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No.: ICC-01/09-02/11
Date: 5 November 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,
With Public Annex 1 and Confidential *Ex Parte*, only available to the Registry
Annexes 2, 3 and 4

Recommendation for the position of Common Legal Representative of victims

Source: Registry

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 the Defence

Defence of Francis Kirimi Muthaura

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

Defence of Uhuru Muigai Kenyatta

Mr Steven Kay
Ms Gillian Higgins

Legal Representatives of the Victims

Mr. Morris Anyah

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

Mr Xavier-Jean Keïta

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Counsel Support Section

Mr Esteban Peralta Losilla

Deputy Registrar

Mr Didier Preira

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Ms Fiona McKay

Other

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

NOTING Pre-Trial Chamber II’s First Decision on Victims’ Participation in the Case notified on 30 March 2011(the “First Decision on Victim Participation”);¹

NOTING the Registry’s Pre-Trial Proposal for the Common Legal Representation of Victims (the “Pre-Trial Proposal”)² notified on 1 August 2011;

NOTING Pre-Trial Chamber II’s Decision confirming the charges against Francis Kirimi Muthaura and Uhuru Muigai Kenyatta;³

NOTING the Decision of Trial Chamber V (the “Chamber”) notified on 9 July 2012, scheduling the start of the trial on 11 April 2013;⁴

NOTING the Decision of the Chamber on Victims’ Registration and Participation (“the Decision”)⁵ notified on 3 October 2012;

NOTING article 68(3) of the Rome Statute, rules 16(1)(b) and 90 of the Rules of Procedure and Evidence (the “RPE”), regulations 23*bis*, 24*bis* (2), 79 and 86(9) of the Regulations of the Court; and regulations 112 and 113 of the Regulations of the Registry;

CONSIDERING that Annexes 2, 3 and 4 to the present document are classified as “confidential *ex parte*, only available to the Registry”, in order: (1) to preserve the anonymity of the candidate for common legal representative proposed by the Registry so that the Chamber is in a position to freely decide on the current proposal without prejudicing the candidate’s reputation, and (2) not to disclose

¹ ICC-01/09-02/11-23.

² ICC-01/09-02/11-214.

³ ICC-01/09-02/11-382.

⁴ ICC-01/09-02/11-451.

⁵ ICC-01/09-02/11-498.

communications between the relevant counsel and the Registry without the prior consent of the concerned persons;

TRANSMITS the following recommendation for the position of common legal representative of victims to the Chamber.

1 Introduction

1. On 3 October 2012, Trial Chamber V issued a decision on Victims' Representation and Participation ordering the ICC Registry to submit a recommendation for the position of Common Legal Representative within 30 days in the case of *The Prosecutor v Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* ("the Muthaura *et al.* Case").⁶
2. In the Decision, the Chamber indicated that the Registry may consider the following criteria relevant in the selection of the common legal representative:
 - Knowledge of the details of the case and of the specific situation of the victim community and willingness and ability to maintain an ongoing presence in Kenya throughout the course of proceedings;
 - An established relationship of trust with the victims or ability to establish such a relationship;
 - Demonstration of an ability and willingness to take a victim-centred approach to their work;
 - Familiarity with the country where the crimes in connection to which the victims are admitted to participate in the proceedings have been allegedly committed;
 - Possession of relevant expertise and experience, demonstrated by previous experience in criminal trials, experience representing large groups of victims and specialized study in relevant academic fields;
 - Readiness to commit a significant amount of time to maintain contact with a large number of clients, to follow developments in the Court's proceedings, to take any appropriate steps in the proceedings, and to maintain adequate contact with the Court;

⁶ Decision on victims' representation and participation, ICC-01/09-02/11-498.

- A minimum level of knowledge in information technology.⁷
3. Upon reception of the Decision, the Registrar delegated its implementation to the Deputy Registrar, who undertook all actions reflected in the present filing.
 4. The present report describes the steps taken by the Registry to arrive at a recommendation for the post of common legal representation of victims during the trial phase of the case, in accordance with the Chamber's Decision, and presents the recommendation of the Registry.⁸

2 The Registry's approach to organizing common legal representation

5. The selection process that has been implemented by the Registry following the Decision followed the same approach adopted in other cases and is aimed at ensuring a process that is open, transparent and objective.⁹

3 The organization of common legal representation in the present case

3.1 Identification of conflicts of interest

6. During the pre-trial appointment process the Registry carefully considered whether any conflicts of interest had arisen in the present case, or whether applicants possess "distinct interest" such as would require the separate representation of two or more victim groups. The considerations which arose in the process were detailed in Annex 2 of the Pre-Trial Proposal.¹⁰
7. The Registry is not aware of any reason why a single common legal representative could not continue to represent all victims linked to the case, but recommends that the common legal representative keeps this matter under review and, should any conflict or significant divergence of interest arise at any

⁷ *Id.* at para 60.

