



Original: English

No.: ICC-01/09-02/11

Date: 27 March 2012

THE APPEALS CHAMBER

Before: Judge Akua Kuenyehia, Presiding Judge
Judge Judge Sang-Hyun Song
Judge Erkki Kourula
Judge Anita Ušacka
Judge Sanji Mmasenono Monageng

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
*THE PROSECUTOR v. FRANCIS KIRIMI MUTHAURA AND
UHURU MUIGAI KENYATTA***

**Public Document
With a confidential Annex**

**The Registrar's Observations on the "Notification regarding the Legal
Representation of Participating Victims in these Appeals Proceedings" dated 19
March 2012**

Source: Registry

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

The Office of the Prosecutor

Mr. Luis Moreno Ocampo, Prosecutor
Ms. Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Mr. Karim A.A. Khan Q.C.
Mr. Essa Faal

Counsel for Uhuru Muigai Kenyatta

Mr. Steven Kay, Q.C.
Ms. Gillian Higgins

Legal Representatives of the Victims

Mr. Morris Azumah Anyah

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(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

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Mr. Didier Preira

Counsel Support Section

Prof. Dr. Esteban Peralta Losilla

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

THE REGISTRAR OF THE INTERNATIONAL CRIMINAL COURT ("the Registrar"),

RESPECTFULLY SUBMITS the present observations on the "Notification regarding the Legal Representation of Participating Victims in these Appeals Proceedings"¹ (hereinafter "the Notification") to the honourable Judges of the Appeals Chamber, in accordance with Regulation 24*bis*, paragraph 1, of the Regulations of the Court.

1. On 19 March 2012 the Legal Representative filed the Notification and sought specific reliefs before this Chamber. This Notification raised several issues related, *inter alia*, to the Legal Representative's mandate.
2. The Registrar respectfully informs the Chamber of the status of the Legal Representative's mandate as defined and interpreted by the Pre Trial Chamber II ("the Pre-Trial Chamber")² and implemented by the Registrar in accordance with the terms set out in the "Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings"³.
3. The Registrar respectfully submits in this context that the Pre Trial Chamber appointed the Legal Representative after a careful consideration of several relevant, chronological factors.
4. In the "First Decision on Victims' Participation in the Case" dated 30 March 2011, the Pre Trial Chamber instructed the Registry to "[...] take appropriate steps with a view to organizing common legal representation for the purposes of the confirmation of charges hearing, in accordance with rules 16(l)(b) and 90(2) of the Rules"⁴.
5. In accordance with this instruction, the Registrar filed on 5 August 2011 the "Proposal for a common legal representation of victims during the Pre Trial phase"⁵.
6. After considering the proposal of the Registrar, the Pre Trial Chamber appointed the Legal Representative in its "*Decision on Victims' Participation at the Confirmation of*

¹ ICC-01/09-02/11-409.

² Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, ICC-01/09-02/11-267 (dated 26 August 2011).

³ ICC-01/09-02/11-267.

⁴ ICC-01/09-02/11-23, paragraph 24.

⁵ ICC-01/09-02/11-214.

*Charges Hearing and in the Related Proceedings*⁶,” rendered on 26 August 2011. The Pre-Trial Chamber, at the outset, clarified itself in Paragraphs 1, 17 and 77 of this decision by recalling in all paragraphs the scope of the decision, and thereby the mandate of the Legal Representative.

7. In paragraph 1 of the aforementioned decision the Pre Trial Chamber stated clearly that

“The present decision addresses in a comprehensive manner the issues relating to the participation of victims at the confirmation of charges hearing and in the proceedings related thereto [...]”.

8. And clarified further on paragraph 17:

“The Single Judge wishes to point out that the scope of the present decision is limited to the participation of victims at the confirmation of charges hearing and in the related proceedings. In this respect, reference is made to article 61(7) of the Statute, which clarifies the limited purpose and scope of the confirmation hearing [...]”.

9. The Pre Trial Chamber further noted in paragraph 77, that:

“At the outset, the Single Judge recalls once again that the present decision addresses the issues relating to victims' participation at the confirmation of charges hearing and in the related proceedings. Therefore, in this section, the Single Judge will exclusively address the matter of common legal representation of those victims that are hereby admitted to participate in such proceedings”.

10. The Registrar respectfully submits that the decision to appoint the common legal representative in this case was implemented *in toto*.
11. The Registrar formally notified the Legal representative of the Chamber's decision and the limited scope of mandate as clearly defined by the Chamber's decision by letter dated 12 September 2011 (see Annex).

⁶ ICC-01/09-02/11-267.

12. At this juncture, the Registrar deems it relevant to refer to the "Decision on the 'Urgent Request by the Victims' Representative for an order from the Chamber requiring the Registrar to provide appropriate resources for the current mission in Kenya⁷" rendered by the Pre Trial Chamber II in which the Single Judge precised without any ambiguity the scope of the appointment and mandate of a common legal representative designated under identical circumstances⁸ to represent victims in the case of *The Prosecutor vs. Ruto et al*⁹.

13. In paragraph 12 of this decision, the Pre Trial Chamber indicated that:

"[The legal representative] was appointed as common legal representative of those victims admitted to participate at the confirmation of charges hearing and in the related proceedings thereto. In particular, she was entrusted with the responsibility to exercise, on those victims' behalf, a number of participatory rights at the confirmation of charges hearing and in the proceedings related thereto. Thus, the Victims' Legal Representative's appointment was clearly limited to these proceedings. Indeed, the Single Judge, when addressing the matter of common legal representation, clarified at the outset that: *[T]he Single Judge recalls once again that the present decision addresses the issues relating to victims' participation at the confirmation of charges hearing and in the related proceedings. Therefore, in this section, the Single Judge will exclusively address the matter of common legal representation of those victims that are hereby admitted to participate in such proceedings*"¹⁰.

