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Date: **24 August 2012**

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 CASES OF THE
PROSECUTOR V. WILLIAM SAMOEI RUTO AND JOSHUA ARAP SANG AND
THE PROSECUTOR V. FRANCIS KIRIMI MUTHAURA AND UHURU MUIGAI
KENYATTA**

**Public Document,
With Confidential *Ex Parte* Annex 1**

**Request for Leave to Submit Amicus Curiae observations pursuant to Rule 103 of
the Rules of Procedure and Evidence**

Source: The Civil Society Organization Network ('CSO Network')

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

The Office of the Prosecutor

Counsel for the Defence

Legal Representative of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representative

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia

Deputy Registrar

Mr. Didier Preira

Victims and Witnesses Unit

Defence Support Section

Detention Section

Victims Participation and Reparations Section

Ms. Fiona McKay

Other:

I. Introduction

1. The Civil Society Organization Network ('CSO Network') respectfully seeks leave to submit observations as *amicus curiae* on the modalities of victim participation at the trial phase of the proceedings in the cases of the *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*¹ and the *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*².
2. The present application is made pursuant to Rule 103 of the Rules of Procedure and Evidence (the 'Rules').

II. Application for Leave

3. The CSO Network is a Trust established under the laws of Kenya and has been operating as a Network of Civil Society Organizations since 1999. The Network has a large participation from different development actors and research institutions operating within Kenya. The CSO Network has also been working with the victims of the 2007-2008 Post-Election Violence, including informing them of their right to participate as victims before the International Criminal Court. Since 2008, the CSO Network has actively worked with victims in a number of initiatives, including assisting their participation in the Commission of Inquiry into the Post-Election Violence ('CIPEV or the Waki Commission') and the Truth, Justice and Reconciliation Commission ('TJRC') amongst others. All these various endeavors have been aimed at seeking justice for the victims of the 2007-2008 Post-Election Violence.
4. Rule 103(1) of the Rules states the following:

"At any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite, or grant leave to a State,

¹ ICC-01/09-01/11

² ICC-01/09-02/11

organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate."

5. For the reasons stated below, the CSO Network requests leave to submit an *amicus curiae* brief in the two Cases. Therefore in accordance with rule 103(1), CSO Network applies for leave to submit observations in writing.

III. The Proposed *Amicus Curiae* will assist the Chamber in ensuring an effective system of victim participation at the Trial Phase of proceedings

6. At present, the CSO Network has been in constant communication with victims who are within the scope of the two Cases before the Trial Chamber V ("the Chamber"), including eleven victims³ who have applied to participate in the proceedings before the International Criminal Court in the *Ruto et al* and the *Muthaura et al*⁴ Cases before the Chamber, but who have yet to be accepted to participate in the Cases. In addition, CSO Network has been in communication with victims who are within the scope of the two Cases before the Chamber, who have not yet applied to participate in the proceedings and/or have yet to transmit their applications to the Victims Participation and Reparations Section ('VPRS'), but are interested in doing so.
7. The Victims are interested in exercising their right to participate before the ICC as enshrined in Article 68 (3) of the Rome Statute. Article 68(3) of the Rome Statute states:

"Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which

³ Please refer to Confidential Annex 1

⁴ ICC-01/09-01/11 and ICC-01/09-02/11

is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”

8. The text of Article 68(3) ensures that the relevant Chamber will define the scope of victims’ participation. The manner in which the Chamber circumscribes victim participation at the Trial Phase has a direct impact on victims who fall within the scope of the two Cases who want to participate in the proceedings. Therefore, the Victims request the Chamber for leave to submit their observations regarding the modalities of victim participation at the Trial Phase of proceedings as *amicus curiae*.
9. As yet, the Chamber has not stated how victims will be able to participate at the Trial Phase of the two Cases. Given that the trials in both cases commence on 10 April 2013⁵ and 11 April 2013,⁶ it is imperative that the victims who fall within the scope of the Kenya cases receive guidance as to when and how they can participate. Victims deserve and require relevant access to information pertaining to how and when they can participate. The victims that CSO Network is in communication with have expressed their interest in applying to participate in the proceedings. However, they require urgent communication on when the application process shall commence. Further, Application Forms for participation must be made easily accessible to the victims and relevant trainings be conducted to enable the victims properly fill out the Application Forms for participation.
10. It must be noted that during the Confirmation of Charges hearings of the two Kenya Cases, a large number of victims could not participate as their application forms were incomplete and thus could not be transmitted to the Pre Trial Chamber II (“the Pre Trial Chamber”). This is partly due to the fact that the VPRS only had a deadline of approximately three months to submit completed Application Forms for participation in order to meet the deadline

