

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 30 March 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

First Decision on Victims' Participation in the 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

Defence

Francis Kirimi Muthaura
Uhuru Muigai Kenyatta

Counsel for the Defence

Evans Monari and Gershon Otachi
Bw'omanwa for Mohammed Hussein Ali

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**

Fiona McKay

Other

Judge Ekaterina Trendafilova, acting as Single Judge on behalf of Pre-Trial Chamber II (the “Chamber”)¹ of the International Criminal Court (the “Court”) hereby renders the first decision on victims’ participation in the present case, with a view to instructing the Victims Participation and Reparation Section (the “VPRS”) accordingly.

1. On 8 March 2011, the Chamber, by majority, issued three summonses to appear in the present case.² Thus, in order to ensure predictability and expeditiousness of the proceedings, the Single Judge deems it appropriate to set in advance the framework for victims’ participation in the present case.

I. The Law and its Interpretation

2. The Single Judge notes articles 21(2) and (3), 43(6), and 68(1) and (3) of the Rome Statute (the “Statute”), rules 16, 85 to 93 of the Rules of Procedure and Evidence (the “Rules”) and regulations 80, 81 and 86 of the Regulations of the Court (the “Regulations”).

3. The Single Judge recalls article 68(3) of the Statute, which reads:

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 Single Judge also notes rule 85 of the Rules, which states:

For the purposes of the Statute and the Rules of Procedure and Evidence:

(a) “Victims” means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court;

(b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.

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 Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali”, ICC-01/09-02/11-01.

5. The Single Judge further recalls, in particular, rule 90(2) of the Rules, which stipulates:

Where there are a number of victims, the Chamber may, for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular groups of victims, if necessary with the assistance of the Registry, to choose a common legal representative or representatives. In facilitating the coordination of victim representation, the Registry may provide assistance, *inter alia*, by referring the victims to a list of counsel, maintained by the Registry, or suggesting one or more common legal representatives.

6. The Single Judge recalls previous jurisprudence of the Court with regard to the notion "victim" within the meaning of rule 85 of the Rules.³ In particular, reference is made to 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 purposes 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.⁴ With reference to the second requirement mentioned above, the Single Judge recalls that not every incident alleged by the victim applicant, which falls within the meaning of article 7 of the Statute, may satisfy the requirements of rule 85 of the Rules. In this regard the Single Judge emphasizes the importance of establishing a link between the alleged incident and the present case. The alleged incident must relate to the offences alleged in the summonses to appear, or, at a later stage in the proceedings, the document containing the charges, in the case in which the application is made.⁵ Therefore, a

³ Appeals Chamber, "Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008", ICC-01/04-01/06-1432; *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/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06' of Pre-Trial Chamber II", ICC-02/04-01/05-371.

⁴ Pre-Trial Chamber III, "Fourth Decision on Victims' Participation", ICC-01/05-01/08-320, paras 33-78.

⁵ See also Pre-Trial Chamber I, "Decision on the 34 Applications for Participation at the Pre-Trial Stage of the Case", ICC-02/05-02/09-121, para. 12; *id.*, "Decision on 6 Applications for Victims' Participation in the Proceedings", ICC-02/05-01/07-58, para. 6; following the same line of argumentation at the stage

victim applicant may be recognized as a victim to participate in the context of this case if he or she has shown that the alleged crime against humanity was committed from on or about 24 January 2008 until 31 January 2008 in locations, including Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya.

7. The Single Judge also takes note of the report of the VPRS in which it informs the Chamber about identification documentation available to victims in the Republic of Kenya.⁶ The Single Judge recalls that each victim applicant must prove his or her identity satisfactorily, meeting a few basic requirements. The same applies for proof of kinship and guardianship. However, the Single Judge is aware of the victim applicants' personal circumstances and the difficulties victim applicants in the Republic of Kenya may encounter in obtaining or producing copies of official identity documents, such as a passport. Bearing in mind that some victim applicants may have lost their identity documents in the course of the events from on or about 24 January 2008 until 31 January 2008, the Single Judge holds that a flexible approach must be adopted. Having due regard to the practice of other Chambers,⁷ the Single Judge, therefore, accepts the following documentation as proof of identity and/or proof of kinship, as indicated in the report of the VPRS: (i) Passport; (ii) National Identity Card; (iii) Birth Certificate; and (iv) Driver's Licence.

8. In case such documentation is not available to victim applicants, the Single Judge will accept substitute forms of identification, including (i) National ID Waiting Card;

of trial proceedings, Appeals Chamber, "Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008", ICC-01/04-01/06-1432, paras 2 and 63.

⁶ ICC-01/09-54-Conf-Exp and annex.

