

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/09-01/11 OA 3 OA 4

Date: 23 April 2012

THE APPEALS CHAMBER

Before:
Judge Akua Kuenyehia, Presiding 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

**Decision on the “Application of the Victims’ Representative pursuant to
Article 83 of the Regulations”**

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

The Office of the Prosecutor

Ms Fatou Bensouda, Deputy Prosecutor
Mr Fabricio Guariglia

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 Victims

Ms Sureta Chana

REGISTRY

Registrar

Ms Silvana Arbia



The Appeals Chamber of the International Criminal Court,

In the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang, pursuant to article 82 (1) (a) of the Statute, against the decision of Pre-Trial Chamber II entitled “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute” of 23 January 2012 (ICC-01/09-01/11-373),

Having before it the “Application of the Victims’ Representative pursuant to Article 83 of the Regulations” of 23 March 2012 (ICC-01/09-01/11-404),

Renders unanimously the following

DECISION

The “Application of the Victims’ Representative pursuant to Article 83 of the Regulations” is rejected.

REASONS

I. PROCEDURAL HISTORY

1. This decision relates to the scope of legal assistance paid by the Court to the victims participating in the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang, pursuant to article 82 (1) (a) of the Statute, against the decision of Pre-Trial Chamber II (hereinafter: “Pre-Trial Chamber”) entitled “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”¹ (hereinafter: “Impugned Decision”) and the mandate of the victims’ legal representative.

2. On 5 August 2011, the Pre-Trial Chamber rendered the “Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings”² (hereinafter: “Decision on Victims’ Participation”). In that decision, the Pre-Trial Chamber granted applications of several individuals for participation as

¹ 23 January 2012, ICC-01/09-01/11-373.

² ICC-01/09-01/11-249.

victims in the proceedings (hereinafter: “Victims”)³ and appointed Ms Sureta Chana (hereinafter: “Legal Representative”) “as common legal representative of all the victims admitted to participate by the present decision”.⁴

3. On 30 January 2012, Mr William Samoei Ruto filed the “Articles 19(6) and 82(1)(a) Appeal by the Defence for Mr. Ruto on Jurisdiction”,⁵ and Mr Joshua Arap Sang filed the “Articles 19(6) and 82(1)(a) Appeal by the Defence for Mr. Sang on Jurisdiction”.⁶

4. On 2 February 2012, the Appeals Chamber issued 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”⁷ (hereinafter: “Directions”), *inter alia* inviting the Victims to “submit consolidated observations on the documents in support of the appeals and on the responses thereto”.

5. On 9 March 2012, the Pre-Trial Chamber rendered the “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”⁸ (hereinafter: “Decision on Leave to Appeal”), rejecting applications by Mr Sang and Mr Ruto for leave to appeal the Impugned Decision under article 82 (1) (d) of the Statute.

6. On the same day, the Pre-Trial Chamber rendered 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”⁹ (hereinafter: “9 March Decision”). In that decision, the Pre-Trial Chamber rejected *in limine* for lack of standing a request by the Legal Representative to order the Registry to make available resources for a mission to Kenya.¹⁰ The Pre-Trial Chamber noted that under the Decision on Victims’ Participation, the Legal Representative’s mandate “was limited to the confirmation of charges hearing and related proceedings, and thus did not include, in and of itself, future involvement in the case”, as this would be

³ Decision on Victims’ Participation, pp. 46-48.

⁴ Decision on Victims’ Participation, p. 48.

⁵ ICC-01/09-01/11-374 (OA 3).

⁶ ICC-01/09-01/11-375 (OA 4).

⁷ ICC-01/09-01/11-383 (OA 3, OA 4).

⁸ ICC-01/09-01/11-399.

⁹ ICC-01/09-01/11-398.

¹⁰ 9 March Decision, paras 17-18.

“tantamount to predetermining a possible different approach to victims’ common legal representation by the Trial Chamber to be constituted pursuant to article 61(11) of the Statute”.¹¹ The Pre-Trial Chamber recalled that “the proceedings before the [Pre-Trial] Chamber that are related to the confirmation of charges have come to an end”,¹² and that the purpose of the Legal Representative’s mission to Kenya “goes beyond the mandate specified in the [Decision on Victims’ Participation]”.¹³

7. On 13 March 2012, the Victims filed the “Consolidated observations on the documents in support of the Articles 19(6) and 82(1)(a) appeals and on the Prosecution responses thereto”¹⁴ (hereinafter: “Victims’ Observations”).

