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No.: ICC-01/09-02/11
Date: 17 October 2012

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
With Public Annex**

**OPCV's Proposal on the Division of Responsibilities and Effective Functioning of
the Common Legal Representation System**

Source: Office of Public Counsel for Victims

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

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I. PROCEDURAL HISTORY

1. On 3 October 2012, Trial Chamber V issued the “Decision on victims’ representation and participation” (the “Decision”),¹ by which it directed the Registry and the Office of Public Counsel of Victims (the “OPCV” or “Office”) *“to consult and to submit a joint proposal on the division of responsibilities and effective functioning of the common legal representation system within 14 days of notification of this Decision”*.²

2. On 10 October 2012, with a view of facilitating the consultation process with the Registry, the Office sent to the latter an Internal Memorandum³ wherein it explained its preliminary position on the implementation of the Decision and provided its suggestions on the fulfilment by the Office of the tasks as described in the Decision.⁴

3. On 12 October 2012 in the afternoon, the Registry held a consultation meeting in the presence of two members of the OPCV, the Deputy Registrar and representatives of the relevant sections of the Registry (VPRS, CSS, DCS, RLASS). On that occasion, the Principal Counsel was informed that the Registry had already requested to the appointed Common Legal Representatives their views/position on the matter. During the meeting, the participants agreed that the Registry would be in charge of preparing a draft joint submission establishing principles regarding the division of responsibilities and effective functioning of the common legal representation system. The Registry never informed the Office during the meeting of its position in relation to the matters raised by the Principal Counsel in her Memorandum dated 10 October 2012. At the time of the filing of the present

¹ See the “Decision on victims’ representation and participation” (Trial Chamber V), No. ICC-01/09-02/11-498, 3 October 2012 (the “Decision”).

² *Idem.*, p. 33.

³ See Annex, Internal Memorandum “Common legal representation in the cases *The Prosecutor v. Ruto et al.* and *The Prosecutor v. Muthaura et al.*”, No. OPCV/2012/29/PM, 10 October 2012.

⁴ *Idem.*

submissions, the OPCV had not received any correspondence from the Registry concerning these matters.

4. On 16 October 2012 at 1:44 A.M., the Registry sent to the OPCV a draft joint submission to be filed to the Chamber which contained in reality the Registry's observations on the issues raised by the Office in its Internal Memorandum of 10 October 2012 and provided no joint proposal or position regarding the division of responsibilities and effective functioning of the common legal representation system.

5. On same day, following further consultations with the Registry at the initiative of the Principal Counsel, the OPCV sent to the latter an amended draft joint submission which, despite divergent views on the possible ways to comply with the Decision, aimed at presenting, as far as possible, a common approach in relation to the implementation of the Decision.

6. In an email sent on same day at 5:33 P.M., the Registry informed the OPCV that their eventual amendments to the latter's draft joint submission would in any case not affect the spirit of said draft.

7. In another email sent on same day at 7:33 P.M., the Registry informed the OPCV that the Registrar directed, on the one hand, the drafters to reintegrate in the draft joint submission the entirety of the Registry's observations provided in the latter's first draft, and on the other hand, to provide the OPCV's views within a separate part of the draft joint submission.

8. On 17 October 2012, at 11.47 A.M., the OPCV received a second draft emanating from the Registry which mirrored the arguments as put forward in the first draft received the day before.

9. The Principal Counsel of the OPCV informs the Chamber that, despite her best efforts, the Office was unable to reach an agreement to submit a joint submission and/or proposal to the Chamber regarding the division of responsibilities and effective functioning of the common legal representation system. Indeed, although the Registry and the OPCV have divergent views on the actual implementation of the Decision, the Office believes to have taken all reasonable steps in order to reach an agreement and to put forward a joint approach as regards the matters at stake.

10. It is with deep regret that the Office has to notice that the Registry – which triggered the consultation process with the OPCV only five days before the completion of the deadline set up by the Chamber and submitted its draft “joint” submission the day before said deadline – demonstrated inconsistency in its approach and, finally, a lack of willingness to cooperate on the matters at stake in order to duly comply with the instructions of the Chamber. Indeed, it is the Office’s view that a submission providing divergent views on the issues identified by the Chamber without advancing a common or joint approach or/and proposal on said issues, as finally proposed by the Registry, seems to be senseless in light of the instructions of the Chamber.

11. Consequently, the Principal Counsel of the OPCV submits her proposals on the division of responsibilities and effective functioning of the common legal representation system in the case.

