

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 31 August 2011

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single Judge

**SITUATION IN THE REPUBLIC OF KENYA
IN THE CASE OF THE PROSECUTOR V. WILLIAM SAMOEI RUTO, HENRY
KIPRONO KOSGEY AND JOSHUA ARAP SANG**

**Public Document
With four confidential Annexes**

**Motion from Victims a/0041/10, a/0045/10, a/0051/10 and a/0056/10 requesting the
Pre-Trial Chamber to Reconsider the Appointment of Common Legal
Representative Sureta CHANA for All Victims**

**Source: Victims' Legal Representatives Liesbeth Zegveld, Wambui Njogu,
Göran Sluiter and Arthur Igeria**

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

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Fatou Bensouda, Deputy Prosecutor

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Hooper and Kioko Kilukumi Musau

Counsel for Henry Kiprono Kosgey

George Odinga Oraro

Counsel for Joshua Arap Sang

Joseph Kipchumba Kigen-Katwa

Legal Representatives of the Victims

Ms Liesbeth Zegveld

Ms Wambui Njogu

Göran Sluiter

Arthur Igeria

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants

(Participation/Reparation)

**The Office of Public Counsel for
Victims**

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Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

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Victims and Witnesses Unit

Defence Support Section

Detention Section

**Victims Participation and Reparations
Section**

Fiona McKay

Other

I. Introduction

1. This filing is submitted by Victims a/0041/10, a/0045/10, a/0051/10 and a/0056/10 [hereafter: the Victims] in response to the ruling of Pre Trial Chamber II of 5 August 2011 and the Registry's Report filed on 1 August 2011 concerned with the appointment of a common legal representative in the case of the Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang.
2. The Victims have been admitted by the Pre-Trial Chamber [hereafter: the Chamber] in its decision of 5 August 2011 to participate in the confirmation of charges hearing due 1 September 2011.¹
3. In the same decision the Chamber appointed Ms Sureta Chana as their common legal representative.
4. The Victims have serious concerns regarding the appointment of the common legal representative in the present case and the procedure followed in respect of this appointment. The Victims request the Chamber to reconsider its decision leading to this appointment to all victims.

II. The Victims

5. The Victims wish to emphasise that this motion contains their views and is not just the result of an agreement between them and the legal representatives that have worked with them over the last nearly four years.
6. The Victims do not accept Ms Chana as representing their interests. It is the Victims' view that Ms Chana has been imposed on them as common legal representative by the Chamber.

¹ Pre-Trial Chamber II, "Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings", ICC-01/09-01/11-249.

7. The Victims attach their Declarations against the decision of the Chamber appointing Ms Chana as their counsel.²

8. The legal representatives of the Victims sign the present motion on direct behalf of the Victims. These representatives wish to point out that the agreement on representation with the Victims established early 2008 has not terminated. Thus these representatives have a mandate to represent the Victims in proceedings other than the confirmation of charges hearing.

III. Violation of the Victims' right to representation

9. The Victims have serious reservations regarding the appointment of the common legal representative in the present case and the procedure followed in respect of this appointment. It is submitted that a) the Registrar's selection procedure suffers from serious errors and violations of the law, as a result of which the Victims' right to representation has been violated, b) the Chamber's Decision of 5 August 2011 confirming the Registrar's proposal has violated the Victims' right under the law of the ICC (RPE) to appeal with the Chamber the Registrar's choice within a period of 30 days.

10. The Victims recognise the structure of the rules which provide for common legal representation and that ultimately a decision might be taken by the Court which determines that the common legal representative is someone other than the person who had until then been their counsel of choice. This is understood for purposes of efficiency.

11. The Victims main grievance is that they were not given any opportunity to consult or provide their views. The appointment of the common legal representative was presented as a *fait accompli*, without any possibility of appeal or redress in case of errors and violations.

² See Confidential Annexes 1 to 4.

12. Furthermore, the basis for and procedure culminating in the appointment of this common legal representative remain obscure and unclear to the Victims. It appears that a) the framework for appointment, which has no formal legal status, contains many flaws and obscurities, b) the Registrar has in important respects deviated from this framework and has in general applied it in a capricious and arbitrary manner.

