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

Date: 8 February 2012

THE APPEALS CHAMBER

Before: Judge Akua Kuenyehia, Presiding Judge
 Judge Sang-Hyun Song
 Judge Erkki Kourula
 Judge Anita Ušacka
 Judge Daniel David Ntanda Nsereko

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR v. WILLIAM SAMOEI RUTO,
HENRY KIPRONO KOSGEY AND JOSHUA ARAP SANG

PUBLIC

**Response to OPCV ‘Observations on the “Directions on the submission
 of observations pursuant to Article 19(3) of the Rome Statute and
 Rule 59(3) of the Rules of Procedure and Evidence”’**

Source: Defence for Mr. William Samoei Ruto
 Defence for Mr. Joshua Arap Sang

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

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Sureta Chana

Legal Representatives of the Applicants

Unrepresented Victims

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I. Introduction

1. On 3 February 2012, the Office of the Public Counsel for Victims (“OPCV”) requested the Appeals Chamber to find that the OPCV is entitled to submit observations on jurisdiction pursuant to Article 19(3) and Rule 59(3), on behalf of victim-applicants in this case and generally on behalf of victims who have communicated with the Court.¹
2. The Defence for Mr. Ruto and the Defence for Mr. Sang opposes the participation of the OPCV in the appeal on jurisdiction.
3. The Appeals Chamber should reject the OPCV’s request to submit observations on behalf of this vague class of victims, given that the OPCV did not participate in the underlying jurisdiction challenge and as the views and concerns of the victims will be canvassed properly through the observations of the Legal Representative.²

II. Submissions

4. The Defence notes that the OPCV relies on Article 19(3) and Rule 59 as support for its request to submit observations on behalf of victim-applicants and victims who have communicated with the court. However, the Defence submits that victim applicants have no general right to participation once a legal representative has been appointed. Rule 59(1)(b) is written disjunctively, in that only “victims who have already communicated with the Court in relation to that case or their legal representatives” may make representations in writing to the competent Chamber as to issues of jurisdiction. The rule does not suggest that both victims who have communicated to the Court in some capacity and representatives who have subsequently been appointed may make representations.
5. The rule is disjunctive in recognition of the fact that a suspect can challenge jurisdiction or admissibility at a very early stage of proceedings, ie before legal representation has been appointed on behalf of victim applicants. Thus, the rule allows victim applicants to participate even in the absence of legal representation, in order to ensure that their views and concerns are heard at a preliminary stage. Yet once victim applicants have been

¹ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-384 OA3 OA4, Observations on the “Directions on the submission of observations pursuant to Article 19(3) of the Rome Statute and Rule 59(3) of the Rules of Procedure and Evidence”, 3 February 2012 (“Observations”).

² ICC-01/09-01/11-383 OA3 OA4, Directions on the submissions of observations pursuant to Article 19(3) of the Rome Statute and Rule 59(3) of the Rules of Procedure and Evidence, 2 February 2012 (“Directions”).

confirmed as victim participants, their participation should be facilitated through their legal representatives (or not at all, if they have been denied victim status). This is indeed the approach endorsed by Pre-Trial Chamber II in this case. In the *First Decision on Victims' Participation in the Case*,³ the Single Judge indicated that “where no legal representative has been appointed by a victim applicant, the Office of the Public Counsel for Victims shall act as legal representative from the time the victim applicant submits his or her application for participation until a legal representative is chosen by the victim or is appointed by the Chamber”.⁴

6. As far as the Defence is aware, there are no victim applications pending before the Pre-Trial Chamber. Therefore the mandate of the OPCV has expired and it is unclear who the OPCV actually intends to represent. The Defence submits that it would be contrary to the interests of justice and the integrity of the proceedings to allow the OPCV to make submissions on behalf of unknown victims who have ostensibly communicated with the Court but whose status as victims or victim applicants is unspecified. Under the circumstances, it appears that the OPCV simply wants to file observations before the Appeals Chamber as an amicus. Such a practice should not be encouraged.
7. Furthermore, the OPCV never asserted a right nor attempted to submit observations on jurisdiction at first instance when the issue was before Pre-Trial Chamber II; the Legal Representative alone filed observations presenting the views and concerns of the victims.⁵ It would seem contrary to the natural order of the appellate process to now allow observations from the OPCV for the first time on this issue.
8. The fact that the OPCV participated in the appeal relating to the admissibility of the Kenyan situation⁶ is inapposite for several reasons. Therein, the OPCV had participated at first instance⁷ prior to the appointment of Ms. Sureta Chana as the common legal representative, and thus logically continued to do so on appeal even after her appointment. In inviting the participation of the OPCV, the Pre-Trial Chamber II explained:

³ ICC-01/09-01-11-17.

⁴ Ibid, para. 23.

⁵ ICC-01/09-01/11-332.

⁶ ICC-01/09-01/11-250.

⁷ The Defence notes that this is similar to the approach taken in the *Katanga* and *Bemba* admissibility appeals wherein victim applicants who had participated at first instance were thereafter allowed to participate in the appeal through the OPCV. *Prosecutor v. Bemba*, ICC-01/05-01/08-802 Decision on the Admissibility and Abuse of Process Challenges, 24 June 2010, para. 29; *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-1295, Directions on the Submission of Observations pursuant to Article 19(3) of the Rome Statute and Rule 59(3) of the Rules of Procedure and Evidence, 13 July 2009.

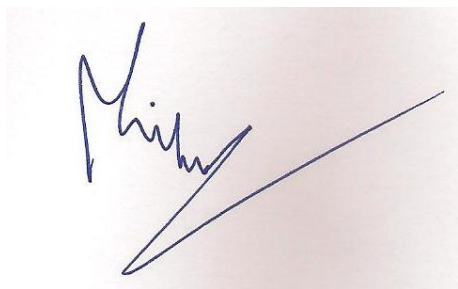
“In order to ensure the proper and expeditious conduct of the article 19 proceedings and **taking into consideration that no victim has been recognized yet in the present case**, the Chamber is of the view that it is in the interest of justice to appoint the Office of Public Counsel for Victims (the "OPCV") to represent all those victims who have submitted applications to participate in the proceedings in the present case.”⁸

This was deemed to be the most expeditious way for the Pre-Trial Chamber to proceed, given that there were several legal representatives at that stage, and the OPCV could act as a common legal representative for the purposes of the admissibility challenge.⁹ However, at present, Ms. Chana has been appointed as the common legal representative and can thus serve the same function on behalf of all victims.

9. Furthermore, in relation to the Kenyan admissibility appeal proceedings, the Appeals Chamber was able to specify which victim applicants were permitted to participate through the OPCV in the appeal.¹⁰ Herein, the OPCV has given no indication of such, and thus the Defence's arguments at paragraph 6 are applicable.

III. Conclusion

10. Consequently, and in light of the above, the Defence respectfully requests the Appeals Chamber deny the request of the Office of the Public Counsel for Victims to file observations in the appeal on jurisdiction.



Kioko Kilukumi
On behalf of William Samoei Ruto
Dated this 8th day of February 2012
In Nairobi, Kenya



Joseph Kipchumba Kigen-Katwa
On behalf of Joshua Arap Sang
Dated this 8th day of February 2012
In Nairobi, Kenya

⁸ ICC-01/09-01/11-31, para. 12.

⁹ Ibid, para. 13.

¹⁰ ICC-01/09-01/11-123. The Defence also notes that when victims participated in an Article 19 appeal in *Lubanga*, the victims were specified by their applicant number. ICC-01/04-01/06-569 OA4, 13 October 2006.