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Date: **1 June 2012**

TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding
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***

URGENT
PUBLIC DOCUMENT WITH CONFIDENTIAL *EX PARTE* ANNEXES
**Urgent request by the Victims' Representative pursuant to regulation 83(4) of the
Regulations**

Source: Victims' Representative

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

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Legal Representatives of the Victims

Ms Sureta Chana

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants(Participation/Reparation)

The Office of Public Counsel for Victims

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Other

Introduction

1. The victims' representative hereby requests the Trial Chamber, pursuant to regulation 83(4) of the Regulations of the Court, to review the Registrar's decisions of 23 May 2012 (the "**Registrar's first decision**")¹ and 24 May 2012 (the "**Registrar's second decision**")² on the scope of legal assistance to be paid by the Court for the legal representation of the victims in this case. The Registrar's first decision and Registrar's second decision are referred to below collectively as the "**Registrar's decisions**".

Applicable law

2. Paragraphs 2-4 of regulation 83 of the Regulations of the Court state:
 2. The scope of legal assistance paid by the Court regarding victims shall be determined by the Registrar in consultation with the Chamber, where appropriate.
 3. A person receiving legal assistance paid by the Court may apply to the Registrar for additional means which may be granted depending on the nature of the case.
 4. Decisions by the Registrar on the scope of legal assistance paid by the Court as defined in this regulation may be reviewed by the relevant Chamber on application by the person receiving legal assistance.
3. The present application is an application under regulation 83(4), made on behalf of the victims by their common legal representative. The Registrar's decisions are decisions within the meaning of regulation 83(4).

Background

4. In the "Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings" of 5 August 2011³ (the "**5 August 2011 decision**"), the Single Judge of the Pre-Trial Chamber *inter alia*:
 - a. admitted 327 victims as participants at the confirmation of charges hearing and in the related proceedings;⁴

¹ Confidential and *ex parte* Annex A to the present filing. This request is filed publicly, but the annexes are filed confidentially and *ex parte*, given that they contain information relating to internal work of the victims' representative's team, details of proposed activities by the victims' representative's team, and certain personal information.

² Confidential and *ex parte* Annex B to the present filing.

³ ICC-01/09-01/11-249.

⁴ *Ibid.*, para 127(a).

- b. appointed Ms. Sureta Chana as common legal representative of all the victims admitted to participate by the present decision;⁵
- c. endorsed the Registry's proposal in respect of the financial and human resources to be provided to the victims' representative;⁶ and
- d. granted the legal representative the right to participate in the confirmation of charges hearing and related proceedings in various ways.⁷

5. In the 5 August 2011 decision, the Single Judge stated that:

The Single Judge concurs with other Chambers of the Court with respect to the necessity that an appropriate legal and administrative support be provided to the common legal representative in order to perform her duties in an efficient and expeditious manner. In this respect, the Single Judge adopts such approach as also reiterated by the Registrar in her Proposal on Common Legal Representation, according to which a support structure to be proposed by the Registrar would allow the common legal representative to:

- a. Keep his or her clients informed about the progress of the proceedings and any relevant legal or factual issues that may concern them, in accordance with article 15 of the Code of Conduct for Counsel. The support structure should also allow the common legal representative to respond to a reasonable number of specific legal inquiries from individual victims.
- b. Receive general guidelines or instructions from his or her clients as a group and particular requests from individual victims.
- c. Maintain up to date files of all participating victims and their whereabouts.
- d. Obtain qualified legal support on a need basis.
- e. Store and process any confidential filings or other information, including the identity of his or her clients, in a safe and secure manner.
- f. Communicate with victims in a language they understand.⁸

6. The Single Judge also affirmed in that decision that "the effectiveness of common legal representation depends, inter alia, on the assistance, in terms of financial and human resources".⁹ That decision furthermore noted "the peculiarities of the case – including the number of victims admitted to participate, the geographical and

⁵ *Ibid.*, para 127(c).

⁶ *Ibid.*, para 127(c).

⁷ *Ibid.*, para 127(d)-(i).

⁸ *Ibid.*, para 78 (footnotes omitted).