II. SUBMISSION OF THE OPCV

1. Proposal on the Division of Responsibilities and Effective Functioning of the Common Legal Representation System in the case

12. The Principal Counsel notes that pursuant to the Decision, the Common Legal Representative shall be responsible for, *inter alia*:

- Acting as the point of contact for victims whom he/she represents and to formulate their views and concerns;⁵
- Ensuring that the views and concerns he or she represents are those of only individuals qualifying as victims in the present case;⁶
- Making sure (in conjunction with the Registry) that the victims of the case assigned to the Common Legal Representatives are informed of the new procedure;⁷
- Submitting filings on behalf of victims wishing to appear directly, in person or via video-link, before the Court⁸ and, should the Chamber request so, make a selection of a specified number of applications, from which the Chamber will select those eligible for personal appearance;⁹
- Giving instruction to OPCV on the submissions to be made on his or her behalf;¹⁰
- Appearing on the victims' behalf at critical junctures of trial that involve victims interests;¹¹
- Appearing at other times during the trial upon specific request filed with the Chamber;¹²
- Drafting and submitting filings in response to documents presented at trial that impact the interests of victims;¹³
- Making Opening and Closing Statements;¹⁴
- Submitting discrete applications for the presentation of evidence.¹⁵

⁵ See the Decision, *supra* note 1, par. 41.

⁶ *Idem.*, par. 52.

⁷ *Ibid.*, par. 53.

⁸ *Ibid.*, par. 55.

⁹ *Ibid.*, par. 56.

¹⁰ *Ibid.*, par. 59.

¹¹ *Ibid.*, par. 70.

¹² *Ibid.*

¹³ *Ibid.*, par. 71.

¹⁴ *Ibid.*, par. 72.

¹⁵ *Ibid.*, par. 76.

13. On the other hand, the OPCV, acting on behalf of the Common Legal Representative,¹⁶ shall be responsible for:

- Attending hearings in which victims are allowed to participate *“in order to ensure that the Common Legal Representative is fully informed of the day-to-day developments in the proceedings”*;¹⁷
- Making submissions on behalf of the Common Legal Representative;¹⁸
- Questioning witnesses on behalf of the Common Legal Representative, *“except where the Chamber has authorised the Common Legal Representative to appear in person”*;¹⁹
- Assisting the Common Legal Representative in preparing relevant written submissions.²⁰

14. At the outset, the Principal Counsel wishes to inform the Chamber that the option of appointing an external counsel who will not be present in The Hague and who will be supported by the OPCV members acting on his or her behalf in courtroom might give rise to both legal and practical impediments.

15. The Office’s position – when consulted in the matter – has constantly been that its staff cannot form part of, or be otherwise assimilated to, external legal representatives’ teams. Such a scenario would jeopardize the core principle of the independence of the Office as enshrined in the Regulations of the Court as well as its ability to work on multiple cases simultaneously. In this respect, the Principal Counsel notes that the seven staff of the Office with legal expertise currently provide support and assistance to 42 legal representatives in the different situations and cases before the Court and that the Office has been appointed as legal representative of

¹⁶ *Ibid.*, par. 40.

¹⁷ *Ibid.*, par. 59.

¹⁸ *Ibid.*

¹⁹ *Ibid.*, par. 74.

²⁰ *Ibid.*, par. 42.

numerous victims in different situations and cases. Moreover, placing members of the Office in an external legal representative's team could create conflicting standards and mechanisms of accountability that would not be easily resolved. Staff members would have to be bound by the external legal representatives' instructions, but would still be accountable to the Principal Counsel of the Office who is responsible for their performance appraisal. Moreover, it has to be noted that the staff of the Office are also bound by the Staff Rules and Regulations. Last but not least, the Office has insufficient resources to dedicate to "secondments" of this nature.

16. However, the Office has reflected upon possible ways to implement the Decision. Consequently, the Principal Counsel submits the following proposals, taking into account the guidance of the Chamber; insofar the Decision already provides the description of some tasks to be fulfilled by the Common Legal Representative and by the OPCV.

17. As a preliminary remark, the Principal Counsel observes that the Office already considered before Pre-Trial Chamber II that, although no conflict of interests seem to arise, at the time of its submissions, with regard to representation of victims in both cases, it was nevertheless alerted to the possibility of real or perceived conflicts of interests that could arise and that, out of an abundance of caution, it deemed it necessary to constitute two separate and autonomous legal teams, one for each case.²¹ Accordingly, confidential information is not shared between the teams and an information management system segregates access to such information by case. This arrangement is still in place and it is the opinion of the OPCV that it should be maintained. Indeed, the experience in the field following the appointment as legal representative of unrepresented applicants has shown that victims are very sensitive to cultural and ethnic matters.

²¹ See the "Submission on Appointment for Representation of Victims in the Muthaura et al. Case", No. ICC-01/09-02/11-49, 7 April 2011, paras. 5 to 7.