⁸ ICC-01/09-02/11-498, section VI, pp. 33-34.

⁹ ICC-01/09-02/11-214; ICC-02/11-01/11-120; ICC-02/05-03/09-203; ICC-02/05-03/09-204..

¹⁰ ICC-01/09-02/11-214-Anx2.

point, the Registry could propose the arrangement of separate legal representation.

3.2 Selection process adopted by the Registry

3.2.1 *Criteria applied*

8. Considering that the Registry was given a 30 day deadline to submit a recommendation for the position of common legal representative, the Registry did not attempt to conduct a consultation process with the affected communities on the criteria to be applied in the common legal representation selection process. However, the criteria put forward by the Chamber in the Decision draws from the criteria developed by the Registry in the context of the selection process followed to identify a common legal representative at the confirmation of charges stage of the case, where the views of the relevant communities were taken into account.
9. The criteria set out by the Chamber, set out in paragraph 2 above, provided the framework for the Selection Panel established by the Registry to evaluate which candidate would be most suitable to be recommended for the position of common legal representative, in light of the specific role laid out for the position in the Decision.

3.2.2 *Selection process*

10. A Selection Panel composed of the Deputy Registrar, Registry staff members and a representative of the Special Tribunal for Lebanon was established by the Registrar.
11. On 12 October 2012 a Call for Expressions of Interest¹¹ was sent to all lawyers on the list of counsel maintained by the Registry in accordance with rule 21(2) of the RPE and to the Law Society of Kenya, inviting persons wishing to represent

¹¹ See Annex 1.

victims in the case to express their interest. Counsel were informed of the criteria that would be applied and were asked to provide, by 17 October 2012, a *curriculum vitae* and information indicating their suitability in relation to the criteria. By the deadline set, the Registry received 40 responses. Of these, 30 included the information requested.

12. An initial review of these 30 responses was carried out to ascertain whether, at a minimum level, they met the requirements and criteria. For example, candidates were excluded if their availability appeared to be manifestly insufficient or if it was clear that they lacked the requisite experience.¹²
13. The 13 counsel identified as meeting the basic requirements were requested to provide written answers to two follow-up questions concerning their proposed approach to the legal representation of victims. A further assessment taking into account these responses was then made against the identified selection criteria.

3.2.3 Current legal representative

14. The current common legal representative of victims, Mr. Morris Anyah, was given the opportunity to make his views known to the Registry on whether or not he would like to be considered as a candidate to continue to act as common legal representative during the trial phase.
15. In response, on 11 October 2012, Mr. Anyah submitted a letter addressed to the Deputy Registrar indicating the he was no longer able to continue as the common legal representative in the *Muthaura et al. Case*. This letter is provided as Annex 2.¹³

¹² See Rule 22 of the Rules of Procedure and Evidence; regulation 67 of the Regulations of the Court.

¹³ See Annex 2. Recall here also what was mentioned in our cover filing concerning the content of this letter.

3.2.4 Recommendation of the Registry for the position of common legal representative

16. Five counsel, including the current common legal representative in the *Ruto et al. Case*, were invited to take part in a telephone interview. These were conducted by the Selection Panel using standardized questions.
17. The conclusions and recommendation of the Selection Panel are attached in Annex 3, along with information pertaining to the recommended candidate (Annex 4).

3.3 Composition of the team

18. Once the common legal representative has been appointed by the Chamber, the Registry will discuss with that person the composition of his or her team and other resources to be made available in conformity with the Court's legal aid scheme, taking into account the role of the common legal representative as set out in the Decision.

3.4 Transitional arrangements

19. The Registry is mindful of the role set out in the Decision for the VPRS and the common legal representative, once appointed, regarding ensuring victims are informed of the new process and to make sure that any transition between the various counsel representing applicants or victims and the appointed common legal representative is as smooth as possible. The Registry also notes that until such time as the Chamber orders the appointment of the common legal representative, the current counsel, including OPCV in their role as representing victim applicants, continue to represent their respective clients. Once a common legal representative has been appointed or confirmed, any former counsel

representing applicants or victims will be required by articles 15(2) and 18(5) of the Code of Professional Conduct for counsel to convey the case file.

4 Recommendation

20. The Registry submits its recommendation for the post of common legal representative of victims contained in Annex 3.



Didier Pereira, Deputy Registrar,
Per delegation from Silvana Arbia, Registrar

Dated this 5 November 2012
At The Hague, The Netherlands