⁹ *Ibid.*, para 80.

linguistic difficulties in establishing contact with the victims and the legal and factual complexity of the present case”.¹⁰

7. Pursuant to the 5 August 2011 decision, the human resources of the victims’ representative’s team during the confirmation of charges phase of the proceedings consisted of:
 - a. the victims’ representative, Ms Sureta Chana;
 - b. a case manager, based in The Hague;
 - c. two field workers, based in Nairobi; and
 - d. a legal assistant position, used to fund a senior international criminal lawyer based in London.
8. In the course of representing the victims during the confirmation of charges phase, the victims’ representative *inter alia* undertook missions to Kenya in August and October 2011. Both missions were authorised by the Registry.
9. The confirmation of charges hearing was held in September 2011. The victims’ representative filed the “Final written observations of the Victims’ Representative in relation to the confirmation of charges hearing” on 30 September 2011.¹¹ Thereafter, various matters required further filings by the victims’ representative’s team.¹²
10. On 23 January 2012, the Pre-Trial Chamber gave its “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute” (the “**Confirmation of Charges decision**”),¹³ confirming the charges against two of the three suspects.

¹⁰ *Ibid.*, para 79.

¹¹ ICC-01/09-01/11-344.

¹² In particular, the “Response by the Victims’ Representative to the ‘Defence Request Regarding Prejudicial Comments Made by Victims’ Legal Representative Sureta Chana during Closing Statement’”, 10 October 2011, ICC-01/09-01/11-348; the “Response by the Victims’ Representative to the ‘Application on behalf of the Government of Kenya for leave to file observations in response to submissions made by Legal Representative for the Victims’”, 25 October 2011, ICC-01/09-01/11-356; the “Communication pursuant to the Single Judge’s Decision of 5 August 2011”, 9 November 2011, ICC-01/09-01/11-366; the “Request by the Victims’ Representative for authorisation to make a further written submission on the views and concerns of the victims”, 9 November 2011, ICC-01/09-01/11-367; the “Amendments to the Communications by the Victims’ Representative to the Pre-Trial Chamber and further communication following the Single Judge’s decision of 9 December 2011”, 13 January 2012, ICC-01/09-01/11-372; the “Consolidated observations on the documents in support of the Articles 19(6) and 82(1)(a) appeals and on the Prosecution responses thereto”, 13 March 2012, ICC-01/09-01/11-401.

¹³ ICC-01/09-01/11-373.

11. On 30 January 2012, the two accused against whom charges had been confirmed filed before the Pre-Trial Chamber a request for leave to appeal against the Confirmation of Charges decision, and filed before the Appeals Chamber documents seeking to appeal against jurisdiction under Articles 19(6) and 82(1)(a) of the Statute.
12. On 2 February 2012, the Appeals Chamber issued “Directions on the submission of observations pursuant to article 19 (3) of the Rome Statute and rule 59 (3) of the Rules of Procedure and Evidence”,¹⁴ which *inter alia* ordered that the victims’ representative:

may submit consolidated observations on the documents in support of the appeals and on the responses thereto within five days of the notification of the responses or, in the event that no response is filed, the effluxion of the time stipulated for that purpose.
13. On 6 February 2012, the victims’ representative submitted to the Registry mission requests seeking approval for a three-week mission by the victims’ representative and her case manager to Kenya commencing on 19 February 2012. (The start date for the mission was subsequently postponed, such that the victims’ representative departed on 24 February 2012).¹⁵ The mission plan provided for meetings with some 280 of the 327 victims represented by the victims’ representative, at meetings to be held in four separate locations. The requested expenses for the mission were €13,020. These expenses included the costs of transportation of victims who had to travel long distances for security reasons to meet with the victims’ representative’s team, the hire of meeting venues to meet with large groups of victims, and payment for meals of the victims attending the meetings the whole day.
14. On 27 February 2011, after the victims’ representative had already arrived on mission in Kenya, the Registry made clear that the total authorised expenditure for the mission would be only € 2,000. This was some 15% of the amount that had been indicated as necessary for the mission, which made it impossible for the proposed meetings with victims in all four of the locations to be conducted.

¹⁴ ICC-01/09-01/11-383.

¹⁵ Details of this mission request, and of subsequent developments in relation to this mission until 29 February 2012, are set out in 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”, 29 February 2012, ICC-01/09-01/11-392, the public redacted version of which is ICC-01/09-01/11-392-Red (the “**29 February 2012 filing**”), and the annexes thereto.

