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TRIAL CHAMBER V (b)

Before: Judge Kuniko Ozaki, Presiding Judge
Judge Robert Fremr
Judge Chile Eboe-Osuji

**SITUATION IN THE REPUBLIC OF KENYA
IN THE CASE OF
*THE PROSECUTOR V. UHURU MUIGAI KENYATTA***

Public Document

Victims' request for access to confidential filings and evidence

Source: Common Legal Representative

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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I. Introduction

1. On 14 May 2013, the Common Legal Representative sent by email to the Chamber, copied to the Prosecution and the Defence, a request for the Trial Chamber to remind the parties of their disclosure obligations under the “Decision on victims' representation and participation” of 3 October 2012¹ (the “Decision of 3 October 2012”), and to authorise the provision to him of relevant confidential filings. He offered to submit a formal filing on the issue if necessary.² On 15 May 2013, the Chamber requested the Common Legal Representative by email, copied to the parties, to submit a formal filing on this issue.³

II. Applicable law

2. The Trial Chamber, in the Decision of 3 October 2012, determined that victim participation in these proceedings will take place in line with the procedure and modalities outlined in that decision.⁴ The procedure and modalities include provision for the Common Legal Representative and the Office of the Public Counsel for Victims (“OPCV”) to have access to confidential filings and evidence as follows:
 - a. “In view of the specific circumstances of the present case, *and in order to ensure that the participation by victims is meaningful*, the Chamber is of the view that the Common Legal Representative may have access to confidential filings, to the extent that their content is relevant to the personal interests of the victims he represents. It will be the responsibility of the filing party to indicate on the notification page whether the Common Legal Representative shall be notified”;⁵
 - b. “In relation to evidence [...] the Common Legal Representative will have access to the public and confidential documents in Ringtail. In line

¹ “Decision on victims' representation and participation” (Trial Chamber V), No. ICC-01/09-02/11-498, 3 October 2012.

² Email from the Common Legal Representative to the Trial Division on 14 May 2013, at 3.45 p.m.

³ Email from the Trial Division received by the Common Legal Representative on 15 May 2013, at 10.37 a.m.

⁴ Decision of 3 October 2012, page 33.

⁵ Decision of 3 October 2012, paragraph 66. Emphasis added.

with the procedure applied to filings, the party submitting an item to be uploaded into Ringtail shall indicate whether or not the Common Legal Representative shall have access to the document”.⁶

- c. Access to confidential filings and confidential documents in Ringtail is restricted to the Common Legal Representative and to the OPCV when acting on the Common Legal Representative's behalf.⁷

III. The personal interests of the victims

3. The Court’s jurisprudence emphasises that the interests of the victims extend well beyond their obvious interest in receiving just reparation, within a reasonable time, for the harm they have suffered. It also encompasses their right to know the truth about the crimes in question, and to have those responsible convicted:

When the right to truth is to be satisfied through criminal proceedings, victims have a central interest in that the outcome of such proceedings: (i) bring clarity about what indeed happened; and (ii) close possible gaps between the factual findings resulting from the criminal proceedings and the actual truth. The issue of guilt or innocence of persons prosecuted before this Court is not only relevant, but also affects the very core interests of those granted the procedural status of victim in any case before the Court insofar as this issue is inherently linked to the satisfaction of their right to the truth. The victims’ central interest in the search for the truth can only be satisfied if (i) those responsible for perpetrating the crimes for which they suffered harm are declared guilty; and (ii) those not responsible for such crimes are acquitted, so that the search for those who are criminally liable can continue.⁸

4. In the pre-trial phase of the present case, the Single Judge emphasised “that the victims’ core interest in the determination of the facts, the identification of those responsible and the declaration of their responsibility is at the root of the well-established right to the truth for the victims of serious violations of human rights.”⁹

⁶ Decision of 3 October 2012, paragraph 68.

⁷ Decision of 3 October 2012, paragraphs 66 and 68.

⁸ ICC-01/04-01/07-474, Pre-Trial Chamber I (Single Judge), 13 May 2008, paras. 34-36.

⁹ “Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case” (Pre-Trial Chamber I, Single Judge), No. ICC-01/04-01/07-474, 13 May 2008, par. 32. See also “Decision on victims’ participation” (Trial Chamber I), No. ICC-01/04-01/06-1119, 18 January 2008, par. 97: “[...] the general interests of the victims are very wide-ranging and include an interest in receiving reparations, an interest

5. Naturally, any litigation concerning a Defence application seeking to have the charges dismissed, or the proceedings permanently stayed, profoundly and directly impacts upon the victims' rights. Indeed, it is difficult to conceive of an application which more profoundly affects the interests of the victims than an application to bring the proceedings to a permanent halt.
6. Additionally, any application (and any related response and reply) which would delay the start date of trial directly affects the interests of all victims of this case in receiving just reparation, without undue delay, for the harm they have suffered, as well as their right to know within a reasonable time the truth about the events in question and to have those responsible convicted.
7. Further, it is axiomatic that any filings which seek to reduce the scope of the charged crimes (and hence the participatory rights of victims of the crimes which might be removed from the scope of the case) directly and profoundly impact on the rights of those victims.

