

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11

Date: 8 July 2011

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single Judge

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

Public Document

**Decision on the Defence Requests in Relation to the Victims' Applications for
Participation in the Present Case**

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 Francis Kirimi Muthaura
Karim Khan and Kennedy Ogetto

Counsel for Uhuru Muigai Kenyatta
Steven Kay and Gillian Higgins

Counsel for Mohammed Hussein Ali
Evans Monari, John Philpot and
Gershom Otachi Bw'omanwa

Legal Representatives of the Victims

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 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**

Other

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 renders this decision on the requests advanced by the Defence teams in their observations on 4 victims’ applications for participation transmitted by the Registry on 30 May 2011.

1. On 8 March 2011, the Chamber, by majority, decided to summon Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali to appear before the Court.² Pursuant to this decision, the suspects voluntarily appeared before the Court at the initial appearance hearing held on 8 April 2011,³ during which, *inter alia*, the Chamber scheduled the commencement of the confirmation of charges hearing for Wednesday, 21 September 2011.

2. On 30 March 2011, the Single Judge issued the “First Decision on Victims’ Participation in the Case”,⁴ wherein she decided, *inter alia*, that the parties shall provide their observations to the victims’ applications, if they so wish, within a time limit of two weeks upon notification thereof.

3. On 30 May 2011, the Victims Participation and Reparation Section (the “VPRS”) submitted to the Chamber 4 victims’ applications, together with a report prepared pursuant to regulation 86(5) of the Regulations of the Court and transmitted those applications, in a redacted form, to the parties.⁵

4. On 13 June 2011, in compliance with the deadline of two weeks from the notification as established by the Single Judge, the Defence of Uhuru Kenyatta submitted its observations on the 4 victims’ applications, together with a number of

¹ Pre-Trial Chamber II, “Decision Designating a Single Judge”, ICC-01/09-02/11-9.

² Pre-Trial Chamber II, “Decision on the Prosecutor’s Application for Summons to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali”, ICC-01/09-01/11-01.

³ ICC-01/09-02/11-T-1-ENG.

⁴ Pre-Trial Chamber II, “First Decision on Victims’ Participation in the Case”, ICC-01/09-02/11-23.

⁵ ICC-01/09-02/11-97 – “First transmission to the Pre-Trial Chamber of applications to participate in the proceedings” and annexes attached thereto – ICC-01/09-02/11-98 – “First Transmission to the parties and legal representatives of redacted applications to participate in the proceedings” and annexes attached thereto – ICC-01/09-02/11-99-Conf-Exp – “First report on applications to participate in the proceedings” and annexes attached thereto.

requests.⁶ On the same day, the Defence of Francis Muthuara and the Defence of Mohammed Hussein Ali jointly filed their observations on the same group of victims' applications, submitting that two applications for participation should be granted, while the other two should be rejected.⁷

5. The Single Judge notes articles 54(1)(a) and (3)(b), 57(3)(c), 67 and 68(1) of the Rome Statute (the "Statute") and rules 85 to 89 of the Rules of Procedure and Evidence (the "Rules").

6. At the outset, the Single Judge wishes to clarify that the present decision does not address whether the applicants qualify as "victims" within the meaning of rule 85(a) of the Rules and, accordingly, whether they are admitted to participate at the confirmation of charges hearing and in the related proceedings. A decision in this regard will be taken in due time. However, the Single Judge deems it appropriate to address in the present decision the two requests put forward by the Defence of Mr Kenyatta before a decision on the concerned victims' application for participation is taken. In particular, the following two requests advanced by the Defence shall be dealt with hereunder: (i) that the Single Judge orders that the unredacted applications be transmitted to the Prosecutor in order for him to fulfil his obligations under article 54 and article 67(2) of the Statute (the "First Defence Request"); and (ii) that the Single Judge orders the Registry to disclose to the Defence information the redaction of which might not be justified by article 68(1) of the Statute (the "Second Defence Request").

The First Defence Request

7. As recalled above, the First Defence Request is that the Prosecutor be provided with the unredacted version of the victims' applications in order for him to discharge his obligations under article 54 and article 67(2) of the Statute.

⁶ ICC-01/09-02/11-117, and its annex.

⁷ ICC-01/09-02/11-115-Conf.

8. At first, the Single Judge wishes to point out that the information provided by the applicants in their applications for participation can under no circumstances be considered as evidence subject to disclosure within the legal framework of the Court. Indeed, such information has been provided by the applicants to the Chamber only for the purposes of substantiating an application for participation but not to give evidence on either points of fact or law in the present case. Further, the relevant information was not collected by the Prosecutor during his investigation and cannot therefore be defined as "evidence". In this respect, it is worthy clarifying that only evidence collected by the parties is subject to disclosure between them for the purposes of the confirmation of charges hearing.

