

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 13 September 2011

PRE-TRIAL CHAMBER II

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

**Defence Observations in Response to the “Decision Requesting Observations
(ICC-01/09-02/11-318)”**

Source: Defence

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

The Office of the Prosecutor

Mr. Luis Moreno-Ocampo, Prosecutor
Ms. Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Counsel for Francis Kirimi Muthaura:
Karim A.A. Khan QC and Kennedy
Ogetto
Counsel for Uhuru Muigai Kenyatta:
Steven Kay QC and Gillian Higgins
Counsel for Mohammed Hussein Ali:
Evans Monari and Gershom Otachi

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia, Registrar

Deputy Registrar

Mr. Didier Daniel Preira, Deputy
Registrar

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. PROCEDURAL BACKGROUND

1. On 6 April 2011, the Single Judge issued the "Decision Setting the Regime for Evidence Disclosure and Other Related Matters".¹
2. On 26 August 2011, the Single Judge issued the "Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings" (the "Decision on Victims' Participation"), in which she decided to admit 233 victims as participants in the confirmation of charges hearing and the related proceedings and appointed Mr. Morris Anyah as the common legal representative of all the victims admitted in the present case.²
3. On 5 September 2011, the Defence disclosed to the Prosecutor the respective evidence they intend to rely on at the confirmation of charges hearing and the corresponding list of evidence.³
4. On 9 September 2011, the Chamber received the "Request for Access to Confidential Inter Partes Material" (the "Request"), in which the common legal representative seeks "access to all inter partes confidential material filed in the record of the case".⁴
5. On 12 September 2011, the Single Judge issued her "Decision Requesting Observations", in which she requested the Defence teams to submit, no later than Tuesday 13 September 2011, observations as to whether or not they object

¹ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Decision Setting the Regime for Evidence Disclosure and Other Related Matters, 6 April 2011, ICC-01/09-02/11-48.

² Pre-Trial Chamber II, Prosecutor v Muthaura et al., Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings, 26 August 2011, ICC-01/09-02/11-267, pp. 45-46, letters (c) and (e) of the operative part.

³ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Disclosure of Evidence Pursuant to Rule 121(4) of the Rules of Procedure and Evidence, 5 September 2011; Pre-Trial Chamber II, Prosecutor v Muthaura et al., Defence Communication of its List of Evidence in Compliance with the Decision of Time Limit for Disclosure under Rule 121(6) of the Rules of Procedure and Evidence ICC-01/09-02/11-293 and its two confidential annexes; ICC-01/09-02/11-295 and its three confidential ex parte annexes, 5 September 2011, ICC-01/09-02/11-300 and its confidential ex parte annex; Pre-Trial Chamber II, Prosecutor v Muthaura et al., Defence Submission of its List of Evidence and In-depth Analysis Chart, 5 September 2011, ICC-01/09-02/11-301 and its two confidential annexes.

⁴ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Request for Access to Confidential Inter Partes Material, 9 September 2011, ICC-01/09-02/11-310, at para 17.

to the victims' common legal representative having access to their respective lists of evidence.⁵

II. OBSERVATIONS

6. The Defence for Mr. Uhuru Kenyatta observes that there is no provision in the Rome Statute or Rules of Procedure and Evidence whereby the Defence are obligated to disclose information or evidence to the victims' representative. In an oral decision on 9 December 2009, the Trial Chamber in *Lubanga* confirmed that "the Statute and the Rules of Procedure and Evidence do not expressly provide for disclosure by the Defence to the legal representatives of victims." The Chamber observed that any "disclosure obligations imposed on the Defence would merit "a particularly cautious approach".⁶
7. In *Katanga*, the Trial Chamber confirmed that disclosure from the Defence to the victims was a matter of professional courtesy and not a legal obligation.⁷
8. In the present case, it is noteworthy that the Single Judge's Decision on Victims' Participation did not grant the victims' representative the right to tender evidence or call witnesses. The manner of participation of the victims is therefore limited at the confirmation stage.
9. Even at the trial stage, during which victims have more participatory rights, since victims are not parties to the proceedings, they do not have the 'right' to access confidential materials. In order to obtain access to confidential materials, the victims' representative must show how the personal interests of the victims are affected by the specific type of information within the control of the party capable of disclosing the information.⁸ It is for the victims to establish their

⁵ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Decision Requesting Observations, 12 September 2011, ICC-01/09-02/11-318, at p. 5.

⁶ Oral Decision, 9 December 2009, Transcript pp. 19-29 [ICC-01/04-01/06-T-222-ENG ET WT].

