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

Date: 23 March 2012

THE APPEALS CHAMBER

Before: Judge Akua Kuenyehia, , Presiding Judge
Judge Sang-Hyun Song
Judge Erkki Kourula
Judge Anita Ušacka
Judge Sanji Mmasenono Monageng

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

THE PROSECUTOR v. WILLIAM SAMOEI RUTO AND JOSHUA ARAP SANG

Public Document

With confidential and *ex parte* annex

**Application of the Victims' Representative pursuant to Article 83 of the
Regulations**

Source: Victims' Representative

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

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Legal Representatives of the Victims

Sureta Chana

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented
Applicants(Participation/Reparation)**

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Other

Introduction

1. The victims' representatives applies on behalf of the victims, pursuant to regulation 83 of the Regulations, for review by the Appeals Chamber of the decision of the Registrar dated 13 March 2012 (the "**Registrar's Decision**") (attached at Annex A).
2. The Registrar's Decision states that:
 - a. the Single Judge's "Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings" of 5 August 2011¹ (the "**5 August 2011 Decision**"), which appointed the common legal representative, defined the scope of her mandate and appointment as limited to ensuring the participatory rights of victims at the confirmation of charges hearing and in related proceedings;
 - b. by the "Decision on the Defences' Applications for Leave to Appeal the Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute" of 9 March 2012 (the "**9 March 2012 Leave to Appeal Decision**"),² all proceedings before Pre-Trial Chamber II on the confirmation of charges and related proceedings have concluded;
 - c. the 9 March 2012 Leave to Appeal Decision effectively concluded the victims' representative's mandate and appointment as common legal representative of the victims admitted to participate in this case and this phase of proceedings;
 - d. the victims' representative should inform all her team members without undue delay of the "implications of the Chamber's decision" and the conclusion of their mandates;

¹ ICC-01/09-01/11-249.

² ICC-01/09-01/11-399.

- e. notwithstanding this, the victims' representative may have pending matters emanating from her participation in this case during the Pre-Trial Phase, and the victims' representative is invited to conclude these in no case later than 26 March 2012;
 - f. the victims' representative and members of her team should complete the check-out procedures stipulated in the check-out form;
 - g. the matter of common legal representation of victims in the subsequent proceedings in this case is subject to Article 61(11) of the Statute, and any involvement or activity that the victims' representative envisages performing in this case after 26 March 2012 must be requested in advance and pre-approved by the Registry.
3. The victims' representative requests the Appeals Chamber, upon review of the Registrar's Decision pursuant to regulation 83, to order that the mandate of the victims' representative and her team will continue until such time as a common legal representative appointed for the trial phase has commenced that mandate, and that until that time the Registry shall continue to provide the victims' representative's team with the resources specified in the 5 August 2011 Decision.
 4. It is submitted that this order is necessary to ensure that the victims remain represented continuously throughout the proceedings. It is submitted that there should be no hiatus in the representation of victims who are entitled to legal representation through the Court's legal aid system. The interests of victims could be adversely affected by developments during the period of any such hiatus, to which they would be unable to respond effectively or at all if they are without legal representation.

Applicable law

5. Paragraphs 2-4 of regulation 83 of the Regulations of the Court state:

2. The scope of legal assistance paid by the Court regarding victims shall be determined by the Registrar in consultation with the Chamber, where appropriate.
3. A person receiving legal assistance paid by the Court may apply to the Registrar for additional means which may be granted depending on the nature of the case.
4. Decisions by the Registrar on the scope of legal assistance paid by the Court as defined in this regulation may be reviewed by the relevant Chamber on application by the person receiving legal assistance.

6. The present application is an application under regulation 83(4), made on behalf of the victims by their common legal representative. The Registrar's Decision is a decision within the meaning of regulation 83(4).

Other relevant background to the present application

7. The victims' representative and her case manager were on mission to Kenya from 27 February 2009 until 11 March 2009. The victims' representative's team had various exchanges with the Registry in relation to approval of this mission and its budget. Only on 27 February 2012, two days after the victims' representative arrived in Kenya, the Registry informed the victims' representative that the approved budget for the mission would be only some 15% of the amount that the victims' representative indicated would be necessary to achieve the purpose of the mission.
8. The victims' representative made an application to the Pre-Trial Chamber under regulation 83(4) for review of the Registrar's decision of 27 February 2012,³ requesting an urgent order of the Pre-Trial Chamber approving the sum requested by the victims' representative in the mission request. The contents of that application set out the details of the circumstances relative to that request, which are not unnecessarily repeated here.

