

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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No.: ICC-01/09

Date: 3 November 2010

**PRE-TRIAL CHAMBER II**

**Before:** Judge Ekaterina Trendafilova, Presiding Judge  
Judge Hans-Peter Kaul  
Judge Cuno Tarfusser

**SITUATION IN THE REPUBLIC OF KENYA**

**Public Document**

**Decision on Victims' Participation in Proceedings Related to the Situation in the  
Republic of Kenya**

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 the Defence**

**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**

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**Registrar & Deputy Registrar**  
Silvana Arbia, Registrar

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**  
Fiona McKay

**Other**

**THE JUDGES OF PRE-TRIAL CHAMBER II** (the “Chamber”) of the International Criminal Court (the “Court”) hereby render a framework decision on victims’ participation in proceedings related to the situation in the Republic of Kenya, irrespective and outside the context of any case which may arise from that situation.

1. On 31 March 2010, the Chamber, by majority, authorized the commencement of the Prosecutor’s investigation into the situation in the Republic of Kenya.<sup>1</sup> Thus, in order to ensure predictability and expeditiousness of the potential participation of victims in the context of the situation in the Republic of Kenya, the Chamber deems it appropriate to set in advance the substantive and procedural framework for such participation with a view to instructing the Victims Participation and Reparation Section (the “VPRS”) accordingly.

## **I. The Law**

2. The Chamber notes articles 68(3), 21(2) and (3) of the Rome Statute (the “Statute”), rules 85 to 93 of the Rules of Procedure and Evidence (the “Rules”) and regulations 86 and 87 of the Regulations of the Court (the “Regulations”).

3. The Chamber recalls, in particular, article 68(3) of the Statute which states

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

4. The Chamber also recalls article 21(3) of the Statute which reads

The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7,

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<sup>1</sup> Pre-Trial Chamber II, “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya”, 31 March 2010, ICC-01/09-19.

paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.<sup>2</sup>

5. In this respect, the Chamber takes note of international human rights instruments concerning victims' rights, such as the "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power",<sup>3</sup> the "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law"<sup>4</sup> and the "Convention on the Rights of the Child"<sup>5</sup>. Moreover, the "right to an effective remedy" and the "right to have access to justice", which lie at the heart of victims' rights are also found in articles 2(3)(a) and 14(1) of the International Covenant on Civil and Political Rights,<sup>6</sup> articles 6(1) and 13 of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>7</sup> article 7(1)(a) of the

<sup>2</sup> In this context, the Appeals Chamber said: "[a]rticle 21 (3) of the Statute stipulates that the law applicable under the Statute must be interpreted as well as applied in accordance with internationally recognized human rights. *Human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights*; first and foremost, in the context of the Statute, the right to a fair trial, a concept broadly perceived and applied, embracing the judicial process in its entirety" (emphasis added). Appeals Chamber, "Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006", ICC-01/04-01/06-772, para. 37.

<sup>3</sup> United Nations General Assembly, A/RES/40/34 of 29 November 1985.

<sup>4</sup> United Nations General Assembly, A/RES/60/147 of 21 March 2006.

<sup>5</sup> Convention on the Rights of the Child, adopted by resolution 44 25 of 20 November 1989 at the 44th session of the United Nations General Assembly, UN Treaty Series, vol. 1577. p 3.

<sup>6</sup> International Covenant on Civil and Political Rights (ICCPR), adopted and opened for signature on 19 December 1966, UN Treaty Series, vol. 999, p. 171.

