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TRIAL CHAMBER V

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

**SITUATION IN THE REPUBLIC OF KENYA
IN THE CASE OF THE PROSECUTOR V. FRANCIS KIRIMI MUTHAURA AND
UHURU MUIGAI KENYATTA**

Public Document

***Amicus Curiae* Observations of Kituo Cha Sheria pursuant to Rule 103 of the Rules of
Procedure and Evidence**

Source: Kituo Cha Sheria (Centre for Legal Aid Empowerment)

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

The Office of the Prosecutor
Ms Fatou Bensouda

Counsel for Francis Kirimi Muthaura
Mr. Karim A. A. Khan, QC, Mr. Essa M. Faal, Mr. Kennedy Ogetto, and Ms. Shyamala Alagendra
Counsel for Uhuru Muigai Kenyatta
Mr. Steven Kay, QC, and Ms. Gillian Higgins

Legal Representative of the Victims
Mr. Fergal Gaynor

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States Representative

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia

Deputy Registrar

Mr. Didier Preira

Victims and Witnesses Unit

Counsel Support Section

Mr. Esteban Peralta-Losilla

Detention Section

Victims Participation and Reparations Section

Ms. Fiona McKay

Other:

***Amicus Curiae* Submission of Kituo Cha Sheria pursuant to Rule 103 of the Rules of Procedure and Evidence**

I. INTRODUCTION

1. Having sought and been granted leave pursuant to Rule 103 of the ICC Rules of Procedure and Evidence (“Rules”) ¹, Kituo Cha Sheria (hereafter referred to as the “*Amicus*”) hereby submits its observations in relation to the implementation of the system of victims’ representation and participation,² as envisaged by Trial Chamber V in its ‘Decision on victims’ representation and participation’ (hereafter referred to as “Victims’ Decision”)³.
2. In its ‘Decision granting the application by Kituo Cha Sheria for leave to submit observations’ (hereafter referred to as the “Decision”), the Chamber considered that such observations may assist the Registry including the Victims Participation and Reparations Section (VPRS), the Office of Public Counsel for Victims (OPCV) and Common Legal Representative (CLR) in ensuring “the effective implementation of the envisaged system of common legal representation which marks a departure from the practice of previous trial chambers...”⁴
3. Furthermore, the Chamber observed that certain issues the *Amicus* proposed to address fall outside the ambit of the modalities of the implementation of the Victims’ Decision, namely, the actual appointment process of the CLR and the criteria for his or her selection. In addition, in the interests of judicial economy and due to the substantive nature of each of the points raised in its application for leave to submit *amicus curiae* observations⁵, the *Amicus* will expound upon only what it considers to be the most pressing issues, but remains at the Chamber's disposal in the event that the Chamber requests further information on the remaining topics raised in the *amicus* request.
4. Therefore, the *Amicus* will limit its observations to the following issues: security considerations to be taken into account in the implementation of the common legal representation system; support provided to the common legal representative; coordination between the OPCV and the legal representative; victim participation; the role of the common legal representative vis-à-vis the role of the VPRS; bi-monthly reports to the Chamber; and informing the victims adequately about the change of system.

¹“Decision granting the application by Kituo Cha Sheria for leave to submit observations”, 15 November 2012 , ICC-01/09-01/11-473, ICC-01/09-02/11-532

²“Recommendation for the position of Common Legal Representative of victims”, 5 November 2012, ICC-01/09-02/11-517.

³ “Decision on victims’ representation and participation”, ICC-01/09-01/11-460, ICC-01/09-02/11-498, 3 October 2012

⁴ Para. 6, ICC-01/09-01/11-473, ICC-01/09-02/11-532

⁵ “Application by Kituo Cha Sheria for Leave to Submit Observations pursuant to Rule 103 of the Rules of Procedure and Evidence”, 30 October 2012, ICC-01/09-01/11-464-Corr, ICC-01/09-02/11-514-Corr

II. RELEVANT PROCEDURAL HISTORY

5. On 3 October 2012, the Chamber issued the “Decision on victims’ representation and participation “in the *Ruto and Sang*⁶ case, as well as in the *Muthaura and Kenyatta*⁷ case.
6. On 17 October 2012, the OPCV and the Registry each filed a "Proposal on the Division of Responsibilities and Effective Functioning of the Common Legal Representation System".⁸
7. On 30 October 2012, the *Amicus* applied to the Chamber for leave to submit *amicus curiae* observations in relation to the modalities of implementation of the system for victims' participation and representation established by the Chamber in the Victims' Decision.⁹
8. On 5 November 2012, the Registry submitted its recommendation for the position of common legal representative of victims pursuant to the Victims' Decision.¹⁰