13. In particular, the Victims raise the following errors in the Registrar's selection procedure:

- (i) the Victims were at no point involved in the procedure leading to the appointment of the common legal representative;
- (ii) no consideration was given to the views of Victims;
- (iii) the Victims were given no meaningful opportunity to organize themselves, with a view to ensure (common) legal representation themselves;
- (iv) the Victims do not know the common legal representative and neither does she know them. In addition, the timing of the appointment of the common legal representative – 3 weeks before the commencement of the confirmation hearing – rules out the possibility to build a meaningful relationship with the appointed common legal representative. Also the sheer number of victims (over 300 victims)³ to be represented by the common legal representative makes a meaningful representation impossible;
- (v) the legal representatives who have been constructively working with the Victims over the past four years have not been consulted in the selection of a common legal representative, other than a mere invitation from the Registry sent to all ICC listed counsel, to apply for the position.

³ Pre-Trial Chamber II, "Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings", ICC-01/09-01/11-249, para. 60.

Furthermore, the approach taken by the Registry and chamber has impeded their ability to act in accordance with art 15 (1) of the Code of Conduct for Counsel, obliging them to provide the client with all explanations reasonably needed to make informed decisions regarding his or her representation.

14. The procedure followed in respect of the appointment of the common legal representative violates the law of the ICC in various respects. The Victims refer the Chamber in this regard to the letter of the Victims' Rights Working Group to the Registry of 17 August 2011 in which it expresses:

[T]he 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.⁴

15. As a result of the abovementioned and other errors in the selection and appointment of Ms Chana as common legal representative, it is submitted that the Victims' right to representation has been violated.

IV. Violation of the Victims' right to appeal with the Chamber the Registrar's choice within a period of 30 days (Regulation 79(3))

16. Regulation 79 allows victims 30 days to request the Chamber to review the Registrar's choice of a common legal representative under rule 90, sub-rule 3. The Regulation states, insofar relevant:

2. When choosing a common legal representative for victims in accordance with rule 90, sub-rule 3, consideration should be given to the views of the victims, and the need to respect local traditions and to assist specific groups of victims.

⁴ See The Registry's approach to Common Legal Representation for victims participating in cases before the Court, available at : < http://www.vrwg.org/VRWG_DOC/2011_08_17_VRWGLetter.PDF>.

3. Victims may request the relevant Chamber to review the Registrar's choice of a common legal representative under rule 90, sub-rule 3, within 30 days of notification of the Registrar's decision.

17. In the current case, however, the possibility provided by Regulation 79(3) to seek revision of a Rule 90(3)-proposal by the Registry has been rendered ineffective and inapplicable by the Chamber's decision, made within four days after the Registry's proposal, in which the Chamber appointed Ms Chana as common legal representative, thereby endorsing the Registry's choice in full.

18. The Victims wish to point out in this regard that they were only able to make a request as meant under Regulation 79(3) after they had been informed of the selected common legal representative, in the Chamber's decision of 5 August 2011. The Registry's choice of a common legal representative was stated in a confidential Annex to the Registry's Report, and thus had been kept concealed.

19. By endorsing the – to the Victims unknown – choice of the Registry of the common legal representative, the Chamber acted in direct violation of its role as a supervisory body in respect of the Registrar's choice, and violated the right to appeal. Not only was any appeal made impossible by the fact that – without prior notice of the Registry's selection of a common legal representative – the period for appeals of 30 days was not respected, but also no proper appellate review can be expected from a Chamber that fully confirms the Registry's choice that could be subject to appeal.

V. Request to reconsider the appointment of the common legal representative

20. On the grounds stated above, the Victims request the Chamber to reconsider its decision on appointment of the common legal representative.

21. The Victims are mindful of the exceptional nature of a motion for reconsideration as a procedural remedy against any decision taken by the Chamber. However, the Victims respectfully urge the Chamber to follow the

approach to reconsideration adopted by Trial Chamber I in the Lubanga case. In that case, the majority noted that the idea that decisions can only be varied if permitted by an express provision of the Rome Statute framework "does not entirely reflect the true position of the law".⁵ Indeed, it is in the interests of justice to avoid absurd, unfair and highly prejudicial results.

22. It is submitted that a Motion for Reconsideration is particularly appropriate when important principles of fairness and human rights are at stake and when without intervention human rights, right to appeal and the right to representation, will be violated. Moreover, a Motion for Reconsideration is appropriate when no other procedure for redress appears available.