<sup>7</sup> Convention on Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, UN Treaty Series, vol 213, p. 221. The Chamber takes note of the jurisprudence of the European Court of Human Rights which has recognized the applicability of article 6(1) of the Convention ("reasonableness of the length of proceedings") already at the early stage of the investigation, before the confirmation of charges, particularly where the outcome of the criminal proceedings are of decisive importance for obtaining reparations for the harm suffered, see, for example, *Case of Antunes Rocha v Portugal*, "Judgment", 31 May 2005, Application no. 64330/01; *Case of Selmouni v France*, "Judgment", 28 July 1999, Application no. 25803/94; *Case of Acquaviva v France*, "Judgment", 21 November 1995, Series A No. 333-A; *Case of Tomasi v France*, "Judgment", 27 August 1992, Application no. 12850/87; *Case of Moreira de Azevedo v Portugal*, "Judgment", 23 October 1990, Application no. 11296/84. Further, in the context of the European Convention, article 13 ("right to an effective remedy") has been interpreted as requiring a thorough and effective investigation capable of leading to the identification and punishment of those responsible, including effective access for the complainant to the investigative procedure leading to the identification and punishment of those responsible, see, for example, *Case of Batayev and Betayeva v Russia*, "Judgment", 29 May 2008, Application no. 37315/03, para. 123; *Case of Bazorkina v Russia*, "Judgment", 27 July 2006, Application no. 69481/01, para. 161; *Case of Anguelova v Bulgaria*, "Judgment", 13 June 2002, Application no. 38361/97, para. 162; *Case of Velikova v Bulgaria*, "Judgment", 18 May 2000, Application no. 41488/98, para. 89.

African Charter on Human and Peoples' Rights<sup>8</sup> and articles 8(1) and 25(1) of the American Convention on Human Rights<sup>9</sup>.

6. The Chamber also recalls article 21(2) of the Statute, according to which, "[t]he Court may apply principles and rules of law as interpreted in its previous decisions". In this regard, the Chamber considered the relevant jurisprudence of the Court with particular focus on the decisions of Pre-Trial Chambers I and II in the situations in the Democratic Republic of the Congo and Uganda.<sup>10</sup> The Chamber also took note of the relevant decisions of the Appeals Chamber<sup>11</sup> addressing some aspects of victims' participation in proceedings related to a situation.

## **II. Substantive framework for the possible participation of victims in proceedings at the situation stage**

7. The Chamber considers that article 68(3) of the Statute constitutes the basic norm according to which victims' participation may take place in proceedings before the Court. There are also other provisions in the Statute, such as articles 15(3), 19(3) and 75, which specify particular instances where victims have the right to participate. However, the Chamber is of the view that unless the Statute allows *expressis verbis*

<sup>8</sup> African Charter on Human and Peoples' Rights, concluded at Nairobi on 27 June 1981, UN Treaty Series, vol. 1520, p. 217.

<sup>9</sup> American Convention on Human Rights, also referred to as the pact of San José, Cost Rica, adopted on 22 November 1969. UN Treaty Series, vol. 1144, p. 143. The Chamber takes note of the case-law of the Inter-American Court of Human Rights which has determined that article 8(1) of the American Convention recognizes the right to effective investigations and the right to have those responsible prosecuted and punished. It hereby acknowledges that Article 8(1) of the American Convention is applicable already at the investigation stage, see, for example, *Case of the 'Street Children' (Villagran-Morales et al.) v Guatemala*, "Judgment of November 19, 1999 (Merits)", Series C No. 63, para. 227; and *Case of Blake v Guatemala*, "Judgment of January 24, 1998 (Merits)", Series C No. 36, paras 91 and 97.

<sup>10</sup> Pre-Trial Chamber I, "Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6", 17 January 2006, ICC-01/04-101-tENG; this decision was not subject to appeal. Pre-Trial Chamber II, "Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06", 10 August 2007, ICC-02/04-101; this decision was not subject to appeal.

<sup>11</sup> Appeals Chamber, "Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007", 19 December 2008, ICC-01/04-556; *id.*, "Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 3 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 6 December 2007, 2 February 2009, ICC-02/05-177; *id.*, "Judgment on the appeals of the Defence against the decisions entitled 'Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0121/06 and a/0123/06 to a/0127/06' of Pre-Trial Chamber II", 23 February 2009, ICC-02/04-179.

for victims' participation at specific stages of the proceedings, their participation is governed by the normative framework of article 68(3) of the Statute.

