

**Cour
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**International
Criminal
Court**

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THE APPEALS CHAMBER

Before: Judge Sang-Hyun Song
Judge Sanji Mmasenono Monageng
Judge Akua Kuenyehia
Judge Erkki Kourula
Judge Anita Ušacka

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR v. WILLIAM SAMOEI RUTO and JOSHUA ARAP SANG

**Public Document,
with a confidential annex**

**Application to Participate in the Interlocutory Appeal filed by the Prosecution
against the “Decision on the ‘Prosecution’s Request to Amend the Updated
Document Containing the Charges Pursuant to Article 61(9) of the Statute’”**

Source: Common Legal Representative

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

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I. PROCEDURAL HISTORY

1. On 08 March 2011, Pre-Trial Chamber II rendered the *“Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang”* and summoned William Samoei Ruto (“Mr. Ruto”), Joshua Arap Sang (“Mr. Sang”) and Henry Kiprono Kosgey (“Mr. Kosgey”) to appear before the Court for the purposes of the hearing to be held pursuant to article 60 of the Statute and rule 121(1) of the Rules of the Procedure and Evidence.¹

2. On 5 August 2011, Pre-Trial Chamber II issued the *“Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings”* and decided, *inter alia*, to admit 327 victims as participants at the confirmation of charges hearing and in the related proceedings.²

3. On 23 January 2012, Pre-Trial Chamber II issued, by majority, the *“Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”* (the “Confirmation Decision”), in which it, *inter alia*, declined to confirm the charges presented against Mr. Kosgey but confirmed the charges presented against Mr. Ruto and Mr. Sang to the extent specified in the same decision and committed the two accused persons to trial on the charges as confirmed.³ With regard to the temporal framework of the crimes allegedly committed in the greater Eldoret area, the Pre-Trial Chamber confirmed the charges against the two accused only for the period *“between 1 January 2008 and 4 January 2008.”*⁴

¹ See the *“Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang”* (Pre-Trial Chamber II), No. ICC-01/09-01/11-01, 08 March 2011, pp. 22-24.

² See the *“Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings”*, with Confidential Annex (Pre-Trial Chamber II), No. ICC-01/09-01/11-249, 5 August 2011, pp. 46-48.

³ See *“Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”* (Pre-Trial Chamber II), No. ICC-01/09-01/11-373, 23 January 2012, p. 138.

⁴ *Idem*, paras. 349(b) and 367(b).

4. On 29 March 2012, the Presidency of the Court constituted Trial Chamber V and referred the case to it.⁵

5. On 03 October 2012, Trial Chamber V rendered the “*Decision on victims’ representation and participation*”⁶ and decided, *inter alia*, that: (i) victims who do not wish to present their views and concerns individually and directly to the Chamber, but rather to express those views and concerns solely through their common legal representative, will not be required to submit an application under Rule 89(1) of the Rules. However, such victims may, if they so wish, register with the Registry, indicating their names, contact details as well as information as to the harm suffered; (ii) victims who were authorised to participate at the confirmation of charges stage would be considered as having registered for the purpose of participation through the common legal representation system provided that the harm they had suffered must be linked to the charges confirmed against the accused; (iii) the Registry would review the applications of individuals who were authorised to participate at the confirmation of charges stage and assess whether the harm they had suffered was linked to the confirmed charges. In the event that the Registry identified any individuals who had been authorised to participate at the confirmation of charges stage but who did not meet the preceding requirement, it would submit a report to the Chamber and inform the Common Legal Representative; (iv) the Common Legal Representative would ensure that the views and concerns he or she represents were those of all individuals qualifying as victims in the present case. It would be the responsibility of the Common Legal Representative not to take into consideration the views and concerns of persons whom he or she had reason to believe did not qualify as victims in the present case.⁷

⁵ See the “Decision constituting Trial Chamber V and referring to it the case of “The Prosecutor v. William Samoei Ruto and Joshua Arap Sang” (The Presidency), No. ICC-01/09-01/11-406, 29 March 2012, p. 4.