On 15 November 2012, the Chamber issued its Decision granting Kituo Cha Sheria leave to submit *amicus curiae* observations on the implementation of the system of victims’ representation and participation.¹¹
9. On 21 November 2012, the Chamber issued the Decision appointing Mr. Fergal Gaynor as common legal representative of victims in the *Muthaura & Kenyatta* case.¹²

III. OBSERVATIONS OF THE *AMICUS*

10. The *Amicus* would like to elaborate upon the following issues as raised in its application to submit *amicus* observations pursuant to Rule 103 of the Rules.

⁶ “Decision on victims’ representation and participation”, ICC-01/09-01/11-460, 3 October 2012

⁷ Decision on victims’ representation and participation”, ICC-01/09-02/11-498, 3 October 2012

⁸ OPCV's Proposal on the Division of Responsibilities and Effective Functioning of the Common Legal Representation System, 17 October 2012, ICC-01/09-02/11-507; Registry's Proposal on the Division of Responsibilities and Effective Functioning of the Common Legal Representation System, 17 October 2012, ICC-01/09-02/11-508.

⁹ Application by Kituo Cha Sheria for Leave to Submit Observations pursuant to Rule 103 of the Rules of Procedure and Evidence, 30 October 2012, ICC-01/09-02/11-514-Con-.

¹⁰ Recommendation for the position of Common Legal Representative of victims, 5 November 2012, ICC-01/09-02/11-517.

¹¹ Decision granting the application by Kituo Cha Sheria for leave to submit observations”, 15 November 2012 , ICC-01/09-01/11-473, ICC-01/09-02/11-532

¹² “Decision appointing a common legal representative of victims”, 21 November 2012, ICC-01/09-02/11-537

Common Legal Representation

i) Security considerations to be taken into account in the implementation of the Common Legal Representation system

11. The *Amicus* submits that there are serious security concerns raised by the fact that the common legal representative will be based in Kenya on an ongoing basis. Given the public interest in the two Kenya cases currently before the ICC, the public profile of the two legal representatives based in Kenya could lead to an undesirable security situation. Security of information is paramount in this context, given that the legal representative will have access to confidential filings¹³ and evidence¹⁴. Access to such information is indispensable in order to ensure adequate representation of the victims' interests and meaningful participation.
12. Therefore the Court must take the necessary steps to ensure that the legal representative and his/her team are equipped with IT and security tools in order to safeguard the security of confidential information. In this respect, a secure and safe office is mandatory if the legal representative is to operate from Kenya without placing his/her clients at risk. There have been instances where Non-Governmental Organizations (NGOs) working with various sections of the Court have been susceptible to being compromised through no fault of their own.¹⁵ The threat is real and one that the Chamber must consider very seriously.
13. Indeed, if the legal representative is to maintain an "ongoing presence in Kenya" a safe and secure working environment should be considered a *sine qua non*. The *Amicus* notes that during the pre-trial phase the teams of the legal representatives operated without the provision of office space, and to the best of the *Amicus*'s knowledge, nor were they afforded with office space within the ICC field office in Nairobi. Such practice will be untenable in the long-term, and it is our opinion that it is only a matter of time before sensitive information will be compromised if such a mode of operation is maintained.

¹³ See para. 66 of the Victims' Decision

¹⁴ See para.68 of the Victims' Decision

¹⁵ See for example, "Robbers strike at rights group offices", The Daily Nation, available at <http://www.nation.co.ke/News/Robbers%20strike%20at%20rights%20group%20offices%20in%20Nairobi/-/1056/1027644/-/view/printVersion/-/146201v/-/index.html>; ICPC Annual Report 2012, p. 22, available at <http://www.icpcfrfrica.org/annual-reports/ICPC%202010%20Annual%20Report.pdf>; T.R. Lanser "Countries at the crossroads 2012- Kenya", Freedom House, p.8, available at <http://www.freedomhouse.org/sites/default/files/Kenya%20-%20FINAL.pdf>

14. In addition, if the legal representative works from home or his/her own office, they could be an easy target for attack and/or surveillance with the potential consequences of the identification of team members, victims and others who cooperate with the legal representative. The existence of unprecedented security concerns in the Kenya cases was acknowledged by the Chamber in the Victims' Decision.¹⁶ The Prosecutor has also raised concerns regarding intimidation of witnesses, including during public statements made during a recent visit to Nairobi.¹⁷ Security of documents and communications is not only vital to ensure the safety of the victims, the legal representative, members of his/her team, and others facilitating the victims' access to the Court, but it is also crucial for the protection of witnesses and ICC staff. In this respect, it is recalled that the Court has an obligation to "take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses."¹⁸

ii) *Support provided to the Common Legal Representative:*

15. The *Amicus* submits that although it cannot comment upon the exact team structure that would be required in order to implement the Victims' Decision, given that this is an issue under the purview of the legal representatives that are appointed, there are certain elements that will be necessary in order to ensure the effective functioning of a team under the new system.

