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No.: ICC-01/09-02/11
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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 – URGENT
With Annexes 1 & 2 CONFIDENTIAL
And Annexes 3 & 4 PUBLIC**

**Registry's Proposal on the Division of Responsibilities and Effective
Functioning of the Common Legal Representation System**

Source: The Registrar

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

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Mr Morris Anyah

Legal Representatives of Applicants

Unrepresented Victims

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The Registrar of the International Criminal Court (the “Court”)

NOTING the “Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings” issued by the Single Judge of Pre-Trial Chamber II on 26 August 2011 (the “Decision of 26 August 2011”);¹

NOTING the “Decision on the ‘Notification regarding the Legal Representation of Participating Victims in the Appeals Proceedings” issued by the Appeals Chamber on 23 April 2012 (the “Appeals Decision of 23 April 2012”);²

NOTING the “Decision on victims’ representation and participation” (the “Decision”) issued by Trial Chamber V (the “Chamber”) on 3 October 2012;³

NOTING article 68(3) of the Rome Statute, rules 89 to 91 of the Rules of Procedure and Evidence (the “RPE”), regulations 67, 68, 80 and 81 of the Regulations of the Court (the “RoC”), regulations 115, 124 and 125 of the regulations of the Registry (“the RoR”), articles 7(4), 8(1), 16, 17, 24(1) and 32 of the Code of Professional Conduct for Counsel (the “CPCC”);

CONSIDERING that, in her Decision of 26 August 2011, the Single Judge appointed Mr Morris Anyah as legal representative for victims admitted to participate in the case;⁴

CONSIDERING that, in its Decision of 23 April 2012, the Appeals Chamber confirmed that the appointment of Mr. Anyah as common legal representative of the victims was not limited to the pre-trial phase and would continue until expressly brought to an end under article 17 CPCC;⁵

CONSIDERING that the Decision instructed the Registry and the Office of the Public Counsel for Victims (“OPCV”) to consult with each other and to submit, within 14 days of the notification, a joint proposal on the division of responsibilities

¹ ICC-01/09-02/11-267.

² ICC-01/09-02/11-416.

³ ICC-01/09-02/11-498.

⁴ ICC-01/09-02/11-267, par. 91 and p. 46.

⁵ ICC-01/09-02/11-416, par. 18.

and effective functioning of the common legal representation system set out in the Decision;⁶

RESPECTFULLY SUBMITS AS FOLLOWS:

A. The consultation process

1. Upon notification of the Decision, the Registrar and the OPCV took steps in preparation of the forthcoming consultation.
2. As a preliminary step, the Registrar undertook to contact the current common legal representative in the case, Mr Anyah. As a result of the Appeals Decision of 23 April 2012, Mr Anyah's appointment as common legal representative should continue until it is expressly brought to an end under article 17 of the CPCC. The Registrar observes that the Chamber refers to the Appeals finding in its Decision,⁷ instructs the Registry to submit a recommendation for the position of Common legal representative,⁸ but nowhere expressly puts to an end the mandate of Mr Anyah. The Registrar accordingly concluded that Mr Anyah's appointment continued until the possible designation of another common legal representative by the Chamber and, in preparation of the requested recommendation on the appointment of a common legal representative, first sought Mr Anyah's views as to whether he wished to continue representing victims in the case under the new conditions set up by the Chamber.
3. A letter was sent by the Deputy Registrar to Mr Anyah on 8 October 2012 (**Annex 1**). Mr Anyah responded on 11 October 2012 (**Annex 2**). In his letter, he requested not to be nominated by the Registry for the purpose of the designation of the Common Legal Representative. The reasons for his position are stated in the letter. The Registrar will address the consequences of Mr. Anyah's response

⁶ ICC-01/09-02/11-498, par. 44.

⁷ ICC-01/09-02/11-498, par. 6.

⁸ ICC-01/09-02/11-498, par. 60.

together with her forthcoming recommendation for the position of Common Legal Representative.