⁵ ICC-01/09-01/11

⁶ ICC-01/09-02/11

set out by the Pre Trial Chamber. As a result, a large number of victims were locked out of participating during the Confirmation of Charges Hearings in the two Cases. This situation was highly undesirable and the Victims urge the Chamber to ensure that reasonable time-limits be demarcated well in advance of the commencement of trial in the two cases.

11. The Victims believe that the Court should endeavor to communicate with the victims on a more consistent basis. This is supported by the fact that a significant number of victims with whom the CSO Network has been in contact with have complained about a lack of communication from the Court in relation to Application Forms for participation that they had submitted in May 2011.⁷
12. Therefore, the Victims urge the Chamber to ensure that effective outreach on victim participation in proceedings before the Court be conducted as soon as possible within the affected communities. Further to this, the Victims state that they should be allowed to participate on a rolling basis during the proceedings in the two Cases in order to ensure that Application Forms for participation are not submitted in a hurried manner and are complete when submitted to the VPRS.
13. The victims who fall within the scope of the two Kenya Cases have particular views and concerns separate to the victims of the Kenya situation and thus would like the opportunity to raise these issues through the Common Legal Representatives for victims in the two Kenya Cases. In order for this to happen, victim Application Forms for participation must be completed, forwarded to the Chamber and a decision on victims accepted to participate in the proceedings rendered. In addition it has been noted by several scholars

⁷ The importance of communicating with victims has been stated in various Court documents including the *'Report of the Court on the strategy in relation to victims'*, Assembly of States Parties, ICC-ASP /8/45, 10 November 2009. One of the broad principles underpinning the Strategy is 'A commitment to communicate with victims both in order to provide information so that the Court's mandate on victims is widely understood by victims and in order to listen to victims''

that Legal Representatives for victim continue to make a substantial impact in the proceedings before the Court.⁸ The victims therefore wish to be part of this process and be represented by the Legal Representatives, but can only do so once and when the Chamber makes a decision on victim participation in the proceedings of the two Kenya Cases.

14. It is therefore hoped that unlike in the past, the Court will take a consistent and unified approach to victim participation and the manner in which victims will be permitted to present their views and concerns in the proceedings. Indeed it is hoped that the Chamber will follow the approach adopted by Trial Chamber II in the *Katanga/Ngudjolo*⁹ case. The Victims believe that this decision most accurately reflects the rights afforded to victims under Article 68(3) of the Rome Statute.

IV. Confidentiality¹⁰

15. The annex to this request has been submitted confidentially and on an *ex parte* basis, in order to protect the identities of the victims that the CSO Network has been in contact with. The victims have specifically requested that their identities not be disclosed to the public or to the parties and participants in the two Kenya cases.

V. Conclusion and Relief

16. For the foregoing reasons, the CSO Network requests that the Chamber grant leave to submit observations regarding the modalities of victim participation

⁸ See for example in B. McGonigle Leyh, 'Understanding Limitations. Victim Participation and the International Criminal Court' in R. Letschert, R. Haveman, A.M de Brouwer, A. Pemberton, *Victimological Approaches to International Crimes: Africa*, Intersentia, 2001

⁹ *Prosecutor v. Germain Katanga and Mathieu Ndjolo Chui*, Decision on the Modalities of Victim Participation at Trial, 22 January 2010, ICC-01/04-01/07-1788

¹⁰ See Regulation 23 *bis*, Regulations of the Court, as amended through 14 November 2007.

at trial, *amicus curiae*, and order that a brief be filed in the present matter pursuant to rule 103.

Respectfully submitted,



Martha Ndukuyu

On behalf of

CSO Network

Dated this 24th day of August 2012

At Nairobi, Kenya