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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. WILLIAM SAMOEI RUTO and JOSEPH ARAP SANG

Public Document

**Request to present views and concerns of victims on their legal representation at
the trial phase**

Source: Victims' Representative

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 William Samoei Ruto

Mr David Hooper

Mr Kioko Kilukumi Musau

Counsel for Joshua Arap Sang

Mr Joseph Kipchumba Kigen - Katwa

Mr Joel Kimutai Bosek

Legal Representatives of the Victims

Ms Sureta Chana

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**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Deputy Registrar

Mr Didier Preira

Counsel Support Section

Mr Esteban Peralta-Losilla

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Ms Fiona McKay

Other

I. INTRODUCTION

1. Pursuant to Article 68(3) of the Statute, it is requested that the Trial Chamber, before taking a decision on the legal representation of the victims during the trial phase of the proceedings, permit the victims to present their views and concerns on the issue or otherwise consult with the victims. This is a matter in which the victims' personal interests are directly affected.

II. PROCEDURAL HISTORY

2. On 5 August 2011, the Single Judge of the Pre-Trial Chamber II issued the "Decision on Victim Participation at the Confirmation of Charges Hearing and Related Proceedings."¹ That decision, *inter alia*, granted 327 victims the right to participate in pre-trial proceedings and appointed a common legal representative.²
3. On 23 April 2012, the Appeals Chamber issued the "Decision on the 'Application of the Victims' Representative pursuant to Article 83 of the Regulations'",³ confirming that the appointment of the common legal representative would continue until brought to an end pursuant to article 17 of the Code of Professional Conduct for Counsel.⁴
4. Following the conclusion of pre-trial proceedings and assignment of the present case to this Trial Chamber, on 11 June 2012 the Trial Chamber held its first status conference in the case. At the status conference, the Trial 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."⁵ It is noted that such submissions were not subsequently requested.

¹ ICC-01/01-01/11-249.

² *Id.*, paras. 77.

³ ICC-01/09-01/11-409.

⁴ *Id.*, para. 21.

⁵ ICC-01/09-01/11-T-15-ENG, page 42, lines 23-25.

5. On 24 August and 6 September 2012, civil society organisations Civil Society Network and Kituo Cha Sheria submitted applications requesting leave to submit observations as *amicus curiae* in relation to the issue of victim participation in these proceedings. In the “Decision on two requests for leave to submit amicus curiae observations” of 13 September 2012,⁶ the Trial Chamber stated that it “ha[d] 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 the Registry was informed that no further proposals concerning the issue would be required.”⁷ A footnote shows that the Draft Protocol referred to was filed as a confidential ex-parte document. Neither the victims themselves nor the victims’ representative had access to or were involved in any manner in observations in relation to that Draft Protocol which would affected the victims’ interests at trial.
6. On 3 October 2012, the Trial Chamber issued the “Decision on victims’ participation and legal representation” (the “Decision”).⁸ The Decision introduces fundamental and far-reaching changes to the system for victim participation at the trial phase of this case.
7. Pursuant to the Decision, on 17 October 2012 the Registry filed the “Registry’s Proposal on the Division of Responsibilities and Effective Functioning of the Common Legal Representation System” (the “October 2012 Registry Proposal”).⁹ Although the Trial Chamber had ordered the Registry and the Office of Public Counsel for Victims (“OPCV”) to consult and submit a joint proposal on the matter,¹⁰ the persistence of fundamental disagreements led the OPCV to file a separate “OPCV’s Proposal on the Division of Responsibilities and Effective Functioning of the Common Legal Representation System.”¹¹

⁶ ICC-01/09-01/11-456.

⁷ *Id.*, para. 4.

⁸ ICC-01/09-01/11-460.

⁹ ICC-01/09-01/11-463.

¹⁰ Operative part of the Decision.

¹¹ ICC-01/09-01/11-462.

8. On 30 October 2012, Kituo Cha Sheria (the “Applicant”) filed the “Application by Kituo Cha Sharia for Leave to Submit Observations pursuant to Rule 103 of the Rules of Procedure and Evidence.”¹² In its application, the Applicant requested to be authorised to put forward observations in relation to the implementation of the victim participation and representation system set up by the Decision.
9. On 5 November 2012, the Registry filed its “Recommendation for the position of Common Legal Representative of victims” (the “November 2012 Registry Recommendation”).¹³

III. SUBMISSIONS

10. This request is filed pursuant to Article 68(3) of the Statute, which states:

Where their personal interests 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 is not prejudicial or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate in accordance with the Rules of Procedure and Evidence. [Emphasis added.]

