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No.: ICC-01/09-01/11
Date: 9 September 2011

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single Judge

**SITUATION IN THE REPUBLIC OF KENYA
IN THE CASE OF THE PROSECUTOR V. WILLIAM SAMOEI RUTO, HENRY
KIPRONO KOSGEY AND JOSHUA ARAP SANG**

Public

**Decision on the “Motion from Victims a/0041/10, a/0045/10, a/0051/10 and a/0056/10
requesting the Pre-Trial Chamber to Reconsider the Appointment of Common
Legal Representative Sureta Chana for All Victims”**

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

The Office of the Prosecutor

Luis Moreno-Ocampo, Prosecutor
Fatou Bensouda, Deputy Prosecutor

Counsel for William Samoei Ruto

Joseph Kipchumba Kigen-Katwa, David
Hooper and Kioko Kilukumi Musau

Counsel for Henry Kiprono Kosgey

George Odinga Oraro

Counsel for Joshua Arap Sang

Joseph Kipchumba Kigen-Katwa

Legal Representatives of the Victims

Sureta Chana

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Paolina Massidda

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar & Deputy Registrar

Silvana Arbia, Registrar
Didier Preira, Deputy Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Fiona McKay

Other

Liesbeth Zegveld, Wambui Njogu, Göran
Sluiter and Arthur Igeria

Judge Ekaterina Trendafilova, acting as Single Judge on behalf of Pre-Trial Chamber II (the “Chamber”) of the International Criminal Court (the “Court”)¹ hereby issues this decision on the “Motion from Victims a/0041/10, a/0045/10, a/0051/10 and a/0056/10 requesting the Pre-Trial Chamber to Reconsider the Appointment of Common Legal Representative Sureta Chana for All Victims” (the “Motion for Reconsideration”).²

1. On 8 March 2011, the Chamber, by majority, decided to summon William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang to appear before it.³ Pursuant to this decision, the suspects voluntarily appeared before the Court at the initial appearance hearing held on 7 April 2011,⁴ during which, *inter alia*, the Chamber scheduled the commencement of the confirmation of charges hearing for Thursday, 1 September 2011.⁵

2. On 30 March 2011, the Single Judge issued the “First Decision on Victims’ Participation in the Case” (“the 30 March 2011 Decision”), wherein she instructed the Victims Participation and Reparation Section (the “VPRS”) “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”.⁶

3. On 1 August 2011, the Registrar filed the “Proposal for the common legal representation of victims” (the “Proposal on Common Legal Representation”),⁷ in

¹ Pre-Trial Chamber II, “Decision Designating a Single Judge”, ICC-01/09-01/11-6.

² ICC-01/09-01/11-314 and its confidential annexes.

³ Pre-Trial Chamber II, “Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang”, ICC-01/09-01/11-01.

⁴ ICC-01/09-01/11-T-1-ENG.

⁵ ICC-01/09-01/11-T-1-ENG, page 17, lines 12 to 25.

⁶ Pre-Trial Chamber II, “First Decision on Victims’ Participation in the Case”, ICC-01/09-01/11-17.

⁷ ICC-01/09-01/11-243 and its annexes.

which Ms. Sureta Chana was proposed for the position of common legal representation of victims in the present case.⁸

4. On 5 August 2011, the Single Judge issued the “Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings” (the “5 August 2011 Decision”) wherein she decided, *inter alia*, to admit 327 victims as participants in the confirmation of charges hearing and in the related proceedings and appointed Ms. Sureta Chana as the common legal representative of all the victims admitted to participate.⁹

5. On 1 September 2011, the Chamber received the Request for Reconsideration filed by Liesbeth Zegveld, Wambui Njogu, Göran Sluiter and Arther Igeria (collectively the “Applicants”), in which they request the Chamber “to reconsider its decision of 5 August 2011 and to order the Registrar to undertake a de novo appointment procedure of a common legal representative, in accordance with the law”.¹⁰ The Applicants attached four annexes containing declarations signed by victims a/0041/10, a/0045/10, a/0051/10 and a/0056/10, in which these victims allegedly oppose the appointment of Ms. Chana as their legal representative.¹¹

6. On 5 September 2011, the Registrar filed the “Submission of information relating to the former Legal Representatives’ Motion” (the “Registrar’s Submission”).¹²

7. On 6 September 2011, the Chamber received a declaration submitted by Ms. Liesbeth Zegveld on behalf of victim a/0063/11 for the purpose of joining the Request for Reconsideration.¹³

8. The Single Judge notes articles 68(3) of the Rome Statute (the “Statute”), rule 90(2) of the Rules of Procedure and Evidence (the “Rules”), regulations 79(3) and 80(1) of

⁸ ICC-01/09-01/11-243, para. 29.

