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No.: **ICC-01/09-02/11 OA 4**

Date: **19 March 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. FRANCIS KIRIMI MUTHAURA AND
UHURU MUIGAI KENYATTA***

**Public Document,
with Confidential *Ex Parte* (Legal Representative Only)
Annex A and Confidential Annex B**

**Notification regarding the Legal Representation of Participating Victims in these
Appeals Proceedings**

Source: Victims' Legal Representative

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

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I. INTRODUCTION

1. The undersigned Legal Representative seeks through this notification to advise the Appeals Chamber that victim-participants in these appeals proceedings will be without legal representation, starting on 27 March 2012.

2. This is as a consequence of a letter dated 13 March 2012 from the Registry's Counsel Support Section (CSS), advising the Legal Representative that his appointment and mandate were limited to "ensuring the participatory rights of victims at the confirmation of charges hearing and in related proceedings," and that all proceedings before "Pre[-]Trial Chamber II on the confirmation of charges and related proceedings" were concluded on 9 March 2012, by virtue of the decision denying the Defence leave to appeal the Decision on the Confirmation of the Charges.¹

3. Having concluded that the Legal Representative's appointment and mandate effectively came to an end on 9 March 2012, the CSS has invited the Legal Representative "to take all necessary measures" to conclude any "pending matters" emanating from the pre-trial phase of the case by "no later than 26 March 2012,"² and to conclude "check-out procedures" and ensure that any office equipment belonging to the Court is returned.³

4. This notification is being brought, pursuant to Articles 14, 15 (1) and (2), and 24 (1) of the Code of Professional Conduct for Counsel.⁴ Article 24(1) provides that, "Counsel shall take all necessary steps to ensure that his or her actions or those of

¹ See "CSS' Letter," Confidential *Ex Parte* Annex A. See, also, "Decision on the Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges," ICC-01/09-02/11-406, 9 March 2012 ("Decision on Leave to Appeal").

² CSS' Letter, Confidential *Ex Parte* Annex A.

³ CSS' Letter, Confidential *Ex Parte* Annex A.

⁴ Code of Professional Conduct for Counsel, ICC-ASP/4/Res.1, adopted at the 3rd plenary meeting on 2 December 2005 by consensus, Articles 14, 15 (1) and (2), and 24 (1).

counsel's assistants or staff are not prejudicial to the ongoing proceedings and do not bring the Court into disrepute."⁵

5. The Legal Representative sets out below his respectful and considered view regarding the consequences of the CSS' Letter for the legal representation of victims in these appeals proceedings and the necessity of appointing qualified counsel to ensure that the victims' interests (including, at a minimum, their right to communicate with counsel and to receive information about the status of their case from sources other than the news media) are safeguarded for the entirety of these appeals proceedings.

II. RELEVANT PROCEDURAL HISTORY

6. The Legal Representative was appointed on 26 August 2011, pursuant to the Single Judge's, "Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings."⁶ That decision authorized two hundred and thirty-three victims to participate in the Confirmation of Charges Hearing and related proceedings.⁷

7. The Document Containing the Charges was filed by the Prosecutor on 19 August 2011⁸ and amended on 2 September 2011.⁹

8. Challenges to the jurisdiction of the Court over the crimes alleged in the DCC were filed by Messrs Kenyatta and Ali on 19 September 2011.¹⁰ On 5 October 2011,

⁵ Code of Professional Conduct for Counsel, ICC-ASP/4/Res.1, adopted at the 3rd plenary meeting on 2 December 2005 by consensus, Article 24 (1).

⁶ See, ICC-01/09-02/11-267, 26 August 2011, page 46, para. (e).

⁷ "Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings," ICC-01/09-02/11-267, 26 August 2011 (hereinafter "Appointment Decision").

⁸ "Prosecution's Document Containing the Charges, List of Evidence and Comprehensive In-Depth Analysis Chart of Evidence Included in the List of Evidence Submitted Pursuant to Article 61(3) and Rule 121(3)," ICC-01/09-02/11-257, 19 August 2011. See, also, Article 61(3)(a), Rome Statute of the International Criminal Court ("the Statute").

⁹ "Prosecution's Amended Document Containing the Charges and List of Evidence Submitted Pursuant to Article 61(3) and Rule 121(3), (4) and (5)," ICC-01/09-02/11-280, 2 September 2011 ("DCC"). All references herein to the "DCC" are to the amended version.

the victims and the Prosecution were invited by the Pre-Trial Chamber to submit observations to the said jurisdictional challenges.¹¹ A response by the Prosecution¹² and observations by the victims¹³ were consequently filed on 14 October 2011.