11. The decision that the Trial Chamber will ultimately take with respect to the legal representation of the victims during the trial phase of the proceedings will directly affect the personal interests of every victim. The decision taken will have a direct practical effect on the effectiveness of their rights of participation in the proceedings under the Statute. In addition to the express terms of Article 68 of the Statute, general principles of fairness and justice would dictate that the victims should be consulted or entitled to present their views on proposed changes to the regime of their legal representation effected during the course of a case. Even if it may be legitimate to consider making changes to the extent and mode of victim representation during the course of a

¹² ICC-01/09-01/11-464-Corr.

¹³ ICC-01/09-01/11-467.

case, there is no reason why victims should not be directly consulted, as the persons most directly affected, before any such changes are made.

12. The October 2012 Registry Proposal notes at paragraph 3 that on 8 October 2012 the Registry sent to the victims' representative a letter,¹⁴ to which she confirmed her interest and availability to continue to represent victims in the case.¹⁵ The Registry's communication to the legal representative also invited the victims' representative to express her "views on the content of the joint proposal to be developed with the OPCV". However, that solicitation of views could not be considered as a true consultation process involving the views of the victims concerned.¹⁶ It is also noted that such request for observations was only sent once the Decision had already been handed down. The practice of the Court has been to consult the parties and participants in advance of any decision regarding victim participation and legal representation at trial.¹⁷

13. Paragraph 5 of the October 2012 Registry Proposal refers to a consultation meeting that took place on 12 October 2012 between the Registry and OPCV. The victims' representative was not included in those consultations, nor were the victims consulted in any other way. Paragraph 5 of the October 2012 Registry Proposal states that OPCV "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". However, the fact that no decision has yet been taken as to the appointment of a common legal representative for the trial phase is not a

¹⁴ Letter available to the Chamber in the annex to the October 2012 Registry Proposal: ICC-01/09-01/11-Conf-Exp-Anx1.

¹⁵ ICC-01/09-01/11-Conf-Exp-Anx2.

¹⁶ The deadline given for those views to be submitted was three days.

¹⁷ Other chambers of the Court have invariably sought and received observations from the parties and participants, as well as, where relevant, the Registry, in relation to such matters. See, *inter alia*: *Bemba*, Transcript of hearing on 7 October 2009, ICC-01/05-01/08-T-14-ENG, page 28, lines 16 to 25; *Katanga*, Order Instructing the Participants and the Registry to Respond to Questions of Trial Chamber II for the Purpose of the Status Conference (article 64(3)(a) of the Statute), 13 November 2008, ICC-01/04-01/07-747-tENG; *Katanga*, Order Instructing the Participants and the Registry to File Additional Documents, 10 December 2008, ICC-01/04-01/07-788-tENG; *Lubanga*, Order setting out schedule for submissions and hearings regarding the subjects that require early determination, 5 September 2007, ICC-01/04-01/06-947; *Lubanga*, Transcript of hearing on 29 October 2007, ICC-01/04-01/06-T-57-ENG.

reason for denying to the victims the opportunity to express their own views on the system for legal representation at the trial phase. Such views and concerns could be expressed via the existing common legal representative, whose mandate continues until brought to an end pursuant to article 17 of the Code of Professional Conduct for Counsel. There are also other ways in which the views of victims could be elicited.

14. Paragraph 8 of the November 2012 Registry Recommendation acknowledges that “the Registry did not attempt to conduct a consultation process with the affected communities on the criteria to be applied in the common legal representative selection process”. The stated reason for not consulting affected communities was that “the Registry was given a 30 day deadline to submit a recommendation”. It is submitted that while the Registry may have been under such a deadline, given that the trial in this case is not due to start until April 2013, there remains ample time for consultations with the victims to be undertaken before a final decision is taken by the Trial Chamber as to the legal representation of the victims during the trial phase.

15. It is noted that it is apparent from the October 2012 Registry Proposal (especially paragraphs 6 and 7), and from the associated OPCV filing,¹⁸ that there are disagreements between the OPCV and the Registry on important issues relating to the legal representation of victims at the trial phase. Paragraph 27 of the October 2012 Registry Proposal goes so far as to suggest that it will be necessary to “set a procedure for a dispute resolution mechanism to arbitrate between the Common Legal Representative, the member(s) of the OPCV working on his or her behalf, and/or the OPCV.”¹⁹ It is alarming that it is envisaged at the outset that the proposed system of representation carries such potential for conflict between different persons responsible for the victims’ representation that a dispute resolution

¹⁸ ICC-01/09-01/11-462.

