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

Date: 13 September 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

**Sang Defence Response to the Public Redacted Version of
Common Legal Representative for Victims' Comprehensive Report on the
Withdrawal of Victims from the Turbo area by Letter dated 5 June 2013**

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
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Other

I. SUBMISSIONS

1. On 5 September 2013, the Legal Representative of Victims (“LRV”) filed a *Public Redacted Version of the Common Legal Representative for Victims’ Comprehensive Report on the Withdrawal of Victims from the Turbo area by Letter dated 5 June 2013*.¹ Therein, the LRV informed the Trial Chamber of a letter sent by the Amani Peace Building and Welfare Association in Turbo, which contained the application numbers and names of 93 victims who have indicated that they want to withdraw their participation in the ICC process against the accused.² Apparently 47 of these victims were actually qualified as participating victims in the case, following the decision on the confirmation of charges.³
2. It appears that the LRV contacted these 47 victims and ascertained that seven of them should be “regarded as continuing to participate in the case”.⁴ Whatever the reason indicated by the other 40 victims as to their desire to withdraw from the process (be it their opposition to reparations being given on a community basis⁵ or their desire to be involved in the peace process in Kenya⁶, or their concern that the wrong people have been charged,⁷ etc), it has become clear that their withdrawal is genuine and should be taken at face value by the court.
3. As such, the defence requests the Trial Chamber to order the LRV to urgently disclose to the parties the application numbers of the forty victims previously deemed participating victims, whom he has verified no longer wish to participate. That way, it is clear to all parties, whose views and concerns are properly represented by the LRV.

II. ADDITIONAL MATTERS

4. The defence acknowledges the content of the Report and, in addition to the main relief requested at paragraph 3, wishes to note that it is unfortunate that there has had to be ancillary litigation on this issue of the withdrawal of victims, due to the non-forthcoming nature of the LRV’s communication with the defence.

¹ ICC-01/09-01/11-896-Corr-Red, 5 September 2013 (“Report”).

² Report, paras. 1-2.

³ Report, para. 5.

⁴ Report, para. 6.

⁵ Report, para. 12.

⁶ Report, para. 13.

⁷ Report, para. 13.

5. As the Chamber is aware, the Sang defence has attempted on an *inter partes* basis, to engage the LRV on the issue of the withdrawal of these victims since 11 June 2013.⁸ Via email correspondence, the defence specifically asked the LRV whether this information would be notified to the Chamber; the LRV did not respond to this question. In July, the LRV filed his *Fourth Periodic Report on the General Situation of Victims in Kenya*,⁹ in which, as far as the defence was aware, the issue of the withdrawal of victims was not raised. This non-communication on an *inter partes* basis and the apparent lack of disclosure on the part of the LRV in the Fourth Periodic Report, is what led the Sang defence to raise the matter with the Chamber in its 19 August *Request in Relation to the Fourth Periodic Report on the General Situation of Victims in Kenya*.¹⁰
6. The Chamber will recall that therein, the Sang defence requested that the LRV be ordered to fully comply with the Victims' Participation Decision and 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.¹¹ Though this date has already passed, the defence reiterates the importance of knowing precisely which victims are actually willing to participate in the case, as early in the court process as possible. This is especially so, since the Chamber has cautioned that the LRV 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.¹²
7. The defence notes that at paragraph 1 of his Report, the LRV says that he notified the Chamber of the withdrawal of the victims on 11 June 2013. He does not indicate whether this was done via email or an *ex parte* filing. Either way, the defence does not see why this should have been a confidential communication with the Chamber, given that the withdrawal was covered extensively in public Kenyan media and was known to the defence. At this point, this is all water under the bridge.

⁸ ICC-01/09-01/11-861 ("Sang Defence Request"), 19 August 2013, Confidential Annex B. The defence sent emails to Mr Nderitu on 11 June and 24 June 2013, seeking clarification as to the status of the victims and whether their withdrawal had been notified to the Trial Chamber.

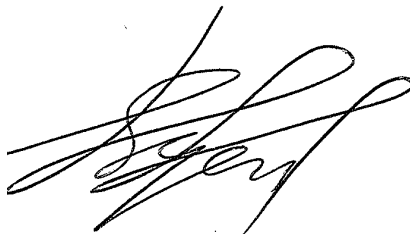
⁹ ICC-01/09-01/11-825, 23 July 2013.

¹⁰ ICC-01/09-01/11-861, 19 August 2013.

¹¹ Sang Defence Request, para. 4.

¹² ICC-01/09-01/11-460 ("Victims' Participation Decision"), 3 October 2012, para. 55.

8. However, the defence requests that, in the future, the LRV be more forthcoming and attendant to *inter partes* communications so as to avoid unnecessary filings before the Chamber on issues relevant to the participation of victims in these proceedings.



Joseph Kipchumba Kigen-Katwa
On behalf of Mr. Joshua arap Sang
Dated this 13th day of September 2013
In Nairobi, Kenya