



Original: English

No.: ICC-01/09-01/11

Date: 19 August 2013

**TRIAL CHAMBER V(A)**

**Before:** Judge Chile Eboe-Osuji, Presiding  
Judge Olga Herrera Carbuccion  
Judge Robert Fremr

**SITUATION IN THE REPUBLIC OF KENYA**

**IN THE CASE OF**

***THE PROSECUTOR v. WILLIAM SAMOEI RUTO  
AND JOSHUA ARAP SANG***

**Public  
with Confidential Annexes A-B and Public Annexes C-D**

**Sang Defence Request in Relation to the Fourth Periodic Report  
on the General Situation of Victims in Kenya**

**Source:** Defence for Mr. Joshua arap Sang

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 Representatives of the Victims**

Wilfred Nderitu

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**

Orchlon Narantsetseg

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

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Victims Participation and Reparations  
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## I. INTRODUCTION

1. On 3 October 2012, the Trial Chamber directed the Victims Participation and Reparation Section (the “VPRS”) to file every two months, in cooperation with the Common Legal Representative (the “CLR”) (ie, Mr Wilfred Nderitu), a comprehensive report on the situation of victims as a whole, including statistics about the victims’ population and detailed information in relation to the CLR’s activities amongst the victims (both registered and unregistered).<sup>1</sup>
2. On 23 July 2013, the VPRS and the CLR filed its *Fourth periodic report on the general situation of victims in Kenya*.<sup>2</sup> The defence submits that this Report is deficient, in that it leaves out significant developments, known to the CLR, which are directly pertinent to the situation of victims in Kenya, and particularly the “population” of victims registered in this case.
3. There have been public reports in the Kenyan media, since 5 June 2013, that 93 of the victims ostensibly registered in the Kenya 1 case have written a Letter stating that they “wish to withdraw from the above case and processes with immediate effect since we are no longer confident that the process which is going on at the court is beneficial to our interests as victims of the 2007-2008 post-election violence”.<sup>3</sup> The defence has corresponded with the CLR in respect to this Letter.<sup>4</sup> Furthermore, the CLR has made a public statement acknowledging that he is aware of the victims’ “withdrawal”, claiming that it “will have no significant impact on the case”.<sup>5</sup>
4. In light of this, the defence requests that the Trial Chamber order the VPRS and the CLR to comply fully with its directive set out in Victims’ Participation Decision. Specifically, the defence requests that the Trial Chamber order the VPRS

<sup>1</sup> *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-460, Decision on victims’ representation and participation, 3 October 2012, para. 55 and Part VI (“Victims’ Participation Decision”).

<sup>2</sup> *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-825, Fourth Periodic Report on the General Situation of Victims in Kenya, 23 July 2013.

<sup>3</sup> See Letter from the Chairman of the Amani Peace Building and Welfare Organization of Turbo, addressed to the Victims and Witness Office on Maanweg, dated 5 June 2013 (“Letter”). The Letter then lists the 93 witnesses and their application numbers. Though the letter is available publicly online, in the Letter is attached to this Request confidentially as Annex A. This is done out of an abundance of caution and in order to prevent any further dissemination of the names of the victims listed therein.

<sup>4</sup> The email exchanges between the Sang defence and Mr Nderitu are attached in Confidential Annex B.

<sup>5</sup> The article, published on the Capital FM website on 11 June 2013, and titled “Withdrawal of 93 ICC victims immaterial – lawyer” is attached as Annex C.

and the CLR to provide the Chamber and the parties with an update as to the participation status of the 93 victims, prior to the start of trial on 10 September.

## II. SUBMISSIONS

### Breach of Victims' Participation Decision

5. In its Victims' Participation Decision, the Trial Chamber very carefully set out the role and responsibilities of the VPRS and the CLR with respect to registered and non-registered victims in the Kenya 1 case. Therein, the Chamber ordered the VPRS and the CLR to submit regular reports as to the general situation of victims, as well as statistics about the victims' population. In the context of this reporting requirement, the Chamber directed that the CLR should provide the VPRS with "detailed information" relating to his activities amongst the victims. The Chamber further cautioned that the CLR has the responsibility not to take into consideration the views and concerns of persons whom he has reason to believe do not qualify as victims in the present case.<sup>6</sup>
6. From the foregoing, it is clear that the Chamber wants to be regularly updated as to the number of and circumstances regarding victims who are qualified and participating in this case. As a corollary to that, it is clear that the Chamber would want to be apprised of any information suggesting that 93 victims authorized to participate in the case have indicated that they want to withdraw.

### Procedural History

7. There were 327 victims authorized by Pre-Trial Chamber II to participate in the confirmation of charges hearing.<sup>7</sup> Following the confirmation decision on 23 January 2012, the VPRS identified 149 victims who now fall outside the temporal or geographic scope of the case. Thus, the VPRS determined that "the total number of victims remaining within the scope of the case from those authorised to participate at the confirmation hearing is therefore provisionally set at 120".<sup>8</sup>

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<sup>6</sup> Victims' Participation Decision, para. 55.

<sup>7</sup> *Prosecutor v. Ruto, Kosgey and Sang*, ICC-01/09-01/11-249, Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 5 August 2011.