15. Therefore, on 29 February 2012, the victims' representative filed before the Pre-Trial Chamber a request for review, pursuant to regulation 83(4) of the Regulations, of the decision of the Registrar not to approve the necessary expenses of the mission (the "**29 February 2012 request**").¹⁶
16. On 9 March 2012, the Pre-Trial Chamber refused the Defence applications for leave to appeal against the Confirmation of Charges decision (the "**Leave to Appeal decision**").¹⁷
17. On the same day, 9 March 2012, the Single Judge of the Pre-Trial Chamber issued a decision (the "**9 March 2012 decision**") on the 29 February 2012 request.¹⁸ That decision dismissed the request for review under regulation 83(4) *in limine*. The Single Judge reasoned that the victims' representative was appointed to participate at the confirmation of charges hearing and in the related proceedings thereto, that the confirmation of charges hearing had concluded with the issuance of the Confirmation of Charges decision and Leave to Appeal decision, and that the victims' representative therefore had no more *locus standi* to put forward the request. The Single Judge was also of the view that the scope of the mission in Kenya to which the application related went beyond the scope of the victims' representative's mandate.
18. On 13 March 2012, the victims' representative filed before the Appeals Chamber the "Consolidated observations on the documents in support of the Articles 19(6) and 82(1)(a) appeals and on the Prosecution responses thereto".¹⁹
19. On the same day, 13 March 2012, the Registrar issued a decision to the victims' representative (the "**Registrar's 13 March 2012 decision**"),²⁰ which stated that the Confirmation of Charges decision and Leave to Appeal decision had effectively concluded the mandate and appointment of the victims' representative and members of her team, who should therefore complete their check-out procedures. Inconsistently with this, the decision went on to state that any involvement or activity

¹⁶ See footnote 15 above.

¹⁷ "Decision on the Defences' Applications for Leave to Appeal the Decision on the Confirmation of Charges Pursuant to Article 61(7) (a) and (b) of the Rome Statute", 9 March 2012, ICC-01/09-01/11-399.

¹⁸ "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'", 9 March 2012, ICC-01/09-01/11-398 ("**9 March 2012 decision**").

¹⁹ ICC-01/09-01/11-401.

²⁰ Confidential and *ex parte* Annex E to the present filing.

that the victims' representative envisaged performing in this case after 26 March 2012 had to be requested in advance and pre-approved by the Registry.

20. On 23 March 2012, the victims' representative consequently filed before the Appeals Chamber a request for review under regulation 83(4) of the Regulations of the Registrar's 13 March 2012 decision.²¹
21. On 26 March 2012, the victims' representative wrote to the Registry.²² That letter noted the regulation 83(4) request that had been made to the Appeals Chamber, and advised of matters that required ongoing attention by a legal representative of the victims until the time of appointment of legal representation for the victims at the trial phase. The letter requested reconsideration of the Registrar's 13 March 2012 decision. It also requested that no e-mail accounts should be closed and that no check-out procedures should be undertaken in relation to members of the victims' representative's team until the regulation 83(4) request was decided.
22. On 23 April 2012, the Appeals Chamber issued its "Decision on the 'Application of the Victims' Representative pursuant to Article 83 of the Regulations'" (the "**23 April 2012 Appeals Chamber decision**").²³ In that decision, the Appeals Chamber held that, without prejudice to the power of the Trial Chamber to determine questions of victim representation at the trial phase, unless and until the representation agreement is brought to an end pursuant to article 17 of the Code, the legal representative appointed pursuant to the 5 August 2011 decision continues to represent the victims.
23. In that decision, the Appeals Chamber went on to state that:

This, however, does not mean that the scope of legal assistance paid by the Court must be maintained at the same level as during the pre-trial proceedings. The Appeals Chamber recalls that the Victims have already submitted the Victims' Observations, setting out their views on the appeals. Currently, no further intervention by the Victims in relation to the present appeals is anticipated. In the view of the Appeals Chamber, and based on the information currently available to the Chamber, the approach of the Registry as to legal assistance paid by the Court for the present phase of the proceedings before the Appeals Chamber, namely that further activities of the Legal Representative must be authorised beforehand by the Registry in order to be covered by the legal aid scheme, is therefore adequate.

