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No.: ICC-01/09-02/11
Date: 30th October 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

**Application by Kituo Cha Sheria for Leave to Submit Observations pursuant to
Rule 103 of the Rules of Procedure and Evidence**

Source: Kituo Cha Sheria (Centre for Legal Aid Empowerment)

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

The Office of the Prosecutor

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Legal Representative of the Victims

Mr. Morris Anyah

Legal Representatives of the Applicants

Unrepresented Victims

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I. INTRODUCTION

1. Kituo Cha Sheria (Centre for Legal Empowerment) (“the Applicant” and “Kituo”) hereby seeks leave to submit *amicus curiae* observations in relation to the modalities of implementation of the new system for victims’ participation and representation established by the Chamber in its “Decision on victims’ participation and representation” (“The Decision”), issued on 3 October 2012 in the cases of the *Prosecutor v. William Ruto and Joshua Arap Sang*¹ (“Ruto and Sang” and “Kenya case I”) and the *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*² (“Muthaura and Kenyatta” and “Kenya case II”), respectively.
2. The present application is being brought before the Chamber pursuant to Rule 103 of the Rules of Procedure and Evidence (“Rules”).

II. RELEVANT PROCEDURAL HISTORY

3. On 5 and 26 August 2011, in Kenya case I and II respectively, the Single Judge issued the “Decision on Victims’ Participation at the Confirmation of Charges Hearing and Related Proceedings”³, whereby *inter alia* it appointed common legal representatives for the victims authorised to participate in the pre-trial proceedings of each case.⁴ In the same decision the Single Judge, endorsing the Registry’s proposal, ruled that the legal team assisting the legal representative should consist of: (i) a legal assistant, (ii) a case manager and (iii) two field assistants.⁵

¹ “Decision on victims’ representation and participation”, ICC-01/09-01/11-460, 3 October 2012.

² “Decision on victims’ representation and participation”, ICC-01/09-02/11-498, 3 October 2012.

³ “Decision on Victims’ Participation at the Confirmation of Charges Hearing and Related Proceedings”, ICC-01/09-01/11-249, 5 August 2011 and ICC-01/09-02/11-267, 26 August 2011.

⁴ ICC-01/09-01/11-249, para. 77; ICC-01/09-02/11-267, para. 91.

⁵ ICC-01/09-01/11-249, paras. 79-80; ICC-01/09-02/11-267, paras. 93-94.

4. On 23 January 2012, Pre-Trial Chamber II confirmed the charges against Mr. Ruto, Mr. Sang, Mr. Kenyatta and Mr. Muthaura.⁶
5. On 29 March 2012, the Presidency constituted Trial Chamber V, to which both cases were assigned.⁷
6. On 11 and 12 June 2012, in *Ruto & Sang* and *Muthaura & Kenyatta* respectively, the Trial Chamber held its first status conference⁸ as per the scheduling order of 14 May 2012.⁹ The matter of the participation of victims at trial was not dealt with during either status conference. The Chamber stated that “[w]ith regard to the participation of victims in this trial, the Chamber *will request submissions* in order to issue a decision on this matter in due course”.¹⁰ (emphasis added)
7. On 9 July 2012, the Trial Chamber set the dates for the commencement of the trials in the two Kenya cases, *Ruto & Sang* and *Muthaura & Kenyatta*, for 10 and 11 April 2013, respectively.¹¹
8. On 24 August and 6 September 2012 respectively, Civil Society Network and the Applicant requested leave to submit observations as *amicus curiae* in both cases.¹² On 13 September 2012, Trial Chamber V rejected the requests filed by both organizations.¹³ The Trial Chamber explained that “[t]he Chamber has already received from the Registry a ‘Draft Protocol on the application process for victim participation and reparations at the Trial stage’, in response to which

⁶ “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, ICC-01/09-01/11-373 and 01/09-02/11-382, 23 January 2012.

⁷ “Decision constituting Trial Chamber V and Referring to it the case of The Prosecutor v. William Ruto and Joshua Arap Sang”, 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.

⁸ ICC-01/09-01/11-T-15-ENG ET WT and ICC-01/09-02/11-T-18-ENG ET WT.

⁹ “Order scheduling a status conference”, ICC-01/09-01/11-413 and ICC-01/09-02/11-422, 14 May 2012.