4. In the meantime, the Public Counsel sent an internal office memorandum to the Registrar on 10 October 2012 conveying the preliminary position of the OPCV in relation to the implementation of the Decision (**Annex 3**). In this memorandum, the Public Counsel first identified “legal and practical impediments” and indicated the resources the Office may offer in order to implement de decision. The Registrar responded on 17 October 2012 (**Annex 4**).
5. A consultation meeting took place on Friday 12 October 2012 in the presence of representatives of the OPCV and of the relevant sections of the Registry (VPRS, CSS, DCS, RLASS). The meeting was chaired by the Deputy Registrar. During this meeting, the Principal Counsel of the OPCV confirmed the preliminary position of her office stated in her memorandum of 10 October 2012 and expressed reticence as to defining in detail with the Registry, in the absence of the common legal representative who was not yet appointed, the division of responsibilities and effective functioning of the common legal representation system set up by the Decision. The Deputy Registrar took note of the Public Counsel’s position and it was agreed that the Registry would prepare a first draft of a proposal setting out the general principles relevant to the issues identified by the Chamber and would then give an opportunity to the OPCV to comment on it. The Registry and the OPCV agreed on this approach.
6. The Registry transmitted its initial proposal to OPCV on Tuesday 16 October, 1.44 a.m.. On the same day at 4.45 p.m., the OPCV transmitted an alternative draft. After consideration, the Registry considered that the new draft did not reflect the Registry’s views expressed at the meeting of 12 October 2012 and in its initial filing. It communicated this concern on 16 October 2012, 7.33 p.m. and submitted a consolidated draft reflecting the views of the Registry – as exposed in its initial draft – and of the OPCV – as exposed in its alternative draft – on 17 October 2012, 11.47 a.m.. At 1.42 p.m., the Principal Counsel informed the Registry by e-mail that it would submit a separate filing and complained about the way the

consultation process took place. She also opposed her memorandum of 10 October 2012 to be annexed to the filing.

7. In light of the Principal Counsel's express mention, in her memorandum of 10 October 2012, that the issues addressed therein shall be brought to the attention of the Chamber, the Registrar nevertheless keeps annexes 3 and 4, which she deems relevant for the Chamber's consideration of the issues at stake.

B. Registry's proposal on the division of responsibilities and effective functioning of the common legal representation system set up by the Decision

B.1. Division of responsibilities

8. At the outset, the Registry observes that the Decision provides guidance as to the respective responsibilities of the Common Legal Representative and of the OPCV.
9. Under the Decision, the Common Legal Representative is responsible for, *inter alia*:
 - i. Acting as the point of contact for victims whom he/she represents and to formulate their views and concerns;⁹
 - ii. Ensuring that the views and concerns he or she represents are those of only individuals qualifying as victims in the present case;¹⁰
 - iii. Making sure (in conjunction with the Registry) that the victims of the case assigned to the Common Legal Representatives are informed of the new procedure.¹¹
 - iv. Submitting filings on behalf of victims wishing to appear directly, in person or via video-link, before the Court¹² and, should the Chamber request so, make a selection of a specified number of applications, from which the Chamber will select those eligible for personal appearance;¹³

⁹ ICC-01/09-02/11-498, para. 41.

¹⁰ ICC-01/09-02/11-498, para. 52.

¹¹ ICC-01/09-02/11-498, para. 53.

¹² ICC-01/09-02/11-498, para. 55.

¹³ ICC-01/09-02/11-498, para. 56.

- v. Giving instruction to OPCV on the submissions to be made on his/her behalf;¹⁴
- vi. Appearing on the victims' behalf at critical junctures of trial that involve victims interests;¹⁵
- vii. Appearing at other times during the trial upon specific request filed with the Chamber;¹⁶
- viii. Drafting and submitting filings in response to documents presented at trial that impact the interests of victims;¹⁷
- ix. Giving Opening and Closing Statements;¹⁸
- x. Presenting Evidence.¹⁹