8. Article 68(3) of the Statute sets out certain criteria that must be met before victims, who meet the requirements of rule 85 of the Rules, are permitted to participate at "stages of the proceedings". Before examining such criteria, the Chamber will have first to determine whether and to what extent a situation stage may qualify as a "stage of the proceedings" within the meaning of article 68(3) of the Statute. Thereafter, the Chamber will have to determine (1) whether the relevant stage is "appropriate", and (2) whether the personal interests of the victims are affected.

9. The Chamber finds that hitherto the Court's jurisprudence has been consistent in recognizing the possibility of victims' participation during the stage of the situation. However, while Pre-Trial Chambers I and II adopted a broad definition of the notion of "stage of the proceedings" as encompassing the situation as a whole,<sup>12</sup> the Appeals Chamber distinguished between the investigation itself conducted by the Prosecutor on the one hand, and judicial proceedings, on the other, stating that "[a]rticle 68(3) of the Statute correlates victim participation to 'proceedings', a term denoting a judicial cause pending before a Chamber" and that "[i]n contrast, an investigation is not a judicial proceeding".<sup>13</sup> By so doing, the Appeals Chamber, confined victims' participation during the situation stage to judicial proceedings, which "includ[e] proceedings affecting investigations, provided [that victims'] personal interests are affected by the issues arising for resolution".<sup>14</sup> It follows that the Appeals Chamber clearly acknowledged that victims can be allowed to

<sup>12</sup> Pre-Trial Chamber I, "Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6", 17 January 2006, ICC-01/04-101-tENG, paras 28-54. Pre-Trial Chamber II, "Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06", 10 August 2007, ICC-02/04-101, paras 88-103.

<sup>13</sup> Appeals Chamber, "Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007", 19 December 2008, ICC-01/04-556, para. 45.

<sup>14</sup> Appeals Chamber, "Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007", 19 December 2008, ICC-01/04-556, para. 56.

participate in judicial proceedings taking place at the stage of a situation. The Chamber, accordingly, sees no reason to depart from the unified approach undertaken by the different Chambers that victims may participate in proceedings related to the situation stage. Therefore, victims participation may take place only when an issue arises which may require judicial determination.

10. Since it has been established that judicial proceedings within the situation may qualify as a “stage of the proceedings” within the meaning of article 68(3) of the Statute, the Chamber will turn on to examine the two criteria under the said provision. With respect to the first criterion, the Chamber must consider whether the relevant stage of the proceedings is deemed “appropriate” for the purpose of victims’ participation. If the answer is in the affirmative, then the Chamber must assess the second criterion, namely whether the victims’ personal interests are affected by those judicial proceedings, which will be assessed on a case-by-case basis and only when an issue arises which may require judicial determination.

11. In the present decision the Chamber will provide scenarios by way of example constituting an issue leading to judicial proceedings which may be deemed appropriate for victims’ participation, and where victims’ personal interests may be affected. In this respect, the Chamber notes that so far there is a divergence in the approaches taken by the different Chambers of the Court with respect to the envisaged scenarios. In particular, the Appeals Chambers Judgment of 19 December 2008, which addressed the question of victims’ participation in the context of the situation, fell short of any guidance as to the possible scenarios that could lead to such participation at the situation stage.

12. The Statute and the Rules foresee different scenarios of judicial proceedings related to the situation stage, where victims’ personal interests may be affected and where judicial scrutiny is required. These scenarios are outlined, for example, in article 53 of the Statute pertaining to the review powers of the Chamber of a decision

by the Prosecutor not to proceed with an investigation or prosecution;<sup>15</sup> article 56(3) of the Statute concerning preservation of evidence in the context of a unique investigative opportunity;<sup>16</sup> article 57(3)(c) of the Statute in relation to victims' protection and privacy or to the preservation of evidence;<sup>17</sup> and rule 93 of the Rules which confers on the Chamber the power to seek the views of victims or their legal representatives on any issue. This does not deny the fact that there may be other instances where victims' participation may be deemed appropriate by the Chamber.