8. On 23 March 2012, the Victims filed the “Application of the Victims’ Representative pursuant to Article [sic] 83 of the Regulations”¹⁵ (hereinafter: “Application”). The Victims request the Appeals Chamber to review, pursuant to regulation 83 of the Regulations of the Court, the decision of the Registrar contained, in the Victims’ submission, in a letter dated 13 March 2012 that the Registry’s Counsel Support Section (hereinafter: “CSS”) sent to the Legal Representative¹⁶ (hereinafter: “Conclusion Letter”). The Conclusion Letter informed the Legal Representative that all proceedings before the Pre-Trial Chamber in relation to the case at hand were concluded and that the Decision on Leave to Appeal “also effectively concluded [the Legal Representative’s] mandate and appointment as common legal representative of all victims admitted to participate in this case and this phase of the proceedings”.¹⁷ CSS requested the Legal Representative to conclude all pending matters “no later than 26 March 2012”,¹⁸ and informed her that “any involvement or activity that you envision to perform in this case after the 26 March 2012 must be requested in advance and pre-approved by the Registry. Any activities

¹¹ 9 March Decision, para. 14.

¹² 9 March Decision, para. 16.

¹³ 9 March Decision, para. 17.

¹⁴ ICC-01/09-01/11-401 (OA 3, OA 4).

¹⁵ ICC-01/09-01/11-404 (OA 3, OA 4).

¹⁶ ICC-01/09-01/11-404-Conf-Exp-AnxA (OA 3, OA 4).

¹⁷ Conclusion Letter, p. 2.

¹⁸ Conclusion Letter, p. 3.

done outside a prior request and approval shall not be covered by the legal aid scheme of the Court under which you currently operate”.¹⁹

9. The Victims request 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, and that until that time the Registry shall continue to provide the victims’ representative’s team with the resources specified in the [Decision on Victims’ Participation]”.²⁰ In support of this request, the Victims submit that they should be represented continuously throughout the proceedings and that their interests may be prejudiced if they could not respond to issues arising in the proceedings.²¹

10. The Victims submit before the Appeals Chamber that the Pre-Trial Chamber erred in the 9 March Decision when rejecting their request *in limine*, and argue that this is relevant for their Application.²² They raise several arguments in support of their contention that the 9 March Decision was erroneous,²³ the essence of their submission being that in the Decision on Victims’ Participation, the Legal Representative was appointed to represent the Victims for all “related proceedings”, which means all proceedings until a new legal representative for the trial is appointed and includes the present appeals proceedings.²⁴ The Victims also point out that the Conclusion Letter is illogical because it is based on the assumption that the Legal Representative no longer has a mandate, yet provides for the possibility that the Legal Representative could seek approval from the Registry for the payment of certain activities on a case-by-case basis.²⁵

11. On 27 March 2012, the Appeals Chamber ordered the Registrar to submit observations on the Application,²⁶ which she did on 3 April 2012 by filing the “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

¹⁹ Conclusion Letter, p. 3.

²⁰ Application, paras 3 and 32.

²¹ Application, para. 4.

²² Application, para. 11.

²³ Application, paras 12-27.

²⁴ Application, para. 18.

²⁵ Application, para. 30.

²⁶ “Order on the submission of observations by the Registrar on the ‘Application of the Victims’ Representative pursuant to Article 83 of the Regulations”, ICC-01/09-01/11-405 (OA 3, OA 4).

83 of the Regulations” dated 27 March 2012”²⁷ (hereinafter: “Registrar’s Observations”).

12. The Registrar submits that the Application is inadmissible under regulation 83 (4) of the Regulations of the Court²⁸ because the issue that needs to be determined is not the scope of legal assistance paid by the Court, but the “legal mandate of the Legal representative as defined, established and interpreted by the Pre Trial Chamber II”.²⁹ In the Registrar’s view, the Application is seeking, in effect, a review of the Pre-Trial Chamber’s 9 March Decision, and not of the Conclusion Letter.³⁰ The Registrar also argues that granting the request made in the Application “may at the least predetermine any direction the Trial Chamber might take regarding the question of legal representation of victims during trial”.³¹

13. As to the merits of the Application, the Registrar submits that the Legal Representative’s appointment was limited to the pre-trial proceedings, which have now ended.³² She submits that the “principal objective of [the Conclusion Letter] was to recall the end of the mandate of the Legal representative”.³³ She underlines that “the deadline of the 26 March 2012 indicated in [the Conclusion Letter] was only for a proper administrative management of the Court’s legal aid scheme under which the Legal representative and her team operated”.³⁴

14. The Registrar states that she is aware of the present appeals proceedings and the fact that the Appeals Chamber invited the Legal Representative to make submissions on the appeal.³⁵ She also states that:

[S]hould the Honourable Judges of the Appeals 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

²⁷ ICC-01/09-01/11-408 (OA 3, OA 4).

²⁸ Registrar’s Observations, paras 3-4.