VI. Confirmation of charges hearing

23. Pending the final decision of this motion the Chamber is requested to postpone the commencement of the confirmation hearing.

24. In the alternative, the Victims request that their views and concerns be heard on this matter under art 68(3) of the ICC Statute.

25. Regarding the Victims' expression of their views on the appointment of the common legal representative, they wish their own counsel to assist them until the decision on the request for reconsideration is made. In the alternative, the Victims wish to appear on their own behalf, with representatives to appear in person to express views and concerns directly.

26. If the Chamber rejects all the above requests, the Chamber is hereby informed that the Victims a/0041/10, a/0045/10, a/0051/10 and a/0056/10 continue their participation in the confirmation of charges hearing and related proceedings unrepresented, as long as their rights to representation under the law of the ICC have not been effectively secured.

⁵ Trial Chamber I, "Decision on the defence request to reconsider the 'Order on numbering of evidence' of 12 May 2010", ICC-01/04-01/06 (30 March 2011), para. 12.

27. The Victims wish to point out that it is their view that they can exercise a right to self-representation. The ICC Statute nor any other rule obliges them to be represented in proceedings at the ICC. Nor does any rule oblige the Victims to be represented by counsel against their will. Rule 90, which is concerned with the legal representation of victims and in particular their choice of counsel, does not make the choosing of such counsel a mandatory requirement for victim participation.⁶ The notion that victims can act independently from their legal representatives is further confirmed by the fact that the Regulations reserve the discretion to contest a Rule 90(3)-decision by the Registry for the victims alone.

28. The Victims trust that the Chamber, assisted by the Registrar, will facilitate their unrepresented participation and will allow them to make their own and direct submissions in the case.

VII. Conclusion

29. It is respectfully submitted:

- a. the Chamber is requested to reconsider its Decision of 5 August 2011 and to order the Registrar to undertake a *de novo* appointment procedure of a common legal representative, in accordance with the law;
- b. pending a decision on this Motion the Chamber is requested to postpone the commencement of the confirmation of charges hearing;
- c. in case no decision on the present Motion is taken prior to the commencement of the confirmation hearing, the Chamber is requested to allow the Victims to express their views and concerns on representation;
- d. in respect to point c) the Victims request the Chamber that their own legal representatives assist them until the decision on the request for reconsideration is made; in the alternative, the Victims wish to appear on

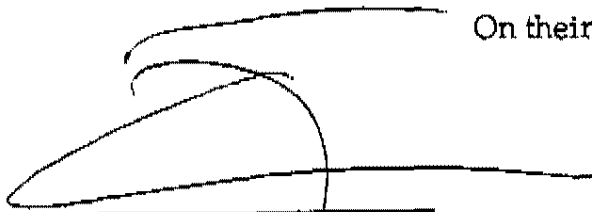
⁶ OPCV Manual, p. 103, Rule 90 (3): "a victim's freedom to choose a legal representative includes the right not to proceed to such a choice and to exercise his or her right to participate on his or her own."

their own behalf, with their legal representatives to appear in person to express views and concerns directly;


- e. If the Chamber rejects all the above requests, the Chamber is hereby informed that the Victims a/0041/10, a/0045/10, a/0051/10 and a/0056/10 continue their participation in the present case unrepresented, as long as their rights to representation under the law of the ICC have not been effectively secured. The Chamber is requested to assist in and facilitate the Victims' unrepresented participation.

Victims 0041/10, a/0045/10, a/0051/10 and a/0056/10.

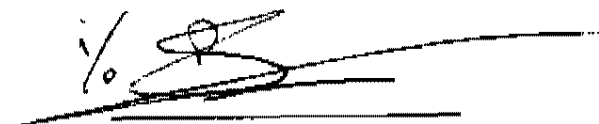
On their behalf:



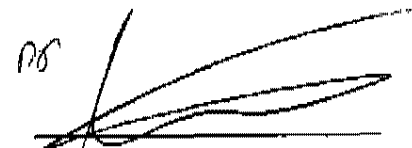
Liesbeth Zegveld



Wambui Njogu



Göran Sluiter



Arthur Igeria

Dated this Wednesday, 31 August 2011

At Amsterdam, The Netherlands