16. The first of which is effective communication between the team based in The Hague (OPCV) and the team based in Kenya. The Chamber must ensure that the two teams do not operate as two distinct entities, and that a common line of communication is maintained between those seconded from the OPCV and the legal representative based in Kenya.

17. Secondly, it is imperative that the legal representative be provided with sufficient resources to discharge the functions that have been assigned to him or her. These resources include human resources as well as resources necessary to conduct adequate consultations with the victims. Resources akin to those provided at the confirmation

¹⁶ See *i.e.* ICC-01/09-01/11-460, paras. 24 and 31, ICC-01/09-01/11-498, paras. 23 and 30

¹⁷ See *e.g.* Statement by the Prosecutor of the International Criminal Court Mrs. Fatou Bensouda at the press conference at the conclusion of Nairobi segment of ICC Prosecutor's visit to Kenya, Nairobi 25 October 2012, available at: www.icc-cpi.int/menus/icc/press+and+media/press+releases/otpstatement251012

¹⁸ Article 68(1) of the Rome Statute

stage¹⁹ would represent the bare *minimum* of those required to satisfy the field intensive mandate of the legal representative, considering the extended set of tasks assigned to the legal representative. Provision ought to be made for a possible increase in resources if the legal representative reports the task unmanageable with the resources allocated. In this respect we hold that the system can only function as envisaged by the Chamber if the legal representatives are given the resources that they need to conduct regular meetings with their clients.

18. This has proven problematic in the past, particularly with certain sections of the Registry failing to appreciate the logistics required to meet safely with victims in Kenya.²⁰ It is important to note that the victims are geographically dispersed, as a result of their displacement and thus the legal representative will have to travel to various locales in order to meet with them. The legal aid system of the Court must be flexible enough to cover in-country travel arrangements of the legal representative if he/she is to meet with the victims in the case.
19. However, the system can also only function properly if the legal representatives (together with VPRS and intermediaries) develop a system that is as cost effective as possible in order to ensure that the legal representatives are meeting with their clients not just once, but systematically throughout the course of proceedings. This can be done through careful planning – preferably by the VPRS and intermediaries in order to identify hyper-local venues (i.e. neighbourhood churches, townhalls) that victims can reach without having to incur travel costs or with only minimal costs.
20. Reimbursing victims for travel is the most expensive aspect associated with the legal representatives' role and must be reduced as much as possible in order to ensure that available resources are optimally utilized. However, additional costs such as: venues, food/water, mobilization fees cannot be dispensed with and will be a necessary aspect of each of the meetings conducted by the legal representatives.
21. To reiterate, the legal representatives will require office space to be provided by the Registry. However, experience illustrates that if not specifically authorized by the Chamber, resources such as these will be a source of contention.²¹ Cost effective

¹⁹ “Decision on Victims’ Participation at the Confirmation of Charges Hearing and in Related Proceedings”, 5 August 2011, ICC-01/09-01/11-249, paras. 79-80; “Decision on Victims’ Participation at the Confirmation of Charges Hearing and in Related Proceedings”, 5 August 2011, ICC-01/09-02/11-267, paras.93-94

²⁰ “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, ICC-01/09-01/11-392-Red

²¹ “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, ICC-01/09-01/11-392-Red; “Notification regarding the Legal Representation of Participating Victims in these Appeal Proceedings”, 19

measures such as the division of office space between the two teams is also an option that should be considered.

