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No.: ICC-01/09-01/11
Date: 24 December 2012

TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding Judge
Judge Christine Van Den Wyngaert
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

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

Public Document

**Request pursuant to rule 103 of the Rules of Procedure and Evidence for leave to
submit observation as *amicus curiae***

Source: Ms Sureta Chana

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

The Office of the Prosecutor

Ms Fatou Bensouda

Counsel for William Samoei Ruto

Mr Kioko Kilukumi Musau

Mr David Hooper

Counsel for Joshua Arap Sang

Mr Joseph Kipchumba Kigen - Katwa

Mr Joel Kimutai Bosek

Legal Representatives of the Victims

Mr Wilfred Nderitu

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Deputy Registrar

Mr Didier Preira

Counsel Support Section

Mr Esteban Peralta-Losilla

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Ms Fiona McKay

Other

Ms Sureta Chana

1. On 6 November 2012, at a time when I was legal representative of the victims in this case, I filed in that capacity a “Request to present views and concerns of victims on their legal representation at the trial phase” (the “**November request**”).¹
2. That document “requested that the Trial Chamber, before taking a decision on the legal representation of the victims during the trial phase of the proceedings, permit the victims to present their views and concerns on the issue or otherwise consult with the victims”.²
3. That document observed that the decision that the Trial Chamber would ultimately take with respect to the legal representation of the victims during the trial phase of the proceedings would directly affect the personal interests of every victim, would have a direct practical effect on the effectiveness of their rights of participation in the proceedings under the Statute, and that general principles of fairness and justice would dictate that the victims should be consulted or entitled to present their views on proposed changes to the regime of their legal representation effected during the course of a case.³
4. On 13 December 2012, the Trial Chamber issued a decision which rejected that request (the “**December decision**”).⁴ By the time that this decision was issued, the Trial Chamber had already issued its “Decision appointing a common legal representative of victims” (the “**November decision**”).⁵
5. The December decision noted that the Trial Chamber had previously, in October 2012, issued a “Decision on victims’ representation and participation” (the “**October decision**”).⁶ In the December decision, the Trial Chamber stated that:

¹ ICC-01/09-01/11-469.

² *Id.*, para. 1.

³ *Id.*, para. 11.

⁴ ICC-01/09-01/11-511, “Decision on the request to present views and concerns of victims on their legal representation at the trial phase”.

⁵ ICC-01/09-01/11-479, 23 November 2011.

⁶ ICC-01/09-01/11-460, 3 October 2012.

... the Chamber considers that the Request is largely an attempt to ultimately persuade the Chamber to reconsider matters which it has already examined in the [October decision]. While the Chamber acknowledges that it may reconsider past decisions when they are “manifestly unsound and their consequences are manifestly unsatisfactory”, Ms Chana does not persuade the Chamber that the Victims Decision was manifestly unsound or created manifestly unsatisfactory consequences.⁷

6. However, the December decision went on to state that:

... the Chamber invites Ms Chana to file an application under Rule 103 of the Rules if she believes that an *amicus curiae* submission would be desirable for the Chamber’s implementation of the system of victim representation and participation outlined in the Victims Decision.⁸

7. Pursuant to that invitation, I hereby respectfully apply under rule 103 of the Rules to make the following submissions as *amicus curiae*.
8. First, as *amicus curiae*, I would adopt and reiterate the submission made in the November request that, as a matter of principle, where consideration is given to making changes to the extent and mode of victim representation during the course of a case, the victims should be directly consulted, as the persons most directly affected, before any such changes are made.⁹
9. I do not seek, as *amicus curiae*, to make any submission on what the future arrangements should be for the legal representation of victims during the trial phase, or on how the October decision should be implemented. As *amicus curiae*, I am unable to state a view on behalf of the victims themselves. As *amicus curiae*, I confine myself to submitting that as a matter of principle the victims themselves should be consulted, as the persons most directly affected, in matters affecting their legal representation. The October decision emphasizes that victim participation should be meaningful, as opposed to purely symbolic¹⁰. As *amicus curiae*, I submit that victims cannot be

⁷ December decision, para 6, footnote omitted.

