

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 7 September 2015

TRIAL CHAMBER V(A)

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

SITUATION IN THE REPUBLIC OF KENYA

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

Confidential

Order on the Timing of the Victims' Views and Concerns

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Anton Steynberg

Counsel for William Samoei Ruto

Mr Karim Khan
Mr David Hooper
Mr Essa Faal
Ms Shyamala Alagendra

Counsel for Joshua Arap Sang

Mr Joseph Kipchumba Kigen-Katwa
Ms Caroline Buisman

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

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V(A) (the 'Chamber') of the International Criminal Court (the 'Court'), in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, having regard to Article 68(3) of the Rome Statute (the 'Statute') and Rule 89 of the Rules of Procedure and Evidence (the 'Rules'), renders this 'Order on the Timing of the Victims' Views and Concerns'.

1. On 3 October 2012, the Chamber¹ rendered the 'Decision on victims' representation and participation' (the 'Victims Participation Decision'), in which it established the procedure and modalities for the participation of victims in this case. Particularly, it determined that victims who wished to present their views and concerns before the Chamber may be allowed to do so at various stages of the trial as determined by the Chamber.²
2. On 3 June 2014, the Chamber rendered its 'Decision No. 5 on the Conduct of Trial Proceedings (Principles and Procedures on 'No Case to Answer' Motions) (the 'Decision on "No Case to Answer" Procedure')',³ in which it determined that, should the common legal representative for victims (the 'Legal Representative') 'be granted permission to present separate evidence, any 'no case to answer' motion should instead be brought only after the completion of the presentation of such evidence by the Legal Representative'.⁴ In the same decision, the Chamber set out the procedure for such a 'no case to answer' motion, directing the defence teams for Mr Ruto and Mr Sang 'to notify the Chamber orally no later than the last day of the Prosecution's case – or completion of the presentation of any evidence by the Legal Representative or as requested by the Chamber, as applicable – of their intention to file 'no case to answer' motions, if any'. It further held that any such 'no case to

¹ Then constituted as Trial Chamber V.

² ICC-01/09-01/11-460, para 56.

³ ICC-01/09-01/11-1334.

⁴ ICC-01/09-01/11-1334, para. 34.

answer' motion would have to be filed no later than 14 days after the last day of the Prosecution's case.⁵

3. On 5 June 2015, the Chamber directed the Legal Representative to make any application for the victims to call evidence in the case or to present views and concerns by 12 June 2015.⁶
4. On 12 June 2015, the Legal Representative submitted a request for four victims to present their views and concerns *viva voce* (the 'Request'), indicating, in particular, a preference for these views and concerns to be presented after any 'no case to answer' motion has been ruled upon.⁷
5. On 6 July 2015, the defence team for Mr Ruto (the 'Ruto Defence') filed its response, stating that in principle it does not oppose the Request.⁸
6. On 7 July 2015, the Office of the Prosecutor (the 'Prosecution') informed the Chamber via e-mail that it did not file any observations, since pursuant to the Victims Participation Decision⁹ the parties will be able to make more specific submissions on the Request, once they receive the victims' application forms. However, the Prosecution already deemed it premature to respond to the Request, including on the appropriate timing of the proposed victims' participation, prior to the Chamber rendering its initial assessment and without having had full access to the victims' application forms.¹⁰

⁵ ICC-01/09-01/11-1334, para. 37.

⁶ Hearing on 5 June 2015, ICC-01/09-01/11-T-206-Conf-Eng, pages 4-5.

⁷ Common Legal Representative for Victims' Request for the *viva voce* Presentation of Views and Concerns by Victims a/00115/15, REP a/0041/10, a/25189/13 and a/0372/10, ICC-01/09-01/11-1909-Conf.

⁸ Ruto Defence Response to the "Common Legal Representative for Victims' Request for the *viva voce* Presentation of Views and Concerns by Victims a/00115/15, REP a/0041/10, a/0372/10, ICC-01/09-01/11-1926-Conf.

⁹ Victims' Participation Decision, ICC-01/09-01/11-460, para. 58.

¹⁰ E-mail from the Prosecution to Trial Chamber V-A Communications at 18:27.