³ "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", 29 February 2012, ICC-01/09-01/11-392-Red.

9. On 9 March 2012, the Pre-Trial Chamber issued a decision on that application of the victims' representative (the "**9 March 2012 regulation 83 Decision**").⁴ In that decision, the Single Judge of the Pre-Trial Chamber dismissed the application *in limine* on the basis that:

- a. The mandate of the victims' representative as established in the 5 August 2011 was limited to the confirmation of charges hearing and related proceedings. With the issuance by the Pre-Trial Chamber of the article 61 decision on the confirmation of the charges on 23 January 2012 (the "**Confirmation of Charges Decision**"),⁵ and with the subsequent issuance of the 9 March 2012 Leave to Appeal Decision, the confirmation of charges proceedings had come to an end such that the victims' representative no longer had *locus standi*.⁶
- b. The scope of the mission in Kenya to which the application related went beyond the scope of the victims' representative's mandate. In particular, it was considered to be beyond the scope of the victims' representative's mandate to meet those victims that the victims' representative has not yet met,⁷ or to inform the victims of the outcome of the confirmation of charges proceedings.⁸

10. The victims' representative is no longer seeking a review of the decision of the Registrar of 27 February 2012, which was the decision that was the subject of that application to the Pre-Trial Chamber. That application has now been superseded by events. The victims' representative's mission to Kenya is now over. The necessary funding was not provided by the Registry and certain purposes of the mission consequently could not be undertaken.

⁴ "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", Pre-Trial Chamber, 9 March 2012, ICC-01/09-01/11-398 ("**9 March 2012 regulation 83 Decision**").

⁵ ICC-01/09-01/11-373, "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute", Pre-Trial Chamber II, 23 January 2012 (the "Confirmation of Charges Decision").

⁶ 9 March 2012 regulation 83 Decision, paragraphs 12, 16 and 17.

⁷ *Ibid.*, paragraph 13.

⁸ *Ibid.*, paragraph 14.

11. However, for purposes of argument in relation to the present regulation 83 application to the Appeals Chamber, which relates to the Registrar's decision of 13 March 2012, it is submitted that the 9 March 2012 regulation 83 Decision was based on reasoning that was incorrect for the reasons given below.

Arguments in support of the present application

In relation to the victims' representative's locus standi:

12. The 9 March 2012 regulation 83 Decision considered that because the confirmation of charges stage of the proceedings has now been completed, the victims' representative was "without *locus standi*".
13. However, the mandate of the victims' representative was not confined strictly to the confirmation of charges proceedings, but was expressed to encompass also the "related proceedings". The very title of the 5 August 2011 Decision was "Decision on Victims' Participation at the Confirmation of Charges Hearing *and in the Related Proceedings*" (emphasis added). That decision contained numerous references to the "related proceedings".⁹ In paragraph (a) of the dispositive part of that decision (paragraph 127), the Single Judge "DECID[ED] to admit the following victims as participants at the confirmation of charges hearing *and in the related proceedings*" (emphasis added), and at paragraph (d) of the dispositive part "GRANT[ED] the legal representative of victims the right to attend all public sessions of the confirmation of charges hearing as well as all public hearings convened *in the related proceedings*" (emphasis added).
14. The term "related proceedings" was not defined in the 5 August 2011 Decision. Nor is that expression defined (or used) in the Court's Statute, Rules of Procedure and Evidence, Regulations of the Court, or Regulations of the Registry. Nor does the meaning of this expression appear to have been the subject of express consideration in the case law of the Court.

⁹ 5 August 2011 Decision, paragraphs 3, 15, 63, 85, 86, 91 and 94, and see the heading above paragraph 61.

15. However, the Appeals Chamber has clearly understood the expression “related proceedings” to include, for instance, the jurisdiction appeal presently pending before the Appeals Chamber in this case. In the Appeals Chamber’s “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” of 2 February 2003,¹⁰ the Appeals Chamber directed that:

The victims represented by Ms Sureta Chana pursuant to Pre-Trial Chamber II’s “Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings” of 5 August 2011 (ICC- 01/09-01/11-249) may submit consolidated observations on the documents in support of the appeals and on the responses thereto within five days of the notification of the responses or, in the event that no response is filed, the effluxion of the time stipulated for that purpose.