⁶ See the “Decision on victims’ representation and participation” (Trial Chamber V), No. ICC-01/09-01/11-460, 03 October 2012.

⁷ *Idem*, paras. 46, 49, 62, 53 and p. 34.

6. On 25 March 2013, the Registry reported to the Trial Chamber⁸, *inter alia*, that: (i) the VPRS had reviewed the applications and certain supplementary information received of the 327 victims authorised to participate at the confirmation of charges stage; and (ii) in doing so, the VPRS had identified 149 victims who henceforth fell outside the scope of the case. All of these 149 victims reported having suffered harm outside either the significantly reduced geographical boundaries of the present case or the significantly reduced temporal limits set out in the Confirmation Decision. For example, several victims were now outside the temporal scope of the present case because before the Confirmation Decision the scope of the case was from “30 December 2007 to the end of January 2008” but after the Confirmation Decision it had been limited to 31 December 2007 in Turbo town and 1 - 4 January in the Greater Eldoret area (Huruma, Kimumu, Langas, Yamumbi and Kiambaa).⁹ The Registry concluded that the total number of victims remaining within the scope of the case from those authorised to participate at the confirmation hearing was therefore provisionally set at 120.¹⁰

7. The Registry transmitted the data of all 327 victims to the Common Legal Representative for verification of the status of each and every victim admitted at the pre-trial stage. A full assessment by the Common Legal Representative and his team of the information given about these 327 victims resulted in the classification of 125 individuals qualifying as victims in the present case. The variance with the figure (120) provisionally provided by the Registry is explained with the geographical expertise of the Common Legal Representative. Knowing the Uasin Gishu area well, he could ascertain that five more persons fall within the geographical scope and hence do qualify as victims in the case. He agreed with the Registry upon the classification.¹¹

⁸ See the “Second periodic report on the general situation of victims in Kenya”, with one annex, No. ICC-01/09-01/11-661 and No. ICC-01/09-01/11-661-Anx, 25 March 2013.

⁹ *Idem*, paras 6-8, footnote 13.

¹⁰ *Ibid.*, para. 8.

¹¹ This information is based on internal correspondence between the VPRS and the Common Legal Representative which had not been subject to the formal reports submitted to the Trial Chamber.

8. On 05 September 2013, the Common Legal Representative informed Trial Chamber V (a), *inter alia*, that: (i) an organisation called “Amani Peace Building and Welfare Association”, which had initiated and facilitated the application and registration of at least two thousand victims in the Kenyan situation, sent to the Court a letter dated 5 June 2013 titled “*Withdrawal from the International Criminal Court Proceedings at The Hague*”; (ii) this letter stated that 93 victims wished to withdraw from their participation in the case; (iii) according to the inquiry conducted in the field by the Common Legal Representative, out 93 victims; 47 persons are victims falling within the scope of case whilst the status for participation of another 13 victims remains uncertain. Moreover, the remaining 33 victims are situation victims, in other words, they do not fall within the scope of the case and therefore they are not currently represented by the Common Legal Representative. Thus, out of the 93 persons who signed the letter in question, a total of 60 victims were found to be either clearly within the scope of the case or of uncertain status; (iv) the members of the Common Legal Representative’s team have successfully contacted 27 victims but failed to reach 20 victims out of the total of 47 victims who clearly fall within the scope of case. As a result of the individual responses received from these 27 victims, the Common Legal Representative concluded that seven (7) victims, who expressly confirmed their willingness to maintain their victim status, ought to be regarded as continuing to participate in the case.¹² In order to be able to establish the status of remaining 40 victims who have signed the letter, the Common Legal Representative has sought necessary guidelines from the Trial Chamber in a filing on 20 September 2013.¹³ By reason of the fact that the letter of 5 June 2013 by the Amani Peace Building and Welfare Association, which purportedly was the basis for the

¹² See the “Common Legal Representative for Victims’ Comprehensive Report on the Withdrawal of Victims from the Turbo area by Letter dated 5 June 2013”, No. ICC-01/09-01/11-896-Corr-Red, 05 September 2013, paras. 1-6.

