

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 25 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***

Public

**Decision on the "Registry's transmission of a submission received on 20 February
2013"**

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

For William Samoei Ruto :

Mr Karim A. Khan

Mr David Hooper

Mr Kioko Kilukumi Musau

For Joshua Arap Sang :

Mr Joseph Kipchumba Kigen-Katwa

Mr Silas Chekera

Legal Representatives of the Victims

Mr Wilfred Nderitu

Legal Representatives of the 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

Defence Support Section

Victims and Witnesses Unit

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* having regard to Rule 13(1) of the Rules of Procedure and Evidence (“Rules”) and Regulations 23 *bis* and 24 *bis* of the Regulations of the Court (“Regulations”) hereby delivers the following Decision on the “Registry’s transmission of a submission received on 20 February 2013”.

I. Background and Submissions.

1. On 22 February 2013, the Registry made a confidential filing to the Chamber transmitting two documents it had received from the Office of the Prosecutor (“Prosecution”) on 20 February 2013.¹ The documents in question are a letter, dated 13 February 2013, from the Mungiki Veterans Group/Kenya Sovereignty Defence Squad and a statement, dated 20 February 2013, from the Chief Justice of Kenya on Judges’ security and elections.²
2. In its filing, the Registry references Rule 13(1) of the Rules and Regulations 23 *bis* and 24 *bis* of the Regulations and notes that the documents concern the overall security situation in Kenya; that the Prosecution is “of the view that the documents should be brought to the attention of the [Chamber]”; that the Security Section has been instructed by the Registrar to make an assessment of these documents vis-à-vis the Court’s operations on the ground; and that the documents are filed as confidential as they contain sensitive and confidential information.³
3. On 26 February 2013, the defence for Mr William Samoei Ruto and the defence for Mr Joshua Arap Sang (together “Defence”) submitted a joint

¹ Registry’s transmission of a submission received on 20 February 2013, ICC-01/09-01/11-619-Conf.

² Annex 1 to Registry’s transmission of a submission received on 20 February 2013, ICC-01/09-01/11-619-Conf-Anx1; Annex 2 to Registry’s transmission of a submission received on 20 February 2013, ICC-01/09-01/11-619-Conf-Anx2.

³ ICC-01/09-01/11-619-Conf, page 3.

response to the Registry's filing.⁴ The Defence submits that, in light of the public nature of the documents attached to the Registry's filing, there is no justification for it to be classified as confidential.⁵ Moreover, the Defence highlights the "unusual" manner in which the filing was transmitted to the Chamber and questions why the Registry "should act on behalf of the Prosecutor."⁶

4. As to the substance of the filing, the Defence submits that the Mungiki letter (Annex 1) "has every appearance on the face of it of being a concoction aimed at prejudicing President Kibaki, Mr Kenyatta and other accused." It contends that, due to the "political overtones" that this case has in Kenya, the Registry should act more carefully in order to avoid potential distractions of the Court from its primary purpose.⁷ The Defence requests the Registry to keep the Chamber and the parties informed of the follow up investigations that are being carried out by the Security and Safety Section of the Court.⁸ It further requests the reclassification of the Registry's filing (including the annexes) and its response as public documents.⁹

II. Analysis

5. The Chamber agrees with the Defence as to the unusual nature of the filing. The documents annexed to the Registry's filing were received in the first instance by the Prosecution and forwarded to the Registry. To the extent that the Prosecution considered that they should be brought to the attention of the Chamber, the proper procedure would have been for the Prosecution to file the documents directly together with any appropriate

⁴ Joint Defence Response to Registry's Transmission of a Submission received on 20 February 2013, ICC-01/09-01/11-626-Conf with confidential annexes A and B.

⁵ ICC-01/09-01/11-626-Conf, para. 3.

⁶ ICC-01/09-01/11-626-Conf, para. 4.

⁷ ICC-01/09-01/11-626-Conf, para. 4.

⁸ ICC-01/09-01/11-626-Conf, para. 5.

⁹ ICC-01/09-01/11-626-Conf, para. 6.

request for relief. Rule 13 of the Rules, although nominating the Registry as the “channel of communication of the Court”, does not provide a basis for the Registry to file documents on behalf of parties or participants to the proceedings.

6. In addition, apart from noting that the documents concern the “overall security situation in Kenya” and that the Security and Safety Section is making an assessment of the documents, the Registry does not identify the purpose of its filing, request any relief from the Chamber, or demonstrate how the filing is necessary for “the proper discharge of [the Registrar’s] functions” within the meaning of Regulation 24 *bis* of the Regulations. In these circumstances, the Chamber will disregard the content of the filing. Accordingly, the first request by the Defence for the Registry to keep the Chamber and the parties updated on its investigations is moot and need not be ruled upon. In the event that the Registry’s subsequent investigations reveal matters which may have an impact on the work of the Chamber or the proceedings generally, the Registry may raise such matters in a future, appropriately formulated, filing.
7. As to the second request set forth by the Defence, namely, the reclassification of the Registry’s filing, including its annexes, and the Defence’s response as public,¹⁰ the Chamber will grant the request pursuant to Regulation 23 *bis*(3). As the information contained in the documents has been made available to the public through the press and social media, the Chamber agrees with the Defence that there is no basis for a confidential classification.

¹⁰ ICC-01/09-01/11-626-Conf, para. 6.

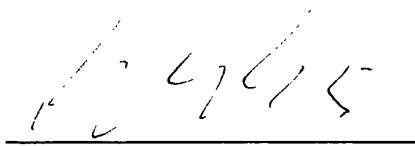
FOR THE FOREGOING REASONS, THE CHAMBER

DISREGARDS the Registry's filing;

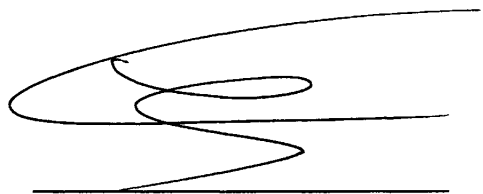
DECLARES MOOT the Defence request for the Registry to keep the Chamber and the parties informed of the Registry's follow up investigations; and

DIRECTS the Registry to re-classify the filing, including its annexes, and the Defence response as public documents.

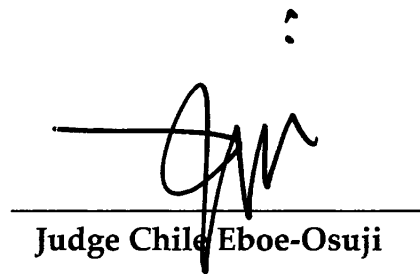
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding Judge



Judge Christine Van den Wyngaert



Judge Chile Eboe-Osuji

Dated 25 April 2013