⁸ *Id.*, para. 7.

⁹ November request, para 11.

¹⁰ October decisión, paras. 10, 59, 60 and 67.

meaningfully and genuinely engaged if the Court fails to consult them on matters that affect the core of their interest and that will determine their ability to participate in future proceedings.

10. *Amicus curiae* submissions cannot serve the function of consultation with victims, which is why victims have legal representation in proceedings before the Court. The participants in the proceedings are the *victims*, and not the *victims' representatives*. The victims' representatives are merely legal representatives, through whom the *victims themselves* participate. The victims' representative, like any counsel in any proceedings, has the responsibility of presenting their client's views and concerns to the Court. The victims' representative is not an independent *amicus curiae*, expressing his or her own views on what would be in the victims' interest, or on what should be of concern to victims. An *amicus curiae* cannot perform the function of a victims' representative, and I do not seek to do so.

11. I acknowledge that the Trial Chamber has not invited me to make any submissions seeking to reopen what has now been decided in the October decision and November decision, and I do not seek to do so. I would simply submit, with respect, for the reasons given in the November request, that the victims were not meaningfully consulted before the October decision or November decision were issued. Inviting *amicus curiae* submissions to be made after the decisions have been taken by the Chamber will not remedy that nor the fact the victims' fundamental right to be heard on a matter that affects their interests has been breached.

12. I would also respectfully submit that it was not the case, contrary to what is stated in the December decision quoted above, that the November request was "largely an attempt to ultimately persuade the Chamber to reconsider matters which it has already examined in the [October decision]." At the time that the November request was filed, all aspects of victim representation at the trial phase had not yet been finalised. For instance, at the time that the November

request was made, it was unclear whether the Chamber had definitively decided that the legal representative at the trial phase would need to be located in Kenya throughout the proceedings. This is evidenced by the fact that the Registry nonetheless put me forward as a “viable option” for appointment,¹¹ and by the fact that the November decision had a dissenting opinion by one member of the Chamber. Furthermore, the October decision directed the Registry and the OPCV “to consult and to submit a joint proposal on the division of responsibilities and effective functioning of the common legal representation system”. At the time of the November request, no decision had yet been taken by the Chamber on any such Registry/OPCV proposal.

13. As noted in the November request, I had concerns at the time as victims’ representative that the victims were not included in a consultation meeting between the Registry and OPCV on 12 October 2012, that the November 2012 Registry Recommendation acknowledged that “the Registry did not attempt to conduct a consultation process with the affected communities on the criteria to be applied in the common legal representative selection process”, and that there were disagreements between OPCV and the Registry on important issues relating to the legal representation of victims at the trial phase.¹²
14. There were thus matters on which no final decision had yet been taken by the Trial Chamber, in respect of which the victims could have been meaningfully consulted without reopening the October decision. Of course, if as a result of any consultations with the victims the Chamber had concluded that aspects of the October decision should be reconsidered, that would have been a course open to the Chamber.
15. The December decision invited me to apply to make *amicus curiae* submissions if I believe “that an *amicus curiae* submission would be desirable for the

¹¹ November decision, para 4.

¹² November request, paras 13-15.

Chamber's implementation of the system of victim representation and participation outlined in the [October decision]".

16. For the reasons above, I would make the respectful submission that, in the ongoing implementation of the system of victim representation and participation outlined in the October decision, there should be consultation with victims before any changes are made to the arrangements for their legal representation and/or before any outstanding matters significantly affecting their legal representation are finalised.

A handwritten signature in blue ink, consisting of a series of loops and a long horizontal stroke.

Sureta Chana

Dated this 24th day of December 2012

At London, United Kingdom