10. On the other hand, the OPCV shall be responsible for:

- xi. Attending hearings in which victims are allowed to participate "in order to ensure that the Common Legal Representative is fully informed of the day-to-day developments in the proceedings";²⁰
- xii. Making submissions on behalf of the Common Legal Representative;²¹
- xiii. Questioning witnesses on behalf of Common Legal Representative, "except where the Chamber has authorised the Common Legal Representative to appear in person";²²
- xiv. Assisting the Common Legal Representative in preparing relevant written submissions.²³

11. In all its tasks in relation to the present case, the OPCV will be acting on behalf of the Common Legal Representative.²⁴

B.2. Corresponding resources

12. The Registry's understanding of the functions entrusted to the OPCV is that functions (xi), (xii) and (xiii) above are performed by the Office as counsel appointed in the case under Regulation 80(2) of the RoC, whereas function (xiv)

¹⁴ ICC-01/09-02/11-498, para. 59.

¹⁵ ICC-01/09-02/11-498, para. 70.

¹⁶ ICC-01/09-02/11-498, para. 70.

¹⁷ ICC-01/09-02/11-498, para. 71.

¹⁸ ICC-01/09-02/11-498, para. 72.

¹⁹ ICC-01/09-02/11-498, para. 76.

²⁰ ICC-01/09-02/11-498, para. 59.

²¹ ICC-01/09-02/11-498, para. 59.

²² ICC-01/09-02/11-498, para. 74.

²³ ICC-01/09-02/11-498, para. 42.

²⁴ ICC-01/09-02/11-498, para. 40.

rather falls within its basic mandate under Regulation 81(4)(a) of the RoC. Functions (xi)-(xiii) form part of the core activities of representation that shall normally be performed by Counsel: representation in the courtroom, filing of submissions and questioning of witnesses.

13. In its decision of 21 February 2007, the Appeals Chamber ruled:²⁵

15. Counsel for the defence may, again as provided in rule 22 (1) of the Rules of Procedure and Evidence, be assisted by other persons with relevant expertise including professors of law. Regulation 68 of the Regulations of the Court provides that assistants to counsel “may include persons who can assist counsel in the presentation of the case before a Chamber”. The qualifications of legal assistants are established by regulation 124 of the Regulations of the Registry. The qualifications of counsel and assistants to counsel are different, both in terms of legal expertise and years of experience. The authority of assistants is limited to rendering assistance to counsel in the presentation of the case before a Chamber. They have no authority to replace counsel or stand in for him/her, except perhaps with the authorization of the latter. [...]

14. It results from the above ruling by the Appeals Chamber that every member of a legal team cannot indistinctively replace a counsel in the performance of all of his/her functions. Certain functions require to be performed by counsel. On the other hand, legal assistants, whose functions and qualifications are contemplated under regulation 68 of the RoC and regulations 124-125 of the RoR, cannot perform acts other than rendering assistance; they cannot replace counsel or stand in for him/her. The Appeals Chamber does not totally rule out that legal assistants may be (“perhaps”) admissible to stand in for counsel, but as a limited exception to the general rule and with the express authorization of the counsel.

15. In the present case, since the Chamber has already ordered that functions (xi) to (xiii) should be provided by OPCV on behalf of the Common Legal Representative, it would not be appropriate to seek the Common Legal Representative’s authorization for something that was already ordered by the Chamber. The Common Legal Representative cannot be empowered to frustrate the implementation of the Chamber’s decision solely by refusing his authorization to have functions (xi) to (xiii) performed by a person who does not

²⁵ ICC-01/04-01/06-834, para. 15.

fulfill the criteria for eligibility as co-counsel. On the other hand, persons acting on behalf of a Counsel engage the latter's responsibility under the CPCC. The Counsel thus cannot be compelled to entrust persons not fulfilling the appropriate requirements with the performance of tasks under his/her own responsibility.

16. It can therefore be concluded that the only solution for accommodating the Appeals Chamber's requirement is for the OPCV to provide staff fulfilling the qualifications as Counsel under rule 22 of the RPE and regulation 67 of the RoC, namely:

- a. established competence in international or criminal law;
- b. at least 10 years of relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings;
- c. an excellent knowledge of and fluency in at least one working language of the Court; and
- d. absence of conviction for serious criminal or disciplinary offence considered to be incompatible with the nature of the office of counsel before the Court.