9. The Confirmation of Charges Hearing¹⁴ was held between 21 September and 5 October 2011.¹⁵ At the invitation of the Pre-Trial Chamber,¹⁶ written observations were filed by the victims, in respect of the Hearing,¹⁷ in addition to written submissions filed by the parties regarding the Hearing.¹⁸

10. The Decision on the Confirmation of Charges was rendered on 23 January 2012.¹⁹

11. Leave was sought to appeal the Confirmation Decision by Messrs Muthaura and Kenyatta²⁰ on 30 January 2012.²¹ The Appellants on the same day lodged this jurisdictional appeal.²²

¹⁰ “Submissions on Jurisdiction on Behalf of Uhuru Kenyatta,” ICC-01/09-02/11-339, 19 September 2011 (the “Kenyatta Jurisdictional Challenge”); and “Defence Challenge to Jurisdiction, Admissibility and Prosecution’s Failure to Meet the Requirements of Article 54,” ICC-01/09-02/11-338, 19 September 2011.

¹¹ ICC-01/09-02/11-T-15-CONF-ENG, 5 October 2011, page 88, lines 5 – 8.

¹² “Prosecution’s Response to the Defence Challenges to Jurisdiction,” ICC-01/09-02/11-356, 14 October 2011.

¹³ “Victims’ Consolidated Observations on the Kenyatta and Ali Submissions regarding Jurisdiction and/ or Admissibility,” ICC-01/09-02/11-357, 14 October 2011.

¹⁴ Hereinafter “the Hearing.”

¹⁵ See Annex A to “Decision on the Schedule for the Confirmation of Charges Hearing,” ICC-01/09-02/11-321, 13 September 2011. See, also, ICC-01/09-02/11-T-4-ENG ET WT 21-09-2011, 1/121 PV PT and ICC-01/09-02/11-T-15-CONF-ENG ET 05-10-2011, 1/90 SZ PT.

¹⁶ ICC-01/09-02/11-T-15-CONF-ENG ET 05-10-2011, 1/90 SZ PT, page 2, lines 4 – 7 and page 88, lines 14 – 17.

¹⁷ See, “Corrigendum to *Victims’ Observations in relation to the Confirmation of Charges Hearing*,” ICC-01/09-02/11-360-Corr, 31 October 2011.

¹⁸ See, “Prosecution’s Written Submissions Following the Hearing on the Confirmation of the Charges,” ICC-01/09-02/11-361, 28 October 2011; “Defence Submissions on behalf of Uhuru Kenyatta Following the Confirmation of Charges Hearing,” ICC-01/09-02/11-372, 17 November 2011; “General Mohammed Hussein Ali’s Final Submissions on the Confirmation of Charges Hearing,” ICC-01/09-02/11-373, 21 November 2011; and “Final Written Observations of the Defence Team of Ambassador Francis K. Muthaura on the Confirmation of Charges Hearing,” ICC-01/09-02/11-374, 21 November 2011 (the “Muthaura Final Submission”).

¹⁹ “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute,” ICC-01/09-02/11-382-Conf., 23 January 2012 (the victims are privy to only the public, redacted version of this decision. Cf., ICC-01/09-02/11-382-Red., 23 January 2012) (“Confirmation Decision”).

²⁰ The “Appellants.”

²¹ See, “Defence Application for Leave to Appeal the ‘Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute,’” ICC-01/09-02/11-385, 30 January 2012 (“Muthaura Application”); and “Defence Application for Leave to Appeal the ‘Decision on the Confirmation of Charges,’” ICC-01/09-02/11-384, 30 January 2012 (“Kenyatta Application”).

²² “Appeal on behalf of Uhuru Muigai Kenyatta and Francis Kirimi Muthaura pursuant to Article 82(1)(a) against Jurisdiction in the ‘Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute,’” ICC-01/09-02/11-383 OA 4, 30 January 2012 (“Notice of Appeal”).

12. Citing the mandate conferred on the Legal Representative by the Appointment Decision, this Chamber on 2 February 2012 issued directions to the victims (through the Legal Representative), regarding the filing of observations on the document in support of the appeal that the Appellants were to file, as well as the response thereto by the Office of the Prosecutor.²³

13. On the following day, 3 February 2012, the Office of the Public Counsel for Victims (OPCV) sought to intervene in these appeals proceedings on the behalf of “victim-applicants in this case” and “generally on behalf of victims who have communicated with the Court in the case.”²⁴ The OPCV’s request was denied on 20 February 2012, on grounds that “[t]he OPCV was not invited to make observations in respect of the present appeal as it had not submitted any observations on the Jurisdictional Challenge before the Pre-Trial Chamber.”²⁵

14. The document in support of the appeal or Appellants’ Brief was filed on 14 February 2012,²⁶ and the response from the Office of the Prosecutor was filed on 7 March 2012.²⁷

15. Leave to appeal the Confirmation Decision was denied the Appellants on 9 March 2012.²⁸

16. On 13 March 2012, in compliance with the Directions of the Appeals Chamber, the Legal Representative transmitted for filing, the victims’ “Observations pursuant

²³ “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,” ICC-01/09-02/11-394 OA 4, 2 February 2012 (“Directions of the Appeals Chamber”), para. 1.