### **III. Procedural framework for the possible participation of victims in proceedings at the situation stage**

13. In its judgment of 19 December 2008, the Appeals Chamber stated: "Having determined that the Pre-Trial Chamber cannot grant the procedural status of victim entailing a general right to participate in the investigation, the Appeals Chamber is not in a position to advise the Pre-Trial Chamber as to how applications for participation in judicial proceedings at the investigation stage of a situation should generally be dealt with in the future (...)"<sup>18</sup> Therefore, in the absence of any clear guidance of the Appeals Chamber with respect to the issue at stake, the Chamber finds it essential to define the procedural framework for victims' participation at the situation stage.

14. In this regard, the Chamber will outline three different hypotheses which may lead the Chamber to assess the merits of the victims' applications at the stage of the

<sup>15</sup> See also rule 92(2) of the Rules together with regulation 87 of the Regulations which oblige the Registrar to notify the victims, who have participated in the proceedings or who have communicated with the Court, or their legal representatives of any decision of the Prosecutor not to initiate an investigation or not to prosecute. *Cf* also, Pre-Trial Chamber II, "Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06", 10 August 2007, ICC-02/04-101, para. 95; Pre-Trial Chamber I, "Decision on the request of the legal representative of victims VPRS 3 and VPRS 6 to review an alleged decision of the Prosecutor not to proceed", 25 October 2010, ICC-01/04-582.

<sup>16</sup> See also Pre-Trial Chamber II, "Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06", 10 August 2007, ICC-02/04-101, para. 100.

<sup>17</sup> See also Pre-Trial Chamber II, "Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06", 10 August 2007, ICC-02/04-101, paras 97-98 and 101.

<sup>18</sup> Appeals Chamber, "Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007", 19 December 2008, ICC-01/04-556, para. 57.



situation. The Chamber considers that the distinction between the three hypotheses is necessary because it could have implications on whether and which victims' applications will be considered on their merits.

15. The three different hypotheses are the following: (a) the Chamber is seized of a request that is not submitted by victims of the situation; (b) the Chamber decides to act *proprio motu*; and (c) the Chamber is seized of a request emanating from victims of the situation<sup>19</sup> who have filed an application for participation in the proceedings with the Registry.

16. With respect to the first and third hypotheses, the Chamber will first have to determine whether the issue raised could lead or be linked to judicial proceedings such as those exemplified in paragraph 12 above. By contrast, with respect to the second hypothesis, the Chamber has already determined that judicial proceedings will take place as the Chamber has decided to act on its own motion triggering those proceedings. Only in case the Chamber has found that judicial proceedings are to be conducted, it will resort to the assessment of the requirements of rule 85 of the Rules with respect to those applications that are linked to the issue which forms the subject-matter of judicial proceedings. In this context, the three hypotheses presented may assist to identify the link between the victim and the issue requiring judicial determination. In the first and second hypotheses, the Chamber will assess the requirements of rule 85 of the Rules concerning those victims' whose applications can be linked to the issue at stake. In the third hypothesis the Chamber will resort only to the applications of those victims who have addressed a request to the Chamber. Once the Chamber has assessed the requirements of rule 85 of the Rules, it will then turn on to examine whether those victims' personal interests are affected by the issue that is subject to judicial determination.

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<sup>19</sup> It is clarified that the reference to the term "victims of the situation" covers both persons who have applied to participate and those who have been recognized by the Chamber as victims participating in the proceedings.

17. The Chamber will now address the practical implementation of this decision and, in particular, the involvement and assistance of the VPRS.

#### **IV. Implementation of this decision by the VPRS**

18. The VPRS will have to first make a distinction between those applying for participation in the proceedings and those applying solely for the purposes of reparations. Thus, unless the victims explicitly indicate their wish to participate in the proceedings, the VPRS shall treat these applications as presented merely for the purposes of reparations. The VPRS will have to assess whether all applications related to participation in the proceedings are complete. This assessment must be carried out within 60 days from the date of receipt of the said applications. Following regulation 86(4) of the Regulations, the VPRS will request additional information from the victims, if need be. Once the applications are complete, the VPRS must commence prepare proposals for redactions in the victims' applications for the purposes of future transmission of those applications to the parties.