¹⁰ ICC-01/09-01/11-T-15-ENG ET WT, p. 42, lines 22-25 ; ICC-01/09-02/11-T-18-ENG ET WT, p. 59, lines 10-13.

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

¹² “Request for Leave to Submit Amicus Curiae observations pursuant to Rule 103 of the Rules of Procedure and Evidence”, ICC-01/09-01/11-450 and ICC-01/09-02/11-470, “Request for Leave to Submit Amicus Curiae observations pursuant to Rule 103 of the Rules of Procedure and Evidence”, ICC-01/09-01/11-454 and ICC-01/09-02/11-480, 5 September 2012, notified on 6 September 2012.

¹³ “Decision on two requests for leave to submit *amicus curiae* observations”, ICC-01/09-01/11-456 and ICC-01/09-02/11-484, 13 September 2012.

the Registry was informed that *no further proposals concerning the issue would be required.*¹⁴ (emphasis added)

9. On 3 October 2012, the Chamber issued in both cases the “Decision on victims’ participation and legal representation”.¹⁵ The Decision sets up a new system for victims’ participation and common legal representation. In the Decision, Trial Chamber V instructs “the Registry and the OPCV to consult and to submit a joint proposal on the division of responsibilities and effective functioning of the common legal representation system within 14 days of notification of [the] Decision” and “the Registry to submit a recommendation for the position of Common Legal Representative within 30 days of notification of [the] Decision.”
10. On 17 October 2012, the Office of Public Counsel for Victims (“OPCV”) and the Registry each filed a “Proposal in relation to the Division of Responsibilities and Effective Functioning of the Common Legal Representation System” (“the OPCV and Registry Submissions”).¹⁶

III. KITUO IS AN APPROPRIATE ORGANIZATION TO ACT AS AMICUS CURIAE ON THE MATTER CONCERNED

11. 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 ICC process. As part of the aforementioned project,

¹⁴ “Decision on two requests for leave to submit *amicus curiae* observations”, ICC-01/09-01/11-456 and ICC-01/09-02/11-484, para. 5.

¹⁵ ICC-01/09-01/11-460 and ICC-01/09-02/11-498.

¹⁶ “OPCV’s Proposal on the Division of Responsibilities and Effective Functioning of the Common Legal Representation System”, ICC-01/09-01/11-462 and ICC-01/09-02/11-507; “Registry’s Proposal on the Division of Responsibilities and Effective Functioning of the Common Legal Representation System, ICC-01/09-01/11-463 and ICC-01/09-02/11-508.

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

12. So far, Kituo has reached out to more than 6000 victims between July 2009 and September 2012 and has helped victims submit over 2000 victim participation and reparation application forms to the Court. Some of these applicants were subsequently admitted to participate in the cases.
13. 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
14. Kituo is in constant communication with victims who appear to be within the scope of the two cases before Trial Chamber V. For example, 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.
15. 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, it has encountered issues that it believes are significant at this stage of the proceedings and could be of assistance to the Chamber.

IV. THE OBSERVATIONS WILL ASSIST THE COURT IN THE PROPER DETERMINATION OF THE ISSUES CONCERNED

16. Rule 103 (1) of the Rules 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 the Chamber deems appropriate”. (emphasis added)
17. Pursuant to Rule 103 of the Rules, spontaneous applications can be submitted either by States, organizations or individuals interested to participate in proceedings before the Court.
19. It is respectfully submitted that the Applicant, as a result of its work and expertise, is in a position to provide the Chamber with information and insight that would assist it in the proper determination of issues related to the implementation of the newly established system of victims’ representation and participation and that otherwise would not be available to the Chamber. Indeed, it is the Applicant’s view that its submissions would constitute a unique perspective for and contribution to the realization of a system of victims’ representation and participation which is “as meaningful as possible, as opposed to purely symbolic.”¹⁷
20. In this regard the Applicant respectfully notes that no consultation was undertaken by the Chamber with participating victims, applicant victims or other victims, the Legal Representatives of Victims, the OPCV or the Registry of the International Criminal Court prior to the issuance of the Decision. Submissions on the implementation of the system of common legal representation have been filed by the OPCV and the Registry only on 17 October 2012. We note that both the OPCV and the Registry Submissions do not reflect any sort of thorough analysis of the victims’ needs in relation to common legal representation, but rather internal disputes among offices of the Court.

