

ANNEX 6



Silvana Arbia
 Registrar
 International Criminal Court
 PO BOX 19519
 The Hague 2500 CM
 The Netherlands

17 August 2011

Madam Registrar,

Re: **The Registry's approach to Common Legal Representation for victims participating in cases before the Court**

I am writing on behalf of the Victims' Rights Working Group to express the serious concerns of its members regarding the failure of the Registry to ensure that victims seeking to participate in the pre-trial stages of the *Ruto et al.* and *Banda and Jerbo* cases were provided with the opportunity to choose their legal representative as required by Rule 90 (1) and (2) of the Rules of Procedure and Evidence (RPE).

The Victims' Rights Working Group notes the challenges for the Registry to develop a system which complies with its obligations under Rule 90 of the RPE, and gives full effect to victims' autonomy to exercise their right to participate in proceedings in accordance with Article 68(3) of the Statute. We also acknowledge the challenges faced by the Registry in carrying out its mandate within the context of budget and related operational constraints.

However, we urge you to take immediate measures to address the underlying budgetary reasons for failing to consult with victims and to ensure that this situation is not repeated in future cases; and moreover to make certain that consultation is the heart of the Registry's approach in this and other areas impacting on victims' engagement with the Court.

Victims' choice of counsel is the rule, not the exception

Ensuring that victims are able to have a say in selecting the counsel that are to represent their interests in legal proceedings before the Court is a crucial component of the right to legal assistance as reflected in Article 68(3) of the Rome Statute, Rule 90 of the RPE and Regulation 112 of the Regulations of the Registry.

On 30 March 2011, the Single Judge in the *Ruto et al.* case instructed the Victims Participation and Reparation Section (VPRS) “to take appropriate steps with a view to organizing common legal representation for the purposes of the confirmation of charges hearing, in accordance with Rules 16(l)(b) and 90(2) RPE.”¹ However, the VPRS failed to engage sufficiently with victims and groups of victims, and instead proceeded directly to choose a legal representative for victims under Rule 90(3) RPE without reaching a determination that “the victims are unable to choose a common legal representative” or unable to choose “representatives within a time limit that the Chamber may decide”.

Similarly, in the *Banda and Jerbo* case, in accordance with Rule 90(2) RPE, the Chamber “request[ed] the victims, **with the assistance of the Registry**, to choose their common legal representative to act on their behalf throughout the proceedings in this case. **Should the victims be unable to make such a choice by 23 June 2011**, the Chamber instruct[ed] the Registry to submit to the Chamber a proposal on the common legal representation of victims by 28 June 2011”² [emphases added]. The Registry indicated two months later, and two days before the deadline set by the Chamber, that it did not carry out the required consultations with victims. The Registry further referred to resource and logistical constraints, and concluded that it would be “preferable to rely on input received already as regards their wishes relating to legal representation and to apply objective criteria aimed at achieving quality legal representation in the best interests of the victims.”³

In *Ruto et al.*, the Registry acknowledged “the lack of a tailored consultation to be regrettable and emphasize[d] that its preferred means of operating would involve a much greater emphasis on discussions with the applicants and victim communities”.⁴ Similarly, in *Banda and Jerbo*, the Registry noted that “holding direct consultations with victims would have the advantages of providing an opportunity for victims to provide input on their preferences regarding legal representation, and for Registry staff to meet directly with the victims, to answer their questions and to develop a sense of their situation and concerns. Discussions with Registry staff may also assist victims to understand the reasons for the

¹ *The Prosecutor v. Ruto et al.* (Situation in the Republic of Kenya), *First decision on victims' participation in the case*, Decision of Single Judge Trendafilova, Pre-Trial Chamber II, ICC-01/09-01/11-17 of 30 March 2011, para 24: ‘4. Mindful of the fact that a large number of victims may wish to participate in these upcoming pre-trial proceedings on the one hand, and the need to ensure the effectiveness of the proceedings on the other hand, the Single Judge instructs the VPRS to take appropriate steps with a view to organizing common legal representation for the purposes of the confirmation of charges hearing, in accordance with rules 16(l)(b) and 90(2) of the Rules. To that end, the Single Judge instructs the VPRS to group victims in the course of the assessment of victims' applications. The VPRS shall include information with respect to this issue in its report(s) according to regulation 86(5) of the Regulations.’

² *The Prosecutor v. Banda and Jerbo* (Situation in Darfur, Sudan), *Order instructing the Registry to start consultations on the organisation of common legal representation*, Trial Chamber IV, ICC-02/05-03/09-138 of 21 April 2011, paras. 5-6.

³ *The Prosecutor v. Banda and Jerbo* (Situation in Darfur, Sudan), *Report on the implementation of the Chamber's order instructing the Registry to start consultations on the organisation of common legal representation*, Registry filing, ICC-02/05-03/09-164-RED of 21 June 2011, para 14.