⁷ For example, Pre-Trial Chamber I, "Decision on the 34 Applications for Participation at the Pre-Trial Stage of the Case", ICC-02/05-02/09-121, para. 8; *id.*, "Decision on Applications a/0013/06, a/0015/06 and a/0443/09 to a/0450/09 for Participation in the Proceedings at the Pre-Trial Stage of the Case", ICC-02/05-01/09-62, para. 9; Pre-Trial Chamber III, "Fourth Decision on Victims' Participation", ICC-01/05-01/08-320, paras 36-38; Trial Chamber I, "Decision on victims' participation", ICC-01/04-01/06-1119, paras 87-89; Trial Chamber II, "Decision on the treatment of applications for participation", ICC-01/04-01/07-933-tENG, para. 30.

(ii) Chief's Identification Letter which provides certain basic information: (a) the full name, date and place of birth, and gender of the victim applicant; and (b) the name of the Chief, his or her signature and the use of an official stamp; (iii) Notification of Birth Cards (for minors); (iv) Clinic Cards (for minors); (v) Kenya Police Abstract Form (for lost national identity cards or Kenyan passports); (vi) a signed declaration from two witnesses attesting to the identity of the victim applicant and, where relevant, the relationship between the victim applicant and the person acting on his or her behalf. The declaration shall be accompanied by proof of identity of the two witnesses.

9. The Single Judge has been made aware of purported practice of identification fraud in the provision of identity documents in the Republic of Kenya.⁸ With a view to verify, to the extent possible, the identity of victim applicants, the Single Judge, therefore, adopts a cautious approach with regard to less reliable forms of formal identification documents as substitutes. She therefore requests victim applicants, who cannot provide proof of identification as set out in paragraph 7, to provide her with substitute forms of identification as set out in paragraph 8, together with a brief explanation why proof of identity as set out in paragraph 7 is not available.

10. In case the applicant is an organization or institution, the Single Judge will consider any document constituting it in accordance with the law of the relevant country, and any credible document that establishes it has sustained direct harm to its property which is dedicated to the purposes set out in rule 85(b) of the Rules.⁹ Additionally, the person acting on behalf of the organization or institution must provide information as regards his or her legal standing to act on behalf of the organization or institution.¹⁰

⁸ ICC-01/09-54-Conf-Exp, para. 9 and annex.

⁹ See also Trial Chamber I, "Decision on victims' participation", ICC-01/04-01/06-1119, para. 89.

¹⁰ Pre-Trial Chamber III, "Fourth Decision on Victims' Participation", ICC-01/05-01/08-320, para. 55.

11. In light of the need to ensure expeditious and fair conduct of the proceedings, the Single Judge finds it necessary to set a date beyond which applications for participation in the proceedings leading to the confirmation of charges may no longer be submitted to the Chamber by the VPRS. This will enable the Chamber to rule on these applications and to leave sufficient time for victims, who have been recognized to participate in the proceedings, and their legal representative(s) to prepare meaningfully for the confirmation of charges hearing. Thus, the final date for the submission of victims' applications to the Chamber shall be Friday, 8 July 2011.

12. The Single Judge highlights that she can only consider complete applications. More specifically, the Single Judge deems it necessary to recall that its oversight is exercised primarily within the limits of the information provided by the victim applicants, as collected and verified by the VPRS. The Single Judge, therefore, instructs the VPRS to ensure as early as possible, and before the submission to the Chamber, that the information gathered is complete and consistent.

II. Implementation of this Decision by the VPRS

13. For the purposes of proper and expeditious preparation of the confirmation of charges hearing in the present case, it is crucial that the VPRS supports the Chamber in a timely and efficient manner. To that end, the Single Judge sets out her expectations with regard to the assistance provided by the VPRS which will enable the Single Judge to prepare the upcoming proceedings efficiently.

1. Distinction of applications for participation and reparation

14. The VPRS will have to first make a distinction between those victims applying for participation in the proceedings and those applying solely for the purposes of reparations. It is recalled that only applications of those victims, who explicitly

indicate their wish to participate in the proceedings, may be considered by the Court for participation.¹¹

15. In this context, the Single Judge takes note of the first periodic report of the VPRS of 24 February 2011 in the context of the situation in the Republic of Kenya,¹² in which the VPRS informed the Chamber that a large number of applications, using the standard form for reparations, have been received by the VPRS. Subsequently, legal representatives submitted declarations by twelve victim applicants in which their intention to participate in the proceedings was expressed, regardless of the reparation standard forms used. Consequently, a sample declaration was provided for the Chamber's consideration. It was submitted that further declarations by the remaining victim applicants, who submitted applications for reparations but equally wished to participate in the current proceedings, may be presented in due course, if this approach was acceptable to the Chamber.

