chekera

**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**

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**Registrar**  
Mr Herman von Hebel

**Defence Support Section**

**Victims and Witnesses Unit**  
Ms Maria Luisa Martinod-Jacome

**Detention Section**

**Victims Participation and Reparations  
Section**      **Other**

**Trial Chamber V** ("Chamber") of the International Criminal Court ("Court"), in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, pursuant to Regulation 28 of the Regulations of the Court, hereby issues the following Order on the request for leave to appeal the "Decision on the request of the Prosecution for review of the Registrar's decision regarding Witness 24".

1. On 1 February 2013, the Office of the Prosecutor ("Prosecution") submitted an urgent request for review of the Registrar's decision denying the request of Witness 24 for assistance ("Registrar's Decision").<sup>1</sup>
2. On 5 March 2013, the Chamber issued its decision on the Prosecution's request for review ("Decision"),<sup>2</sup> in which the majority rejected the Prosecution's request. The majority concluded that it was bound to uphold the Registry's determination unless it was "manifestly unreasonable" or "affected by a material error of fact or law."<sup>3</sup> Judge Eboe-Osuji issued a dissenting opinion.<sup>4</sup>
3. On 11 March 2013, the Prosecution applied for leave to appeal the Chamber's Decision ("Application")<sup>5</sup> with respect to the following issue:

Whether, when considering an appeal from a Registrar's denial of assistance to a protected witness, the Chamber must defer to the Registrar's decision unless it is clearly erroneous or manifestly unreasonable, and whether in

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<sup>1</sup> Prosecution's urgent request for review of the Registry's decision regarding P-0024, ICC-01/09-01/11-581-Conf-Exp. A confidential redacted version was filed on 4 February 2013, ICC-01/09-01/11-581-Conf-Red.

<sup>2</sup> Decision on the request of the Prosecution for review of the Registrar's decision regarding Witness 24, ICC-01/09-01/11-635-Conf-Exp. A confidential redacted version of the decision is available, ICC-01/09-01/11-635-Conf-Red.

<sup>3</sup> *Ibid.*, paras 19 and 21.

<sup>4</sup> Dissenting opinion of Judge Eboe-Osuji, 6 March 2013, ICC-01/09-01/11-637-Conf-Exp. A confidential redacted version was issued on the same day, ICC-01/09-01/11-637-Conf-Red.

<sup>5</sup> Prosecution's application for leave to appeal the "Decision on the request of the Prosecution for review of the Registrar's decision regarding Witness 24" ICC-01/09-01/11-644-Conf-Exp. A confidential redacted version was filed on 14 March 2013, ICC-01/09-01/11-644-Conf-Red.

adherence to that standard it must require that the Registrar's decision take all relevant information into account.<sup>6</sup>

4. The Prosecution submits that the appealable issue meets the criteria set out under Article 82(1)(d) of the Rome Statute. The Prosecution argues in the Application, *inter alia*, that the issue 'will affect the fair conduct of the proceedings and have potential significant effect on the outcome of the case because it may affect the Prosecution's ability to present critical evidence,'<sup>7</sup> as Witness 24 may no longer be able or willing to act as a witness. The Prosecution further argues that the issue affects the expeditious conduct of proceedings as, if the Prosecution loses Witness 24 as a witness, this could affect the expeditiousness of the finalisation of the case as the Prosecution would have to find substitute evidence.<sup>8</sup> The Prosecution also contends that an immediate resolution of the issue by the Appeals Chamber may materially advance the proceedings as "[i]f the witness withdraws because of an incorrect Registry determination that would not be upheld under a less deferential standard of review, and the non-availability of his critical evidence has a noticeable impact on the trial, it could itself be a significant ground on appeal following the judgment."<sup>9</sup>
5. On 12 March 2013, the Prosecution filed a notification regarding the status of Witness 24,<sup>10</sup> in which it informs the Chamber that Witness 24 is still willing to cooperate with the Court and has affirmed his readiness to appear as a witness at trial. The Prosecution informs the Chamber that Witness 24 will be retained on its list of witnesses and that the

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<sup>6</sup> *Ibid.*, para. 20.

<sup>7</sup> *Ibid.*, para. 33.

<sup>8</sup> *Ibid.*, para. 38.

<sup>9</sup> *Ibid.*, para. 44.

<sup>10</sup> Prosecution's notification regarding the status of P-0024, ICC-01/09-01/11-645-Conf.

incriminating material related to him will be kept on its list of evidence, with the relevant remaining disclosure to be made forthwith.<sup>11</sup>

6. On 18 March 2013, the Registry filed its report on the situation of Witness 24.<sup>12</sup> The Registry informs the Chamber of Witness 24's views to improve his situation and the Registry's support therefor.<sup>13</sup>
7. In light of the information provided by the Prosecution subsequent to its filing of the Application, as well as the information provided by the Registry, some of the arguments put forward by the Prosecution in support of the Application appear to be moot. In particular, the indication that Witness 24 remains willing to testify for the Prosecution contradicts the Prosecution's assertion that the Decision would affect the Prosecution's ability to present critical evidence in the case.
8. Accordingly, the Chamber seeks an indication from the Prosecution as to whether it wishes to proceed with the Application, having had regard to the information on Witness 24's willingness to testify at trial.

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

**ORDERS** the Prosecution to indicate whether it wishes to proceed with the Application in light of the abovementioned facts, and to inform the Chamber of its decision by no later than 1 May 2013.

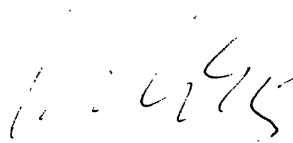
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<sup>11</sup> *Ibid.*, para. 2.

<sup>12</sup> Registry's Report on the Situation of Witness 24, 18 March 2013, ICC-01/09-01/11-656-Conf-Exp.

<sup>13</sup> *Ibid.*, paras 5 – 8.

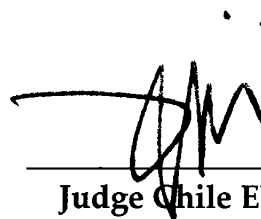
Done in both English and French, the English version being authoritative.



**Judge Kuniko Ozaki**



**Judge Christine Van den Wyngaert**



**Judge Chile Eboe-Osuji**

Dated this 24 April 2013

At The Hague, The Netherlands