19. The VPRS will also have to perform an analysis of the applications following the requirements of rule 85 of the Rules. In so doing, it shall follow the "Fourth Decision on Victims' Participation" in the case of the *Prosecutor v. Jean-Pierre Bemba Gombo*, in which Pre-Trial Chamber III spelled out the requirements that need to be met for the purpose of the rule 85 assessment, namely, whether (1) the victim applicant is a natural person or an organization or institution (2) a crime within the jurisdiction of the Court appears to have been committed, (3) the victim applicant has suffered harm, and (4) such harm arose "as a result" of the alleged crime within the jurisdiction of the Court.<sup>20</sup> With reference to the second requirement a victim may be recognized as a victim in the context of the situation if he/she has shown that the crime could be qualified as a crime against humanity in accordance with article 7 of

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<sup>20</sup>Pre-Trial Chamber III, "Fourth Decision on Victims' Participation", ICC-01/05-01/08-320; See also Pre-Trial Chamber I, "Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6", 17 January 2006, ICC-01/04-101-tENG, para. 85.

the Statute committed within the territory of Kenya between 1 June 2005 and 26 November 2009.<sup>21</sup>

20. The analysis conducted by the VPRS shall be prepared in order to be included in a report pursuant to regulation 86(5) of the Regulations to be later submitted to the Chamber. The report shall also include an assessment as to which applications might be accepted, rejected, or raise difficult issues. This initial rule 85 assessment will be subject to the Chamber's final determination. The report will also include one paragraph for each victim which reflects the information contained in the application analyzed in respect of each of the requirements of rule 85 of the Rules. This paragraph shall contain concise information with regard to location, time and the specific alleged events reflecting the harm suffered by the victim.

21. This report will be submitted together with the applications in case the Chamber has determined that judicial proceedings regarding a specific issue will take place. The Chamber stresses the importance of the VPRS to be ready at any time to present complete applications together with the assessment when an issue requiring judicial determination arises before the Chamber.

22. In addition, the VPRS will have to endeavor to group victims in the course of the assessment of the victims' applications. During this exercise, the VPRS will have to bear in mind the possibility that those groups of victims may be represented by common legal representatives. In order to ensure appropriate representation for the victims and continuous consultation between the victims and their legal representatives, the VPRS will have to engage into discussions as soon as possible with the counsel community in Kenya who may represent victims before the Court. This would provide a practical solution concerning (common) legal representation at the time an issue arises for judicial determination before the Chamber. The VPRS is

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<sup>21</sup> Pre-Trial Chamber II, "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya", 31 March 2010, ICC-01/09-19, paras 201 to 211.

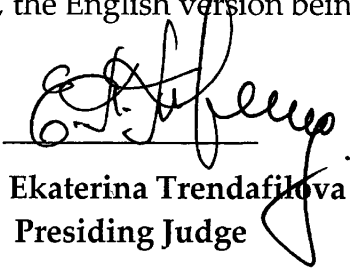
also invited to seek information as to the counsel community in Kenya and a possible need for training necessities.

23. The VPRS shall report periodically (for information purposes) every three months on the applications received and the progress made by the VPRS on their assessment under rule 85 of the Rules. The periodic report shall also include information with respect to the issue of (common) legal representation.

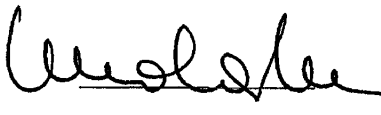
**FOR THESE REASONS, THE CHAMBER HEREBY**

- a) **decides** that victims may participate in proceedings related to the situation in the Republic of Kenya in accordance with the framework established in the present decision;
- b) **orders** the VPRS to comply with the requirements set forth in part IV of this decision.

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

  
 Judge Ekaterina Trendafilova  
 Presiding Judge

  
 Judge Hans-Peter Kaul  
 Judge

  
 Judge Cuno Tarfusser  
 Judge

Dated this Wednesday, 3 November 2010  
 At The Hague, The Netherlands