¹³ See the “Reply to the Sang defence Response to the Public Redacted Version of the Common Legal Representative for Victims’ Report on the Withdrawal of Victims from the Turbo Area by Letter dated 5 June 2013”, No. ICC-01/09-01/11-963-Conf-Anx, 20 September, 2013, p. 10.

withdrawal from participation, is – as reported - heavily impugned¹⁴, the Common Legal Representative takes the view that the letter or more precisely the signatures cannot be recognized as effective declaration for a withdrawal from participation in the case.¹⁵ Thus, the classification of these 40 victims is currently pending. In sum, a total of 85 victims who were admitted to participate in the pre-trial proceedings definitely continue to participate at trial stage.

9. Meanwhile, between April and August 2013, the Registry has transmitted to the Common Legal Representative a total of 1370 new applications for participation.¹⁶ According to the assessment jointly conducted by VPRS and the Common Legal Representative, a total of 543 victims definitely fall within the scope of the case. This is in addition to the 85 victims who were authorised to participate in the pre-trial proceedings. This brings the total number of victims presently represented by the Common Legal Representative at 628¹⁷ (plus potentially up to 40 additional victims as explained above).

10. On 22 July 2013, the Prosecution filed the *"Prosecution's Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute"* (the "Amendment Request").¹⁸ In its Request, the Prosecution sought permission to amend the charges for the limited purpose of extending the temporal scope of the

¹⁴ See "Corrigendum Legal Representative for Victims' Comprehensive Report on the Withdrawal of Victims from the Turbo area by Letter dated 5 June 2013", No. ICC-01/09-01/11-896-Corr-Red, 5 September 2013, paras 7 - 11 and para. 23 as well as the Annex.

¹⁵ *Idem*, para. 23.

¹⁶ The VPRS transmitted to the Common Legal Representative the applications on the following dates: (i) 250 victim applications on 11 April 2013; (ii) 300 victim applications on 30 May 2013 and (iii) 11 victim applications and 809 victim applications with unclear status on 2 August 2013. However, within these transmitted applications, there were 16 applications that are duplicate forms of victims who were already being represented by the CLR, and there was also on application of a victim who was not relevant to this case that was transmitted twice. This is a total of 18 application forms disregarded. This information is based on internal correspondence between the VPRS and the Common Legal Representative which had not been subject to the formal reports submitted to the Trial Chamber.

¹⁷ See the Annex.

¹⁸ See "Prosecution's Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute", No. ICC-01/09-01/11-824, with confidential Annex A and confidential *ex parte* Annexes B-M, 22 July 2013.

crimes alleged in Counts 1 to 6 in the greater Eldoret area from “1 January to 4 January 2008” to “30 December 2007 to 4 January 2008.”¹⁹

11. On 16 August 2013, the Single Judge of Pre-Trial Chamber II (the “Single Judge”) issued the *“Decision on the ‘Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’”* (the “Impugned Decision”) by which she rejected the Amendment Request.²⁰

12. On 26 August 2013, the Prosecutor filed an *“Application for leave to Appeal the ‘Decision on the Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’”*.²¹ In her Application, the Prosecutor sought leave to appeal the Impugned Decision on two issues, namely: *“(1) the determination of the criteria pursuant to Article 61(9) that a Chamber ought to consider to permit the amendment of charges after the charges are confirmed and before the trial has begun (‘First Issue’); and (2) whether the scope of the Single Judge’s discretion pursuant to Article 61(9) permits the Single Judge to reject the Prosecution’s application to amend the charges due to the Prosecution’s purported ‘lack of diligence, organization and efficiency’ and ‘absence of any justification as to the belated nature of the Prosecutor’s Request’ (‘Second Issue’).”*²²

13. On 06 September 2013, the Single Judge rendered the *“Decision on the Prosecutor’s Request for Leave to Appeal the Decision Rejecting the Amendment of the Charges (ICC-01/09-01/11-859)”*.²³ The Single Judge found that the First and the Second Issues are interrelated and decided to take her decision on the First Issue together with the Second Issue.²⁴ The Single Judge reasoned further, *inter alia*, that: (i)

¹⁹ *Idem*, paras. 1 and 21.