17. The Registrar observes that, in her memorandum of 10 October 2012, the Principal Counsel of the OPCV suggests to allocate to each case one Legal Officer at the P-3 level, plus, if need be, one Associate Legal Officer at the P-2 level. These indications as to the profile of the persons are not sufficient to assess whether the persons fulfill the abovementioned criteria. The Registrar therefore reserves her position as to the suitability of the proposed resources for the purpose of implementing the Decision until communication of the identity, qualifications and experience of the proposed candidates.

18. Whatever the resources provided, the Registrar further observes that the OPCV already considered before Pre-Trial Chamber II that, although no conflict of interests arose, according to the Office, at the time of its submissions from representation of victims in both cases ICC-01/09-01/11 and ICC-01/09-02/11, it

was nevertheless alert to the possibility of real or perceived conflicts of interests that could arise and that, out of an abundance of caution, it deemed it necessary to constitute two separate and autonomous legal teams, one for each case;²⁶ confidential information should not be shared between the teams and an information management system should rigorously segregate access to such information by case. The Registrar observes that, under article 16 of the CPCC, it is up to the Counsel to decide when conflicts of interests may arise and to exercise all care to ensure that none arise. The Registrar accordingly commends the care used by the Public Counsel to prevent such conflicts from arising and considers that, unless the OPCV and the Common Legal Representative can provide good reasons for a change of circumstances excluding the arising of a conflict of interests at the present stage, the same cautions should continue to apply. The resources provided by OPCV in support of the Common Legal Representatives in the two cases should therefore continue to be separated in the same way.

19. The Registrar further observes that the Public Counsel mentions in her memorandum of 10 October 2012 that “the Office will need – in order to comply with the decisions – additional resources which can be, at this point in time, quantified as an additional P-3” and that “[t]his need can be easily accommodated, in the Office’s view, by funding the said position for an initial period of one year (1 January – 31 December 2013) from the legal aid budget.” The Registrar observes that the solution contemplated by the Public Counsel for funding the additional resource her Office requires is not workable for two reasons: first, the additional resource would be appointed as staff of the Court, whereas the legal aid budget cannot be used for such purpose; second, the current legal aid scheme provides that the team of a legal representative at trial phase shall be composed of one Counsel plus one case manager. The resources provided by OPCV would therefore anyway go beyond what the legal aid scheme provides and thus cannot be supported on the budget of legal aid. Such additional resources, should the OPCV need them, would have to be found outside the legal

²⁶ ICC-01/09-02/11-49, par. 5-7.

aid budget. Otherwise, the Office will have to work on the basis of its existing resources.

20. Now turning to the resources that may be provided to the Common Legal Representative other than by the OPCV, the Registrar intends to take into consideration the assistance provided by the OPCV in its assessment of resources to be provided under the legal aid scheme. As mentioned above, the assistance provided by the OPCV goes beyond what is normally provided for a legal representative's team at trial stage and in that sense is difficult to quantify. But the Registrar will strive to avoid unnecessary duplications in assessing the resources to be provided to the common legal representative. This may imply that no additional resources may be provided for the legal team at headquarters, but that resources may be allocated in order to ensure an ongoing presence in Kenya throughout the course of the proceedings, as per the Chamber's instruction.²⁷ This shall be a primary consideration when the Registry will make its recommendation to the Chamber on the appointment of the Common Legal Representative.

B.3. Accountability and functioning

21. As mentioned earlier, the Decision provides that the OPCV shall fulfill its functions in the case "on behalf of the Common Legal Representative."
22. The Registrar observes that the Principal Counsel of the OPCV stated in her Memorandum of 10 October 2012 that this aspect gave "rise to both legal and practical impediments": she mentions the independence of the Office, its ability to work on multiple cases simultaneously, and conflicting standards and mechanisms of accountability, especially the fact that the staff of the OPCV would have to be bound by the Common Legal Representative's instructions, while still being accountable to the Principal Counsel of the Office, who is responsible for their performance appraisal, and by the Staff Rules and Regulations.