⁷ ICC-01/09-01/11-398.

⁸ Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, ICC-01/09-01/11-249 (dated 5 August 2011).

⁹ ICC-01/09-01/11.

¹⁰ The italicized sentences were quoted by the Single Judge from the "Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings", ICC-01/09-01/11-249, para. 63, which appointed a common legal representative in the case the Prosecutor vs. Ruto, also simultaneously presided over by the Pre Trial Chamber II.

14. The Registrar notes that the italicized sentences above were identically reproduced in paragraph 77 of the decision appointing the Common Legal Representative of victims¹¹ in the case of *The Prosecutor vs. Muthaura et al.*

15. The Pre Trial Chamber, in the aforementioned “Decision on the “Urgent Request by the Victims’ Representative for an order from the Chamber requiring the Registrar to provide appropriate resources for the current mission in Kenya”,¹² further emphasized the limitation of the mandate by stating that,

“As recalled above, pursuant to the 5 August 2011 Decision, the Victims’ Legal Representative’s mandate was limited to the confirmation of charges hearing and related proceedings, and thus did not include, in and of itself, future involvement in the case. Holding otherwise would be tantamount to predetermining a possible different approach to victims’ common legal representation by the Trial Chamber to be constituted pursuant to article 61(11) of the Statute”¹³.

16. This precedent further concluded thus:

“The Single Judge considers that with the issuance of the decision on the confirmation of charges and the rejection of the applications for leave to appeal this decision, the proceedings before the Chamber that are related to the confirmation of charges have come to an end¹⁴. In light of the above, the Victims’ Legal Representative has no more *locus standi* [...]”¹⁵.

17. The Registrar submits that on all instances the Registry has implemented decisions of the Chamber, including in this context, in conformity with the decision of the confirmation of charges and the conclusion of the Pre Trial phase, by officially

¹¹ ICC-01/09-02/11-267.

¹² ICC-01/09-01/11-398.

¹³ ICC-01/09-01/11-398, paragraph 14.

¹⁴ ICC-01/09-01/11-398, paragraph 16.

¹⁵ ICC-01/09-01/11-398, paragraph 17.

informing the Legal representative by letter, of the direct implication of the end of the Pre Trial phase to his mandate as indicated by the Pre Trial Chamber¹⁶.

18. The letter dated 13 March 2012 annexed in the Notification intervened in this specific context and its principal objective was to recall the end of the mandate in accordance with the “Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings¹⁷” and the Annex I of this Observations as was done in the same context when the Chamber appointed him (Annex I).
19. The referred letter was in no way a usurpation of the Chamber’s rightful powers on this matter, an extraordinary appointment, a modification of appointment, extension or termination of his mandate, but strictly an enforcement of a decision of the Chamber.
20. The Registrar notes that the deadline of the 26 March 2012 indicated in this letter, and now challenged in the Notification, was only for a proper administrative management of the Court’s legal aid scheme¹⁸ under which the Legal representative and his team members operated, providing ample and specific timeline to enable Counsel complete any outstanding matters already commenced in the course of the representation of victims participating in the Pre Trial phase, and was in no way an extension of the mandate.
21. At this stage, the Registrar informs the Chamber that in all these contexts the Registry remains mindful of the fact that, on the 30 January 2012, the defence team submitted before this Chamber an “Appeal on behalf of Uhuru Muigai Kenyatta and Francis Kirimi Muthaura pursuant to Article 82(1)(a) against Jurisdiction in the “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute¹⁹”. Furthermore, the Registrar notes that on the 2 February 2012, this

¹⁶ See Annex of the Notification.

¹⁷ ICC-01/09-02/11-267

¹⁸ The Registrar is mandated to manage the legal aid scheme of the Court in accordance with Regulations 83 of the Regulations of the Court.

¹⁹ ICC-01/09-02/11-383.

Chamber issued directions²⁰ to the Common Legal Representative to make submissions on this appeal, which was effected on the 13 March 2012²¹.

22. Accordingly, the Registrar submits that should this Chamber require the intervention of the Legal representative at any relevant stage, for any matter directly related to this ongoing appeal, in the context where the Counsel has already participated in submissions in response to directions of this Chamber²², the Registry shall consider this specific activity eligible for remuneration under the Court's legal aid scheme, in accordance with the Registry's letter²³ to Counsel.
23. The Registrar finally notes that should counsel be unable, unwilling or unavailable to intervene in proceedings at such a stage when this Chamber requires any action from the parties and participants in this specific appeals proceeding or information to be provided to the victims participating in this appeal, she will take any appropriate action to ensure that the representation of victims is carried out in an appropriate manner.
24. Pursuant to Regulation 23*bis*, Paragraph 1, of the Regulations of the Court, the Registrar submits that the Annex is filed confidentially because it contains the contact details of the Legal representative.

²⁰ ICC-01/09-02/11-394.

²¹ Observations pursuant to Article 19 (3) of the Rome Statute and Rule 59 (3) of the Rules of Procedure and Evidence ICC-01/09-02/11-408.

²² ICC-01/09-02/11-394.

²³ See Annex of the Notification.



Esteban Peralta Losilla, Chief, Counsel Support Section
on behalf of
Silvana Arbia, Registrar

Dated this 27 March 2012

At The Hague, Netherlands