9. Accordingly, the information provided by the applicants in their applications for participation is not to be disclosed between the parties even if information provided therein can be considered exonerating in nature.

10. However, this does not mean that the information contained in the victims' applications is of no relevance for the Prosecutor's obligations to investigate exonerating and incriminating circumstances equally, as provided for in article 54(1)(a) of the Statute. This is equally true for the Prosecutor's prerogative under article 54(3)(b) of the Statute to request the presence of and question, *inter alia*, victims. In fact, the applications for participation could lead to the Prosecutor's determination that the applicants may possess information to be considered exculpatory within the meaning of article 67(2) of the Statute, in which case, the Prosecutor's investigation should extend to cover such information. However, only in case information in the victims' possession is collected by the Prosecutor and reveals itself as exculpatory in nature and/or in any way material for the preparation of the defence, the Prosecutor will be under the statutory obligation to disclose to the Defence any such evidence pursuant to article 67(2) of the Statute and rule 77 of the Rules.

11. The Single Judge notes that the same view has recently been taken by the Appeals Chamber which stated as follows:

[I]t is reasonable that, in particular where the submissions in the victims' applications for participation indicate that victims may possess potentially exculpatory information, the Prosecutor's investigation should extend to discovering any such information in the victims' possession. Such information would then be disclosed to the accused pursuant to article 67 (2) of the Statute and rule 77 of the Rules of Procedure and Evidence.⁸

12. Therefore, in light of the relevance that victims' applications can have to the Prosecutor's obligations under the Statute and to the extent clarified above, the Single Judge considers that the Prosecutor should be provided with unredacted versions of the victims' applications. Thus, he will be placed in a position to verify whether information in the possession of the applicants could be considered exculpatory in nature and, as the case may be, to collect such evidence and disclose it to the Defence as requested by the legal texts of the Court.

13. According to the Single Judge, this does not constitute a violation of the principle of equality of arms between the Prosecutor and the Defence since the approach is based upon a substantial difference between the parties, in terms of their nature and role in the proceedings before the Court. In particular, the Prosecutor is an organ of the Court entrusted, by virtue of articles 54(1)(b) and (e) and 68(1) of the Statute, with the obligation to protect, *inter alia*, victims.

14. Consequently, and considering that full disclosure is the principle while redaction of information only constitutes the exception, the Single Judge is of the view that providing redacted versions of the applications to the Prosecutor is not necessary, also in light of the autonomous duty of the Prosecutor to protect victims. Furthermore, the transmission of the unredacted versions of the applications to the Prosecutor would permit him to properly discharge his statutory obligations, as clarified above.

⁸ Appeals Chamber, "Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled 'Decision on the Modalities of Victim Participation at Trial'", ICC-01/04-01/07-2288, para. 81.

15. In light of the above, the Single Judge is of the view that the First Defence Request advanced by Mr Ruto and Mr Sang should be granted. The Registry is therefore hereby ordered to transmit to the Prosecutor the unredacted versions of all the victims' applications for participation received in the present case. By the same token, for the purposes of the remaining transmission of the applications pursuant to rule 89(1) of the Rules, the VPRS is instructed to provide the Prosecutor with unredacted version of such applications.

The Second Defence Request

16. As recalled above, the Second Defence Request is that the Registry be ordered to disclose to the Defence information the redaction of which might not be justified by article 68(1) of the Statute. In this respect, the Defence submits that sufficient information concerning the redacted components of the victims' applications shall be provided to the Defence.

17. The Single Judge notes the provisions of articles 68(1) and 57(3)(c) of the Statute, which mandate the Court to take appropriate measures to protect, *inter alia*, the safety, privacy, physical and physiological well-being of the victims. The Single Judge is as well cognizant that, in accordance with the principle of proportionality enshrined in article 68(1) of the Statute, measures taken pursuant to this provision may restrict the rights of the suspect only to the extent necessary.

18. In light of the nature, purpose and circumstances of the current proceedings, the Single Judge is convinced that the redactions applied in the victims' application are indeed limited to what is strictly necessary in light of the security situation in Kenya and the applicants' safety and do not unnecessarily restrict the rights of the Defence. In particular, the Defence has been provided with sufficient information in order for it to be able to determine whether the relevant criteria for an applicant to qualify as victim are fulfilled. The few redactions of some relevant information in the victims' applications are the only available measures to protect the applicants concerned,

since the disclosure of any further information would unnecessarily compromise their safety and security.

19. In light of the above, the Single Judge is of the view that the Second Defence Request must be rejected.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

ORDERS the Registry to transmit to the Prosecutor the unredacted version of all the victims' applications for participation received in the present case;

REJECTS the Second Defence Request.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Friday, 8 July 2011

At The Hague, The Netherlands