

**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**



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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 Cuno Tarfusser

**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**

**Prosecution's Response to the Victims' Legal Representative's Requests for Access to  
Confidential *Inter Partes* Material**

**Source:** Office of the Prosecutor

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

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**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
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**Defence Support Section**

**Detention Section**

**Victims Participation and Reparations Other  
Section**

## Summary

1. On 26 August 2011, the Single Judge specified the participatory rights which the victims can exercise. She specified that access to confidential material was to be decided on a case-by-case basis.
2. On 9 September 2011, the legal representative for victims requested access to all confidential *inter partes* material. On 12 September 2011, he confirmed that the victims requested to remain anonymous.
3. The Prosecution believes that anonymous victims can be permitted to participate in pre-trial proceedings, subject to the imposition of strict limitations on their procedural rights in light of security concerns and considerations of fairness to the accused.
4. Therefore the Prosecution opposes their access to all confidential *inter partes* material.

## Background

5. On 26 August 2011, the Single Judge issued a decision on victims' participation at the confirmation of charges hearing and in the related proceedings.<sup>1</sup>
6. In the decision, she recognised 233 "anonymous"<sup>2</sup> applicants as victims that are admitted to participate at the confirmation of charges hearing and in the proceedings related thereto.<sup>3</sup> She appointed a common legal representative<sup>4</sup> and

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<sup>1</sup> ICC-01/09-02/11-267.

<sup>2</sup> Their identities are un-known to the Defence.

<sup>3</sup> ICC-01/09-02/11-267.

<sup>4</sup> ICC-01/09-02/11-267, page 46 (e).

ordered him to communicate to the Chamber, by no later than 12 September 2011, the victims' preference on the disclosure of their identities to the Defence.<sup>5</sup>

7. Furthermore, she specified the participatory rights that the victims can exercise at the confirmation of charges hearing and in the related proceedings.<sup>6</sup> The Single Judge clarified in this respect that “in determining whether any right pursuant to article 68(3) of the Statute shall be granted, the Chamber will also consider whether the exercise of that specific right sought by the legal representative would be prejudicial to the rights of the suspects if done on behalf of victims who are anonymous vis-à-vis the Defence.”<sup>7</sup>
8. In respect of access to materials, she decided that these victims may have access to the public record of the case, including the public evidence filed by the parties. In relation to those decisions, filings or evidence that are classified as "confidential", she indicated that “the Chamber retains the option to decide on a case-by-case basis, either *proprio motu* or upon receipt of a specific and motivated request, whether to grant victims' legal representative access thereto.”<sup>8</sup>
9. On 9 September 2011, the legal representative of victims requested access to all confidential materials filed *inter partes*.<sup>9</sup>
10. On 12 September 2011, the legal representative of victims notified the Chamber that he personally consulted with 94 of his 233 clients and that none of those consulted wished to have his or her identity disclosed to the Defense.<sup>10</sup> In respect

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<sup>5</sup> ICC-01/09-02/11-267, page 47 (l).

<sup>6</sup> ICC-01/09-02/11-267, para. 109.

<sup>7</sup> ICC-01/09-02/11-267, para.100.

<sup>8</sup> ICC-01/09-02/11-267, paras. 97 to 118.

<sup>9</sup> ICC-01/09-02/11-310.

<sup>10</sup> ICC-01/09-02/11-314, para.3.

of those victims that the Legal Representative was unable to consult, he submitted that the *status quo ante* be maintained and non-disclosure be presumed.<sup>11</sup>

11. All 233 victims remain thus for the time being anonymous vis-à-vis the Defence teams.
12. On 12 September 2011, the Single Judge requested the Prosecution to submit, no later than Tuesday, 13 September 2011, observations as to whether it objects to the victims' common legal representative's access to the Prosecution's list of evidence.<sup>12</sup>

### **Submissions**

13. Victims' rights of access to information at this stage of the proceedings is governed by Rule 121(10). The Statute and the Rules do not provide that the victims should have unfettered access to the entire records of the case or situation. Various Chambers, including this Chamber, have also restricted access to anonymous victims.
14. Similarly, it is clear from the provisions of the Statute and the Rules that the Prosecution has no disclosure obligations to victims.<sup>13</sup> The Rules specifically provide for disclosure between the Prosecution and the person(s) in respect of whom a warrant of arrest or a summons to appear has been issued.<sup>14</sup> Disclosure thus falls outside the scope of victim participation and remains primarily a matter between the parties.<sup>15</sup>

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<sup>11</sup> ICC-01/09-02/11-314, para. 6.

