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

Date: **5 September, 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 CASE OF

***THE PROSECUTOR V. FRANCIS KIRIMI MUTHAURA AND UHURU MUIGAI
KENYATTA***

Public Document

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

Source: Kituo Cha Sheria (Centre for Legal Empowerment)

Document 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 Francis Muthaura

Mr. Karim Khan, Mr. Essa Faal, Mr. Kennedy Ogetto, Ms. Shyamala Alagendra

Counsel for Uhuru Muigai Kenyatta

Mr Steven Kay, Ms Gillian Higgins

Legal Representative of the Victims

Mr. Morris Anyah

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

Civil Society Organization Network

REGISTRY

Registrar

Ms. Silvana Arbia

Deputy Registrar

Mr. Didier Preira

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations Other:
Section**

Ms. Fiona McKay

Introduction

1. Kituo Cha Sheria (Centre for legal Empowerment) respectfully seeks leave to submit observations as *amicus curiae* on the issue of victim participation in the trial proceedings in the cases of the *Prosecutor v. William Ruto and Joshua Arap Sang* and the *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*.
2. The present application is made pursuant to Rule 103 of the Rules of Procedure and Evidence (the ‘Rules’).

Background

3. On 23 January 2012, Pre-Trial Chamber II confirmed the charges against Mr Kenyatta, Mr Muthaura, Mr Ruto and Mr Sang.¹
4. On 29 March 2012, the Presidency constituted Trial Chamber V (TC V) to try both cases.²
5. On 14 May 2012, TC V in both cases issued the Order scheduling a status conference in which it stated among others that : “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**”.³[emphasis added]
6. On 28 May 2012, the Registry submitted its observations in both cases in relation to the order scheduling a status conference where it indicated among others that it had

¹ Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red and ICC-01/09-01/11-373, 23 January 2012.

² Decision constituting Trial Chamber V, 29 March 2012, ICC-01/09-01/11-406,; Decision referring the case of The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta to Trial Chamber V, 29 March 2012, ICC-01/09-02/11-414.

³ Order scheduling a status conference, ICC-01/09-01/11-413 and ICC-01/09-02/11-422, 14 May 2012, at para 6.

identified “several issues relating to the organisation of victim participation during the trial that require to be resolved before the commencement of the trial...”⁴

7. On 9 July 2012, TC V set the dates for the commencement of the trials in the two Kenyan cases, *Ruto & Sang* and *Muthaura & Kenyatta*, for 10 and 11 April 2013 respectively.⁵
8. On 24 August 2012, TC V in both Kenya cases issued its decision on the protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call in which it stated among others that: “as the Chamber has not yet ruled on the system of processing applications for participation and modalities of participation of victims, the final protocol will not deal with matters relating to victims.”⁶
9. On 24 August 2012, the Civil Society Organization Network filed a request for leave to intervene in both cases on the issue of the modalities of victim participation at the trial phase of the proceedings.⁷

The Applicant

10. Kituo Cha Sheria (Centre for Legal Empowerment), hereinafter referred to as ‘Kituo’, is a human rights non-governmental organization founded in 1973. Kituo is committed to supporting access to justice for the disadvantaged and the poor people and has carved its niche in the area of transitional justice as it relates to the poor and the marginalized. Shortly after the 2007/2008 post election violence (PEV), Kituo designed a project aimed at facilitating effective community participation in the Truth Justice and Reconciliation Process in Kenya, as well as victims’ participation in the

⁴ Registry submissions following the Order scheduling a status conference”, ICC-01/09-01/11-418 and ICC-01/09-02/11-430, 28 May 2012, at page 6.

⁵ Decision on the schedule leading up to trial, ICC-01/09-01/11-440 and ICC-01/09-02/11-451, 9 July 2012.

⁶ Decision on the protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call, ICC-01/09-01/11-449 and ICC-01/09-02/11-469, 24 August 2012.

⁷ Request for leave to submit amicus curia observations pursuant to Rule 103 of the Rule of Procedure and Evidence, ICC-01/09-01/11-450 and ICC-01/09-02/11-470, 24 August 2012.

ICC process. As part of the aforementioned project, Kituo is currently undertaking outreach to 2007/2008 PEV victims with the aim of promoting victim participation in the ICC process.

11. So far, Kituo has reached out to more than **6000** victims between July 2009 and September 2012 and submitted over **2000** victim participation and reparation application forms to the Court. Some of these applicants were subsequently admitted to participate in the respective two cases.

12. Kituo operates in the following areas:

- **North Rift:** Eldoret, Burnt Forest, Turbo, and Nandi Town
- **Central Rift:** Subukia, Naivasha, Nakuru
- **South Rift:** Kericho, Litein, Bomet, Chepilat
- **Nyanza:** Kisumu
- **Western:** Vihiga
- **Coast:** Kisauni
- **Central:** Nyahururu Mawingu Camp, Limuru and Kiambu
- **Nairobi:** Kibera

13. Kituo is in constant communication with victims who appear to be within the scope of the two cases before Trial Chamber V. In the months of June and July 2012, Kituo conducted outreach sessions to **434** victims in Molo, Nakuru, Naivasha, Eldoret, Kitale and Kericho all of whom have applied to participate in the proceedings in the ICC.

14. At the time of this application, Kituo is conducting awareness sessions on victims' participation in ICC proceedings and related matters in some of the above mentioned areas. In the process of this, we have encountered issues that we believe are significant at this stage of the proceedings and could be of assistance to the Chamber.