²⁴ “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’,” ICC-01/09-02/11-395, 3 February 2012 (“OPCV Request”).

²⁵ “Decision on the ‘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”’,” ICC-01/09-02/11-400 OA 4, 20 February 2012, paras. 14 and 17.

²⁶ “Document in Support of Appeal on behalf of Uhuru Muigai Kenyatta and Francis Kirimi Muthaura pursuant to Article 82(1)(a) against Jurisdiction in the ‘Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute’,” ICC-01/09-02/11-399, 14 February 2012 (“Appellants’ Brief”).

²⁷ “Prosecution’s Response to ‘Document in Support of Appeal on behalf of Uhuru Muigai Kenyatta and Francis Kirimi Muthaura pursuant to Article 82(1)(a) against Jurisdiction in the “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”’ (ICC-01/09-02/11-399 OA 4),” ICC-01/09-02/11-404 OA 4, 7 March 2012 (“Prosecution’s Response”).

²⁸ “Decision on the Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges,” ICC-01/09-02/11-406, 9 March 2012 (“Decision Denying Leave to Appeal”).

to Article 19 (3) of the Rome Statute and Rule 59 (3) of the Rules of Procedure and Evidence.”²⁹

17. At 5:24 p.m., on 13 March 2012 (shortly after the filing of the “Victims’ Jurisdictional Observations”) the Legal Representative received an e-mail from CSS which transmitted the CSS’ Letter.

III. THE LEGAL REPRESENTATIVE’S MANDATE

a. The Appointment Decision

18. The Appointment Decision limited the Legal Representative’s mandate to the participation of victims “at the confirmation of charges hearing and in related proceedings.”³⁰ Nowhere does the decision mention possible appeals proceedings that might flow from the confirmation of charges hearing.

19. However, and up until recently, the Legal Representative was of the view that the mandate conferred upon him by the Appointment Decision, necessarily extended to these jurisdictional appeals proceedings by virtue of the phrase “related proceedings” in connection with the Hearing, and inasmuch as these proceedings derive directly from findings made as a consequence of the Hearing in the Confirmation Decision. That understanding of the Legal Representative was buttressed by the reference to the Appointment Decision and the Legal Representative in the Directions of the Appeals Chamber regarding the modalities for the filing of any observations on behalf of the victims in response to the Appellants’ Brief.

b. The *Ruto, et al.*, Case and the Meaning of “Related Proceedings”

²⁹ ICC-01/09-02/11-408 OA 4, dated 13 March 2012, filed 14 March 2012 (“Victims’ Jurisdictional Observations”). Technical difficulties associated with converting the document from MS Word to .pdf format on the CITRIX platform, necessitated that it be transmitted to the Registry’s Court Management Section (CMS) in MS Word format, if the deadline of 16:00 hours was to be adhered to. The .pdf version was subsequently transmitted to CMS within 30 minutes of the transmittal of the MS Word version. Upon information and belief, authorization was granted to CMS to accept the filing, after CMS sought guidance from representatives of this Chamber.

³⁰ See, Confirmation Decision, title, para. 1 and page 46, para. (e).

20. A decision dated 9 March 2012 in the companion Kenyan case before the Court, *Ruto et al.*, provides some clarity regarding the scope of the phrase, “related proceedings,” in the context of the Appointment Decision and the mandate of the Legal Representative.³¹ The Legal Representative in *Ruto et al.*, was appointed by way of an appointment order of the Single Judge who issued the Appointment Decision at bar. The mandate of the Legal Representative in *Ruto et al.*, was similarly limited to the participation of victims “at the confirmation of charges hearing and in related proceedings.”³² In dismissing a 29 February 2012 request by the Legal Representative in *Ruto et al.*,³³ for an order to the Registrar to facilitate an ongoing field mission in Kenya, the Single Judge there stated the scope of the Legal Representative’s mandate was limited:

...to represent victims at the confirmation of charges hearing and proceedings related thereto.³⁴ ... [W]ith the issuance of the decision on the confirmation of charges³⁵ and the rejection of the applications for leave to appeal this decision,³⁶ the proceedings before the Chamber that are related to the confirmation of charges have come to an end.³⁷ In light of the above, the Victims' Legal Representative has no more *locus standi* to put forward before the Chamber the Request with respect to her current mission, the purpose of which goes beyond the mandate specified in the 5 August 2011 Decision.³⁸ Accordingly, the Single Judge is of the view that the Victims' Legal Representative's Request must be dismissed *in limine*.³⁹

³¹ *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, “Decision on the ‘Urgent Request by the Victims’ Representative for an order from the Chamber requiring the Registrar to provide appropriate resources for the current mission in Kenya’,” ICC-01/09-01/11-398, 9 March 2012 (the “*Ruto Decision*”).

³² *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, “Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings,” ICC-01/09-01/11-249, 5 August 2011 (“*Ruto Appointment Decision*”), title, para. 1 and page 48, para. (c).

³³ *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, “Urgent Request by the Victims’ Representative for an order from the Chamber requiring the Registrar to provide appropriate resources for the current mission in Kenya,” ICC-01/09-01/11-392-Red, 29 February 2012.

³⁴ *Ruto Decision*, para. 15.

³⁵ See, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute,” ICC-01/09-01/11-373, 23 January 2012.

³⁶ See, *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, “Decision on the Defences' Applications for Leave to Appeal the Decision on the Confirmation of Charges Pursuant [sic] to Article 61(7) (a) and (b) of the Rome Statute,” ICC-01/09-01/11-399, 9 March 2012.

³⁷ *Ruto Decision*, para. 16.

³⁸ See, *Ruto Appointment Decision*.

³⁹ *Ruto Decision*, para. 17.

21. It might be argued that reference in the *Ruto* Decision to “proceedings before *the Chamber* that are related to the confirmation of charges (emphasis added)” and *locus standi* to put forward the request before “the Chamber,” does not serve to circumscribe the mandate of the Legal Representative as far as “related proceedings” before another Chamber (e.g., the Appeals Chamber) are concerned, but such an interpretation would appear contrary to the plain meaning and overall context of the *Ruto* Decision. Indeed, and upon information and belief, the CSS has written a letter to the Legal Representative in *Ruto et al.*, in the same terms as the CSS’ Letter at bar, advising the Legal Representative in *Ruto et al.*, that her mandate also concluded on 9 March 2012 and providing a deadline for purposes of “checking-out” from the Court.

c. Question Presented and Related Legal Issues

22. The 9 March 2012 *Ruto* Decision pertained to that case and no similar decision has been issued in respect of the mandate of the Legal Representative in this case. Nevertheless, it is of significance and a host of issues arise and easily come to mind regarding the scope of the Legal Representative’s mandate in its wake, and in light of the CSS’ Letter of 13 March 2012.

23. Most of such issues are not central to the precise and rather narrow legal question that is presented in this notification: namely, **whether in the particular circumstances of this case, legal representation provided to indigent victim-participants should extend to the period after the core written submissions⁴⁰ on appeal have been filed with the Appeals Chamber.** Two such issues are, however,

⁴⁰ This, of course, does not include further submissions that might be called for *proprio motu* by the Appeals Chamber, nor possible supplemental and/ or other written submissions that may be made by the parties or victim-participants, in respect of any number of issues which might arise, following the core written submissions of appellants’ brief, respondent’s brief, and observations by the victim-participants. See, for example, Regulation 28 (1) which provides that “[a] Chamber may order the participants to clarify or to provide additional details on any document within a time limit specified by the Chamber,” and Regulation 28 (2) which reads that, “A Chamber may order the participants to address specific issues in their written or oral submissions within a time limit specified by the Chamber.” See, Regulations 28 of the Regulations of the Court, ICC-BD/01-02-07.

worthy of mention and of some reflection. They are as follows and are addressed below in *seriatim*:

1. If the mandate conferred upon the Legal Representative in the Appointment Decision expired on 9 March 2012 with the issuance of the Decision Denying Leave to Appeal⁴¹ (i.e., the end of proceedings related to the confirmation of charges before Pre-Trial Chamber II, as indicated in the *Ruto* Decision⁴²), pursuant to what legal authority/ mandate was the Legal Representative acting when he filed the Victims' Jurisdictional Observations in these appeals proceedings on 13 March 2012? and

2. If the mandate conferred upon the Legal Representative in the Appointment Decision expired on 9 March 2012, pursuant to what legal authority is the CSS permitted to extend the Legal Representative's mandate (a legal mandate) to 26 March 2012? (This question could equally be framed as whether or not it is permissible for the CSS to modify – extend, circumscribe, terminate – a legal mandate of appointment given by a Chamber of this Court, without consulting the relevant Chamber in question?⁴³)

24. With respect to the first of the two questions above, the Legal Representative was acting in good faith reliance on the Directions of the Appeals Chamber regarding the filing of observations on behalf of victim-participants, in respect of the Appellants' Brief and the Prosecution's response thereto. No letter had been received from the CSS, alluding to the ostensible termination of the Legal Representative's mandate, and neither had any decision been issued in this case by the Single Judge regarding the scope of the said mandate, as of when the Victims' Jurisdictional Observations was filed.