²¹ "Application of the Victims' Representative pursuant to Article 83 of the Regulations", 23 March 2012, ICC-01/09-01/11-404 (the "**23 March 2012 request**").

²² Confidential and *ex parte* Annex F to the present filing.

²³ ICC-01/09-01/11-409.

24. On 26 April 2012, the Registry wrote a letter to the victims' representative,²⁴ stating that pursuant to the 23 April 2012 Appeals Chamber decision, activities of the legal representative must be authorised by the Registry in advance in order to be remunerated under the legal aid scheme of the Court. That letter also stated that the resources available under the legal aid scheme of the Court were restricted to the legal representative personally, and that involvement by any other members appointed to the victims' representative's team pursuant to the 5 August 2011 decision would not be remunerated under the Court's legal aid scheme. A letter in similar terms was sent to the victims' representative of the victims in the *Muthaura and Kenyatta* case.
25. On 7 May 2012, the victims' representatives in the *Ruto and Sang* case and *Muthaura and Kenyatta* case submitted a joint response to the Registry.²⁵ That response stated *inter alia* the following. It follows from the reasoning of the 23 April 2012 Appeals Chamber decision that the mandate of the victims' representation, as determined by the 5 August 2011 decision, continues until such time as the representation is brought to an end pursuant to Article 17 of the Code or the Trial Chamber elects to appoint another legal representative. The legal representation of the victims for this purpose includes all members of the legal representative's team. The appointments of all members of the victims' representative's team therefore continue and remain unchanged, but the Registry must pre-authorise and further activities of any members of the team, if their activities are to be remunerated under the Court's legal aid scheme. Any request by the victims' representative for pre-authorisation by the Registry of activities of other members of the team would have to be considered on its merits by the Registry if and when any such request was made. It would be contrary to any recognised principles of administrative law for the Registry to prejudge any such future application, before it is even made, by stating that any such application will be refused to the extent that it involves activity by other members of the victims' representative's team.

²⁴ Confidential and *ex parte* Annex G to the present filing.

²⁵ Confidential and *ex parte* Annex C to the present filing.

26. On the same day, 7 May 2012, the victims' representative in the present case submitted a request to the Registry for pre-authorisation of activities of members of the victims' representative's team (the "**7 May 2012 request**").²⁶ That request is at Annex D to the present filing. That request noted that the functions of the victims representative as set out in the 5 August 2011 decision (quoted in paragraph 6 above) are ongoing functions, that victims may at any time wish to communicate concerns to their legal representative, that there may at any time be developments in the case which the victims' representative needs to communicate to clients, and that the victims' representatives therefore have to continue to monitor developments in the case on an ongoing basis. Paragraphs 8-10 of that request then set out three specific activities on which work was immediately required by the victims' representative's team. Paragraphs 14 and 15 also expressed concern that the field workers and case manager, who had left other jobs to take up their present employment, had been left with no income since 26 March 2012. The request sought pre-authorisation for the field workers and case manager to continue their work on a full-time basis under the normal timesheet regime of the Registry. The request sought pre-authorisation for other members of the team to work for a limited number of hours.
27. On 14 May 2012, the Trial Chamber issued the "Order scheduling a status conference" ("**14 May 2012 order**"), scheduling a status conference to be held in this case on 11 June 2012. In that order, the Trial Chamber confirmed that in accordance with the 23 April 2012 Appeals Chamber decision, "the legal representative of victims shall provisionally continue to represent victims currently participating in the proceedings before the Trial Chamber until a decision is made on the legal representation of victims". The 14 May 2012 order also provided *inter alia* for the victims' representative to file certain written submissions before the Trial Chamber by 28 May 2012 and 25 June 2012 respectively.
28. On 18 May 2012, the victims' representative sent an e-mail to the Registry,²⁷ noting that the 14 May 2012 order required the victims' representative to file certain written submissions, and seeking further pre-authorisation for work on these filings by the

²⁶ Confidential and *ex parte* Annex D to the present filing.

²⁷ Confidential and *ex parte* Annex H to the present filing.

legal representative, case manager and legal assistant position, in addition to the work on the other matters identified in the 7 May 2012 request.

