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

Date: 3 April 2012

THE APPEALS CHAMBER

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

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 a confidential and *ex parte* Annex

Observations in accordance with the "Order on the submission of Observations by the Registrar on the "Application of the Victim's Representative pursuant to Article 83 of the Regulations"" dated 27 March 2012

Source: Registry

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

Ms Sureta Chana

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
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**Victims Participation and Reparations
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Other

THE REGISTRAR OF THE INTERNATIONAL CRIMINAL COURT ("the Registrar"),

1. RESPECTFULLY SUBMITS to the Honourable Judges of the Appeals Chamber the present observations in accordance with the "Order on the submission of observations by the Registrar on the "Application of the Victims' Representative pursuant to Article 83 of the Regulations""¹.

I. Background

2. The Registrar notes that in the "Application of the Victims' Representative pursuant to Article 83 of the Regulations"² (hereinafter "the Application") the Legal representative (also referred to as Counsel) requests the Appeals Chamber to review the decision of the Registrar dated 13 March 2012³ and "[...] 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.
3. In order to substantiate this request, the Legal representative submits that the legal basis of this Application is Regulation 83-4 of the Regulations of the Court and advance that:

"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"⁵.

¹ ICC-01/09-01/11-405.

² ICC-01/09-01/11-404.

³ ICC-01/09-01/11-404, par.1.

⁴ ICC-01/09-01/11-404, pars.3 and 32.

⁵ ICC-01/09-01/11-404, par.23

II. The legal basis of the Application

4. The Registrar respectfully submits that the subject matter for adjudication of the Appeals Chamber is the legal mandate of the Legal representative as defined, established and interpreted by the Pre Trial Chamber II and not the secondary subject of the legal aid scheme of the Court as managed by the Registrar pursuant to Regulation 83 of the Regulations of the Court, albeit decisions of the Chamber on the mandate of Legal representative have consequences on the legal aid system. In this context, the Registrar notes that the resources made available for the purpose of the common legal representation under the legal aid scheme were decided by the Pre-Trial Chamber II⁶, which also clearly defined the scope of the mandate of the Legal representative as elaborated in paragraph 13 and subsequent paragraphs of this Observation.
5. The Registrar is therefore of the view that the Legal representative has wrongly seized the Appeals Chamber on the basis of Regulation 83 of the Regulation of the Court.

III. The Application is an appeal of the Chamber's decision of 9 March 2012

6. The Legal representative requests the Appeals Chamber "[...] 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".
7. Noting the arguments advanced in paragraphs 11 to 14 of the Application, there is no doubt that Counsel is, as a matter of fact, challenging before the Appeals Chamber the "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" rendered by the Pre-Trial Chamber II on 9 March 2012"⁷

⁶ ICC-01/09-01/11-249, pars.77, 78 and 79, 80.

⁷ ICC-01/09-01/11-398.

("Chamber's decision of 9 March 2012") without following the appropriate procedure to appeal a decision issued by a Chamber.

8. In substantiating this Application, Counsel invoked in paragraph 11 of the Application that:

"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".

9. In the subsequent paragraphs of the Application, the Legal representative made several considerations related to the Chamber's decision of 9 March 2012.
10. The Registrar notes that the reference to "the 9 March 2012 regulation 83 Decision" by the Legal representative is a misinterpretation of the Chamber's decision of 9 March 2012 in which the Pre-trial Chamber neither quoted this Regulation as a basis of their Decision nor determined any question related to the legal aid scheme of the Court. In this decision, the Pre-trial Chamber restricted its reasoning strictly to the question of the mandate of the Legal representative.
11. In addition, noting the "Decision constituting Trial Chamber V and referring to it the case of The Prosecutor v. William Samoei Ruto and Joshua Arap Sang"⁸ issued by the Presidency on 29 March 2012 and Article 61, paragraph 11, of the Rome Statute, the Registrar is of the view that granting this specific request beyond the subject of the current appeal before the Appeals Chamber may at the least predetermine any direction the Trial Chamber might take regarding the question of legal representation of victims during trial.
12. The Registrar urges the Appeals Chamber to consider the Application inadmissible for the grounds above; however, should the Honourable Judges consider the merits, the Registrar submits the following amplifications.

⁸ ICC-01/09-01/11-406.

IV. Considerations on the merits

13. The Registrar notes that the status of the Legal representative's mandate was defined and interpreted by the Pre Trial Chamber II⁹ and implemented by the Registry in accordance with the terms set out in the "Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings"¹⁰.
14. Following the decision dated 30 March 2011¹¹ and the proposal of the Registrar¹², the Pre Trial Chamber II appointed the Legal representative in its "Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings"¹³, rendered on 5 August 2011 ("Decision of appointment").
15. The Pre-Trial Chamber II, at the outset, clarified itself in Paragraphs 1, 15, and 63 of the Decision of appointment by recalling in all paragraphs the scope of the decision, and thereby the mandate of the Legal representative.
16. The Registrar respectfully submits that the Decision of appointment was implemented *in toto*, and that the Counsel Support Section formally notified the Legal representative of the Chamber's decision and the limited scope of mandate as clearly defined by the Chamber, by letter dated 11 August 2011.¹⁴

⁹ Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, ICC-01/09-02/11-249 (dated 5 August 2011).