²⁷ ICC-01/09-02/11-498, para. 60.

23. As mentioned by the Deputy Registrar at the meeting held on 12 October 2012, the Registry disagrees with the Public Counsel as to the existence of the legal impediments mentioned by the Public Counsel.
24. As to the independence of the Office, regulation 81(2) of the RoC provides that the OPCV “shall fall within the remit of the Registry solely for administrative purposes and otherwise shall function as a wholly independent office.” Its independence is thus defined *vis-à-vis* the Registry and is intended to constitute a limit to the administrative supervision of the Registrar over the activities and functioning of the OPCV. This interpretation is supported under regulation 115 of the RoR, entitled “Independence of members of the Office”, which provides that “[t]he members of the Office shall not receive any instructions from the Registrar in relation to the conduct of the discharge of their tasks as referred to in regulations 80 and 81 of the RoC.” Regulation 115 of the RoR does not provide anything in support of an independence of the Office *vis-à-vis* other actors, outside Registry. Performing functions on behalf of an external Common Legal Representative, himself totally independent from the Court, thus cannot affect the independence of the OPCV *vis-à-vis* the Registry.
25. As to allegedly conflicting standards and mechanisms of accountability, the Registrar also finds the Public Counsel’s arguments unconvincing. Regulation 115(2) of the RoR specifically provides that the members of the OPCV shall be bound, when discharging their responsibilities under regulations 80 and 81 of the RoC, by the CPCC. Regulation 115(3) of the RoR further provides that the provisions applicable to staff members – in particular the Staff Regulations and Rules – shall only apply to the OPCV’s staff for issues other than the conduct of the representation of a person or assistance to legal representatives of victims. As a consequence of these two provisions, the administrative scheme governing the recruitment and performances of staff members does not apply to OPCV staff members with respect to the performance of their functions when assisting counsel: unlike the submissions of the Public Counsel in her Memorandum, Staff Regulations and Rules do not apply to OPCV staff members when performing

these functions; the administrative performance appraisal system does not apply either. As head of an administrative section, the Principal Counsel of the OPCV shall still appraise the staff of her Office, but such appraisal shall not take into account activities performed in connection with providing assistance to counsel. The appraisal shall focus on other aspects of the activities of the OPCV as an administrative section of the Court.

26. With respect to the activities of OPCV staff performed in compliance with the Chamber's decision on behalf of the Common Legal Representative, these shall be fulfilled under the responsibility of the Common Legal Representative, as lead Counsel of the team, pursuant to articles 7(4), 8(1), 24(1) and 32 of the CPCC. Staff members assisting the Common Legal Representative shall be bound by professional secrecy and confidentiality under article 8 of the CPCC: these shall also apply towards other staff members of the OPCV who are not assigned to the case, including the Principal Counsel, who shall not rely on their administrative authority over the staff to gain access to information. Each OPCV staff member assigned to the case should accordingly be held responsible *vis-à-vis* the Common Legal Representative to whom he or she is assigned, in case of breach of confidentiality or non-respect of the segregation of the teams put in place by the Principal Counsel on her own initiative during the pre-trial phase.²⁸
27. The Registry would welcome, once the Common Legal Representative is appointed and the member(s) of the OPCV working in the case are identified, the setting up of a procedure for a dispute resolution mechanism to arbitrate between the Common Legal Representative, the member(s) of the OPCV working on his/her behalf, and/or the OPCV. In light of the independence of the OPCV and of external counsel *vis-à-vis* the Registry and in order to safeguard its neutrality, the Registrar would rather avoid playing a role in the resolution of such conflicts and would instead recommend a resolution by the Chamber. Such conflict may be drawn to the attention of the Chamber by way of a discrete application by the

²⁸ Op. cit, ICC-01/09-02/11-49, par. 5-7.

Common Legal Representative and/or the OPCV, as contemplated under paragraph 70 of the Decision.



Silvana Arbia, Registrar

Dated this 17 October 2012

At The Hague, the Netherlands