¹⁷ ICC-01/09-01/11-460, para. 59; ICC-01/09-01/11-498, para. 58

Kituo, as an organization which works closely with the victims of the post election violence, submits that in these circumstances its contribution through *amicus curiae* observations would be of great assistance, if not essential, to the Chamber as they will bring awareness about issues and concerns that would not otherwise be taken into account when setting out the modalities of implementation of the new system of participation and representation.

21. The victims have voiced their concerns regarding the possible change in their legal representation and with Counsel that they have established a relationship of trust with for over one year. Indeed, victims in the *Muthaura et al.*,¹⁸ case have specifically voiced their concerns regarding a potential Kenyan legal representative for fears that such an individual may be compromised, given the alleged involvement of the Government of Kenya in the *Muthaura et al.*, case. Furthermore, there are real and perceived security concerns that the Court must take into account given that the legal representative for victims will be based in the country on an “ongoing basis”. Such an individual is bound to be high profile given the public interest that the current ICC cases solicit. We believe the Court must take adequate measures to ensure that the fact Counsel is based in Kenya is not a significant disadvantage given the security context and possible pressures that could be exercised upon the Common Legal Representative.

V. SPECIFIC ISSUES THE APPLICANT SEEKS TO ADDRESS IN THE PROPOSED AMICUS CURIAE OBSERVATIONS

22. The Applicant wishes to provide the Chamber with submissions on the following matters related to the modalities of implementation of the Decision:

a) *Common Legal Representation:*

¹⁸ “Notificaiton by the Victims’ Legal Representative”, ICC/-01/09-01/11-503, 12 October 2012.

- i) *Importance of consultation with the victims:* The victims do not appear to have been consulted on their choice of legal representative. While it is acknowledged that the Chamber has the power to appoint a common legal representative following selection by the Registry, as per Rule 90(3), this rule only applies after the victims have been consulted and in case they are “unable to choose a common legal representative or representatives”.¹⁹ It is also acknowledged the Court may want to expedite the process of appointing a common legal representative. However, it is submitted that the idea of consultation and involvement of victims is at the heart of the notion of victim participation. Not consulting the victims on their choices, either in relation to specific persons or to aspects of the common legal representation system including the qualifications that their lawyer should meet,²⁰ could have serious implications and have a considerably adverse impact on the meaningful character of participation, which the Chamber so eagerly emphasized in the Decision. The Applicant will provide background on the importance of genuine involvement of victim communities in transitional justice processes.
- ii) *Security considerations to be taken into account in the implementation of the Common Legal Representation System:* the Applicant submits that there are serious security concerns raised by the potential appointment of a Kenyan legal representative and by the fact that the common legal representative will be based in Kenya on an ongoing basis. Those concerns relate both to potential pressures that may be exerted by the government as well as

¹⁹ Rule 90(3) of the Rules of Procedure and Evidence.

²⁰ The Registry has previously consulted victims on criteria that common legal representative should meet. See, e.g., “Proposal for the common legal representation of victims”, ICC-02/11-01/11-120, 16 May 2012, para. 10.

physical safety considerations that must be taken into account. The Applicant is aware of the mode of operation of the field team of the common legal representatives who were appointed for the pre-trial phase of the cases and submits that it is imperative to reconsider the safety measures in place. In this regard the Applicant seeks to share with the Chamber its views which are the result of its work with the victims as well as its very first hand knowledge of the real and perceived security situation in Kenya;

- iii) *Support provided to the Common Legal Representative:* in this respect Kituo wishes to make submissions on the structure of the team that should be of assistance to the Common Legal Representative so to ensure his compliance with his duties as per the Code of Professional Conduct for counsel, the jurisprudence of the Court and to enable genuine engagement by the victim in the proceedings through adequate, meaningful and regular consultations. As noted above, the Applicant remarks that these matters are not thoroughly addressed in the OPCV and Registry Submissions of 17 October 2012;
- iv) *Coordination between OPCV and the Common Legal Representative:* According to the Decision, "It will be the responsibility of the OPCV to communicate with the Common Legal Representative, who will instruct the OPCV to make submissions on his/her behalf"²¹. In this regard, the Applicant submits that sufficient safeguards need to be put in place in order for the Common Legal Representative to be in a position to define his/her litigation strategy, and although s/he may choose to consult with the OPCV as appropriate, the OPCV is to follow instructions put