iii) Coordination between the OPCV and the Common Legal Representative

22. The Victims' Decision is novel in many ways, one of which is the secondment of OPCV staff members to teams of the legal representatives. The victims the *Amicus* is in contact with were closely following the confirmation of charges proceedings on live television, and thus it is critical that the legal representative is able to introduce members of his or her own team, in order to ensure that victims are not confused as to who is representing their interests in court. Therefore, there can be no schisms between the legal representative and the OPCV, and the victims must know that there is only one team representing them. If not, this system has the potential to create great confusion for the victims of the cases.
23. This can only be achieved if the staff members of the OPCV are "seconded" to the CLR team throughout the trial. Indeed, if OPCV maintains an independent presence within this system, the credibility of the legal representative will greatly be affected in the eyes of the victims. The victims may come to view the lawyer in the courtroom as the "real" legal representative and not confide or meet with the legal representative based in Kenya.
24. To this end, the Chamber should adopt a flexible approach to the concept of "critical junctures" not only because it would benefit the proceedings to have the legal representative physically present in the courtroom so as to properly convey the views and concerns of victims, but also because it will serve to bolster the credibility of the legal representative in the eyes of his/her clients. The *Amicus* believes that the opening and closing statements are simply "symbolic" moments during a trial, and the Chamber should not shy away from authorizing the legal representative from attending the trial whenever necessary, including for the questioning of key witnesses as well as for the physical appearance of victims before the Court. This will go a long way to ensuring that the legal representative maintains the trust and respect of his or her clients.

March 2012, ICC-01/09-01/11-409, "Application of the Victims' Representative pursuant to Article 83 of the Regulations", 23 March 2012, ICC-01/09-01/11-404; "Urgent Request by the Victims' Representative pursuant to regulation 83(4) of the Regulations", 1 June 2012, ICC-01/09-01/11-420

25. Furthermore, the legal representative must have the ability to convey the views and concerns to his/her team in the Hague in real-time if victim participation is to be genuinely meaningful. In order to achieve this, the OPCV counsel on the legal representative's team must be of sufficient seniority to speak effectively in Court and undertake all relevant court-room tasks, including questioning of witnesses. The *Amicus* remains conscious of the fact that victim participation at the ICC must always be balanced with the rights of the accused²². However, the Chamber should also recall that in order for victim participation to be meaningful, there must also be consideration paid to the rights of victims to be heard and be substantively engaged in the process.

Victim Participation System

iv) The role of the Common Legal Representative vis-à-vis the role of the VPRS

26. The *Amicus* notes that simplification of the victim participation process has been long overdue, and welcomes proposals geared to a new system of participation. The Victims' Decision is positive in its inclusivity, and in ensuring a simpler system by which greater numbers of victims can participate. Indeed, the *Amicus* notes that at this initial phase intermediaries and victims have expressed a positive reaction to the simplification of the victim participation process and potentially simpler procedure for registration.

27. However, at the same time we are deeply concerned that the lack of judicial supervision may lead to an inadvertent dilution of the procedural rights of victims and may call into question the entire victim participation regime before the Court. Of particular concern is ensuring an effective and transparent registration process with the assistance of the Registry. Therefore, the Chamber should endeavour to undertake some form of judicial review in order to ensure a credible process. Such form of review may not necessarily be subject to litigation.

28. It is also worth noting that the legal representative for victims will also have to: consult victims; formulate views and concerns; and follow proceedings remotely on a daily basis as well as register victims. While the legal representative will be in charge of identifying victims, the Victims' decision directs the Registry to facilitate

²² Article 68(3) of the Rome Statute of the International Criminal Court

registration and maintain a victims' Register. In practice, it is likely that these functions will need to be undertaken together by both the Registry and the legal representative. Furthermore, given the limited resources that the legal representative will have, this makes support from the Registry all the more relevant.

29. The system as proposed in the Victims' Decision can only work with the coordinated support of the VPRS. The VPRS will need to coordinate intensively with civil society in order to organize victims of the case into groups for the legal representatives to meet with. This will involve: training of intermediaries on the scope of the case ; the nature of the new participation regime ; and the appropriate security measures to be put in place in order to facilitate meetings with victims.
30. Furthermore, methodology will also have to be developed to ensure that the registration system is efficient and does not cause additional harm – particularly to those who might be inappropriately mobilized (victims of the situation). The VPRS, together with intermediaries will also need to keep victims of the situation informed about the ongoing proceedings so that divisions amongst the victim populations do not arise and feelings of unfairness and resentment do not take hold within the various regions. In addition, the Victim's Decision does not clarify what criteria will be considered in order to grant certain victims the opportunity to present their views and concerns in person. The *Amicus* looks with concern on this standard, as experience illustrates that no two stories of harm are precisely the same, or necessarily representative of the harm suffered by the collective, particularly in instances of sexual violence. Rather, the *Amicus* is of the opinion that the legal representative should be given a free hand to pursue his/her own case theory, formulated through continuous consultations with the victims, and be allowed to present individuals before the Court in furtherance of that theory. The Chamber of course, would still be in a position to review the application in advance to ensure the relevance and timeliness of the submission as is the common practice before the Court.

v) *Bi-monthly reports to the Chamber*

31. The Victims' Decision directs the VPRS in conjunction with the legal representative to prepare and submit statistics and reports on the victims' population. While this information may be relevant in terms of ascertaining who the participating victim

populations are; what is of utmost importance is the meaningful participation of victims.

