

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/09-02/11**
Date: **7 February 2013**

TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding Judge
Judge Christine Van den Wyngaert
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA
IN THE CASE OF THE PROSECUTOR V. FRANCIS KIRIMI MUTHAURA AND
UHURU MUIGAI KENYATTA

Public Document

**Victims' Observations in relation to the "Defence Application for change of place
where the Court shall sit for Trial"**

Source: **Victims' Legal Representative**

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

Ms. Fatou Bensouda, Prosecutor
 Ms. Adesola Adeboyejo, Trial Lawyer

Counsel for Francis Kirimi Muthaura

Mr. Karim A. A. Khan, QC, Mr. Essa M. Faal, Mr. Kennedy Ogetto, and Ms. Shyamala Alagendra

Counsel for Uhuru Muigai Kenyatta

Mr. Steven Kay, QC, and Ms. Gillian Higgins

Legal Representative of the Victims

Mr. Fergal Gaynor

Legal Representatives of the Applicants**Unrepresented Victims****Unrepresented Applicants for Participation/Reparation****The Office of Public Counsel for Victims**

Ms. Paolina Massida

The Office of Public Counsel for the Defence**States Representative****Amicus Curiae****REGISTRY****Registrar**

Ms. Silvana Arbia

Defence Support Section**Deputy Registrar**

Mr. Didier Preira

Victims and Witnesses Unit**Detention Section****Victims Participation and Reparations Section****Other**

Ms. Fiona McKay

I. INTRODUCTION

1. The Common Legal Representative¹ for Victims in the case hereby submits the views of the victims pertaining to the possibility of holding trial proceedings in the Republic of Kenya (“Kenya”) or alternatively in Arusha, Republic of Tanzania (“Tanzania”). For the reasons set out below, the victims oppose the holding of trial proceedings in Kenya or in Tanzania.

II. PROCEDURAL HISTORY

2. On 3 December 2012, the Muthaura Defence applied to the Presidency, requesting the Presidency to undertake consultations required by Rule 100 (3) of the Rules with the governments of Kenya and Tanzania.² The Muthaura Defence submits that: a trial process significantly disrupts the life of an accused person and can have a detrimental effect on the health of an accused³; it is in the interests of justice, the witnesses, and the victims, to hold trials in the territory of the state where the alleged crimes occurred⁴; and it will enhance the Court’s legal processes as the Trial Chamber will have the unique opportunity to obtain a sustained first-hand view of the *locus in quo*⁵.
3. On 17 January 2013, the Chamber requested the Prosecutor, the Kenyatta Defence, the Common Legal Representative for Victims and the Registry, to submit observations no later than 7 February 2013 on the possibility of the trial of this case being held in Kenya, or in Arusha, Tanzania, before deciding whether to recommend the Presidency to consult the relevant authorities.

¹ The Trial Chamber appointed the Common Legal Representative for victims on 20 November 2012 (ICC-01/09-02/11-537) and he has been residing in Kenya since 30 December 2012.

² ICC-01/09-02/11-551.

³ ICC-01/09-02/11-551, para. 15.

⁴ ICC-01/09-02/11-551, para. 16.

⁵ ICC-01/09-02/11-551, para. 17.

III. SUBMISSIONS

4. 233 victims were authorized to participate in the Confirmation of Charges Hearing and related proceedings in this case pursuant to the Single Judge's Decision of 26 August 2011.⁶ On 31 October 2011, the former Common Legal Representative for victims informed the Chamber that 229 victims remain as participants in the proceedings.⁷

5. In order to ascertain the views of a reasonably representative sample of the victims of this case on the question of the venue of this trial, the Common Legal Representative and his team undertook consultations between late December 2012 and 5 February 2013 with 155 of the victims who were accepted, by the Pre-Trial Chamber, to participate in this case.⁸

6. The Common Legal Representative and his team took steps to ensure that a broad cross-section of victims was consulted and thus their views could be taken as being indicative of the views of all the victims as a whole. 82 of the victim respondents were female and 73 were male. As the Chamber is aware, the victims in this case are predominantly from the Luo, Luhya and Kalenjin

⁶ "Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings," ICC-01/09-02/11-267, 26 August 2011

⁷ See, "Notification to the Chamber and Request for Re-Notification by 5 December", ICC-01/09-02/11-362, 31 October 2011, para. 6.