²⁰ See the *“Decision on the ‘Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’”* (Pre-Trial Chamber II, Single Judge), No. ICC-01/09-01/11-859, 16 August 2013.

²¹ See *“Prosecution’s Application for leave to Appeal the ‘Decision on the Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’ (ICC-01/09-01/11-859)”*, No. ICC-01/09-01/11-880, 26 August 2013.

²² *Idem*, para. 3.

²³ See *“Decision on the Prosecutor’s Request for Leave to Appeal the Decision Rejecting the Amendment of the Charges (ICC-01/09-01/11-859)”* (Pre-Trial Chamber II, Single Judge), 06 September 2013.

²⁴ *Idem*, para. 36.

the Second Issue captured the First Issue, relates to the question whether the Single Judge was entitled to reject the Amendment Request on grounds of the Prosecutor's procedural conduct in the context of all the specific circumstances of the proceedings in the present case; (ii) this arose from the Impugned Decision and constituted an appealable issue; (iii) however, the resolution of this issue did not significantly affect the expeditious conduct of the proceedings. As the Prosecutor failed to demonstrate this statutory requirement, the "fairness"-prong within article 82(l)(d) of the Statute would not be further examined; (iv) on the other hand, the Second Issue resulting from the exercise of her discretion would significantly affect the outcome of the trial as additional crimes allegedly committed in the course of 30 and 31 December 2007 would not form the factual basis upon which the trial judgment would be rendered; and (v) moreover, the Second Issue warranted the immediate intervention of the Appeals Chamber as this would materially advance the proceedings.²⁵

14. Consequently, the Single Judge ruled that:

"[...] as article 82(l)(d) of the Statute does not confer a right to appeal an interlocutory decision but leaves it to the Chamber's discretion to certify an appealable issue, the Single Judge deems it crucial to re-define the Second Issue to ensure more clarity which could assist the Appeals Chamber in addressing the matter under appeal. Considering all of the above, the Single Judge therefore opines that the following question be brought to the immediate attention of the Appeals Chamber:

Whether the Single Judge erred in interpreting the term 'permission' referred to in article 61(9) of the Statute so as to include factors relevant to the specificities of the case when exercising her discretion; and whether, consequently, in this particular case, the Single Judge abused her discretion in rejecting the Amendment Request".²⁶

15. In conclusion, the Single Judge granted the Prosecutor leave to appeal the Impugned Decision on the issue as framed in the preceding paragraph.²⁷

²⁵ *Ibid.*, paras 56-66.

²⁶ *Ibid.*, para. 67.

²⁷ *Ibid.*, p. 27.

16. On 19 September 2013, the Prosecutor submitted her appeal against the “Decision on the Prosecution’s request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute”.²⁸

II. REQUEST FOR PARTICIPATION IN THE INTERLOCUTORY APPEAL

17. The Common Legal Representative observes that the Single Judge re-defined the issue for which leave to appeal has been granted.

18. The Common Legal Representative contends in this respect that the issue on appeal as re-defined by the Single Judge constitutes a hybrid issue as compared to the issues for which leave to appeal was sought by the Prosecutor and therefore submits that the victims participating in the present case should be given an opportunity to present their views and concerns on the issue at stake.

19. The Common Legal Representative is aware of the Appeals Chamber’s jurisprudence pursuant to which victims are not granted an automatic right to participate in appellate proceedings.²⁹ Consequently, the Common Legal Representative respectfully requests the Appeals Chamber to allow the victims he

²⁸ See “Prosecution appeal against the Decision on the Prosecution’s request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute”, No. ICC-01/09-01/11-956, 19 September 2013.