²¹ ICC-01/09-01/11-460, para.60; ICC-01/09-02/11-498, para. 59

forward by Counsel. Adequate communication by the OPCV about daily proceedings in Court will be of the essence to allow the Common Legal Representative to formulate a strategy from Kenya. It is expected that difficulties could arise due to distance, communication and technology. Procedures must be put in place at the outset to ensure that the OPCV and the Common Legal Representative, despite their respective locations, the former based in Kenya and the latter in The Hague, coordinate appropriately and do not operate as two separate and distant entities. For this purpose the Applicant will make suggestions to the Chamber on how to achieve this indispensable objective for a meaningful representation of the victims and the credibility of the overall ICC victims' participation process;

b) *Victim Participation System:* The changes proposed in the Decision are considerable. The victims have been filling application forms for over three years. It is acknowledged that the individual participation system was rather cumbersome and that changes possibly needed to be implemented. However, it is submitted that the actors involved should have been consulted when devising a new system. It is imperative that those views be taken into consideration when looking at the specific way in which the new system will be implemented. Should leave be granted to submit observations, the Applicant would like to put forward views on the following issues:

- i) *Avoiding "categories of victims":* it is noted that the system could potentially bring about inequalities between different groups of victims, e.g. individual participation vs. participation through the common legal representative; registered vs. non registered victims; victims accepted to participate at the pre-trial stage of the case (on the basis of individual application forms) and other

victims. The Applicant would like to make submissions on the necessary safeguards that need to be put in place in order to ensure that all victims are afforded equal rights. The Applicant would draw on its experience working with victims of different ethnicities and diverse social background and put forward recommendations to avoid categorizing different groups and re-traumatisation.

- ii) *The role of the Common Legal Representative vis-à-vis the role of VPRS:* It is noted that, according to the Decision, the Common Legal Representative would be in charge of identifying victims, i.e. his/her own clients. It is also noted that the Common Legal Representative would therefore be taking over responsibilities that should in principle be attributed to the Court and which may needed vetting by the Registry and the Chamber. The Applicant intends to draw the attention of the Chamber to the implications of this determination, and the fact that adequate safeguards must be put in place to ensure that this process is transparent, that no abuses are committed and that all victims be given a fair chance to access the system. The Applicant would also submit that the process of identifying victims needs to be adequately supported by the Registry of the Court, so that the Common Legal Representative can undertake his/her core work, i.e. to consult with the victims and put forward their views and concerns, which also demands following the proceedings remotely on a daily basis. .
- iii) *Bi-monthly reports to the Chamber:* It is noted that the Chamber has requested the VPRS, in consultation with the Common Legal Representative, to submit comprehensive reports on victims including statistics and activities undertaken by the Common

Legal Representative. The Applicant has extensive experience working with victims, who have a genuine desire to be meaningfully involved in the proceedings before the Court. If allowed to submit observations, the Applicant would like to put forward views on the need for such reports to focus on substantive matters, including the views and concerns of the victims. The Applicant believes that those reports will be of little interest and use if they only refer to statics and list of activities. Conversely, reports which gather and reflect upon the victims' views, together with briefings by the Common Legal Representative through the OPCV, could significantly assist the Chamber in the consideration of the issues before it.

- iv) Informing the victims adequately about the change of system:* As referred to above, the Applicant has been conducting outreach to victims of the post election violence in Kenya for a significant period of time. Informing victims about participation opportunities and requirements takes significant time and efforts. It is expected that the change of system will bring about lots of queries and confusing from the victim population, who have been informed for the last three years about a system which is no longer applicable. The need to adequately inform victims is all the more relevant in light of the fact that the trials are to start in less than six months. The absence of adequate information and consultation with the victims may lead to long-term disillusionment with the Court. Victims have already contacted the Applicant demanding that they "want their forms back" as they do not understand the changes that are taking place. If granted leave to submit observations, the Applicant will put forward further views on specific aspects that must be taken into

consideration when undertaking information and consultation sessions with the communities in Kenya.

CONCLUSION AND RELIEF

23. For the foregoing reasons, the Applicant respectfully requests it be granted leave to submit *amicus curiae* observations on these matters pursuant to Rule 103 of the Rules, within a time limit determined by the Chamber. Were the Chamber to grant this request, the Applicant praises it to accept the Annex to this motion as its *amicus curiae* observations pursuant to Rule 103 of the Rules.

Respectfully submitted,



ANTHONY KAMARU

On behalf of Kituo Cha Sheria

Dated this 30th day of October 2012

At Nairobi, Kenya