29. On 23 May 2012, the Registry issued the Registrar's first decision.²⁸ This decision stated that "the Registry shall consider the relevant activities performed by you as a legal representative before the Trial Chamber V as eligible for remuneration under the legal aid scheme until a decision is made on the legal representation of victims or until any other relevant factors justify otherwise". However, the decision further stated that the requested pre-authorisation was refused in relation to the field workers, and that no decision had yet been reached in relation to the requested pre-authorisation for the other members of the victims' representative's team. The decision emphasised that "no payment for any *post facto* activities shall be made".
30. On 24 May 2012, the victims' representative sent another letter to the Registry²⁹ providing further details about activities needed in order to prepare for the filing due on 28 May 2012 and for the status conference scheduled for 11 June 2012.
31. On 24 May 2012 (an hour after the victims' representative sent the letter referred to above), the Registry issued the Registrar's second decision, in relation to the 7 May request.³⁰ This second decision effectively refuses the victims' representative's request for pre-authorisation in relation to the other members of the team. It is worded as a request for further details and clarifications of the request. However, for the reasons given below, it is submitted that this letter is effectively a refusal to accede to the request for pre-authorisation in relation to the other members of the victims' representative's team.
32. As additional background information, the victims' representative informs the Chamber that she, as well as her legal assistant and case manager have volunteered time to write extensive letters to the Registry as well as the present filing, among other matters. Neither the victims' representative nor any of the team members have received any remuneration since 26 March 2012.

²⁸ Confidential and *ex parte* Annex A to the present filing.

²⁹ Confidential and *ex parte* Annex J to the present filing.

³⁰ Confidential and *ex parte* Annex D to the present filing.

Submissions

General

33. This is an application for review by the Trial Chamber, under regulation 83(4), of the Registrar's Decisions.
34. The Trial Chamber in the *Katanga* case, in a decision on a regulation 83(4) application,³¹ has recently considered the standard of review to be applied by the Chamber in undertaking a review of a decision of the Registrar under this provision. That Trial Chamber held that:

... the Chamber is of the view that a more flexible standard is appropriate, given that the impact and importance of the Registrar's decisions in relation to the scope of legal aid varies so broadly. For example, when Chambers are asked to review crucial decisions affecting the composition of defence teams at a given procedural stage, it is fitting for a Chamber to review the merits of the Registrar's decision more thoroughly in light of the fairness of proceedings and the need to ensure that suspects and accused persons have adequate legal representation. However, when the Registrar makes decisions in relation to the day-to-day operating of defence counsel or legal representatives and their teams, the Chamber's intervention is more limited. This is so because the Chamber is not supposed to micromanage the Registrar in this regard and because it is the Registrar's responsibility to administer the available legal aid budget. It is not disputed that the Registrar has a relatively wide margin of discretion in this area and Chambers should therefore only interfere with this discretion when there are compelling reasons for doing so. In practical terms, this means that in reviewing such decisions, the Chamber must not consider whether it would have made the same decision as the Registrar. Instead, the Chamber must assess (a) whether the Registrar has abused her discretion; (b) whether the Registrar's decision is affected by a material error of law or fact; and (c) whether the Registrar's decision is manifestly unreasonable. The Chamber will only intervene if counsel can show that the Registrar's decision falls foul of one or more of these criteria.

35. That decision is not binding on this Trial Chamber, and there is as yet no decision by the Appeals Chamber on the standard of review to be applied by the Chamber in undertaking a review under regulation 83(4). It is submitted that it is therefore possible that regulation 83(4) does in fact provide for a *de novo* review by the Chamber. However, even on the assumption that the *Katanga* decision articulates the

³¹ *Prosecutor v Katanga and Chui*, "Decision on the Urgent Requests by the Legal Representative of Victims for Review of Registrar's Decision of 3 April 2012 regarding Legal Aid", 23 April 2012, ICC-01/04-01/07-3277.

correct standard of review, in the present case the Registrar has abused her discretion, and/or the Registrar's decisions are affected by a material error of law or fact, and/or the Registrar's decisions are manifestly unreasonable.