⁴ *The Prosecutor v. Ruto et al.* (Situation in the Republic of Kenya), *Proposal for the common legal representation of victims*, (Registry filing), ICC-01/09-01/11-243 of 1 August 2011, para. 8.

imposition of common legal representation and thus why their legal representation might change without their consent.”⁵

The Victims’ Rights Working Group agrees with the Registry’s observations contained in the paragraph above and is therefore concerned that the Registry’s failure to consult and assist victim participants and applicants, as directed by the respective Chambers, has directly impeded their ability to exercise their right to choose a common legal representative. The Registry’s resort to Rule 90(3) RPE without fully exhausting Rule 90(2) RPE contravenes its obligations to facilitate the coordination of victims’ legal representation.

Notwithstanding the concerns about the process in these cases outlined above and while we would have welcomed prior consultation with civil society on the matter, the Victims’ Rights Working Group considers that the set of basic general criteria for selecting common legal representatives presented by the Registry in its filings in both cases is appropriate. However, we would welcome further information on how the Registry is applying those criteria and plans to do so in future cases. For instance, in some cases, lawyers will have longstanding relationships with victims which predate even the involvement of the ICC; certainly this should be taken into account with regards to whether “meaningful relationships have been formed with the victims.” We also agree that the criteria may need to be adapted according to the circumstances of a specific case, and especially in the light of the preferences indicated by victims.⁶ We therefore urge you to ensure full and timely consultation with victims, their representatives and civil society on the criteria in the future.

In addition, we would like to comment on the Registry’s reference to the alleged poor practice of lawyers “fishing for clients”. If the Registry finds the way in which victims interact with intermediaries and potential counsel problematic, we would encourage it to seek to address any such issues by way of the Code of Conduct or related disciplinary processes or other mechanisms. We find it problematic for potentially adverse inferences to be made from lawyers’ prior contact with victims, and for indirect references to such practices to be made in public Court filings.

Under-budgeting for victims’ participation

The Victims’ Rights Working Group is particularly dismayed that the Registry’s filings in both the *Banda and Jerbo* and *Ruto et al.* cases list budgetary and resource constraints among the reasons for not giving effect to the Chambers’ orders and applying the provisions of Rule 90 (1) and (2) RPE. Sufficient resources must be allocated to fully implement the rights of victims set out in the Rome Statute. It is therefore disappointing that the Proposed Programme Budget for the International Criminal Court in 2012 fails to address the clearly inadequate resources for the Court to complete these tasks effectively. In particular, the VPRS section of the budget proposal notes that 12 associate legal officers are required

⁵ *Prosecutor v. Banda and Jerbo* (Situation in Darfur, Sudan), *Report on the implementation of the Chamber’s order instructing the Registry to start consultations on the organisation of common legal representation*, Registry filing, ICC-02/05-03/09-164-RED of 21 June 2011, para 12.

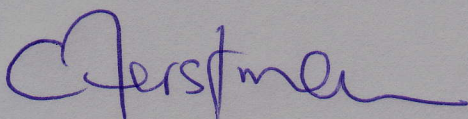
⁶ *Banda and Jerbo*, *Ibid.*, para. 21; *The Prosecutor v. Ruto et al.* (Situation in the Republic of Kenya), *Proposal for the common legal representation of victims*, (Registry filing), ICC-01/09-01/11-243 of 1 August 2011, paras. 16-17.

for it to fulfil its responsibilities (table 99), yet in addition to the current two associate legal officer positions in the Section, the 2012 budget proposal only requests the addition of one general Associate Legal Officer to assist with processing and one other proposed for the Libya situation.⁷

We note that there is significant financial pressure being placed on the Court by States Parties. However, the Registry must ensure that sufficient resources are allocated to fulfil the victims mandate set out in the Rome Statute, give effect to their rights and ensure that their experience of the Court's justice is reparative. This would include requesting additional staff and other resources in its annual budget proposals to provide assistance to and consult with victim participants about common legal representation. This would also be a way to sensitise States Parties about the challenges faced and the need for them to also fulfil their obligations to implement the Rome Statute.

Madam Registrar, we appreciate the consultative relationship that has developed over the years between court officials and NGO representatives on matters concerning the rights and concerns of victims and with your office in particular. We would welcome the opportunity to discuss with you the issues raised above, either bi-laterally or during the upcoming bi-annual roundtable meetings in October.

Sincerely,



Carla Ferstman
Director, REDRESS [on behalf of the Victims' Rights Working Group]

cc: Ms. Fiona Mackay, Chief of the Victim Participation and Reparation Section
Mr. Esteban Peralta Losilla, Chief of the Counsel Support Section

⁷ The VRWG has also taken note of other Registry filings where resource constraints were invoked as an obstacle to meet Chambers' deadlines to process applications. The VRWG will address these issues in a separate communication.