⁷ Oral Decision, 23 September 2010, Transcript pp. 47-48 [ICC-01/04-01/07-T-191-Red-ENG WT 23-09-2010].

⁸ Trial Chamber I, Prosecutor v Lubanga, Decision on the legal representative's request for clarification of the Trial Chamber's 18 January 2008 "Decision on victims' participation", 2 June 2008, ICC-01/04-01/06-1368.

interest in the area of evidence or issue prior to disclosure to them of non-public material.

10. At present, 233 victims have been permitted to participate in the proceedings, all of which remain anonymous. To date, the jurisprudence of the ICC has uniformly confirmed that anonymous victims cannot access confidential evidence themselves.⁹ Furthermore, victims have no duty of impartiality and are not directly bound by any orders or directions from the Court. Victims are not bound by the Code of Conduct nor do they fall within the parameters of Article 70 or 71 of the Rome Statute. There are no safeguards in place to control the dissemination of confidential information directly to the victims.
11. The Defence has grave concerns regarding the possibility that persons unknown to the Defence could have access to sensitive information concerning their witnesses.
12. The Defence observes that the victim's representative is "willing to withhold the information from his clients, should the Chamber deem that appropriate and necessary to further safeguard the information from disclosure."¹⁰ However, the Defence submits that the adoption of such measure is neither workable nor appropriate given the remit of the role of the victims' representative. Article 68(3) of the Statute mandates victim participation on the proviso that the personal interests of the victims are affected by the issue in question, and for the purpose of presenting the victims' views and concerns. The role of the legal representative is therefore to act as a conduit for the views and concerns of his clients. If the legal representative withheld the disclosure from the victims, he would essentially be presenting his own legal views on the responsibility of the Suspects and would be unable to develop any arguments or views as to how the issues in question affect the personal interests of his clients. In acting in this manner, the victims' representative would become

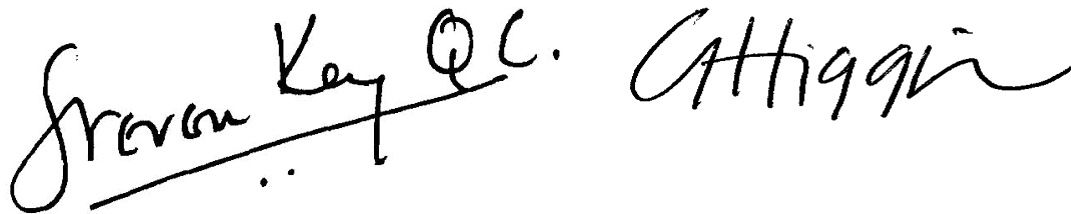
⁹ See Prosecutor v. Mbarushimana, Decision on the 138 applications for victims' participation in the proceedings, 11 August 2011, ICC-01/04-01/10-351 (access only granted to public docs); Prosecutor v. Abu Garda, Decision on the Victims' modalities of participations at the Pre-Trial Stage of the Case, 6 October 2009, ICC-02/05-02/09-136.

¹⁰ Pre-Trial Chamber II, Prosecutor v. Muthaura et al., Request for Access to Confidential *Inter Partes* Material, 9 September 2011, ICC-01/09-02/11-310, at para. 7.

more akin to as a second prosecuting authority and would be likely to fall foul of the Appeals Chamber's direction that the Court must actively ensure that the role of the victims does not usurp or duplicate the role of the Prosecutor.¹¹

III. RELIEF REQUESTED

13. For the aforementioned reasons, the Defence for Uhuru Kenyatta objects to granting the victims' common legal representative access to their respective confidential lists of evidence.

A handwritten signature in black ink, reading "Steven Kay QC. Higgins". The signature is written in a cursive, flowing style. Below the signature is a horizontal line.

Steven Kay QC and Gillian Higgins
On behalf of Uhuru Muigai Kenyatta

Dated this, Tuesday 13 September 2011

At London, UK

¹¹ The Prosecutor v. Thomas Lubanga Dyilo, Decision of the Appeals Chamber on the Joint Application of Victims a/0001/06 to a/0003/06 and a/0105/06 concerning the "Directions and Decision of the Appeals Chamber" of 2 February 2007, 13 June 2007, ICC-01/04-01/06-925, at para. 28: "[A]n assessment will need to be made in each case as to whether the interests asserted by victims do not, in fact, fall outside their personal interests and belong instead to the role assigned to the Prosecutor."