32. For this reason, it is what the victims have to say about the process, as opposed to how many they are, that should be most relevant. The *Amicus* submits that the bi-monthly report could offer an opportunity to state not only the statistics and distribution of victims, but more importantly contain details of relevant methodology and statistics that attest to the veracity of who the participating victims are.
33. The report could also be used as a tool to ensure that the legal representatives are acting in accordance with their mandate by enabling VPRS, a neutral section within the Court, to relay complaints or concerns coming from the field on the activities (or lack thereof) of the legal representative. The periodic report, to be filed in consultation with the legal representative by the VPRS, would obviously not prevent the legal representative to raise issues in relation to the proceedings as matters arise. Rather, the periodic report presents an opportunity for the Court to have a more holistic view of the victim population in relatively regular intervals. It is our opinion that such bi-monthly reports, if analyzed by the Chamber could serve as an opportunity for judicial review, and thus not only ensure the transparency of the proceedings, but also ensure that misuse of the system is curtailed.

vi) *Informing the victims adequately about the change of system:*

34. As indicated above, the *Amicus* believes that the victims may be confused given that they will have a different lawyer representing them in the Courtroom. It has not been uncommon over the past few years for victim communities to be approached by persons who falsely claim to be involved in ICC proceedings. For this reason, it is important that the legal representative be introduced in the communities by persons they trust.
35. In relation to the issue of reparations, the *Amicus* notes that the standard victim application form requests victims to state information for the purpose of reparations. Although not specifically mentioned in our application to submit *amicus curiae* submissions, the *Amicus* would like raise the subject of reparations, given that this is a

concern that has been communicated to us directly by the victims. The concern relates to the fact that the majority of victims will no longer submit such individual victim application form. The Victims' Decision states that "the principles set out in the [...] decision [...] are not applicable to reparations" and that reparations matters "will be addressed at a later stage of the proceedings as necessary."²³

36. The Decision expressly deferred the subject of reparations for a later period, presumably during trial. The *Amicus* is concerned that without an express decision, separating the issue of reparations from the participation (registration) system, the victims will continue to request standard application forms in order to be considered for reparations. Unless the Chamber suggests otherwise²⁴ organizations like the *Amicus* will have no choice but to communicate to the victims that submitting an application form for reparations is the only way to be considered for a possible reparations award in the event of a conviction. Two concurrent registration processes would be unworkable and will create considerable tension, particularly amongst the victims of the situation. The *Amicus* thus requests the Chamber, on behalf of all intermediaries assisting victims in the ICC process, to provide clarity on the subject of reparations so that victims of both the case and the situation understand clearly that the registration system is simply for those who are interested in participating before the Court and not a requirement to receive reparations

37. In this regard, the *Amicus* would like to assert that while the victims' interests in the proceedings are not necessarily or exclusively related to reparations, victims are aware of their right to compensation for the harm suffered and may want to make sure that their claims are considered for the purposes of reparations during relevant proceedings.

III. CONCLUSION

38. It has been repeated time and again that victim participation before the International Criminal Court is one of the most progressive and positive aspects of the Rome Statute. While we appreciate the Chamber's efforts to ensure a more efficient system for victim participation and legal representation, we consider that the Victims'

²³ Para 2, Victims' Decision

²⁴ For example as was stated by the Chamber in *Lubanga* in the "Decision establishing the principles and procedures to be applied to reparations", 7 August 2012, ICC-01/04-01/06-2904

Decision raises new issues that must adequately be considered when implementing the new regime to ensure that participation does not become symbolic but is genuinely meaningful. We hope that these *amicus curiae* observations will assist the Chamber and the Court as a whole in that regard

39. In conclusion, the *Amicus* respectfully offers the above observations to assist the Chamber in the implementation of the Victims' Decision and expresses its appreciation for the opportunity to be heard.

Respectfully submitted,



Gertrude Angote

On behalf of

Kituo Cha Sheria

Dated this 23rd day of November 2012

At Nairobi, Kenya