7. On 14 July 2015, the Legal Representative, without leave from the Chamber, submitted a reply to the aforementioned Ruto Defence response (the 'Reply').¹¹
8. On 20 July 2015, the Chamber rendered its 'Decision on the Common Legal Representative for Victims' Request for viva voce Presentation of Views and Concerns by the Victims',¹² in which it ordered the Victims and Witnesses Unit (the 'VWU') and the Legal Representative to submit a report to the Chamber on the security of the victims concerned. It also ordered the Registry and the Legal Representative to transmit to the Chamber and the parties, the victims' application forms and any other relevant material. The Chamber deferred its decision on the merits of the Request to a later stage.¹³
9. On 10 August 2015, the VWU submitted a report, in which it recommended the non-disclosure of the victims' identities to the parties in the case.¹⁴
10. On 17 August 2015, the Chamber directed the Legal Representative to enquire with the victims concerned if they agreed to disclosure of their identity to the parties, or to otherwise withdraw their applications. The Chamber instructed the Legal Representative to file a report indicating the outcome of the enquiry by 31 August 2015.¹⁵
11. On 1 September 2015, the Legal Representative filed a report, stating that he withdraws the application of one victim (who does not want to disclose his/her identity because of security concerns), but that three other victims

¹¹ "Common Legal Representative for Victims' Reply to the Ruto Defence Response to the Request for the *viva voce* Presentation of Views and Concerns by Victims a/00115/15, REP a/0041/10, a/25189/13", ICC-01/09-01/11-1929-Conf.

¹² ICC-01/09-01/11-1930-Conf.

¹³ ICC-01/09-01/11-1930-Conf, page 8.

¹⁴ Victims and Witnesses Unit Report pursuant to "Decision on the Common Legal Representative for Victims' Request for viva voce Presentation of Views and Concerns by the Victims", ICC-01/09-01/11-1930-Conf, ICC-01/09-01/11-1937-Conf with Conf-Exp-Anx1.

¹⁵ E-mail from Trial Chamber V-A Communications to the Registry and the Legal Representative at 13:56.

consent to the disclosure of their identities to the parties, albeit expressing serious concerns about their security.¹⁶

12. The Chamber considers that in light of the security concerns expressed by the VWU¹⁷ and the Legal Representative in their reports, as well as the victims themselves¹⁸, and taking into account that in the Request, the Legal Representative does not make an application to adduce evidence that would have an impact in a 'no case to answer' motion or an eventual Defence case, the Chamber considers that it is warranted to modify the procedure set out in its Decision on 'No Case to Answer' Procedure¹⁹ and the Victims' Participation Decision.²⁰ The Chamber has also taken into consideration, that in its response to the Request, the Ruto Defence did not oppose such change in the timing of the presentation of the victims' 'views and concerns'.

13. However, in light of the above, and in order to have certainty as to the applicable deadline for the filing of any eventual 'no case to answer' motion,²¹ the Chamber hereby directs the Prosecution to file a notification to confirm it has formally closed its case.

¹⁶ Report to Trial Chamber V(A) of the Common Legal Representative for Victims on Disclosure of the Identities and other Information Relating to Victims a/00115/15, REP a/0041/10, a/25189/13 in Connection with Their Request for the viva voce Presentation of Views and Concerns, ICC-01/09-01/11-1947-Conf-Exp. The Chamber notes that due to technical difficulties, the report was only filed on 1 September 2015, although a courtesy copy was transmitted to the Chamber and the parties earlier that date. See e-mail from the Legal Representative to Trial Chamber V-A Communications on 1 September 2015 at 9:39. A redacted confidential version was filed on 4 September 2015 (ICC-01/09-01/11-1947-Conf-Red).

¹⁷ ICC-01/09-01/11-1937-Conf, para. 2 and Conf-Exp-Anx1.

¹⁸ ICC-01/09-01/11-1947-Conf-Exp, paras 12-19.

¹⁹ ICC-01/09-01/11-1334, para. 34.

²⁰ Decision on victims' representation and participation, ICC-01/09-01/11-460, para 56.

²¹ See, ICC-01/09-01/11-T-199-CONF-ENG, page 4, lines 1-5; ICC-01/09-01/11-T-206-CONF-ENG, page 11, line 18 to page 12, line 4.

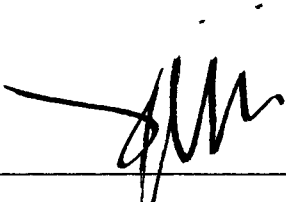
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

PARTIALLY GRANTS the Request, and authorises the Legal Representative to present his clients' views and concerns, if allowed to do so, after the determination of an eventual 'no case to answer' motion;


DEFERS its decision on any protective measures sought vis-à-vis the victims, as well as any determination on the merits of the Request to a later stage in the proceedings; and

ORDERS the Prosecution to file a notification to confirm it has formally closed its case by no later than 3 days from notification of the present order.

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



Judge Chile Eboe-Osuji
(Presiding)

Judge Olga Herrera Carbuccion

Judge Robert Fremr

Dated 7 September 2015

At The Hague, The Netherlands