¹⁹ *Id.*, para. 25.

mechanism is considered necessary. Such disputes would hardly be in the interests of the victims themselves.

16. It is not proposed in this filing to set out the views and concerns that the victims would express if they were consulted on the proposed details of their legal representation during the trial phase. Matters that arise for consideration include the following:

- a. The Decision provides for a dual system of participation, *i.e.* participation through a common legal representative and direct individual participation (the latter involving appearance before the Court either in person or via video-link).²⁰ Only the victims participating directly before the Chamber will need to submit an individual application form. Other victims may, if they so wish, register with the Registry. No determination will be made by the judges in relation to the status of victims. There is an issue whether this may effectively lead to two groups of victims, “first-class victims” who individually appear before the Court, and “second-class victims” who do not, and whose victim status is not even individually determined by the Chamber. More importantly, there is an issue as to whether the effectiveness of the voice of the second category would be significantly diminished. It is noted in this respect that the Decision states that:

Moreover, when assessing any submissions or requests made by the common legal representative, the Chamber will be mindful of the fact that the represented victims have not been subject to an individual assessment by the Court.²¹

There is also an issue that the legitimacy of the victim representation process may be undermined if the decision as to which victims will be

²⁰ In the light of experience in previous cases before the Court and taking into account the need to conduct trials in an efficient and expeditious manner, it can be anticipated that only about a handful of victims may be authorised to participate individually. Para. 57 of the Decision also states that “the Chamber will make a preliminary assessment as to whether the suggested form of participation is appropriate and identify **a limited number of victims** who may be authorised to participate individually by appearing directly before the Chamber” [emphasis added].

²¹ ICC-01/09-01/11-460, para. 38.

allowed to participate personally is not taken in a principled and transparent way.

- b. The Trial Chamber has expressed a preference that the common legal representative be based in Kenya.²² However, there is an issue as to the ability of the functions of common legal representative to be performed effectively, if the common legal representative is based in Kenya, given that external pressures would be more easily brought to bear on a lawyer who is a practitioner in Kenya, and whose practice in Kenya could potentially be threatened by those with influence.²³ Any legal representative based in Kenya may not have the necessary degree of independence to represent the victims' interests without possible influence. Moreover, many of the victims will be located in Kenya in places far from their legal representative, so that common legal representative based in Kenya will not of itself ensure that victims have better access to their representative in practice.
- c. The Decision acknowledges that the system of legal representation of victims presents security considerations.²⁴ There is an issue as to whether the proposed system of legal representation for the trial phase sufficiently addresses security concerns. Paragraph 43 of the Decision states: "Involvement of the OPCV will [...] ensure that confidential information is handled safely and securely." It is difficult to understand how involvement of the OPCV will ensure safety of information. There is certainly no question that the OPCV will itself handle confidential material safely. However, it is submitted that there are matters that are beyond the OPCV's control, in particular in relation to handling of

²² Para. 60 states: "In the present case, the Chamber is of the view that the abovementioned requirements **may** best be achieved with a Common Legal Representative based in Kenya. The Chamber believes that greater geographic proximity between victims and the Common Legal Representative is important to ensure that victims can communicate easily and personally with their representatives and thus ensure meaningful representation" [emphasis added].

²³ ICC-01/09-01/11-463-Conf-Exp-Anx2

²⁴ ICC-01/09-01/11-460, paras. 24, 32.

confidential material in the field, by the common legal representative and others.

- d. There are issues as to the division of responsibilities between OPCV and the common legal representative, and as to the means by which victims can effectively ensure that the submissions made on their behalf in the proceedings accurately reflect their views, especially in cases of disagreement between OPCV and the common legal representative.
- e. There is an issue as to the seniority and experience of the lawyer who would represent the victims in the proceedings on a daily basis.²⁵

17. Although the Decision does not specifically make reference to financial considerations, it is noted that the Assembly of States Parties has been looking at the matter of victim participation, victims' representation and legal aid for the past year.²⁶ Those discussions have overwhelmingly been driven by financial considerations. It is acknowledged that cost is a legitimate consideration to be taken into account when determining the details of legal representation of victims, together with other considerations including those leading to the most effective system for meaningful participation.

18. The victims' representative considers that there are ways that could be explored with a view to reducing the costs of victim representation. The victims' representative is concerned, however, that the particular solution proposed as to common legal representation may not bring any savings, and could even end up being more costly. There is an issue as to whether alternative proposals have been accurately costed, so that the cost-effectiveness of alternative proposals can be compared objectively. Assumptions about the relative cost-effectiveness of different possibilities may not necessarily be correct.

