Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

No.: **ICC-01/09-01/11**
Date: **6 September 2013**

THE PRESIDENCY

Before: **Judge Sang-Hyun Song, President**
Judge Sanji Mmasenono Monageng, First Vice-President
Judge Cuno Tarfusser, Second Vice-President

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

THE PROSECUTOR v.
WILLIAM SAMOEI RUTO AND JOSHUA ARAP SANG

Public

Decision on the Defence Application to Vacate the Decision of the Plenary of Judges on the "Joint Defence Application for a Change of Place where the Court Shall Sit for Trial" in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*

Source: **Presidency**

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

The Office of the Prosecutor
Ms. Fatou Bensouda, Prosecutor
Mr. James Stewart, Deputy Prosecutor
Mr. Anton Steynberg, Senior Trial Lawyer

Counsel for William Ruto
Mr. Karim A. A. Khan QC
Mr. David Hooper QC
Mr. Essa Faal

Counsel for Joshua Sang
Mr. Joesph Kipchumba Kigen-Katwa
Mr. Silas Chekera

Legal Representatives of the Victims
Mr. Wilfred Nderitu

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants (Participation/Reparation)

The Office of the 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

Deputy Registrar
Mr. Didier Preira

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other
Trial Chamber V(a)

The Presidency of the International Criminal Court ("Court") has before it the Defence Application to Vacate the Decision of the Plenary of Judges on the "Joint Defence Application for a Change of Place where the Court Shall Sit for Trial" ("Defence Application"), dated 1 September 2013.

The application is dismissed for the reasons set forth below.

I. Procedural History

1. On 24 January 2013, the Defence for Mr William Samoei Ruto and for Mr Joshua Arap Sang filed before the Presidency the "Joint Defence Application for a Change of Place where the Court Shall Sit for Trial" ("Joint Defence Application"). The Joint Defence Application requested that the place of the trial be changed to the Republic of Kenya ("Kenya"), or, alternatively, to the Republic of Tanzania ("Tanzania"), using the facilities of the International Criminal Tribunal for Rwanda ("ICTR").[1]

2. On 1 February 2013, the Trial Chamber sought observations on the Joint Defence Application, at the request of the Presidency,[2] from the Prosecution, the Registry, the Common Legal Representative for Victims, the Kenyan and Tanzanian authorities, and the ICTR.[3] Observations were filed by the Prosecution on 21 February 2013,[4] and by the Registry and the Common Legal Representative for Victims on 22 February 2013.[5] The Registry transmitted responses from Kenya and from the Registrar of the ICTR on 8 March 2013.[6]

3. On 3 June 2013, the Trial Chamber submitted a recommendation to the Presidency that it may be desirable to hold the commencement of the trial and other portions thereof in Kenya, or, alternatively, in Tanzania, and requested a more detailed feasibility study from the

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[1] ICC-01/09-01/11-567.
[2] 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.
[3] Order requesting observations in relation to the "Joint Defence Application for change of place where the Court Shall Sit for Trial", 1 February 2013, ICC-01/09-01/11-580.
[4] Prosecution Observations on the possibility of the trial being held in Kenya or, alternatively, in Arusha, Tanzania, 21 February 2013, ICC-01/09-01/11-615.
[5] Registry observations in relation to the "Joint Defence Application for change of place where the Court shall sit for Trial", 22 February 2013, ICC-01/09-01/11-617; Common Legal Representative for Victims' Observations in Relation to the "Joint Defence Application for Change of Place Where the Court Shall Sit for Trial", 22 February 2013, ICC-01/09-01/11-620.
[6] Report of the Registry on the request for observations in relation to the "Joint Defence Application for change of place where the Court Shall Sit for Trial", 8 March 2013, ICC-01/09-01/11-643.

Registry.[7] The Registry duly provided a study in respect of Kenya on 18 June 2013,[8] and a study in respect of the ICTR in Tanzania on 9 July 2013.[9] The Trial Chamber reconfirmed its recommendation to the Presidency on 21 June 2013.[10] The Court also received from the governments of Kenya and Tanzania assurances of full cooperation and support with regard to sitting in their respective territories.[11]

4. On 3 July 2013, the Presidency convened a plenary session of judges for 11 July 2013 to consider the Joint Defence Application pursuant to rule 100(3) of the Rules of Procedure and Evidence ("Rules").[12]

5. On 10 July 2013, the Prosecution filed a second set of observations, intended to provide updated information further to its original observations of 21 February 2013.[13] In that filing, the Prosecution revised its earlier limited support for holding parts of the case in Kenya and expressed opposition to such a move.

6. The Plenary was duly held on 11 July 2013, and was attended in person by Judges Song (Chair), Monageng, Tarfusser, Kaul, Kuenyehia, Kourula, Ušacka, Trendafilova, Aluoch, Fernández de Gurmendi, Ozaki, Herrera Carbuccia, Fremr, and Eboe-Osuji. The judges did not reach the required two-thirds majority necessary for a decision to change the place of the proceedings in accordance with rule 100(3) of the Rules. As such, it was determined that the commencement of the trial against William Samoei Ruto and Joshua Arap Sang would take place at the seat of the Court in The Hague.