18. Having reviewed the description of tasks to be fulfilled by the Office as indicated by the Chamber in its Decision, the Principal Counsel is of the view that a P-3 Legal Officer is able to adequately fulfil said tasks.

19. Indeed, the allocation of a P-3 per case will allow for certain flexibility in so far said person will be able to both provide legal research and advice, as well as, being relatively senior and able to work with minimal supervision, to appear in courtroom. Indeed, for the information of the Chamber, a legal officer within the Office is normally in charge of assisting external legal representatives appointed providing him/her with legal researches and advices including when appropriate drafts of relevant written and/or oral submissions. Moreover, the legal officers who will be assisting the Common Legal Representative are already working on the cases and they are fully aware of the developments in the case they are attached to which will optimise the preparation of the trial. Finally, the legal officers who will be assisting the Common Legal Representative have more than 7 years of relevant experience including experience at the hearing in questioning witnesses, which is relevant for the functions to be fulfilled according to paragraph 59 and 74 of the Decision. Said functions are to be carried out, in the understanding of the Office, following direct instructions by the Common Legal Representative, who fulfils the requirements of rule 90 of the Rules of Procedure and Evidence and of regulation 80 of the Regulations of the Court.

20. Moreover, the Principal Counsel notes that the Chamber has provided for the possibility for the Common Legal Representative to participate in person upon specific requests to be filed to the Chamber²², and that his or her presence could also be envisaged at critical junctures of the trial.²³

²² *Idem*.

²³ See the Decision, *supra* note 1, par. 70.

21. Taking into consideration the present allocation of staff within the Office to situations and cases, the current stage of different proceedings which said staff is already allocated to and the workload of the Office, the fact that the OPCV provides support and assistance to 42 external legal representatives and that its staff members are at present appointed as legal representative of numerous applicants and/or victims authorised to participate in different situations and cases before the Court, the Principal Counsel informs the Chamber that should the Chamber consider that a Counsel has to be allocated to both cases, the Office has no resources for this secondment at this point in time. This lack of resources is not only linked to the heavy workload of the Office but also to the fact that the two staff currently performing as P-4 have formerly been assigned to the *Ruto* case (one of the two was P-3 at the time of the appointment by the Pre-Trial Chamber and he has been subsequently recruited as P-4 in July this year), and therefore are both tainted as far as the *Muthaura* case is concerned.

22. Finally, the Principal Counsel wishes to inform the Chamber that each time a common legal representative is appointed, the Office undertakes discussions with the latter in order to understand the extent of the assistance needed by him or her and therefore allocate the necessary resources taking into account said needs, as well as the resources available within the Office. Therefore, upon appointment of the Common Legal Representative in the present case, discussions will be undertaken between the appointed counsel and the Principal Counsel in order to agree on the most efficient way of cooperating for the ultimate benefit of victims in the proceedings. Consequently, there might exist other suitable ways of implementing the Decision. The result of said discussions could be then communicated to the Trial Chamber and to the Registry.

23. In this regard, the Office remains available to review its current proposal taking into account the needs which will be expressed by the appointed counsel.

24. In relation to the issue of accountability, as far as the functions to be performed by the OPCV staff in compliance with the Decision on behalf of the Common Legal Representative are concerned, the Principal Counsel notes that they shall be fulfilled under the responsibility of the Common Legal Representative pursuant to articles 7(4), 8(1), 24(1) and 32 of the Code of Professional Conduct for Counsel.

25. However, considering that the matter is unprecedented and that issues of accountability which cannot be foreseen at this point in time might arise in relation to the fulfilment of the tasks entrusted to the OPCV, the Principal Counsel is of the view that, once the Common Legal Representative is appointed, discussions should be undertaken in order to set a procedure for a dispute resolution mechanism to arbitrate between the Common Legal Representative, the member(s) of the OPCV working on his or her behalf, and/or the OPCV.

2. Problematic issues

3. As indicated above, the Registry and the OPCV were unable to find an agreement on the matter at stake. The contested issues, in the understanding of the Office, relate, on the one hand, to the way in which the Decision should be implemented and, on the other hand, on the legal implications on the status of the OPCV staff which the Decision could generate. The observations provided below by the Office are made on the basis of the understanding of the OPCV of the arguments as put forward by the Registry in its drafts and which are presumably included in the Registry's submission. In this regard, the Principal Counsel respectfully request the indulgence of the Chamber should she be unable to cover all controversial matters and remains available for any further clarification the Chamber might require.