²⁹ See *inter alia* the “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo’” (Appeals Chamber), No. ICC-01/04-01/06-824 OA 7, 13 February 2007, para. 40; the “Decision, *in limine*, on Victim Participation in the appeals of the Prosecutor and the Defence against the Trial Chamber I’s Decision entitled ‘Decision on Victims’ Participation’” (Appeals Chamber), No. ICC-01/04-01/06-1335 OA 9 OA 10, 16 May 2008, paras. 12-13; the “Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 7 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 24 December 2007” (Appeals Chamber), No. ICC-01/04-503 OA 4 OA 5 OA 6, 30 June 2008; the “Reasons for the ‘Decision on the Participation of Victims in the Appeal Against the ‘Decision on the Interim Release of Jean-Pierre Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa’” (Appeals Chamber), No. ICC-01/05-01/08-566 OA 2, 20 October 2009; the “Decision on the Participation of Victims in the Appeal against Trial Chamber I’s Oral Decision of 15 July 2010 to Release Thomas Lubanga Dyilo” (Appeals Chamber), No. ICC-01/04-01/06-2555 OA 17, 17 August 2010; the “Decision on the Participation of Victims in the Appeal against the ‘Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence’ of Trial Chamber III” (Appeals Chamber), No. ICC-01/05-01/08-857 OA 4, 18 August 2010; and the “Decision on the ‘Requête tendant à obtenir autorisation de participer à la procédure d’appel contre la ‘Décision relative à la confirmation des charges’ (ICC-01/04-01/10-465-Conf-tFRA)’” (Appeals Chamber), No. ICC-01/04-01/10-509 OA 4, 2 April 2012.

represents to participate in the Prosecution appeal against the Impugned Decision pursuant to article 68(3) of the Rome Statute since: (i) they have been authorised to participate in the proceedings by the Pre-Trial Chamber and the Trial Chamber; (ii) their personal interests are affected; (iii) their participation is appropriate; and (iv) the manner of their participation is neither prejudicial to nor inconsistent with the rights of the accused and a fair and impartial trial.

1. The individuals seeking participation are victims in the case

20. The Common Legal Representative submits that the 628 victims applying for participation in this interlocutory appeal have either been granted victim status in the case against Mr. Ruto and Mr. Sang by Pre-Trial Chamber II's "*Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings*" or been considered as having registered for the purpose of participation through the common legal representation system at trial pursuant to the Trial Chamber V's "*Decision on victims' representation and participation*".³⁰

2. The victims' personal interests are affected

21. The Appeals Chamber has consistently found in the past that the participation of victims in interlocutory appeals can be permitted "*if it can be shown that their personal interests are affected by the issues on appeal*",³¹ carrying out such analysis on a

³⁰ See *supra* notes 2 and 6.

³¹ See the "Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'D cision sur la demande de mise en libert  provisoire de Thomas Lubanga Dyilo'", *supra* note 29, para. 43; the "Decision, *in limine*, on Victim Participation in the appeals of the Prosecutor and the Defence against the Trial Chamber I's Decision entitled 'Decision on Victims' Participation'", *supra* note 29, para. 35; the "Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court'" (Appeals Chamber), No. ICC-01/04-01/06-2205 OA 15 OA 16, 8 December 2009, para. 34; the "Decision on the Participation of Victims in the Appeal of Mr Katanga Against the 'Decision on the Modalities of Victim Participation at Trial'" (Appeals Chamber), No. ICC-01/04-01/07-2124 OA 11, 24 May 2010, para. 5; the "Decision on the 'Requ te tendant   obtenir autorisation de participer   la proc dure d'appel contre la 'D cision relative   la confirmation des charges' (ICC-01/04-01/10-465-Conf-tFRA)'" , *supra* note 29, para. 6; the "Decision on the application of victims to participate in the appeal against Trial Chamber II's decision on the implementation of regulation 55 of the Regulations of the

case-by-case basis.³² Pursuant to this approach, the Appeals Chamber has found that decisions whereby a Chamber decides not to confirm the charges brought by the Prosecution affect the victims' personal interests, since a decision of this nature *"impacts the victims' ability to present their views and concerns [in the course of a trial] and could ultimately preclude them from the opportunity to claim reparations [before this Court]"*.³³