Fundamental errors in the Registrar's Decisions

36. A fundamental error in the Registrar's decisions is that they fail to have regard to the professional duties of the victims' representative as counsel before the Court.
37. As the 23 April 2012 Appeals Chamber decision expressly recognises, the victims' representative is subject to the Code of Professional Conduct of Counsel. Obligations of counsel under the Code include the duty to act independently (Article 6(1)), the duty not to permit his or her independence, integrity or freedom to be compromised by external pressure and not to do anything which may lead to any reasonable inference that his or her independence has been compromised (Article 6(2)), the duty to ensure respect for professional secrecy and the confidentiality of information (Article 8(1)), and the duty to maintain the confidentiality of communications with clients (Article 15(3)).
38. It is acknowledged that legal aid funding is limited. It is further acknowledged that in order to allocate limited legal aid funding between the various legal teams in different cases, the Registry needs to make some assessment of the needs of each legal team at different stages of the proceedings. However, in the same way that "the Chamber is not supposed to micromanage the Registrar" (as was said in the *Katanga* decision quoted above), the Registrar is not supposed to micromanage legal teams. It would be inconsistent with the Code for counsel to have to explain to the Registry in detail each individual activity that they propose to undertake on behalf of their clients, and to then act on the Registry's view as to whether or not each activity is "necessary".
39. It is accepted that the Registry is entitled to ask for information about the general nature and amount of work that counsel consider to be necessary at different stages of the proceedings. It is also accepted that the Registry will not necessarily be bound by counsel's views as to the level of legal aid resources that are required. However, it is not accepted that the Registry is entitled to seek information about, or to form views

on the necessity of, the minutiae of the activities proposed to be undertaken by counsel. The Single Judge did not do this when approving the level of legal aid funding in the 5 August 2011 decision. Rather, the Single Judge's decision was based on a general assessment of needs, having regard to the considerations referred to at paragraphs 5 and 6 above.

40. It is submitted that the victims' representative's 7 May 2012 request contained sufficient information to enable the Registry to make a decision on that request. For the Registry to wait two weeks, and to then respond with a request for detailed information as to the minutiae of each of the individual proposed activities, amounts to a failure to respect the duties of counsel under the Code. To give a particular example, the second paragraph on page 2 of the Registrar's second decision (beginning "*On the matter raised in point 9 of your letter ...*") deals with work of the victims' representative that is clearly sensitive and confidential, and which the victims' representative should not be required to disclose to the Registry. Furthermore, even if the Registry were entitled to ask those questions, the victims' representative and her team would first need to undertake substantial work on the matter before they were in a position to respond to those questions. That work cannot be undertaken because it is not approved.
41. As is stated in paragraph 17 of the 7 May 2012 request, "it would have ethical implications for the professional relationship between legal representative and client if the legal representative had to negotiate with the Registry over every individual action proposed to be undertaken on behalf of a client". The Registrar's Decisions, in requiring every individual activity of counsel to be justified and pre-approved, errs in law and/or is manifestly unreasonable.
42. A second fundamental error in the Registrar's Decisions is that they fail to have regard to the nature of the victims' representative's mandate.
43. The 23 April 2012 Appeals Chamber decision makes clear that the victims' representative's appointment and mandate as defined in the 5 August 2011 decision continues unchanged (regardless of whether or not the level of legal aid funding has changed). That mandate includes the following functions:
 - a. Keep his or her clients informed about the progress of the proceedings and any relevant legal or factual issues that may

concern them, in accordance with article 15 of the Code of Conduct for Counsel. The support structure should also allow the common legal representative to respond to a reasonable number of specific legal inquiries from individual victims.

b. Receive general guidelines or instructions from his or her clients as a group and particular requests from individual victims.

c. Maintain up to date files of all participating victims and their whereabouts.

44. As is stated in paragraphs 5-6 of the 7 May 2012 request, these are self-evidently ongoing functions. Victims may at any time wish to raise issues or concerns with their legal representative, and there may at any time be developments in the case which the victims' representative considers necessary to communicate to her clients. The performance of these actions requires a structure to support the victims' representative, and requires the victims' representative's team to monitor developments in the case on an ongoing basis. It is submitted that this is reflected in the passages in the 5 August 2011 decision referred to in paragraph 6 above.
45. Furthermore, paragraphs 8 to 10 of the 7 May 2012 request referred to three specific activities which the victims' representative considered necessary to be undertaken at the present time. It is submitted that each of those three activities legitimately fall within the mandate of a victims' representative at this stage of the proceedings. Each of these specific activities requires communication between the victims' representative and her clients, and reasonably requires the involvement of other members of her team, including her field workers and case manager.
46. Notwithstanding this, the third last paragraph of the Registrar's second decision states:

... we kindly seek clarification on the absolute necessity for constant communication with clients, in view of the early stage of the proceedings before Trial Chamber V and the substantially reduced level of activity before the Chamber.