4. In relation to the ways in which the Decision should be implemented and in particular on the issue of the resources to be allocated, the Principal Counsel

reiterates her observations under part. II. 1) and wishes to underline that it is within the responsibility of the Principal Counsel to allocate resources of the Office in so far she is the only one able to assess the workload of the Office at the specific period of time, as well as the extent of the resources needed to comply with the Chambers' decisions. This responsibility derives from the independence of the Office as enshrined in the legal texts of the Court. Contrary to the position of the Registry which seems to interpret the independence of the Office as defined *vis-à-vis* the Registry and not *vis-à-vis* other actors, the Principal Counsel notes that the independence of the Office has been provided for to cover all tasks performed in any capacity by the OPCV.

5. Indeed, regulation 81(2) of the Regulations of the Court clearly indicates that "*counsel and assistants within the Office shall act independently*". Independence is, therefore, a pre-requisite for the OPCV to fulfil all its possible functions. The Principal Counsel contends, therefore, that said provision cannot be interpreted in a narrow sense, *i.e.* as providing for the independence of the OPCV *vis-à-vis* the Registry only. But, said provision seems clearly to call for the independence of the OPCV *tout court*, *i.e.* preventing the staff members of the Office from acting on instructions from any external source.

6. On the resources to be allocated, the Principal Counsel wishes also to draw the attention of the Chamber to the "Reasons for the 'Decision of the Appeals Chamber on the request of counsel to Mr. Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the Court of 7 February 2007' issued on 16 February 2007".²⁴ In said Reasons, the Appeals Chamber ruled upon a request which was not signed by the lead counsel. The Principal Counsel notes that it cannot be inferred from said decision that only a P-4 can be allocated to the Common

²⁴ See the "Reasons for the 'Decision of the Appeals Chamber on the request of counsel to Mr. Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the Court of 7 February 2007' issued on 16 February 2007" (Appeals Chamber), No. ICC-01/04-01/06-834, 27 February 2007.

Legal Representative. In any case, the only relevant part of the decision²⁵ reflects the dissenting opinion of Judge Pikis on the issue since paragraph 6 clearly specified that the majority of the Judges were *“of the view that the Appeals Chamber should make no further inquiry into the question of who might have filed the document”*.²⁶ Finally, the Principal Counsel underlines that this issue will never occur in the present case since the Decision makes clear that the Common Legal Representative *“will instruct the OPCV to make submission on his or her behalf”*²⁷ and more generally the OPCV will only be able to act upon direct instructions given by the Common Legal Representative.²⁸

7. The Principal Counsel takes note of the position of the Registry in relation to the funding of additional resources needed by the OPCV to comply with the Decision and to continue fulfilling the other tasks it has been entrusted with by Chambers. The Principal Counsel is deeply concerned by the position of the Registry in accordance to which said additional resources could not be funded by the legal aid budget and that, in case of impossibility to find resources, the Office will have to work on the basis of its existing resources. In this regard, the Principal Counsel wishes to inform the Chamber that an additional P-3 position was requested by the Office in its proposed budget 2013 and that said position was not retained for unknown reasons. It is therefore unfortunate that the Registry is now using this matter against the OPCV knowing that the latter had requested in due course the resources needed for the fulfilment of its mandate.

8. On this specific issue, the Principal Counsel has a duty to inform the Chamber that without said additional resources the OPCV will be unable to fulfil its mandate in the different situations and cases.

²⁵ *Idem.*, par.15.

²⁶ *Ibid.*, par. 6.

²⁷ See the Decision, *supra* note 1, par. 59.

²⁸ *Idem.*, paras. 40, 42, 43, 59, 67, 68, 70 and 74.

9. Finally, the Principal Counsel takes note of the position of the Registry in accordance to which the Staff Rules and Regulations do not apply to OPCV staff members when performing the functions of assisting the Common Legal Representative. In this regard, the Principal Counsel cannot but underline that she opposes the findings of the Registry on this matter, insofar this will *de facto* deprive OPCV staff members of their entitlements under said legal texts.

10. Indeed, a proper reading of regulation 115(2) and (3) of the Regulations of the Registry leads to the conclusion that two sets of rules apply to OPCV staff members when carrying out their functions, namely the Staff Regulations and Rules in their condition of staff members of the Court, and the Code of Professional Conduct for Counsel in their condition of counsel or legal representatives for victims. Contrary to the Registry's position, both sets of rules are applicable at the same time to the OPCV staff members, but regarding different aspects. Accordingly, the Principal Counsel is under a duty to perform regular appraisals of the performance of the staff members of the OPCV when they conduct activities pursuant to both regulations 80 and 81 of the Regulations of the Court, as instructed by rule 104.17 of the Staff Rules.

Respectfully submitted.

A handwritten signature in black ink, appearing to read 'Paolina Massidda', with a horizontal line drawn underneath the name.

Paolina Massidda
Principal Counsel

Dated this 17th day of October 2012

At The Hague, The Netherlands