22. The Common Legal Representative submits that the said jurisprudence should apply *mutatis mutandis* to the present instance, *i.e.* to interlocutory appeal against a decision rejecting amendments to the charges pursuant to article 61(9) of the Rome Statute. Indeed, the underlying issue on appeal is whether the scope of trial must include or exclude certain temporal limits over the crimes allegedly committed in one of the areas where many victims suffered harm. This is an extremely important issue which clearly and gravely affects the personal interests of the victims, and the Common Legal Representative submits that there ought to be a correlation between the scope of the trial, the temporal jurisdiction over the crimes allegedly committed and the geographical area where a substantial number of the victims suffered harm.

23. In particular, if the Impugned Decision is confirmed or in other words, should the trial in respect of Mr. Ruto and Mr. Sang be based on the charges which do not

Court" (Appeals Chamber), No. ICC-01/04-01/07-3346 OA 13, 17 January 2013, para. 6; and the "Decision on the participation of victims in the appeal" (Appeals Chamber), No. ICC-02/05-03/09-470 OA 4, 6 May 2013, para. 11.

³² See the "Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the 'Directions and Decision of the Appeals Chamber' of 2 February 2007" (Appeals Chamber), No. ICC-01/04-01/06-925 OA 8, 13 June 2007, para. 28; the "Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled 'Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court'", *supra* note 31, para. 35; the "Decision on the Participation of Victims in the Appeal of Mr Katanga Against the 'Decision on the Modalities of Victim Participation at Trial'", *supra* note 31, para. 7; the "Decision on the 'Requête tendant à obtenir autorisation de participer à la procédure d'appel contre la 'Décision relative à la confirmation des charges' (ICC-01/04-01/10-465-Conf-tFRA)'" , *supra* note 29, para. 9; and the "Decision on the application of victims to participate in the appeal against Trial Chamber II's decision on the implementation of regulation 55 of the Regulations of the Court", *supra* note 31, para. 9.

³³ See the "Decision on the participation of victims in the appeal" (Appeals Chamber), No. ICC-01/04-01/06-1453 OA 13, 6 August 2008, para. 9; the "Decision on the Participation of Victims in the Appeal against Trial Chamber I's Decision to Stay the Proceedings" (Appeals Chamber), No. ICC-01/04-01/06-2556 OA 18, 18 August 2010, para. 9; and the "Decision on the 'Requête tendant à obtenir autorisation de participer à la procédure d'appel contre la 'Décision relative à la confirmation des charges' (ICC-01/04-01/10-465-Conf-tFRA)'" , *supra* note 29, para. 10.

include those specific and fateful dates, *i.e.* 30 and 31 December 2007 in Eldoret town, the victims will be prejudiced at least in the following two ways: (i) those victims who have suffered harm only during these two days will be permanently deprived of their right to present their views and concerns at trial and will be unable to present their claims for reparations against the accused, should the latter persons be convicted; and (ii) those victims who have suffered harm during said two days as well as the following four days, *i.e.* between 1 and 4 January 2008, in Eldoret town will be deprived of their right to present their views and concerns at trial in a *complete and comprehensive manner* and will be unable to present their claims for *full* reparations against the accused, should the latter persons be convicted.