¹⁰ ICC-01/09-02/11-249.

¹¹ "First Decision on Victims' Participation in the Case" dated 30 March 2011, the Pre Trial Chamber instructed the Registry to "[...] take appropriate steps with a view to organizing common legal representation for the purposes of the confirmation of charges hearing, in accordance with rules 16(l)(b) and 90(2) of the Rules" ICC-01/09-02/11-17, paragraph 24.

¹² "Proposal for a common legal representation of victims during the Pre Trial phase". ICC-01/09-01/11-243.

¹³ ICC-01/09-02/11-249.

¹⁴ Letter referenced CSS/2011/416 (see Annex).

17. At this juncture, the Registrar deems it necessary to refer to paragraph 12, 14, 16 and 17 of the Chamber's decision of 9 March 2012 in which the Single Judge precised without any ambiguity the limited scope of the appointment and mandate of the Legal representative pursuant to the Decision of appointment to represent victims in the case of *The Prosecutor vs. Ruto et al*¹⁵.
18. The Registrar reiterates that, on all instances, the actions taken by the Registry have been implementing decisions of the Pre-trial Chamber. It did so in particular by informing the Legal representative of the implication of all the relevant decisions issued by the Pre Trial Chamber II by the letter dated 13 March 2012¹⁶.
19. The principal objective of this letter dated 13 March 2012 was to recall the end of the mandate of the Legal representative in accordance with the "Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings¹⁷" and 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 Statute¹⁸" as interpreted by the Chamber's decision of 9 March 2012.
20. In addition, the Registrar clarifies that the deadline of the 26 March 2012 indicated in this letter was only for a proper administrative management of the Court's legal aid scheme¹⁹ under which the Legal representative and her team members operated in accordance with the proposal of the Registrar²⁰ endorsed by the Pre-Trial Chamber²¹.

¹⁵ ICC-01/09-01/11

¹⁶ See Annex of the Application.

¹⁷ ICC-01/09-01/11-249.

¹⁸ ICC-01/09-01/11-399.

¹⁹ The Registrar is mandated to manage the legal aid scheme of the Court in accordance with Regulations 83 of the Regulations of the Court.

²⁰ ICC-01/09-01/11-243.

²¹ ICC-01/09-01/11-249, paragraph 78, 79 and 80.

V. On the current appeal proceedings

21. At this stage, the Registrar informs the Appeals Chamber that in all these contexts the Registry remains mindful of the fact that, on the 30 January 2012, the defence team submitted before this Chamber an “Articles 19(6) and 82(1)(a) Appeal by the Defence for Mr. Sang on Jurisdiction²²” and an “Articles 19(6) and 82(1)(a) Appeal by the Defence for Mr. Ruto on Jurisdiction²³”. Furthermore, the Registrar notes that on 2 February 2012, this Chamber issued Directions²⁴ to the Common Legal representative to make submissions on this appeal, which was effected on the 13 March 2012²⁵.
22. Accordingly, the Registrar submits that should the Honourable Judges of the Appeal Chamber require further intervention of the Legal representative at any relevant stage, for any matter directly related to this ongoing appeal, the Registry shall consider this specific activity eligible for remuneration under the Court’s legal aid scheme, in accordance with the terms of the letter dated 13 March 2012 and Regulation 83-2 of the Regulations of the Court. Should the Appeals Chamber decide to remand one or more issues under appeal to the relevant Chamber for redetermination, the Registry would also reinstate the Legal Representative in her right to be remunerated under the legal aid scheme for the duration of the new proceedings before the Pre-Trial Chamber.
23. The Registrar finally notes that should the Legal representative be unable, unwilling or unavailable to intervene in proceedings at such a stage when this Chamber requires any action from the parties and participants in this specific appeals proceeding or information to be provided to the victims participating in this appeal, she will take all relevant actions to ensure that the representation of victims is carried out in an appropriate manner.

²² ICC-01/09-01/11-375

²³ ICC-01/09-01/11-374

²⁴ ICC-01/09-02/11-383

²⁵ Consolidated observations on the documents in support of the Articles 19(6) and 82(1)(a) appeals and on the Prosecution responses thereto (ICC-01/09-01/11-401)

VII. On the classification of the Annex to the present observations

24. Pursuant to Regulation 23*bis*, Paragraph 1, of the Regulations of the Court, the Annex is filed confidentially because it contains the contact details of the Legal representative.



For the Registrar
Didier Preira, Deputy Registrar

Dated this 3 April 2012

At The Hague, Netherlands