7. On 12 July 2013, Judge Eboe-Osuji presented to the judges of the plenary a Motion to Vacate the Plenary Vote, on the grounds that it was vitiated by procedural irregularities. Judge Eboe-Osuji noted in particular that (i) the OTP filed its second set of observations with the Registry after business hours at 6.28 pm on 10 July 2013, and the Presidency emailed those observations to the judges at 6.38 pm on the same day; (ii) the circumstances of the filing foreclosed any reaction from the Defence, particularly given that the Registry only communicated the filing in the ordinary way at 1.25 pm on 11 July 2013, three hours after the commencement of the Plenary; (iii) the second set of Prosecution observations included

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[7] Recommendation to the Presidency on where the Court shall sit for trial, 3 June 2013, ICC-01/09-01/11-763.
[8] 2013/PRES/00220-01.
[9] 2013/PRES/00220-05.
[10] 2013/PRES/00220-02.
[11] Decision of the Plenary of Judges on the Joint Defence Application for a Change of Place where the Court Shall Sit for Trial in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, 23 August 2013, ICC-01/09-01/11-875-Anx, paragraph 3.
[12] 2013/PRES/00220-04.
[13] Prosecution's Observations on the possibility of holding parts of the trial in Kenya or alternatively in Arusha, Tanzania, 10 July 2013, ICC-01/09-01/11-809-Conf.

annexes filed as 'ex parte', meaning that they were not to be provided to the Defence; and (iv) the proper procedure would have been for the Prosecution to communicate its revised position to the Chamber in a manner that would allow time for the Chamber to invite a reaction from the Defence, and for the Chamber accordingly to revise its own recommendation to the Presidency. Judge Eboe-Osuji also expressed concern regarding an "Open Letter to the President" written by Ms Gladwell Otieno on behalf of Kenyans for Peace with Truth and Justice.

8. In response to Judge Eboe-Osuji's Motion to Vacate the Plenary Vote, the Presidency on 12 July 2013 requested the views of the judges on whether the matter should be taken forward and a resumed plenary session be convened. A majority of the judges did not support vacating the vote of 11 July 2013 and reconvening the plenary, notwithstanding the above issues that were being raised by Judge Eboe-Osuji.

9. On 15 July 2013, the decision of the plenary of judges was communicated through a press release.[14]

10. On 23 August 2013 the Decision of the Plenary of Judges on the Joint Defence Application for a Change of Place where the Court Shall Sit for Trial in the case of the *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* ("Plenary Decision") was issued.[15] Judge Ozaki and Judge Eboe-Osuji each appended separate opinions to the Plenary Decision.

11. On 1 September 2013 the Defence for Mr William Samoei Ruto filed the Defence Application. The Defence Application requested that (i) the Presidency vacate the Plenary Decision and reconvene the plenary, after having received the submissions of the defence, and if deemed necessary the submissions of Kenya and of Tanzania, on the Prosecution's Additional Submissions; or, in the alternative, (ii) should the Presidency determine that it does not have the authority to vacate a decision of the plenary of judges, that the Presidency reconvene the plenary so that the plenary can determine whether the Plenary Decision should be vacated for procedural impropriety and/or unfairness.

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[14] Press Release, "Ruto and Sang case: Trial to open in The Hague", 15 July 2013, ICC-CPI-20130715-PR931.
[15] Decision of the Plenary of Judges on the Joint Defence Application for a Change of Place where the Court Shall Sit for Trial in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, 23 August 2013, ICC-01/09-01/11-875-Anx.

II. Finding

12. There is no legal basis in the statutory instruments of the Court for a party to challenge a decision of the plenary of judges. It must therefore be determined whether the Presidency, or alternatively the plenary of the judges, is empowered to reconsider and/or vacate a decision of the plenary of the judges *proprio motu.*

13. The Presidency does not consider that it has the power to vacate a decision of the plenary of judges of its own initiative. Such a power would be inconsistent with the clear requirement in the Rules that certain decisions are to be made by the judges in plenary session, including, for the present purposes, rule 100(3). It is not open to the Presidency to reconsider a decision of the plenary of judges or to substitute such a decision with its own decision.

14. However, the plenary of judges does hold an inherent power to reconsider its previous decisions *proprio motu*. The plenary may therefore, in its discretion, reconsider a decision if it considers that new facts or circumstances have arisen, or if relevant facts or circumstances are brought to its attention by a party, or if it considers that the decision was erroneous. This power is inherent in the plenary's capacity to control its own processes.

15. In the present case, after consultations with the judges who were present at the Plenary of 11 July 2013, it has been decided that a reconsideration of the Plenary Decision of 23 August 2013 by the plenary of judges is not warranted, notwithstanding the issues that are being raised by the Defence in their application, which are similar to those that were raised by Judge Eboe-Osuji in the Motion to Vacate the Plenary Vote in July 2013.

The Application is dismissed.

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

Judge Sang-Hyun Song
President

Dated this 6 September 2013

At The Hague, The Netherlands