The application for leave to intervene

15. Rule 103(1) of the Rules of Procedure and Evidence (“the Rules”) of the International Criminal Court (“ICC” or “the Court”) provides that: *“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, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate.”*
16. Pursuant to rule 103 of the Rules, spontaneous applications can be submitted either by States, organizations or individuals interested to participate in the proceedings before the Court.
17. In deciding whether to grant leave to an applicant to submit observations as *amicus curiae*, according to rule 103 of the Rules, the Appeals Chamber has underlined that, when acting within the sphere of rule 103 of the Rules, the respective Chamber should take into consideration whether the proposed submission of observations may assist it “in the proper determination of the case”.⁸
18. Other international courts and tribunals permit third party interventions, such as, the International Criminal Tribunal for the former Yugoslavia (“ICTY”) ⁹, the International Criminal Tribunal for Rwanda (“ICTR”) ¹⁰ and the Special Court for Sierra Leone (“SCSL”),¹¹ on similar bases as Rule 103(1). The ICTR and the SCSL have received submissions from third parties where it was considered that there was a reason to believe that those submissions would assist the court to reach the right decision.¹²

⁸ See, Decision on “Motion for Leave to File Proposed Amicus Curiae Submission of the International Criminal Bar Pursuant to Rule 103 of the Rules of Procedure and Evidence” ICC-01/04-01/06 OA 11 of 22 April 2008.

⁹ Rule 74 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia.

¹⁰ Rule 74 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda

¹¹ Rule 74 of the Rules of Procedure and Evidence of the Special Court for Sierra Leone

¹² See for example *Prosecutor v Jean-Paul Akayesu* Case No. ICTR-96-4-T “Order Granting Leave for Amicus Curiae to Appear” 12 February 1998; *Prosecutor v Laurent Semanza* Case No. ICTR-97-20-T “Decision on the Kingdom of Belgium’s Application to File and Amicus Curiae Brief and on the Defence Application to Strike Out the Observations of the Kingdom of Belgium Concerning the Preliminary Response of the Defence” 9

19. The Appeals Chamber of the Special Court of Sierra Leone has further found, when ruling on the application by Non Governmental Organisations to intervene in the *Kallon* case that: “*The issue is whether it is desirable to receive such assistance, and ‘desirable’ does not mean ‘essential’ (which would be over-restrictive) nor does it have an over-permissive meaning such as ‘convenient’ or ‘interesting’. The discretion will be exercised in favour of an application where there is a real reason to believe that written submissions, or such submissions supplemented by oral argument, will help the Court to reach the right decision on the issue before it.*”¹³

20. It is submitted that the issue of victims’ participation including the related application process is currently a live issue before the Chamber, and that Kituo Cha Sheria is well placed to provide information which may assist the Court in the proper determination of the issue.

Specific issues the Applicant seeks leave to submit *amicus curiae* on

21. From the foregoing, Kituo would like to intervene in the following issues:

- a. The importance of meaningful participation for victims in Kenya;
- b. The application process relating to the participation of victims in the upcoming proceedings in the two Kenya cases including considerations around timeframes;
- c. Considerations relevant to the modalities of victims’ participation and their representation at trial.

22. On the importance of participation for victims, the victims that we have interacted with are keen to ensure that they participate in the trial. As such, the view of victims is that they require information and directions on how they can meaningfully

February 200; *Prosecutor v Kallon* Case No. SCSL-2003-07 “Decision on Application by the Redress Trust, Lawyers Committee for Human Rights and the International Commission of Jurists for Leave to File Amicus Curiae brief and to Present Oral Submissions” 1 November 2003.

¹³ SCSL-2003-07 of 1 November 2003, *ibid.*, at para 5.

participate. We would wish to bring to the attention of the Chamber some of the reasons why victims feel that it is important for them to participate such as their desire to feel part of the process. The victims further are of the view that since the ICC process is the only accountability process ongoing to deal with the 2007/8 PEV, they deserve an opportunity to be fully engaged in it.

23. On the application process for victims' participation and reparation, victims have taken note of the approach of collective participation that was employed in the Gbagbo Case. This has created uncertainty and created some confusion amongst victims. Though keen to engage with the Court, they are reluctant to fill in application forms without clear guidance and direction from the Chamber. At the same time, they are concerned that, failure to fill in a form now could negatively impact their ability to get participatory status in the cases. This is informed by the time needed for victims to be sensitized in order for them to make an informed decision on participation and the time required by the Court to process and rule upon applications. We recall that many victims missed the opportunity to participate at the pre-trial phase of both cases due to time limitations and wish to bring to the attention of the Chamber information which may be relevant to its determination of timeframes around the process for victims to apply for participation.

24. On the modalities of participation and representation during the trial proceedings, some of the victims we have interacted with are desirous of an opportunity to tell the court in person of what they suffered and further information they feel would assist the court reach a fair determination.

25. They have also emphasized to us that they wish to see a continued strong representation of victims during the trial phase and be continuously updated on the progress of the cases in The Hague.

Additional Information

26. Kituo is aware of the application from Civil Society Organization Network (CSO-NET) dated 24 August 2012 on the modalities of victims' participation at the trial phase in both Kenyan cases. For the sake of efficiency of the proceedings, should the Chamber deem fit, Kituo would be happy to work together with CSO-NET for the amicus observations to be consolidated to the extent that issues raised are similar.

27. While Kituo has worked with victims who are recognized as participants in the cases, the amicus observations we propose to submit do not purport to represent the views of victims admitted in the case, but rather, bring to the attention of the Chamber information in relation to those victims we have interacted with who have not yet applied for or been granted participatory status in either case.

Conclusion and Relief

28. For the foregoing reasons, Kituo requests that the Chamber grant it leave to submit *amicus curiae* observations on these issues pursuant to rule 103 of the rules of procedure of evidence.

Respectfully submitted,



Priscilla Nyokabi Kanyua- Executive Director

On behalf of

Kituo Cha Sheria

Dated this 5 September, 2012

At Nairobi, Kenya