25. To be sure, the Directions of the Appeals Chamber are in no wise tantamount to an order of appointment of the Legal Representative for purposes of these appeals proceedings, but viewed in the context of the pre-existing Appointment Decision to

⁴¹ "Decision on the Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges," ICC-01/09-02/11-406, 9 March 2012 ("Decision Denying Leave to Appeal").

⁴² *Ruto* Decision, para. 16.

⁴³ This latter formulation of the issue would include the scenario where counsel's mandate has not yet expired and counsel is still actively engaged in the representation of a client, pursuant to the grant of an express or implied mandate of the Chamber before whom counsel is appearing.

which it referred, it imbued in the Legal Representative the *imprimatur* to proceed on behalf of the victim-participants before this Chamber. Indeed, and doubtless, the CSS would not be opining that the mandate of the Legal Representative has expired, had the applications for leave to appeal the Confirmation Decision been granted by the Pre-Trial Chamber; and that necessarily begs the question of how a mandate could be viable for purposes of one appeal that is lodged from the Confirmation Decision (an appeal on the merits) and not for purposes of another appeal (jurisdictional in nature) that is lodged from the same Confirmation Decision.

26. The second question that is presented above – i.e., the CSS’ authority to modify a legal mandate -- is arguably more straightforward than the first. In the view of the Legal Representative, the mandate conferred upon him by virtue of the Appointment Decision was a legal mandate issued on behalf of Pre-Trial Chamber II by the Single Judge. Accordingly, such a mandate cannot be modified (delimited, extended, circumscribed, or terminated) administratively by the Registrar (acting through the CSS) without prior consultation with the appointing Chamber. Viewed in this way, the CSS’ Letter cannot be read as an *extension* of the Legal Representative’s mandate from when it ostensibly expired on 9 March 2012 to 26 March 2012, the “check-out” date provided for in the letter. To suggest that the CSS may extend a legal mandate without prior consultation with the appointing Chamber carries with it the corollary that the CSS could just as well terminate a legal mandate without such prior consultation.

27. In the Legal Representative’s view, the CSS’ Letter can properly be read as an administrative effort to extend past the ostensible expiration of a legal mandate, the period of time during which the wrapping up activities of “former” counsel on a case would appear reasonable and still be compensable by the Registry. Setting aside for a moment, how and why the CSS chose the date of 26 March 2012 as the “check-out”

date from the Court,⁴⁴ the date of 26 March represents nothing more than an effort by the CSS to delimit when counsel's reasonable expectation of payment for work done, or expenses incurred, in connection with an apparently expired legal mandate should cease.⁴⁵ That much is confirmed by the CSS' Letter when it observes that, "... the Registry notes that you may have pending matters emanating from your participation in this case during the Pre Trial Phase and therefore invite you to take all necessary measures to conclude them, in any case no later than 26 March 2012[]"⁴⁶ and "... any involvement or activity that you envision to perform in this case after 26 March 2012 must be requested and pre-approved by the Registry. Any activities done outside a prior request and approval shall not be covered by the legal aid scheme of the Court under which you currently operate."⁴⁷

28. The suggestion in the CSS' Letter that with the prior approval of the Registrar, the Legal Representative may undertake certain "activities" in this case after 26 March 2012 does not, in any way, confer upon the Legal Representative a *legal mandate to act before the Appeals Chamber* on the behalf of the participating victims, after the expiration of the mandate conferred upon him by the Appointment Decision and/ or impliedly through the Directions of the Appeals Chamber (emphasis added). This necessarily raises the question of why the victim-participants might need legal

⁴⁴ One plausible explanation for the selection of the date "26 March" is that it would be exactly seven months to the date when the Legal Representative was appointed by the 26 August 2011 Appointment Decision. Another plausible explanation might simply be that the CSS determination, in its discretion, that seventeen (17) days from 9 March 2012 was sufficient and reasonable time for the Legal Representative to wrap-up and conclude any outstanding matters on the case.