⁹ ICC-01/09-01/11-249, pp. 46-49 letter (a) and (c) of the operative part.

¹⁰ ICC-01/09-01/11-314, para. 29.

¹¹ ICC-01/09-01/11-314-Conf-Anx1; ICC-01/09-01/11-314-Conf-Anx2; ICC-01/09-01/11-314-Conf-Anx3; ICC-01/09-01/11-314-Conf-Anx4.

¹² ICC-01/09-01/11-320 and its confidential *ex parte* annexes.

¹³ ICC-01/09-01/11-322 and ICC-01/09-01/11-322-Conf-Anx1.

the Regulations of the Court (the “Regulations”) and article 28 of the Code of Professional Conduct for counsel.

9. In the Request for Reconsideration, the Applicants also request that:

b. pending a decision on this Motion the Chamber is requested to postpone the commencement of the confirmation of charges hearing [the “Request for Postponement”];

c. in case no decision on the present Motion is taken prior to the commencement of the confirmation hearing, the Chamber is requested to allow the Victims to express their views and concerns on representation, [either with the assistance of their own legal representatives or by allowing their legal representatives to appear in person to express views and concerns directly] [the “Request for Expression of Views and Concerns”].¹⁴

10. In the Request for Reconsideration, the Applicants contend that the five victims on whose behalf they allegedly act “do not accept Ms. Chana as representing their interest” and that Ms. Chana “has been imposed on them as common legal representative by the Chamber”.¹⁵ In the view of the Applicants, the 5 August 2011 Decision “confirming the Registrar’s proposal has violated the Victims’ right [...] to appeal with the Chamber the Registrar’s choice within a period of 30 days”,¹⁶ pursuant to regulation 79(3) of the Regulations. The impossibility to seek review of the Registrar’s choice in respect of the proposed common legal representative has, according to the Applicants, infringed the victims’ right to representation.¹⁷

11. The Single Judge is compelled to recall what has been recently stated in the “Decision on the ‘Defence Request for Leave to Appeal the ‘Urgent Decision on the ‘Urgent Defence Application for Postponement of the Confirmation Hearing and Extension of Time to Disclose and List Evidence’ (ICC-01/09-01/11-260)’”, in which the Single Judge rejected the approach of reconsidering previous rulings, particularly “in instances where a Chamber has ruled on the issue *sub judice* in good faith and

¹⁴ ICC-01/09-01/11-314, para. 29.

¹⁵ ICC-01/09-01/11-314, para. 6.

¹⁶ ICC-01/09-01/11-314, paras 9, 16-19.

¹⁷ ICC-01/09-01/11-314, para. 15.

considering the information available to it as correct and reliable”.¹⁸ In the case of the 5 August 2011 Decision, the ruling on common legal representation was taken on the basis, *inter alia*, of information provided by the Registry as the relevant neutral body of the Court. Accordingly, the Single Judge sees no reason to depart from her previous position and considers that the Request for Reconsideration must be rejected.

12. Nevertheless, taking into account the sensitivity of matters concerning victims, the Single Judge deems it appropriate to make some considerations and clarifications on the arguments advanced by the Applicants.