47. This statement in the Registrar's second decision simply ignores the explanation given in paragraphs 4-11 of the 7 May 2012 request. Furthermore, in referring to the "absolute necessity" for constant communication with clients, the Registrar's second decision applies an incorrect legal test. Eligibility for legal aid funding for legal

representation does not depend on whether each individual proposed activity of a legal representative is an “absolute necessity”. In any event, communication between a legal representative and his or her clients clearly is an absolute necessity.

48. The first paragraph on page 2 of the Registrar’s second decision similarly fails to have regard to the nature of the victims’ representative’s mandate, because it suggests that victims can only raise concerns in response to orders or directions of the Trial Chamber. It is a matter of obvious concern to each of the victims that the Confirmation of Charges decision might have implications for their continuing status as victims in the case. Paragraph 8 of the 7 May 2012 request indicated an intention to make an application to the Trial Chamber in respect of this issue. It is submitted that victims are not precluded from applying to raise concerns before the Trial Chamber at any time. In stating that this activity should not be authorised by the Registry because the Trial Chamber “has not provided any directions at this stage” suggests that the Registry erroneously considers that victims can only raise matters with the Trial Chamber when expressly invited by the Trial Chamber to do so. It also suggests that the Registry is in a better position to decide what actions should be undertaken to advance the interest of the victims’ than the victims’ representative herself.
49. The Registrar’s decisions thereby fail to have regard to the nature of the victims’ representative’s mandate apply an incorrect legal test. They are thereby also an abuse of discretion and are manifestly unreasonable.
50. A third fundamental error in the Registrar’s Decisions is that they amount to an abuse of discretion and are manifestly unreasonable in failing to provide a prompt decision based on the information contained in the 7 May 2012 request. Communications from the Registry to the victims’ representative have repeatedly stated that for any activities to be funded by the Court’s legal aid system, the pre-approval of the Registry is required, and that authorisation will not be granted *ex post facto*. This means that the victims’ representative has been left unable to undertake any work (except to the extent that she or members of her team are prepared to act *pro bono*) until such time as approval is granted.
51. Although a request for pre-approval was made on 7 May 2012, and despite the fact that the Trial Chamber issued an order on 14 May 2012 expressly requiring the

victims' representative to file certain written submissions by 28 May 2012, the Registry did not grant approval to work being undertaken by the victims' representative herself until the 23 May 2012 Registrar's first decision. In respect of members of the victims' representative's team other than the field workers, the Registry only responded on 24 May 2012, not with a decision on whether or not to grant the request, but with a request for "clarifications". Given that the victims' representative's team was unable to undertake legal aid funded work until a decision was taken by the Registry, it is submitted that such delay by the Registry is an abuse of discretion. It is further submitted that there was sufficient information in the 7 May 2012 request for the Registry to take a decision on the request in so far as it related to other members of the team, and that the 24 May 2012 Registrar's second decision falls to be regarded as a constructive refusal of the request in relation to other team members.

Specific errors in the Registrar's First Decision

52. The Registrar's first decision approved legal aid funding in respect of the victims' representative herself, but refused legal aid funding in respect of her field workers. No reasons for this refusal were given, other than the terse statement that "*the Registry ... does not find it absolutely necessary to maintain the full resources available for resource persons in the field as it was established during the pre-trial phase*". It is submitted that the need for field workers is clear from the 7 May 2012 request and from the submissions above. In the Registrar's first decision, the Registry has simply not engaged with the information presented in the 7 May 2012 request. As such, it is manifestly unreasonable and an abuse of discretion.

Specific errors in the Registrar's Second Decision

53. The "clarifications" requested in the Registrar's second decision similarly indicate that the Registry has failed to engage with the information presented in the 7 May 2012 request.
54. The second paragraph of the Registrar's second decision asks why the filings to be presented to the Trial Chamber pursuant to its order scheduling a status conference

could not reasonably be accomplished by the victims' representative alone. The filings in question were expected to address, *inter alia*, "any victims the legal representatives may seek authorisation to call". Clearly, any response to that question would require communication with the individual victims potentially to be called (which requires the services of the field workers). Seeking to identify which of the 327 represented victims would be most appropriate to be called self-evidently requires an analysis of the circumstances of each of the victims and the crimes of which they were victims, which requires the assistance of the case manager.