<sup>12</sup> ICC-01/09-02/11-318, page 5.

<sup>13</sup> See Article 61 (3) (b) of the Statute and Rules 76, 77 and 121.

<sup>14</sup> See Rule 121 (2)

<sup>15</sup> As confirmed in the decision of the Single Judge setting the regime for evidence disclosure: ICC- ICC-01/09-02/11-48, paras. 22 to 25.

15. The victims therefore do not have a general entitlement to access to the supporting material, any confidential or redacted documentation, or *inter partes* disclosures. This is a natural consequence of victims not being a party to the proceedings; they are participants with important but nonetheless limited procedural rights.<sup>16</sup> The limited nature of these procedural rights (including access rights) of anonymous victims in pre-trial proceedings has been confirmed repeatedly.<sup>17</sup>
16. As to the scope of the appropriate access to the case-file, Rule 121(10) explicitly makes victims' access to the record "[s]ubject to any restrictions concerning confidentiality". It is submitted that access to the public record of the proceedings is sufficient to permit the Legal Representatives to present their views and concerns as well as to participate in the proceedings to the degree that was decided by the Single Judge.<sup>18</sup>
17. Access to confidential material should not be granted except on a case-by-case basis, and only when the victims demonstrate that the material relates to issues specific to their interests and the Chamber determines that the interests of the victims outweigh the need to retain the confidentiality of the information. Any decision on this particular issue must be mindful as well of the need to protect the safety and well-being of all persons, victims and witnesses. Such a decision should also be mindful of the dangers of further dissemination of sensitive information capable of endangering persons or the integrity of ongoing investigations. The Prosecution notes that victim participation in the Court's process, involving large numbers of individuals being represented (*in casu* 233 victims), presents particular

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<sup>16</sup> Victims may not, for instance, access exculpatory materials disclosed by the Prosecution to the defence under Article 67 (2), or inspection materials accessed by the parties via Rules 77 and 78, since these are processes of transmission of material that take place solely *inter partes*.

<sup>17</sup> ICC-01/04-01/06-462, page 7; ICC-01/04-01/07-474, paras. 182 to 184; ICC-01/05-01/08-320, para. 99.

<sup>18</sup> ICC-01/09-02/11-267, para. 109.

challenges to the Court's ability to protect information and persons, and if not carefully managed it may lead to inappropriate dissemination of sensitive information.<sup>19</sup>

18. Moreover, the Prosecution fully subscribes to the findings of the Single Judge that in deciding on victim's rights "the Chamber will also consider whether the exercise of that specific right sought by the legal representative would be prejudicial to the rights of the suspects if done on behalf of victims who are anonymous vis-à-vis the Defence".<sup>20</sup> Victims who choose to maintain anonymity may, as a result of that choice, waive access they might otherwise enjoy to confidential materials.
19. These considerations, coupled with the specific and confined nature of the confirmation hearing, strongly militate in favour of a limited access to court material, and more specifically to allow access at this stage only to public evidence.<sup>21</sup>
20. For the reasons set out above, the Prosecution submits that the victims should not now be given access to confidential *inter partes* material. Any initiative to get access to any non-public document will necessarily require a case-by-case showing of a legitimate purpose justifying access to the particular material in question. The Prosecution should be granted an opportunity to be heard before any decision is reached in relation to such access, because of possible impact on witness and victim protection, ongoing investigations, and provider confidentiality under Art. 54(3)(e).

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<sup>19</sup> As indicated by the Legal Representative, the security situation in Kenya remains volatile: ICC-01/09-02/11-314, paras. 4 and 6.

<sup>20</sup> ICC-01/09-02/11-267, para.100.

<sup>21</sup> ICC-01/09-02/11-267, para.108 to 110.

**Conclusion**

21. For all the above reasons, the Prosecution submits that the request should be denied.



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Luis Moreno-Ocampo, Prosecutor

Dated this 13<sup>th</sup> day of September 2011

At The Hague, The Netherlands