13. As regards to what the Applicants inconsistently refer to as “right to appeal”, “possibility of appeal or redress” or “possibility [...] to seek revision” under regulation 79(3) of the Regulations, the Single Judge recalls that the said regulation provides that “[v]ictims may request the relevant Chamber to review the Registrar’s choice of a common legal representative under rule 90, sub-rule 3, within 30 days of notification of the Registrar’s decision”. From this provision, it follows that victims may request the Chamber to review the Registrar’s choice concerning common legal representation only when the candidate is *decided* upon by the Registrar and within 30 days “of notification of the Registrar’s *decision*”.¹⁹

14. Contrary to the procedure foreseen in regulation 79(3) of the Regulations, in the 5 August 2011 Decision the Single Judge decided to appoint Ms. Chana as common legal representative of the 327 admitted victims pursuant to regulation 80(1) of the Regulations, which states that “[a] Chamber, following consultation with the Registrar, may appoint a legal representative of victims where the interests of justice so require”. In appointing the current legal representative, the Single Judge availed herself of the Proposal on Common Legal Representation that the Registrar submitted pursuant to rule 16(1)(b) and 90(2) of the Rules. According to the latter provision, the

¹⁸ Pre-Trial Chamber II, “Decision on the ‘Defence Request for Leave to Appeal the ‘Urgent Decision on the ‘Urgent Defence Application for Postponement of the Confirmation Hearing and Extension of Time to Disclose and List Evidence’ (ICC-01/09-01/11-260)’”, ICC-01/09-01/11-301, para. 18.

¹⁹ [Emphasis added].

Registrar “[i]n facilitating the coordination of victim representation [...] may provide assistance, *inter alia*, by [...] suggesting one or more common legal representatives”.

15. Under those circumstances, it is the view of the Single Judge that no possibility of seeking review of the Registrar’s decision under regulation 79(3) of the Regulations was possible, since no decision pursuant to that regulation was taken by the Registrar. Consequently, there has been no violation of the right to seek revision and the right to representation pursuant to regulation 79(3) of the Regulations.

16. Furthermore, the Single Judge wishes to underline that in compliance with the 5 August 2011 Decision and as confirmed in the Registrar’s Submission, two of the victims on whose behalf the Applicants claim to be acting – namely victims a/0041/10 and a/0056/10 – met Ms. Chana on 24 August 2011, in the presence of VPRS staff and Mr. Njogu, with a view to supervising the transitional phase between the former and the new legal representation.²⁰ In the view of the Single Judge the fact that those two victims, on the very same day of the meeting with Ms. Chana, signed a declaration stating that they do not know her and that they have never spoken to her,²¹ is incorrect and misleading. This, in turn, undermines the credibility of the Applicants’ submissions.

17. Moreover, the Single Judge recalls article 28 of the Code of Professional Conduct for counsel, according to which “[c]ounsel shall not address directly the client of another counsel except through or with the permission of that counsel”. Since all the five victims on whose behalf the Applicants are allegedly acting were represented by Ms. Chana at the time they contacted or were contacted by the Applicants, the Single Judge does not find it appropriate that the Applicants did not bring the matter of the victims’ alleged discontent with regard to their common legal representation to the attention of Ms. Chana, before pursuing any further steps. It is the opinion of the Single Judge that any matter related to the standing that a/0041/10, a/0045/10, a/0051/10, a/0056/10 and a/0063/11 have before the Chamber in their capacity of

²⁰ ICC-01/09-01/11-320, paras 7, 10.

²¹ ICC-01/09-01/11-314-Conf-Anx1 and ICC-01/09-01/11-314-Conf-Anx4.

victims participants in the instant case must be dealt with either by Ms. Chana or by anyone else through or subject to the permission of Ms. Chana.

18. With regard to the Request for Expression of Views and Concerns, the Single Judge observes that article 68(3) of the Statute provides that any views and concerns that the victims can have may be presented by the legal representative. The Single Judge considers that, unless otherwise decided, the legal representative of the 327 victims admitted to participate in the present case is and remains Ms. Chana. Accordingly, the views and concerns that any of these victims may wish to express may be exclusively presented through Ms. Chana. Thus, the Request for Expression of Views and Concerns is also rejected.

19. Lastly, since the confirmation of charges hearing in the present case is over, the Request for Postponement becomes moot.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

rejects the Request for Reconsideration;

rejects the Request for Expression of Views and Concerns;

decides to retain Ms. Chana as common legal representative of the 327 victims admitted to participate in the confirmation of charges hearing and in the related proceedings of the present case.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Friday, 9 September 2011

At The Hague, The Netherlands