²⁵ These disagreements are clearly exposed in the October 2012 Registry Proposal (ICC-01/09-01/11-463) and related OPCV filing (ICC-01/09-01/11-462).

²⁶ Report of the Bureau on Legal Aid, 22 October 2012, ICC-ASP/11/2; Report of the Bureau on Victims and Affected communities and the Trust Fund for victims and Reparations, 23 October 2012, ICC-ASP/11/32; Supplementary Report of the Registry on four aspects of the Court's legal aid system, 1 November 2012, ICC-ASP/11/43.

19. It is additionally noted that one member of this Trial Chamber has expressed extrajudicial concerns about the extent and workability of victim participation.²⁷ It is acknowledged that these statements of view are extrajudicial, and not necessarily those of the Trial Chamber in the present case. However, to the extent that such views may be perceived as having some bearing on the Trial Chamber's decision in this matter, an opportunity should be provided for submissions and alternative views to be presented to the Chamber.

20. The Decision acknowledges the need for victim participation and legal representation to be meaningful, as opposed to purely symbolic.²⁸ There is an issue as to whether the proposals for victim representation at the trial phase would genuinely achieve this.

IV. CONCLUSION

21. It is recalled that victim participation is a unique feature of the Rome Statute. It represents an advance in the evolution of international criminal law and stems from the recognition that "women and men have been victims of unimaginable atrocities"²⁹ and that the Court was created "for the sake of present and future generations"³⁰ with the aim not only to punish perpetrators but also to "contribute to the prevention of [...] crimes."³¹ Victim participation ensures that the proceedings are relevant to the affected communities. The very significant costs of trials before the International Criminal Court will not

²⁷ See, *inter alia*, Judge van den Wyngaert, "Victims Before the International Criminal Court: Some Views and Concerns of an International Trial Judge", in CASE W. RES. J. INT'L L., Vol. 44:475, March 2012; the views expressed by Judge van den Wyngaert at the World Society of Victimology's 14th International Symposium on Victimology, The Hague, 20-24 May 2012, as well as at "Judicial Creativity and Progressive Development of the Law: Aspects of Current ICC Practice", in *Supranational Criminal Law Lectures in Honor of Judge Antonio Cassese*, The Hague, 4 April 2012 (notes of Judge van den Wyngaert's presentations in file with the victims' representative's team); and "Victims before the International Criminal Court: A Challenge for International Criminal Justice", at *Klatsky Seminar in Human Rights presented by Frederick K. Cox International Law Center*, 21 November 2011, available online at: <http://www.youtube.com/watch?v=DYb19TIPOBU> (last accessed: 4 November 2012).

²⁸ ICC-01/09-01/11-460, paras. 35, 59, 60, 67.

²⁹ Rome Statute, Preamble.

³⁰ *Id.*

³¹ *Id.*

be well spent if the proceedings are felt by affected communities to be an irrelevant academic legal exercise, operating in a vacuum of lawyers, prosecutors and judges geographically and culturally distant from those who actually experienced and were affected by the events in question. For the Court to be considered relevant by the affected the communities, and ultimately by the international community as a whole, the “reality-check” provided by effective victim representation is vital.

22. It has been the experience of the victims’ representative that the victims in Kenya that she represents have a sincere desire to be genuinely involved in proceedings. They have in general reacted very positively to consultations conducted by the victims’ representative’s team, have shown an active interest in continued involvement and in being heard in relation to the matters that affect their interests. The victims have expressed their desire to see justice done as much as their need for reparations, and have said to the legal representative that they only want the accused persons convicted if they are guilty and look towards the legal process to establish culpability. The victims’ representative is not another prosecutor, but is there to assist the court by putting forward the victim’s views and concerns so that the Trial Chamber has a full picture of the situation. They must not be seen as an impediment to the criminal trial.

23. Changes in the way that victims are to be represented in proceedings are thus matters fundamental to the proceedings as a whole, but in particular, are matters that directly affect the personal interests of victims.

24. The psychological well-being and dignity of victims may also be impacted by lack of consultation on a matter which goes to the core of their interests. Article 68(1) of the Rome Statute states the following.

The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.

25. Accordingly, it is respectfully requested that the Trial Chamber, before taking a decision on the legal representation of the victims during the trial phase of the proceedings, permit the victims to present their views and concerns on the issue or otherwise consult with the victims.

A handwritten signature in blue ink, consisting of a series of loops and a long horizontal stroke.

Sureta Chana

Victims' Representative

Dated this 6th day of November 2012

At London, United Kingdom