

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11
Date: 20 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

Decision appointing a common legal representative of victims

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

The Office of the Prosecutor

Ms Fatou Bensouda

Ms Adesola Abedoyejo

Counsel for Francis Kirimi 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 Representatives of Victims

Mr Morris Anyah

Mr Fergal Gaynor

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Deputy Registrar

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* (“Muthaura and Kenyatta case”), pursuant to Article 68(3) of the Rome Statute (“Statute”), Rule 90 of the Rules of Procedure and Evidence (“Rules”), Regulations 67 and 80 of the Regulations of the Court (“Regulations”) and Article 17(1)(c) of the Code of Professional Conduct for Counsel renders the following Decision appointing a common legal representative of victims.

1. On 3 October 2012, the Chamber issued its Decision on victims’ representation and participation (“Decision”), establishing the procedure and modalities for the representation and participation of victims in the *Muthaura and Kenyatta* case, setting criteria and providing guidelines to the Registry for the selection of a common legal representative for the trial phase of the case, and directing the Registry to submit a recommendation for the position of common legal representative to the Chamber within 30 days.¹ The Chamber also requested the Registry and the Office of Public Counsel for Victims (“OPCV”) to consult and submit, within 14 days, a joint proposal on the responsibilities and effective functioning of the new system of common legal representation.²
2. On 17 October 2012, the Registry and the OPCV each filed separate reports with the Chamber, submitting that they were unable to reach agreement regarding the division of responsibilities and effective functioning of the common legal representation system.³

¹ ICC-01/09-02/11-498.

² ICC-01/09-02/11-498, page 33.

³ OPCV’s Proposal on the Division of Responsibilities and Effective Functioning of the Common Legal Representation System with public annex, 17 October 2012, ICC-01/09-02/11-507 and Registry’s Proposal on the Division of

3. On 5 November 2012, after conducting its selection process, the Registry filed its recommendation for the position of common legal representative of victims.⁴ The Registry also reported the steps taken during the selection process in order to arrive at its recommendation, including (i) a request for expression of interest sent to all lawyers on the Registry list of counsel and to the Law Society of Kenya; (ii) an initial review of the candidates who provided the information requested; (iii) an evaluation of written answers to questions on their proposed approach to the legal representation of victims; and (iv) a telephone interview.⁵
4. 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.⁶ In response, on 11 October 2012 Mr Anyah indicated to the Registry that he was no longer able to continue as the common legal representative in the *Muthaura and Kenyatta* case.⁷ The Chamber expresses its gratitude to Mr Anyah for his service to the case thus far.
5. The Registry's recommendation to the Chamber for the position of common legal representative during the trial phase is Mr Fergal Gaynor. The Registry states that Mr Gaynor fulfils all of the criteria set out in the Decision and is willing to maintain an ongoing presence in Kenya.⁸ The Registry has also provided the Chamber with Mr Gaynor's curriculum vitae and expression of interest.⁹ The Chamber notes that Mr Gaynor has direct relevant experience for the position, demonstrated by extensive

Responsibilities and Effective Functioning of the Common Legal Representation System, 17 October 2012, ICC-01/09-02/11-508 with confidential annexes 1 and 2 and public annexes 3 and 4.

⁴ Recommendation for the position of Common Legal Representative of victims, ICC-01/09-02/11-517 with public annex 1 and confidential *ex parte* annexes 2, 3 and 4.

⁵ ICC-01/09-02/11-517, paras 1 – 13.

⁶ ICC-01/09-02/11-517, para. 14.

⁷ ICC-01/09-02/11-517, para. 15 and ICC-01/09-02/11-517-Conf-Exp-Anx2.

⁸ ICC-01/09-02/11-517-Conf-Exp-Anx3, paras 5 – 8.