16. The Single Judge considers the sample declaration, together with the information contained in the application form for reparations, to be sufficient in order to satisfy herself that the victim applicant wishes to participate in the proceedings. However, noting the fact that those victim applicants had been assisted by legal representatives and that the new standard application form, combining the application for participation and reparations, was available at the website of the Court as of 14 September 2010, the Single Judge holds that the Chamber will only accept an application for reparations together with a declaration which has been submitted to the Court before 14 September 2010.

2. Submission of complete applications

17. The Single Judge instructs that complete applications are submitted to the Chamber in batches up until 8 July 2011. For the sake of efficiency and fairness of

¹¹ See also Pre-Trial Chamber II, "Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya", ICC-01/09-24, para. 18.

¹² ICC-01/09-49 and confidential annex.

proceedings, the Single Judge reminds all concerned that victims' applications be submitted at the earliest possible opportunity and not only at the very last day of the time limit prescribed by the Single Judge.

18. Further, the Single Judge emphasizes that for efficiency purposes, it is the responsibility of the VPRS to ensure that *all* applications are filled in with pertinent information and completely and, in case of missing information, request, pursuant to regulation 86(4) of the Regulations, such information or documentation within two weeks after receipt of the application. If those requests prove to be unsuccessful within a reasonable period of time, the Registrar shall submit those applications to the Chamber for the Single Judge's consideration.

19. The Single Judge further concurs with the findings of other Chambers as regards the information which must be covered by the applications submitted.¹³ An application is considered complete if it contains the following information, supported by documentation, if applicable:

- (i) the identity of the applicant;
- (ii) the date of the crime(s);
- (iii) the location of the crime(s);
- (iv) a description of the harm suffered as a result of the commission of a crime against humanity as set out in paragraph 6 above;
- (v) proof of identity;
- (vi) if the application is made by a person acting with the consent of the victim, the express consent of that victim;

¹³ For example, Pre-Trial Chamber III, „Fourth Decision on Victims' Participation“, ICC-01/05-01/08-320, para. 81; Pre-Trial Chamber I, „Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation“, ICC-01/04-374, para. 12; Pre-Trial Chamber I, „Public Redacted Version of the 'Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case'“, ICC-01/04-01/07-579, para. 44; Pre-Trial Chamber I, „Decision on the 34 Applications for Participation at the Pre-Trial Stage of the Case“, ICC-02/05-02/09-121, para. 7; Trial Chamber II, „Decision on the treatment of applications for participation“, ICC-01/04-01/07-933-tENG, para. 28; Trial Chamber III, „Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties' observations on applications for participation by 86 applicants“, ICC-01/05-01/08-699, paras 35 and 36.

(vii) if the application is made by a person acting on behalf of a victim, in the case of a victim who is a child, proof of kinship or legal guardianship; or, in the case of a victim who is disabled, proof of legal guardianship;

(viii) a signature or thumb-print of the Applicant on the document, at the very least, on the last page of the application.

3. Initial rule 85 assessment

20. The VPRS will have to perform an analysis of the applications following the requirements of rule 85 of the Rules.¹⁴ 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.

21. The analysis conducted by the VPRS shall be prepared in order to be included in the report pursuant to regulation 86(5) of the Regulations. The report shall also include an assessment as to which applications might be accepted, rejected, or raise difficult issues. The report will also include one paragraph for each victim which reflects the information contained in the application analysed 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 event reflecting the harm suffered by the victim. This initial rule 85 assessment by the VPRS will be subject to the Single Judge’s determination.

4. Redacted versions of victim applications to be transmitted to the parties

22. Pursuant to rule 89(1) of the Rules, the Prosecutor and the Defence shall be provided by the Registrar, subject to article 68(1) of the Statute, with copies of victims’ applications, who shall be entitled to provide their observations thereto. In this regard, the Single Judge notes article 68(1) of the Statute which provides for the taking of appropriate measures to protect, *inter alia*, the safety, privacy, physical and psychological well-being of the victims in a manner that is not “prejudicial to or

¹⁴ See also Pre-Trial Chamber II, “Decision on Victims’ Participation in Proceedings Related to the Situation in the Republic of Kenya”, ICC-01/09-24, paras 19 and 20.

inconsistent with the rights of the accused and a fair and impartial trial". To this end, the VPRS, together with the Victims and Witnesses Unit (the "VWU"), is requested to suggest to the Single Judge for her review redactions to the victims' applications it believes may be necessary to protect the victim applicants in question. It is emphasized that in so doing, the VPRS and VWU pay full tribute to the principle of proportionality, as requested in the last sentence of article 68(1) of the Statute.¹⁵ The redacted versions of all victims' applications shall be transmitted to the Prosecutor and to the Defence¹⁶ at the same time the applications are submitted to the Chamber. The parties are invited to provide their observations thereto within two weeks as of notification thereof, if they so wish.