3. Victims' participation is appropriate

24. The Common Legal Representative submits that the participation of victims in the appeal at hand is appropriate given the subject-matter of the appeal and the consequences that the outcome of the appeal may have on the personal interests of the victims.³⁴ In particular, it is submitted that the views of the victims ought to be heard in this appeal because their interests are considerably affected by the eventual outcome of the appeal, as explained above.³⁵

25. Moreover, victims' participation in the interlocutory appeal filed by the Prosecution is appropriate, since it accords with the requirements regarding the right for victims to be heard as set out in article 68(3) of the Rome Statute. In fact, an analysis of the articles and rules governing victims' participation in the proceedings before the Court clearly shows that victims' participation is not restricted to specific

³⁴ See the "Decision on the 'Requête tendant à obtenir autorisation de participer à la procédure d'appel contre la 'Décision relative à la confirmation des charges' (ICC-01/04-01/10-465-Conf-tFRA)""', *supra* note 29, para. 11. See also the "Decision on the participation of victims in the appeal" (Appeals Chamber), No. ICC-02/04-01/05-324 OA 2, 27 October 2008, para. 14; and the "Decision on the Participation of Victims in the Appeal against the 'Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence' of Trial Chamber III", *supra* note 29, para. 11.

³⁵ See *supra* paras. 21 -23.

stages of the proceedings and is therefore possible at all procedural stages, including interlocutory appeals.³⁶

26. Victims' participation in this interlocutory appeal also responds to the need to maintain the fairness of the proceedings. As indicated above, the victims' personal interests are undeniably affected by the outcome of this appeal.³⁷ Consequently, victims' participation will allow the victims' views and concerns to be taken into consideration in a thorough and objective manner on appeal.

27. Finally, the Common Legal Representative submits that the appropriate character of the victims' participation in this interlocutory appeal is guaranteed by the limits set by the legal framework of the Court. In this regard, regulation 24(1) of the Regulations of the Court provides the Prosecution and the Defence with the possibility to respond to *"any document filed by any participant in the case in accordance with the Statute, the Rules, these Regulations and any order of the Chamber"*.

4. Victims' participation is not prejudicial to or inconsistent with the rights of the suspect and a fair and impartial trial

28. The Common Legal Representative is of the view that protecting the rights of the accused is a fundamental principle without which the integrity of criminal proceedings could not be safeguarded and justice would not be done.

29. Moreover, the Common Legal Representative notes that victims' participation in the proceedings before the Court is not, in itself, liable to affect the rights of the Defence. As Judge Blattmann pointed out:

³⁶ See the Proposal by France, UN Doc. PCNICC/1999/DP.2, 1 February 1999, p. 7; the Proposal by Costa Rica concerning the Rules of Procedure and Evidence, UN Doc. PCNICC/1999/WGRPE/DP.3, 24 February 1999, p. 1; and the Proposal by Colombia, UN Doc. PCNICC/1999/WGRPE/DP.37, 10 August 1999, pp. 2-3. For a review of the preparatory works, see BITTI (G.) and FRIMAN (H.), "Participation of Victims in the Proceedings", in LEE (R.S.) (ed.), *The International Criminal Court: Element of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, New York, 2001, pp. 456-474.

³⁷ See *supra* paras. 21 - 23.

*“[B]oth the rights of victims and that of the accused are amply protected under the Statute. Further, many major legal systems are able to incorporate victims’ participation into their proceedings while ensuring the rights of the accused to both a fair and expeditious proceeding”.*³⁸

30. In this regard, the Common Legal Representative also notes that the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the General Assembly of the United Nations on 29 November 1985 lays down the principle of access to justice for victims and the right to fair treatment.³⁹

31. The Common Legal Representative further points out that the role of the victims must not be confused with that of the Prosecution.⁴⁰ The purpose of victims’ participation in the interlocutory appeal in question is thus simply to ensure that the rights afforded to them under the Rome Statute are effectively implemented, and hence has no impact on the rights of the Defence.