⁹ ICC-01/09-02/11-517-Conf-Exp-Anx4.

previous experience in criminal litigation, and appears to possess both a genuine interest in ensuring meaningful victims' participation and a willingness to work effectively with the OPCV in the new common legal representation established by the Chamber in its Decision.¹⁰

6. On the basis of the criteria identified by the Chamber in its Decision and upon evaluation of the personal information and professional skills of Mr Gaynor, the Chamber hereby decides to appoint Mr Fergal Gaynor as common legal representative of all victims in the *Muthaura and Kenyatta* case.
7. With respect to the assistance to be provided by the OPCV to the common legal representative, it is the Chamber's view that victims should benefit from the highest-quality representation that is possible in the circumstances – both generally and in the courtroom. It is that consideration that primarily guides the Chamber's appointment of common legal representative for victims. It is neither the Chamber's desire nor intent to appoint such counsel and yet prevent him or her from representing victims in the manner warranted by their best interests, including making such appearances in the courtroom that are necessary in the circumstances. But the representation of the best interest of the victims will in many cases require that the common legal representative be in the field attending to the best interests of victims, while court proceedings are in progress. In such situations, it will be necessary for the common legal representative to be represented by members of the OPCV. The Chamber observes that the Registry appears to have interpreted the Decision to require the OPCV to provide staff fulfilling the qualifications of "counsel" within the meaning of Regulation 67 of the Regulations.¹¹ The Chamber notes that, according to the Decision, the OPCV "will be acting on behalf of the Common Legal Representative when

¹⁰ ICC-01/09-02/11-517-Conf-Exp-Anx3, paras 5 – 8.

¹¹ ICC-01/09-02/11-508, paras 12 – 20.

appearing before the Chamber”.¹² Equally, the Chamber recalls that the Decision provides for the common legal representative to appear in person upon request and at critical junctures involving victims’ interests.¹³ As such, the Chamber is of the view that although the representative or representatives of the OPCV acting on behalf of the common legal representative in Court should have significant relevant courtroom experience, the representative or representatives of the OPCV need not fulfil the requirements of “counsel” within the meaning of Regulation 67 of the Regulations. Instead, at a minimum, they should fulfil the requirements for assistant counsel under Regulation 68 of the Regulations and Regulation 124 of the Regulations of the Registry.¹⁴ In such instances, the rule of 10-year post qualification standing prescribed in Regulation 67 should not operate to prevent any OPCV staff member from appearing on behalf of the common legal representative any more than the 10-year rule stands in the way of any counsel appearing to represent the Prosecutor or the lead Defence Counsel in a case.

8. In order to ensure the effective functioning of the common legal representation system, the common legal representative and the OPCV are directed to undertake discussions regarding their cooperation.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

TERMINATES Mr Anyah’s appointment as common legal representative of victims in the *Muthaura and Kenyatta* case;

APPOINTS Mr Fergal Gaynor as common legal representative of victims in the *Muthaura and Kenyatta* case;

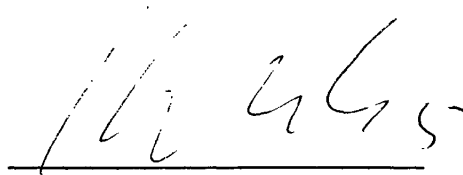
¹² ICC-01/09-02/11-498, para. 43.

¹³ ICC-01/09-02/11-498, para.70.

¹⁴ See ICC-01/09-02/11-507, paras 18 – 19.

DIRECTS the common legal representative and the OPCV to undertake discussions regarding their cooperation

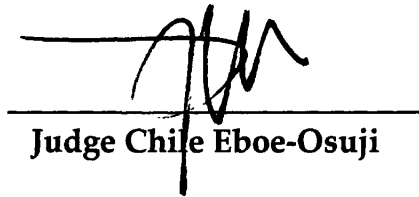
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding



Judge Christine Van den Wyngaert



Judge Chile Eboe-Osuji

Dated 20 November 2012

At The Hague, The Netherlands