16. There was no suggestion in those directions that the victims’ representative was being given a new mandate to represent the victims in the jurisdiction appeal before the Appeals Chamber. Rather, it is submitted, the directions were given on the understanding that the jurisdiction appeal was within the scope of the expression “related proceedings” to the confirmation of charges proceedings, and that representation of the victims before the Appeals Chamber in the jurisdiction appeal thus fell within the victims’ representative’s existing mandate pursuant to the 5 August 2011 Decision.

17. It is additionally submitted that the proceedings in relation to the jurisdiction appeal before the Appeals Chamber have not yet been finalised, and that accordingly, the mandate of the victims’ representative cannot be considered completed until these proceedings have been finalised. Even if the confirmation of charges proceedings have been finalised, the “related proceedings” have not, and the victims’ representative’s mandate continues in relation to those related proceedings.

18. The victims’ representative submits that the words “related proceedings” should be understood to encompass all proceedings and matters in the case

¹⁰ ICC-01/09-01/11-383.

(before any Chamber or the Presidency or the Registrar) until such time as a common legal representative appointed for the trial phase has commenced that mandate. Such an interpretation ensures that the victims remain represented continuously throughout the proceedings. It is submitted that there should be no hiatus in the representation of victims who are entitled to legal representation through the Court's legal aid system. The interests of victims could be adversely affected by any developments during the period of any such hiatus, to which they would be unable to respond effectively or at all if they are without legal representation at the time of such developments.

19. In this regard, it is noted in particular that article 68(1) of the Statute provides that "[t]he Court shall take appropriate measures to protect the safety, physical and psychological well-being [...] of victims". Any application for protection or support to the Court must be made by the victims through their legal representative. The legal team representing the victims thus must constantly monitor the victims' security situation. Lack of legal representation up until the time that a new common legal representative is appointed could have a significant detrimental impact on the victims' security and well-being.

20. It is also submitted that victims need a representative to safeguard their interest in the proceedings, and in particular to ensure continued participation in the case once proceedings resume before the Trial Chamber. In addition, the 5 August 2011 Decision itself expressly provided that the victims' representative is expected to "maintain up to date files of all participating victims and their whereabouts".¹¹ A gap in representation would negatively impact on the victims' representative's ability to maintain and hand in updated records to the common legal representative appointed by the Trial Chamber.

21. However, even if this interpretation of the expression "related proceedings" is wrong, at the very least, for the reasons given above, the mandate of the

¹¹ ICC-01/09-01/11, para. 78

victims' representative cannot be considered as completed until the proceedings before the Appeals Chamber relating to the appeal against jurisdiction has been completed.

22. The Pre-Trial Chamber considered that it could not entertain the victims' representative's 29 February 2012 application on the ground that the confirmation of charges phase has now been completed. However, it was wrong of the Pre-Trial Chamber to conclude that the consequence of this was that the victims' representative was without *locus standi*. Rather, the more correct conclusion would have been that the Pre-Trial Chamber was now *functus officio*. Even if the Pre-Trial Chamber is *functus officio* once the Confirmation of Charges Decision is given and any application for leave to appeal against that decision has been rendered by the Pre-Trial Chamber, this would not mean that the victims' representative's mandate had necessarily terminated, or that the victims' representative lacks *locus standi* before any other Chamber or other organ of the Court seised of any aspect of the present case.

23. Regulation 83(4) of the Regulations provides that any review of a decision of the Registrar pursuant to that provision shall be undertaken "by the relevant Chamber". It is submitted that the Appeals Chamber is now the "relevant Chamber" for purposes of that provision, since the victims' representative is presently representing the victims in proceedings before the Appeals Chamber in relation to the jurisdiction appeal. In any event, if the Pre-Trial Chamber is now *functus officio*, until such time as a Trial Chamber is constituted, the Appeals Chamber is the only Chamber seised of any aspect of this case.

In relation to the scope of the victims' representative's mandate:

24. The 9 March 2012 regulation 83 Decision suggested that the purposes of the victims' representative's mission to Kenya in February-March 2012 exceeded the scope of her mandate. It is submitted that this is not correct, for the

reasons given below. It is furthermore noted that the Registrar approved the mission on the basis of the Registrar's view that this mission was within the scope of the victims' representative's mandate. The issue between the victims' representative and the Registrar concerned the level of funding required to carry out the objectives of the mission. There was no issue as to the need for the mission as such.