5. Appointment of the Office of Public Counsel for Victims

23. The Single Judge is cognizant of the fact that victim applicants have, to a large extent, chosen their legal representative, as provided in rule 90(1) of the Rules. However, where no legal representative has been appointed by a victim applicant, the Office of Public Counsel for Victims (the "OPCV") shall act as legal representative from the time the victim applicant submits his or her application for

¹⁵ See also Pre-Trial Chamber II, "Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on application 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", ICC-02/04-01/05-134, paras 21-24; Pre-Trial Chamber III, "Second Decision on the question of victims' participation requesting observations from the parties", ICC-01/05-01/08-184, paras 14-15; Trial Chamber I, "Decision inviting the parties' observations on applications for participation of a/0001/06 to a/0004/06, a/0047/06 to a/0052/06, a/0077/06, a/0078/06, a/0105/06, a/0221/06, a/0224/06 to a/0233/06, a/0236/06, a/0237/06 to a/0250/06, a/0001/07 to a/0005/07, a/0054/07 to a/0062/07, a/0064/07, a/0065/07, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0168/07 to a/0185/07, a/0187/07 to a/0191/07, a/0251/07 to a/0253/07, a/0255/07 to a/0257/07, a/0270/07 to a/0285/07, and a/0007/08, ICC-01/04-01/06-1308, para. 28; Trial Chamber II, "Decision on treatment of applications for participation", ICC-01/04-01/07-933-tENG, paras 49 and 51.

¹⁶ See also Pre-Trial Chamber III, "Second Decision on the question of victims' participation requesting observations from the parties", ICC-01/05-01/08-184, paras 11-13; Pre-Trial Chamber II, "Decision on legal representation, appointment of counsel for the defence, protective measures and time-limit for submission of observations on application 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", ICC-02/04-01/05-134, para. 25; Trial Chamber I, "Decision inviting the parties' observations on applications for participation of a/0001/06 to a/0004/06, a/0047/06 to a/0052/06, a/0077/06, a/0078/06, a/0105/06, a/0221/06, a/0224/06 to a/0233/06, a/0236/06, a/0237/06 to a/0250/06, a/0001/07 to a/0005/07, a/0054/07 to a/0062/07, a/0064/07, a/0065/07, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0168/07 to a/0185/07, a/0187/07 to a/0191/07, a/0251/07 to a/0253/07, a/0255/07 to a/0257/07, a/0270/07 to a/0285/07, and a/0007/08, ICC-01/04-01/06-1308, paras 27 and 30; Trial Chamber II, "Decision on treatment of applications for participation", ICC-01/04-01/07-933-tENG, para. 54.

participation until a legal representative is chosen by the victim or is appointed by the Chamber. The VPRS shall transmit to the OPCV the applications for participation from unrepresented victim applicants so that the OPCV can exercise its role as legal representative, if necessary.

6. Preparation for common legal representation of victims

24. Mindful of the fact that a large number of victims may wish to participate in these upcoming pre-trial proceedings on the one hand, and the need to ensure the effectiveness of the proceedings on the other hand, the Single Judge instructs 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(1)(b) and 90(2) of the Rules. To that end, the Single Judge instructs the VPRS to group victims in the course of the assessment of victims' applications. The VPRS shall include information with respect to this issue in its report(s) according to regulation 86(5) of the Regulations.


7. Internal organization of the VPRS

25. Lastly, the Single Judge wishes to underline that any efficient preparation of victims' issues by the Chamber will be dependant on the timely and proper assistance by the VPRS to the Chamber. In this respect, the Single Judge is of the view that the VPRS must organize itself internally so as to provide meaningful and timely assistance to the Chamber. More specifically, the Single Judge holds the view that a representative of the VPRS in the field will be necessary, in particular with a view to assess the completeness of victim applications within the time limit provided in paragraph 18. Any difficulty encountered by the VPRS in the implementation of this decision shall be brought to the attention of the Single Judge as soon as possible.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY DECIDES

- a) that the VPRS submit complete applications for participation in the present case to the Single Judge as soon as practicable and no later than **Friday, 8 July 2011**;
- b) that the VPRS comply with all requirements set forth in part II of this decision;
- c) that the VPRS, when submitting victims' applications to the Chamber, transmit redacted victims' applications to the parties of the present case at the same time, who in turn shall provide their observations thereto, if they so wish, within a time limit of two weeks upon notification of the redacted victims' applications;
- d) that, where no legal representative has been appointed by the victim applying, the OPCV act as legal representative for unrepresented victims until such time a legal representative is chosen by the victim or is appointed by the Chamber.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Wednesday, 30 March 2011

At The Hague, The Netherlands