55. The fourth paragraph of the Registrar's second decision (beginning "*Regarding point five of your request ...*") states that the victims' representative has identified no specific activity that would require communication with her clients. That is obviously incorrect. Paragraphs 6-10 of the 7 May 2012 request set out clearly specific activities requiring communication with clients.
56. The first paragraph on page 2 of the Registrar's second decision (beginning "*Furthermore, regarding point eight of your request ...*") states that the victims' representative has already conducted a mission for the purpose of informing the victims of the impact of the Confirmation of Charges decision. This ignores the fact that because the Registry did not approve the necessary expenses to conduct all of the proposed meetings with victims (see paragraphs 13-14 above), the victims' representative was in that mission able to meet with only 32 of the 280 victims with whom she originally intended to meet.³² Furthermore, and in any event, even after the impact of the Confirmation of Charges decision is explained to victims, it is necessary to act on the victims' concerns and instructions in the light of that explanation. This was made clear in paragraph 8 of the 7 May 2012 request, which the Registrar's second decision simply ignores.
57. This paragraph of the Registrar's second decision also states that "*we consider that matters relating to participation of victims or rights during the reparations phase are premature*". This is an obvious over-simplification. Developments at any stage of the pre-trial or trial proceedings may have potential implications for the future right of the victims to reparations. It is the role of a legal representative of victims to advise

³² Confidential and *ex parte* Annex I to the present filing.

victims of such potential implications whenever such developments occur, and to consider what action could be taken at the time of such developments to avoid future rights to reparation being potentially affected. This is made clear in paragraph 8 of the 7 May 2012 request.

58. The third paragraph on page 2 of the Registrar's second decision (beginning *"Furthermore, regarding point ten of your request ..."*) clearly misperceives what is stated in paragraph 10 of the 7 May 2012 request (regarding communication with victims with protection concerns). Paragraph 10 of the 7 May 2012 request referred to this one victim in dire need of protection by way of example. The second sentence of paragraph 10 of the 7 May 2012 request makes clear that security concerns are an issue for other victims also. The Registrar's second decision simply ignores this. The Registry argues that communication with a victim who needed protection in unnecessary. The Registry ignores the background to the specific request for protection of the victim in question and the reasons for rejection. This related to a renewal of measures for a victim already benefiting from protection further to an assessment by the Registrar (through another unit of the Registry, the Victims and Witnesses Unit) that the victim was at risk. The renewal in question was rejected because the Registrar considered that it would be too dangerous for the victim to apply the measure he had requested. In any event, it is submitted that these are details that the victims' representative should not need to provide.

Conclusion

59. For the reasons above, it is submitted that in rejecting the 7 May 2012 request, the Registrar has abused her discretion, and/or the Registrar's decisions are affected by a material error of law or fact, and/or the Registrar's decisions are manifestly unreasonable.
60. It is further submitted that it is evident that there is work required to be undertaken by the victims' representative and other members of her team. The Trial Chamber has now been constituted, a status conference has been scheduled, and the parties and the victims' representative have been ordered by the Trial Chamber to file written submissions.

61. Given the delay by the Registry in issuing the Registrar's decisions after the 7 May 2012 request was made, it is submitted that it would not be appropriate simply to require the Registrar to reconsider the Registrar's decisions. It can be expected that there would be a further delay in any new decision being taken by the Registrar, which might then be the subject of a further application for review under regulation 83(4).
62. It can be expected that the Trial Chamber will, in a relatively short space of time, issue a decision on victims' representation in the trial phase, and on the level of resources to be provided to the victims' representative from the legal aid budget during the trial phase.
63. Having regard to this consideration, and to the explanations given in the 8 May 2012 request, it is submitted that it would be appropriate for the Trial Chamber, on reviewing the Registrar's Decisions under regulation 83(4), to order that until such time as the Trial Chamber issues a decision on victims' representation in the trial phase, the victims' representative's team shall on an interim basis continue to receive the same resources as it had during the confirmation of charges phase, as provided for in the 5 August 2011 decision.



Sureta Chana

Dated this 1st day of June 2012

At London, United Kingdom