²⁹ Registrar’s Observations, para. 4.

³⁰ Registrar’s Observations, paras 6 *et seq.*

³¹ Registrar’s Observations, para. 11.

³² Registrar’s Observations, paras 13-17, 19.

³³ Registrar’s Observations, para. 19.

³⁴ Registrar’s Observations, para. 20 (footnote omitted).

³⁵ Registrar’s Observations, para. 21.

accordance with the terms of the letter dated 13 March 2012 and Regulation 83-2 of the Regulations of the Court.³⁶

15. The Registrar attaches to her filing a letter from CSS to the Legal Representative dated 11 August 2011 on her appointment³⁷ (hereinafter: “Appointment Letter”). The Appointment Letter states that it “officially formalizes [the Legal Representative’s] appointment in conformity with the [Decision on Victims’ Participation]”.³⁸ It explains that “the services to be provided in [the Legal Representative’s] capacity as common legal representative will be remunerated in accordance with the Court’s legal aid system”.³⁹ It states furthermore that the Legal Representative’s “mandate will be valid for the exclusive purposes indicated by the Chamber in its decision, and shall remain effective as of the date of the said decision unless terminated in accordance with the legal texts of the Court”.⁴⁰

II. MERITS

16. The Appeals Chamber notes that the Application is brought under regulation 83 (4) of the Regulations of the Court, which provides that “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”. The Victims direct the Application against the Conclusion Letter and seek a ruling from the Appeals Chamber that the mandate of the Legal Representative and her team continue and that the scope of legal assistance be maintained at the level set out in the Pre-Trial Chamber’s Decision on Victims’ Participation, until such time as a legal representative for the trial phase has taken up the mandate.

17. The Appeals Chamber is not persuaded by the Registrar’s argument that what is at issue is, in reality, not the scope of legal assistance paid by the Court, but whether the Legal Representative continues to have a mandate. While it is true that much of the Application addresses whether the Pre-Trial Chamber erred in the 9 March Decision, the relief sought by the Application also relates to the scope of legal

³⁶ Registrar’s Observations, para. 22.

³⁷ ICC-01/09-01/11-408-Conf-Exp-Anx (OA 3, OA 4). Although the document was filed confidentially, the Appeals Chamber considers it necessary to refer to some parts of it in this public decision, which, however, do not disclose any information that, in the assessment of the Appeals Chamber, must remain confidential.

³⁸ Appointment Letter, p. 2.

³⁹ Appointment Letter, p. 2.

⁴⁰ Appointment Letter, p. 2.

assistance, as set out in the Conclusion Letter. Accordingly, the Application is properly brought under regulation 83 (4) of the Regulations of the Court.

18. Before reviewing the Registrar's decision on the scope of legal assistance paid by the Court, the Appeals Chamber has to consider whether the Legal Representative indeed continues to represent the Victims. This is because if the Legal Representative no longer represents the Victims, she could not have filed the Application on their behalf. In this regard, the Appeals Chamber recalls that the Pre-Trial Chamber appointed the Legal Representative in the Decision on Victims' Participation "as common legal representative of all the victims admitted to participate by the present decision".⁴¹ The Pre-Trial Chamber explained that "the scope of the [Decision on Victims' Participation] is limited to the participation of victims at the confirmation of charges hearing and in the related proceedings".⁴² The reference to the confirmation hearing and related proceedings was repeated elsewhere in the decision, including in the first paragraph of the section on the appointment of a common legal representative.⁴³ In the 9 March Decision, the Pre-Trial Chamber stated that the Legal Representative's mandate was limited to the "confirmation of charges hearing and related proceedings",⁴⁴ which have now come to an end.⁴⁵ Thus, the terms of the appointment of the Legal Representative in the Decision on Victims' Participation and the statements made in the 9 March Decision raise the question of whether the Legal Representative continues to represent the Victims, including in the present proceedings, given that the proceedings before the Pre-Trial Chamber have come to an end.

19. In this regard, the Appeals Chamber recalls that the relationship between counsel and his or her clients is regulated by the Code of Professional Conduct for counsel (hereinafter: "Code"). Under article 11 of the Code, acceptance by counsel of a request for representation from a Chamber establishes a representation agreement, which, under article 2 (2) of the Code "binds counsel to his or her client before the Court". The duration and eventual termination of the representation agreement is

⁴¹ Decision on Victims' Participation, p. 48.

⁴² Decision on Victims' Participation, para. 15.

⁴³ Decision on Victims' Participation, para. 63.

⁴⁴ 9 March Decision, para. 14.