<sup>8</sup> *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-661, Second Periodic Report on the General Situation of Victims in Kenya, 25 March 2013, para. 8. At the time, the VPRS noted that particulars needed to be taken from

8. On 5 June, the 93 victims who wish to withdraw collectively and publicly explained that they have “started sensing that the office of the prosecutor was not after our welfare and was more interested in the two Kenya cases and that we were just being used as stepping stones...”.<sup>9</sup> They further claimed that their version of what triggered the post election violence and the version that they are now hearing from the Court are “completely different”.<sup>10</sup> The victims voiced generally their frustration and dissatisfaction with the ICC process.<sup>11</sup>
9. The CLR responded to this Letter in the media on 11 June 2013. He stated, “the vast majority of the victims participating in the case whom he represents maintain a profound interest in continuing to participate in the case”. He also was said to represent roughly 700 victims<sup>12</sup> and the CLR urged the remaining victims to “remain steadfast” and “not be scared off” by the exit of the 93.<sup>13</sup>
10. The defence formally raised this development with the CLR via email on 11 June 2013. The defence asked whether the Letter had come to his attention and whether he was in a position to verify the genuineness of the victims’ withdrawal. Furthermore, the defence asked for an indication as to whether he would notify the Chamber of this development. The CLR responded on 1 July 2013, acknowledging that the matter had come to his attention and that he bears the burden of verifying that the names of the individuals on the list are participating victims and determining the genuineness of their claims of withdrawal.<sup>14</sup>
11. More than two months have elapsed since the Letter was published. There has been no further follow up or communication from the CLR to the defence. The defence has attempted to tally up which of these 93 victims who signed the Letter

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a further 58 victims, in order to see whether they still fell within the scope of the case. There has been no update from the VPRS in this regard.

<sup>9</sup> See Letter, p. 1 [Confidential Annex A].

<sup>10</sup> Ibid.

<sup>11</sup> Notably, this is not the first time that the presumably unregistered victims in Kenya have complained about the ICC process. When Prosecutor Bensouda came to do outreach in Kenya in October 2012, victims stated, *inter alia*, that they were disappointed by the manner in which the Court gathered evidence that was eventually used to implicate four Kenyans. See, for example, « PEV Victims ‘don’t trust’ ICC witnesses », 26 October 2012, available at <http://www.capitalfm.co.ke/news/2012/10/pev-victims-dont-trust-icc-witnesses/>. [Annex D].

<sup>12</sup> The defence is unsure of how anyone arrived at this figure.

<sup>13</sup> See article in Annex C.

<sup>14</sup> See correspondence in Confidential Annex B.

(and who identified themselves by name and application number), were among those remaining 120 or so participating victims. As best we can figure, at least 50 of the 93 victims who wish to withdraw are still considered participating victims. If these 50 are deemed to have genuinely withdrawn, that would leave approximately 70 participating victims in the case.

12. However, the trial is due to start imminently, and yet neither the Chamber nor the parties (nor the VPRS/CLR?) know precisely which victims are actually participating in the case. In such circumstances, it is unclear whose views and concerns the CLR actually represents. There is the real possibility, therefore, that the CLR,<sup>15</sup> in making his opening statement and/or making other submissions before the Chamber, may include the views and concerns of victims who no longer wish to participate in the ICC process. To do so would contravene the Victims' Participation Decision and prejudice the accused.

#### Prejudice to the Defence

13. It is not only in the Trial Chamber's interest to be appraised of the status of the participating victims. It is also in the interest of the accused in two respects. First, to the extent that victims, collectively, have a right to participate in the proceedings, their number, and consequently their divergent interests, have a bearing on the extent of their participation. For instance, the CLR is only authorized to ask questions of witnesses on issues which are "relevant to the victims' interests".<sup>16</sup> How can one determine which issues are relevant to the victims, when the category of participating victims is itself undefined? Secondly, victims' participation has a bearing on reparations, which maybe levied on the defendants if convicted.
14. The defence submits that this scenario could easily be avoided if the CLR and VPRS were to provide a comprehensive report to the Chamber and the parties, notating what they have ascertained with respect to the genuineness of the

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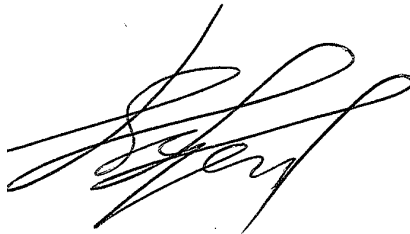
<sup>15</sup> Or the Office of the Public Counsel for Victims, who will appear in Court for the CLR. See Victims' Participation Decision, para. 75.

<sup>16</sup> Victims' Participation Decision, para. 75; see also *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-847, Decision on the Conduct of Trial Proceedings (General Directions), 12 August 2013, paras. 19-20.

withdrawal of these 93 victims. This should be done prior to the start of the case on 10 September 2013.

### III. RELIEF REQUESTED

15. The Trial Chamber has previously acknowledged that it will ensure that the intervention of victims in the proceedings by the CLR is not prejudicial to the accused.<sup>17</sup> Therefore, and in light of the above, the defence requests the Chamber to order the VPRS and the CLR to fully comply with its Victims' Participation Decision, prior to the start of trial. Full compliance would include a comprehensive update as to how the CLR has discharged his burden of verifying the genuineness of the claims of the 93 victims, who now wish to withdraw their participation. The CLR and the VPRS should provide an accurate number of all remaining participating victims.
16. Given the forthcoming start date, the defence requests that the Trial Chamber order an expedited response from the VPRS and/or CLR.



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Joseph Kipchumba Kigen-Katwa  
On behalf of Mr. Joshua arap Sang  
Dated this 19<sup>th</sup> day of August 2013  
In Nairobi, Kenya

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<sup>17</sup> Victims' Participation Decision, para. 34 ("The manner, timing and content of interventions by the common legal representative on behalf of the victims as a whole will be strictly controlled by the Chamber to ensure that the intervention is not prejudicial to the rights of the accused.").