25. The 5 August 2011 Decision appointing the victims' representative stated at paragraph 73 that:

In this respect, the Single Judge adopts such approach as also reiterated by the Registrar in her Proposal on Common Legal Representation, according to which a support structure to be proposed by the Registrar would allow the common legal representative to:

- a. Keep his or her clients informed about the progress of the proceedings and any relevant legal or factual issues that may concern them, in accordance with article 15 of the Code of Conduct for Counsel. The support structure should also allow the common legal representative to respond to a reasonable number of specific legal inquiries from individual victims.
- b. Receive general guidelines or instructions from his or her clients as a group and particular requests from individual victims. ...

26. Thus, it is submitted that it is an *express* part of the victims' representative's function to keep her clients informed of developments in the case, and to receive guidelines, instructions and requests from victims in relation to those developments. There would be no point in obtaining clients' guidelines, instructions or requests if the victims' representative could not act on them. By necessary implication, it was part of the victims' representative's function to keep her clients informed of developments, to obtain views or concerns that clients may have in relation to such developments, and to present such views and concerns to the relevant Chamber.

27. As noted above, proceedings are still pending before the Appeals Chamber in relation to the jurisdiction appeal, in which the victims' representative is presently still representing the victims.

The illogicality of the Registrar's decision:

28. The Registrar's decision states that the victims' representative's mandate and appointment, and those of the members of her team, concluded on 9 March 2012, with the rendering of the 9 March 2012 Leave to Appeal Decision. The definitiveness of this statement is underlined by the fact that the decision goes on to state that victims' representative and members of her team should now proceed to complete the check-out procedures.
29. However, quite inconsistently with this statement, the decision also states that any involvement or activity that the victims' representative envisages performing in this case after 26 March 2012 must be requested in advance and pre-approved by the Registry. This statement implicitly acknowledges that there may be developments of concern to the victims in the hiatus period between the conclusion of the confirmation of charges proceedings and the appointment of victims' representation for the trial phase. The Registrar's Decision suggests that should this occur, the Registry may be asked to approve further involvement or activity by the present victims' representative.
30. This is illogical. The victims' representative can only seek pre-approval of the Registry for further involvement or activity in the case if she continues actively to monitor the proceedings as well as the victims' security and whereabouts, and where possible to inform victims of developments and to obtain victims' instructions or views. The victims' representative cannot do this if she and her team no longer have any mandate, have checked out with the Court, and no longer have any role in the proceedings. Any suggestion that approval for further activity or involvement by the victims' representative's team could be sought on an *ad hoc* basis is illusory. There can be no such request by the victims' representative's team if there is no victims' representative, and if she has not team.

Conclusion

31. For the reasons given above, it is submitted that:

- a. it is important that there be no hiatus in the representation of victims in the period between the conclusion of the confirmation of charges phase and the appointment of a victims' representative for the trial phase;
- b. the victims' representative's present mandate continues, at the very least in relation to the pending jurisdiction appeal before the Appeals Chamber;
- c. there are matters of fundamental concern to the victims relating to the potential implications of the Confirmation of Charges Decision, and the principle of victim representation in the legal system of the Court would mean very little if victims were not able to raise these concerns before the Court; moreover, presenting such concerns to the Court falls within the mandate of the victims' representative as articulated in the 5 August 2011 Decision appointing the victims' representative;
- d. consistently with the above, the mandate of the victims' representative should continue until such time as victims' representation is appointed for the trial phase;
- e. paragraph 78 of the 5 August 2011 Decision expressly acknowledged "the necessity that an appropriate legal and administrative support be provided to the common legal representative in order to perform her duties in an efficient and expeditious manner", and paragraph 80 acknowledged "that the effectiveness of common legal representation depends, inter alia, on the assistance, in terms of financial and human resources, provided to the common legal representative"—consistently with that acknowledgement, during the remaining period of the mandate, the victims' representative's team should continue to be

provided with appropriate legal and administrative support, and financial and human resources.

32. The Appeals Chamber is therefore requested, upon review of the Registrar's Decision pursuant to regulation 83, to order that the mandate of the victims' representative and her team will continue until such time as a common legal representative appointed for the trial phase has commenced that mandate, and that until that time the Registry shall continue to provide the victims' representative's team with the resources specified in the 5 August 2011 Decision.

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

Sureta Chana

Dated this 23rd day of March 2012

At London, United Kingdom