⁴⁵ 9 March Decision, para. 16.

governed by article 17 (1) of the Code (entitled “Duration of the representation agreement”), which stipulates as follows:

Counsel shall advise and represent a client until:

- (a) The case before the Court has been finally determined, including all appeals;
- (b) Counsel has withdrawn from the agreement in accordance with article 16 or 18 of this Code; or
- (c) A counsel assigned by the Court has been withdrawn.

20. The Appeals Chamber notes that this provision ensures that there are no gaps in the legal representation of a client, even if a case continues before the Appeals Chamber. The application of article 17 (1) of the Code to the case at hand leads to a practical result: it ensures that the Victims remain represented⁴⁶ unless and until the case is concluded, the Legal Representative withdraws, or is withdrawn by the Pre-Trial Chamber, the Trial Chamber or indeed the Appeals Chamber. In contrast, limiting the legal representation from the outset to the proceedings before the Pre-Trial Chamber would have led to a situation in which, as soon as the case moves to the Trial Chamber, as well as in respect of all proceedings before the Appeals Chamber, the Victims would be without legal representation. In such a situation, the Trial or Appeals Chamber would not even have an interlocutor with whom to address the arrangements for the participation of the Victims.

21. In the view of the Appeals Chamber, and given the practical implications, if the Pre-Trial Chamber had wanted to limit the mandate of the Legal Representative, from the start, to the proceedings before the Pre-Trial Chamber, thereby modifying the provisions on the duration of a representation agreement under article 17 of the Code, it would have had to do so expressly and with clear reference to article 17 of the Code. However, neither in the Decision on Victims’ Participation nor in the 9 March Decision did the Pre-Trial Chamber consider article 17 of the Code and its impact on the continuing representation of the Victims by the Legal Representative. The Appeals Chamber notes the Pre-Trial Chamber’s concern not to predetermine the question of the legal representation of the Victims at the trial phase of the

⁴⁶ As to the question of entitlement to legal assistance paid by the Court for proceedings beyond the Pre-Trial Chamber see, however, below.

proceedings. Nevertheless, the application to the case at hand of article 17 of the Code does not lead to any such predetermination or limit the Trial Chamber's powers to regulate, within the Court's legal framework, the common representation of victims at the trial, if any. The Trial Chamber remains free to take any decision within that framework to regulate the legal representation of the Victims. The result of the application of article 17 of the Code to this situation is simply that the Victims are currently represented. Accordingly, having regard to the legal framework, the effect of the Decision on Victims' Participation and the 9 March Decision is not that the Victims are currently unrepresented; rather, unless and until the representation agreement is brought to an end pursuant to article 17 of the Code, the Legal Representative continues to represent the Victims, including in the present appeals proceedings.

22. Turning to the review of the Registrar's decision on the scope of legal assistance paid by the Court, as set out in the Conclusion Letter, the Appeals Chamber underlines that the question of whether the Legal Representative continues to represent the Victims must be distinguished from the scope of legal assistance paid by the Court. While the former is governed by the Code, the latter is governed primarily by regulations 83 *et seq.* of the Regulations of the Court. In the Conclusion Letter, the Registrar informed the Legal Representative that because of the end of the pre-trial phase, the level of legal assistance paid by the Court during that phase of the proceedings would be discontinued. Nevertheless, the Conclusion Letter does not rule out that future activities of the Legal Representative may be remunerated through the Court's legal aid scheme. However, in order to receive payment, such activities must be authorised beforehand by the Registry. Thus, the Appeals Chamber has to review whether, at this stage of the proceedings, remuneration only of pre-authorised activities of the Legal Representative is adequate. The Appeals Chamber's review is not concerned with whether specific activities of the Legal Representative should be covered by the Court's legal aid scheme, as the Victims have not requested that the Legal Representative undertake any such activities.

23. The Appeals Chamber notes that the Registry based its decision in the Conclusion Letter on the scope of legal assistance paid by the Court on the assumption that the Legal Representative no longer has a mandate to represent the

Victims. As was explained in paragraphs 18 *et seq.* above the Legal Representative continues to represent the Victims. This, however, does not mean that the scope of legal assistance paid by the Court must be maintained at the same level as during the pre-trial proceedings. The Appeals Chamber recalls that the Victims have already submitted the Victims' Observations, setting out their views on the appeals. Currently, no further intervention by the Victims in relation to the present appeals is anticipated. In the view of the Appeals Chamber, and based on the information currently available to the Chamber, the approach of the Registry as to legal assistance paid by the Court for the present phase of the proceedings before the Appeals Chamber, namely that further activities of the Legal Representative must be authorised beforehand by the Registry in order to be covered by the legal aid scheme, is therefore adequate. Accordingly, the Application must be rejected.

Done in both English and French, the English version being authoritative.



Judge Akua Kuenyehia
Presiding Judge

Dated this 23rd day of April 2012

At The Hague, The Netherlands