⁴⁵ See, e.g., Regulation 83 (2) of the Regulations of the Court: "The scope of legal assistance paid by the Court regarding victims shall be determined by the Registrar in consultation with the Chamber, where appropriate." ICC-BD/01-02-07.

⁴⁶ The CSS' Letter, page 1, last paragraph.

⁴⁷ The CSS' Letter, page 2, 2nd paragraph. See, also, and for example, Prosecutor v. Thomas Lubanga Dyilo, "Decision reviewing the Registry's decision on legal assistance for Mr Thomas Lubanga Dyilo pursuant to Regulation 135 of the Regulations of the Registry," ICC-01/04-01/06-2800, 30 August 2011 ("Lubanga Legal Aid Decision"), wherein the Registry unsuccessfully proposed, *inter alia*, that following the closing submissions in that case, only the costs of intervention by counsel would be paid by the Court and all payments to the defence team, save for lead counsel, would be ceased from then onwards. See Lubanga Legal Aid Decision, paras. 17, 18 and 63.

representation before the Appeals Chamber, at a time when all core written submissions have virtually been filed.⁴⁸

IV. THE NECESSITY OF APPOINTING COUNSEL FOR VICTIM-PARTICIPANTS FOR THE ENTIRETY OF THESE APPEALS PROCEEDINGS

a. Preliminary Question

29. A preliminary question arises regarding whether the Appeals Chamber is the proper forum to which issues concerning the appointment of a common legal representative should be addressed. As a court of last resort with inherently limited jurisdiction, it goes without saying that the Appeals Chamber should be pre-occupied, in the main, with the substantive issues being presented by the current appeals. It is, after all, the resolution of those issues which are equally of great importance to the participating victims. But as the situation has developed in this case, the issue of the continuity of victims' counsel's legal mandate has arisen in the middle of the appeals proceedings while the Appeals Chamber is actively seized of the matter. And unlike in the *Ruto et al.*, case, there has been no decision by the appointing Chamber in this case, clarifying the scope of the Legal Representative's mandate.⁴⁹ Had such a decision been issued, perhaps the victims in this case could have had recourse to a motion for reconsideration.

30. Furthermore, and should the argument be made that the victims should have recourse to Regulation 83 (4) by seeking judicial review of the conclusion in the CSS' Letter that the mandate of the Legal Representative expired on 9 March 2012, three points take on noteworthy significance: first, is the fact that Regulation 83(4) pertains to judicial review of decisions by the Registry regarding the administration of the

⁴⁸ See, e.g., Appellants' Brief; Prosecution's Response; and Victims' Jurisdictional Observations. The Victims' Jurisdictional Observations were filed on 13 March 2012 and the Directions of the Appeals Chamber authorized the Appellants, as well as the Prosecution, to file any responses to the said observations within five days of the notification of the observations. See, para. 2, Directions of the Appeals Chamber. Nineteen March 2012 would thus appear to be the deadline for the filing of responses to the Victims' Jurisdictional Observations, thereby effectively concluding the core written submissions in this appeal.

⁴⁹ See the *Ruto* Decision.

legal aid system, as opposed to decisions that purportedly terminate a legal mandate of counsel; second, is the fact that the CSS' conclusion is apparently consistent with the conclusion in the *Ruto* Decision regarding the termination of the Legal Representative's mandate; and third, is the fact that before the CSS' Letter was written on 13 March 2012, Pre-Trial Chamber II had divested itself of jurisdiction of the case by directing the Registrar on 9 March 2012 to transmit to the Presidency the Confirmation Decision with the record of the proceedings in the case, as provided for in Rule 129 of the Rules of Procedure and Evidence.⁵⁰ That directive was complied with by the Registry on 12 March 2012,⁵¹ meaning that the "relevant Chamber" for purposes of judicial review under Regulation 83 (4) can no longer be deemed to be Pre-Trial Chamber II.

31. Bearing these circumstances in mind, and in particular the fact that the Directions of the Appeals Chamber (as stated before) imbued and reaffirmed in the Legal Representative, the conviction that he was authorized to act on behalf of the victims-participants in this appeal, the Appeals Chamber may appropriately decide on the issue presented regarding the scope of victims' counsel's mandate.⁵² Principles of judicial economy, not to mention the absence of any other appropriate Chamber to which the issue may be addressed, counsel in favor of a pronouncement by the Appeals Chamber.

b. The Reasonable Expectations of Victim-Participants

32. The Legal Representative is far from a disinterested observer vis-à-vis consideration of the propriety of providing participating victims with legal representation for the entirety of these appeals proceedings. It would perhaps have been preferable for certain sections of the Registry to sound the alarm that victim-

⁵⁰ See, Decision Denying Leave to Appeal, page 31, para. (e).