32. Moreover, victims’ participation in the present interlocutory appeal cannot be prejudicial to or inconsistent with the rights of the Defence because the victims request authorisation to present their views and concerns regarding their personal interests solely to the issue raised on appeal. Moreover, rule 91(2) of the Rules of Procedure and Evidence and regulation 24(1) of the Regulations of the Court allow the Defence to respond to any document submitted by the victims as a result of such participation.⁴¹

³⁸ See the Separate and Dissenting Opinion of Judge René Blattmann appended to the “Decision on victims’ participation” (Trial Chamber I), No. ICC-01/04-01/06-1119, para. 26.

³⁹ See United Nations General Assembly Resolution 40/34 of 29 November 1985 available at: <http://www.un.org/documents/ga/res/40/a40r034.htm>, principles 4 to 7.

⁴⁰ See the “Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled ‘Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo’”, *supra* note 29, para. 55. See also in this sense DONAT-CATTIN (D.), “Article 68”, in TRIFFTERER (O.) (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 2nd edition, Verlag C.H. Beck, Hart Publishing and Nomos, 2008, pp. 1296 and 1297, para. 39: “victims (or her/his representative) are ‘guardians’ of the fairness of the proceedings with respect to their personal interests, and not ‘agents’ in search of retribution. The possibility of intervention in the most crucial stages of the proceedings may represent an important step in the ‘rehabilitation’ of the victims”.

⁴¹ See *supra* para. 27. See also the “Decision on the participation of victims in the appeal”, *supra* note 29, para. 14; and the “Decision on the ‘Requête tendant à obtenir autorisation de participer à la procédure d’appel contre la ‘Décision relative à la confirmation des charges’ (ICC-01/04-01/10-465-Conf-tFRA)’”, *supra* note 29, para. 12.

33. The Common Legal Representative further submits that victims' participation constitutes an integral part of the concept of fair and impartial proceedings, since it is expressly provided for in the legal texts of the Court. It follows that the balance of the proceedings before the Court cannot be affected by the participation of victims. On the contrary, taking victims' interests into consideration is one of the factors that help to balance the proceedings, particularly when it is the violation of their own fundamental rights that is involved. Thus, the participation by victims in this interlocutory appeal cannot prejudice the interests of the Defence.⁴²

34. Finally, the Common Legal Representative submits that being granted the right to participate in the present interlocutory appeal is crucial for the purpose of developing the scope of victims' participation in the current case. Should leave be granted, the victims would therefore be able to present their views and concerns for the first time on the subject matter of the appeal in question.

35. The Annex to the present filing is submitted confidential since it contains the assigned of numbers of all the victims currently participating in the case, including the seven victims, mentioned in paragraph 8 above, who have confirmed to the Common Legal Representative their willingness to continue their participation. If disclosed, this specific information or, in other words, the fact that these seven victims continue participate in the proceedings, may put them and their family members at risk.

FOR THE FOREGOING REASONS, the Common Legal Representative respectfully requests the Appeals Chamber:

⁴² See DONAT-CATTIN (D.), "Article 68", *op. cit. supra* note 40, pp. 876-877: "*The victims' genuine wish is that the truth be established and the case solved. [...] The second [concept of due process for defendant] is fair trial, which is comprehensive of, but not limited to, the respect for all the rights of the suspect/accused; it means equitable justice for defendants, victims and international society as such, the foundation of all procedural norms of the Statute*".

- **to RULE** that the personal interests of the 628 victims authorised to participate in the proceedings are affected by this interlocutory appeal, that the presentation of their views and concerns is appropriate at this stage, and that their participation is neither prejudicial to nor inconsistent with the rights of the Defence and a fair and impartial trial; and
- **to GRANT** leave to the victims to present their views and concerns on the document to be submitted by the Prosecution in support of its appeal, within a time limit to be set by the Appeals Chamber, and, more generally, to authorise the Common Legal Representative to submit written observations on any issue affecting the interests of the victims raised by the Prosecution or the Defence during the appellate proceedings, in accordance with the procedure laid down by the Appeals Chamber.

Respectfully submitted.

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke extending to the right.

Wilfred Nderitu

Common Legal Representative of Victims

Dated this 26 September 2013

At Nairobi (Kenya))