IV. Failure of the parties to fully observe the notification requirements of the Decision of 3 October 2012

8. On 23 January 2013 and on 14 February 2013 respectively, the Common Legal Representative sent an email to the Prosecution¹⁰ and to the Defence¹¹ drawing their attention to their disclosure and notification obligations under the Decision of 3 October 2012, and inviting them to let him know how they proposed to comply with those obligations. He indicated that he remained willing to discuss any workable and realistic solution which would help the parties in the discharge of their obligations under the Decision of 3 October 2012.

in being allowed to express their views and concerns, an interest in verifying particular facts and establishing the truth, an interest in protecting their dignity during the trial and ensuring their safety, and an interest in being recognised as victims in the case, among others. The crimes under the Chamber's jurisdiction, as international crimes, may have many and various consequences for victims, of a direct and an indirect nature. Against that background the Chamber will ensure that victims are provided appropriate access to justice within the context of the focus of the trial process, and it will bear in mind the wide-ranging particular needs and interests of individual victims and groups of victims." See also "Decision on the Modalities of Victim Participation at Trial" (Trial Chamber II), No. ICC-01/04-01/07-1788-tENG, 22 January 2010, paragraphs 58-60.

¹⁰ Email from the Common Legal Representative to the Prosecution, dated 23 January 2013 at 8.52 a.m.

¹¹ Email from the Common Legal Representative to the Defence, dated 14 February 2013 at 4.21 p.m.

9. The Defence did not respond, nor did it respond to a follow up email of 9 April 2013.¹² The Defence continues to submit to the Trial Chamber a considerable number of filings, without notice to the Common Legal Representative, nor to the relevant member of the OPCV (Ms Caroline Walter), on issues which clearly and directly affect the interests of the victims represented by the Common Legal Representative.
10. The Prosecution has provided considerable co-operation in respect of access to confidential evidence and has generally adopted a co-operative approach. However, it appears that it too continues to file confidential filings, without notice to the Common Legal Representative/OPCV, on issues which affect the interests of the victims represented by the Common Legal Representative.
11. It therefore appears that the parties are not in compliance with their obligations under the Decision of 3 October 2012.
12. In particular, the Common Legal Representative/OPCV have not been notified of the un-redacted versions of filings where it appears that the redacted parts might be relevant to the personal interests of the victims. A non-exhaustive list of such filings includes:
 - a. ICC-01/09-02/11-726-Red;
 - b. ICC-01/09-02/11-723-Red;
 - c. ICC-01/09-02/11-722-Red;
 - d. ICC-01/09-02/11-721-Red;
 - e. ICC-01/09-02/11-719-Red;
 - f. ICC-01/09-02/11-717-Red;
 - g. ICC-01/09-02/11-708-Red;
 - h. ICC-01/09-02/11-707-Corr-Red;
 - i. ICC-01/09-02/11-681-Red;
 - j. ICC-01/09-02/11-678-Red;
 - k. ICC-01/09-02/11-664-Red2;
 - l. ICC-01/09-02/11-656-Red;
 - m. ICC-01/09-02/11-628-Red;
 - n. ICC-01/09-02/11-621-Red2;
 - o. ICC-01/09-02/11-617-Red;
 - p. ICC-01/09-02/11-607-Red;
 - q. ICC-01/09-02/11-571-Red;
 - r. ICC-01/09-02/11-562-Red2; and

¹² Email from the Common Legal Representative to the Defence, dated 9 April 2013 at 5.15 p.m.

s. ICC-01/09-02/11-519-Red.

13. The filings above were filed after the Decision of 3 October 2012. Furthermore, several filings submitted prior to the Decision of 3 October 2012 are also relevant to the personal interests of the victims of this case, including:

- a. ICC-01/09-02/11-481-Red and its AnxA-Red and AnxB-Red; and
- b. ICC-01/09-02/11-468-AnxD-Red and confidential Annexes A and B

14. In addition, the Common Legal Representative has inferred, from gaps in the sequential numbering of filings in the present case, that the parties have filed, on a confidential basis, other documents without notice to the Common Legal Representative/OPCV. No public redacted versions of these filings exist. The Common Legal Representative believes that some or all of these filings might be relevant to personal interests of victims. Due to the fact that the Common Legal Representative has no access to a full index of the case record, he is not in the position to identify those confidential filings which are relevant to personal interests of victims.

15. The Common Legal Representative is aware that the Trial Chamber recently reminded the parties in *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* of their notification obligations to the Common Legal Representative in that case.¹³ It appears that a similar reminder would be appropriate in the present case.

V. Relief sought

16. In view of the Chamber's ruling that the access of the Common Legal Representative to confidential filings and evidence should be such as to ensure

¹³ The Trial Chamber recalled at the start of the status conference held on 14 May 2013, in open court, the following: "when filing confidential versions of documents, the parties are reminded that, according to the Chamber's decision on victim participation issued on 3 October last year, the common legal representative and OPCV are entitled to confidential documents that are relevant to the personal interests of victims. It is the responsibility of the filing party to indicate on the notification page whether the Common Legal Representative and OPCV should be notified." ICC-01/09-01/11-T-22-CONF-ENG ET 14-05-2013 3/47, p. 3, lines 17-22.

that the participation of victims is “meaningful”,¹⁴ and in order to enable the Common Legal Representative to follow the proceedings in an informed manner in order to fully protect the rights and interests of the victims of this case, the Common Legal Representative requests that the Trial Chamber:

- (1) order the immediate notification to the Common Legal Representative, and to Ms Walter of the OPCV, the confidential versions of all filings which are relevant to the personal interests of victims and which have not been provided in any form to the Common Legal Representative, or which have been provided to him in redacted form only; and
- (2) remind the Prosecution and the Defence of their obligation to notify the Common Legal Representative of all confidential filings, and of their obligation to provide access in Ringtail to all items, which are relevant to the personal interests of the victims.

Respectfully submitted,



Fergal Gaynor
Common Legal Representative

Dated this 23rd day of May 2013
At The Hague (The Netherlands)

¹⁴ Decision of 3 October 2012, paragraph 66.