⁵¹ Transmission to the Presidency of the Decision on the Confirmation of Charges and of the Record of the Proceedings, ICC-01/09-02/11-407, 12 March 2012.

⁵² Noteworthy in this connection is the fact that no Trial Chamber has, as of the time of the submission of this notification for filing, been constituted by the Presidency in respect of this case, pursuant to Article 61 (11).

participants might go unrepresented in pending proceedings before the Appeals Chamber in the wake of the *Ruto* Decision. But such is the situation as it has developed⁵³ and self-interest notwithstanding, the anomaly of victims participating in these appeals through appointed counsel in February 2012, only to be advised that their counsel's mandate has expired as of 9 March 2012, leaves the Legal Representative with little choice other than to bring the matter to the attention of the relevant Chamber. Indeed, a further anomaly is that another section of the Registry (the CSS, as opposed to the VPRS) has instead adopted a course that seeks to conclude the Legal Representative's engagement on behalf of the victims before the Appeals Chamber in the middle of the appeals proceedings.

33. In this case, the Directions of the Appeals Chamber invited victim-participants, through the undersigned Legal Representative, to submit their observations regarding the Appellants' Brief. This was no doubt aimed, in part, at effectuating the rights conferred upon victim-participants by Article 19 (3) of the Rome Statute and Rule 59 (3) of the RPE.⁵⁴ Since the issuance of the Directions of the Appeals Chamber, the Legal Representative has visited Kenya and personally met with over 100 of his clients during consultations that included these jurisdictional appeals as a topic of discussion. The majority of those with whom the Legal

⁵³ It is not being suggested here that sections of the Registry, such as the Victims Participation and Reparations Section (VPRS), are not currently grappling with these issues and contemplating ways of possibly ameliorating the consequences of the *Ruto* Decision for the common legal representation of victims in the Kenyan appeals proceedings. Neither is it being suggested that the CSS does not have a legitimate role to play *vis-à-vis* the Registrar's mandate to ensure that the Court's limited resources, to the extent that they are the Registrar's responsibility, are managed carefully. See, Lubanga Legal Aid Decision, para. 53. The facts are that the VPRS undertook a most commendable and rigorous exercise of interviewing and recommending qualified counsel to serve as common legal representative for victims in both Kenyan cases – a process in which the CSS participated and that involved over 70 lawyer-applicants in different rounds from which two were ultimately put before the Pre-Trial Chamber for approval. But that commendable effort stands to suffer by virtue of not being deemed applicable to proceedings before the Appeals Chamber, in part, through the actions of the CSS. See, "Proposal for the common legal representation of victims," ICC-01/09-01/11-243, 1 August 2011, generally, and esp., para. 24; and "Proposal for the common legal representation of victims," ICC-01/09-02/11-214, 5 August 2011 ("Proposal for Common Legal Representative"), generally, and esp., para. 24.

⁵⁴ The position which has been advanced by His Honor, Judge Song, to the effect that victim-participants have "a right" to submit "a response" to the Appellants' Brief, pursuant to Regulation 64 (4) of the Regulations of the Court, is one that resonates firmly with the victim-participants in this case. See, "Separate Opinion of Judge Sang-Hyun Song," in "Decision on the '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'", ICC-01/09-02/11-400 OA 4, 20 February 2012, para. 4.

Representative did not meet remain in regular contact with field assistants on the Legal Representative's team in Kenya, and these jurisdictional appeals (often a feature in the daily newspapers in Kenya) have naturally been a subject of discussion between the field assistants and those victims.

34. The victim-participants have been left with the unambiguous impression – engendered sufficiently by virtue of the Directions of the Appeals Chamber – that their views and concerns in respect of these jurisdictional appeals would be placed before the Appeals Chamber by their Legal Representative. There has also been engendered in them, certain reasonable expectations⁵⁵ which derive naturally from the experience of having had counsel for the past six months, such as the ability to contact their Legal Representative directly to ascertain the status of their case, better understand a decision that has been rendered in their case, and/ or to clarify the accuracy of news reports regarding their case.

35. The Legal Representative submits that these hallmarks of the relationship between counsel and the victim-participants are indispensable to the notion of meaningful participation by victims in these appeals proceedings. It cannot be that participating victims stand on the same footing as members of the public, in respect of when and from whom they learn about developments regarding these appeals proceedings. Nor should they be left without recourse to counsel to explain any legal nuances that may appear in the orders or decisions of the Appeals Chamber.

36. Significantly, such pre-requisites to meaningful participation survive beyond the period when the “core” written submissions on appeal have been filed, insofar as the Appeals Chamber may order the participants to clarify or provide additional details on any document within a time-limit specified by the Chamber,⁵⁶ order the

⁵⁵ Use of the phrase “reasonable expectations” is not here meant as a legal entitlement or right.

⁵⁶ Regulations 28 (1) of the Regulations of the Court, ICC-BD/01-02-07.

participants to address specific issues in their written or oral submissions within a time-limit specified by the Chamber,⁵⁷ and/ or convene a hearing.⁵⁸

37. There also exists the possibility that for reasons which are not now obvious or foreseeable, the Appeals Chamber could remand the matter back to a competent Chamber below.⁵⁹ And, in the event of such an occurrence, the possible difficulties associated with reviving the mandate of a Legal Representative – a non-staff member of the Court who remains free to pursue other professional opportunities – should be readily obvious. The prospects of a Legal Representative embarking on other professional engagements as a consequence of a discontinued mandate before the Court, is but one more reason why a proposal to provide victim-participants with *ad hoc* legal representation (i.e., “as and when needed”) would prove unworkable and would, indeed, be unfair.

38. The Lubanga Legal Aid Decision, though specific to the context of balancing the rights an accused vis-à-vis Registry decisions on the allocation of resources to the Defence, provides several appropriate observations for present purposes:

These decisions on the allocation of resources need to be case specific.⁶⁰ ... [T]he Registrar needs to weigh the financial advantage of saving resources by dissolving the defence team as against the disruption that will be caused to the later proceedings once the Article 74 Decision is handed down.⁶¹ In weighing the possible savings from dissolving the defence team against the disruption to later proceedings, Rule 150 of the Rules is critical.⁶² ...It would in all likelihood be wholly unfair to the accused to dissolve his defence team following the closing submissions, leaving one lead counsel, a legal assistant and a case manager, who would - depending on the outcome of the Article 74 Decision - have to recruit a new team and file the accused's appeal in 30 days.⁶³

⁵⁷ Regulations 28 (2) of the Regulations of the Court, ICC-BD/01-02-07.

⁵⁸ Rule 156 (3) of the RPE.

⁵⁹ See, e.g., Regulation 28 (3) which states, “These provisions are without prejudice to the inherent powers of the Chamber.” ICC-BD/01-02-07.

⁶⁰ Para. 55, Lubanga Legal Aid Decision.

⁶¹ Para. 56, Lubanga Legal Aid Decision.

⁶² Para. 57, Lubanga Legal Aid Decision.

⁶³ *Ibid.*

39. That victims are participants and not parties before the Court is not in dispute. However, principles of fairness should apply with equal force to victim-participants as they do to parties. As such, the determination in *Lubanga* that any decision taken by the Court “as regards legal assistance provided to the accused should be founded...,” *inter alia*, upon “the basic principle of fairness,” should apply equally to legal assistance provided to victim-participants.⁶⁴ Basic principles of fairness dictate that victim-participants should not find themselves with and without legal representation before the Appeals Chamber from one month to another.

V. CONFIDENTIALITY⁶⁵

21. The annexes to this notification have been submitted confidentially, and with Annex A on an *ex parte* basis, in order to protect privileged communication from the CSS regarding the legal representation of victims in this case and/ or the privacy of the CSS staff members (e.g., names, e-mail address, etc.).

VI. CONCLUSION AND REQUESTED RELIEF

40. To attach substantive meaning to the right to participate in these proceedings which the organic instruments of the Court confer upon participating victims, and/ or for purposes of clarity and avoidance of doubt (in light especially of the *Ruto* Decision and the CSS’ Letter), the Legal Representative respectfully prays for the following, for all of the foregoing reasons:

- (i) An order appointing qualified legal counsel (whether or not the undersigned Legal Representative⁶⁶) to represent the victim-participants in

⁶⁴ Lubanga Legal Aid Decision, para. 44.

⁶⁵ See Regulation 23 *bis*, Regulations of the Court, as amended through 14 November 2007.

⁶⁶ It should be said in this regard that the Legal Representative remains committed to his clients and would welcome, without reservation, consideration for appointment to the suggested mandate. That the level of trust that victim-participants repose in a particular counsel should be considered as a factor when determining which counsel to appoint is obvious enough that it may be suggested, the self-interest of the Legal Representative notwithstanding.

these appeals proceedings *nunc pro tunc* to 9 March 2012 until the conclusion of the appeals proceedings or, alternatively,

- (ii) An order directing the Registrar to appoint counsel, as such.

Respectfully submitted,



Morris Anyah

Victims' Legal Representative

Dated this 19th day of March 2012

At The Hague, The Netherlands.