⁸ a/1203/10, a/8281/11, a/8285/11, a/8445/11, a/8448/11, a/8451/11, a/8452/11, a/8455/11, a/8457/11, a/8484/11, a/8490/11, a/8495/11, a/8501/11, a/8502/11, a/8503/11, a/8505/11, a/8506/11, a/8507/11, a/8509/11, a/8510/11, a/8531/11, a/8532/11, a/8534/11, a/8535/11, a/8537/11, a/8546/11, a/8550/11, a/8578/11, a/8579/11, a/8580/11, a/8583/11, a/8606/11, a/8609/11, a/8610/11, a/8612/11, a/8613/11, a/8614/11, a/8616/11, a/8617/11, a/8619/11, a/8620/11, a/8624/11, a/8626/11, a/8671/11, a/8688/11, a/8701/11, a/8793/11, a/8795/11, a/8799/11, a/9059/11, a/9060/11, a/9062/11, a/9064/11, a/9066/11, a/9070/11, a/9071/11, a/9072/11, a/9074/11, a/9076/11, a/9081/11, a/9082/11, a/9083/11, a/9084/11, a/9085/11, a/9086/11, a/9087/11, a/9088/11, a/9089/11, a/9090/11, a/9096/11, a/9097/11, a/9098/11, a/9103/11, a/9104/11, a/9106/11, a/9107/11, a/9108/11, a/9109/11, a/9111/11, a/9136/11, a/9140/11, a/9141/11, a/9145/11, a/9153/11, a/9184/11, a/9185/11, a/9186/11, a/9187/11, a/9192/11, a/9193/11, a/9194/11, a/9211/11, a/9215/11, a/9217/11, a/9220/11, a/9221/11, a/9223/11, a/9224/11, a/9227/11, a/9228/11, a/9229/11, a/9249/11, a/9250/11, a/9251/11, a/9252/11, a/9256/11, a/9257/11, a/9258/11, a/9265/11, a/9266/11, a/9279/11, a/9280/11, a/9283/11, a/9285/11, a/9289/11, a/9294/11, a/9295/11, a/9297/11, a/9298/11, a/9299/11, a/9300/11, a/9309/11, a/9311/11, a/9322/11, a/9326/11, a/9329/11, a/9330/11, a/9331/11, a/9334/11, a/9335/11, a/9337/11, a/9338/11, a/9352/11, a/9365/11, a/9370/11, a/9372/11, a/9373/11, a/9374/11, a/9379/11, a/9380/11, a/9382/11, a/9383/11, a/9387/11, a/9388/11, a/9389/11, a/9390/11, a/9391/11, a/9392/11, a/9394/11, a/9396/11, a/9397/11, a/9398/11, a/9399/11, a/9406/11, a/9408/11. Consultations were thus taken with 155 victims who were authorized to participate at the confirmation of charges stage, and who are participating victims at the trial stage.

ethnic groups; the Common Legal Representative and his team consulted members of all three groups. The victims consulted are residing in many towns and villages located in the Western Province, the Nyanza Province and the Rift Valley Province.

7. The majority of the 155 victim respondents were consulted initially by telephone by the Legal Representative's Field Staff. After this initial period, the Common Legal Representative raised the issue with several other victims in person, during six meetings with victims of this case which were held in five towns in Kenya in late January and early February 2013. After brief explanations regarding the possibility of having the ICC trial proceedings take place in either Arusha or Kenya, the victims were asked their preference as to where the trial should take place. Thus, the option of having the ICC hold the trial in Kenya, Arusha or The Hague was given to each individual respondent.
8. 151 victims of the 155 victim respondents consulted (97.4%) expressed a preference that the ICC should hold the trial in The Hague. Some victims expressed their own security concerns as the reason for their choice: *i.e.* the victims fear that the proximity of the Accused to the victims (if the trial were to be held in Arusha or in Kenya) would enhance the threat level to the victims as the Accused could more easily mobilize their supporters to intimidate and interfere with victims participating in this trial. Many also expressed the view that a trial held in or near Kenya could not be fair, as the Accused, who the victims perceive to be very rich and powerful, could more easily exercise undue influence, including bribery and intimidation, over those involved in the proceedings.
9. Two respondents stated that the trial should take place in Nairobi as they would be able to observe the hearings in person.

10. The remaining two respondents consulted communicated no preference as to where the trial should take place. They expressed a loss of interest in the proceedings which, they said, have already been delayed for too long.
11. Several academic commentators have emphasized the benefits of having trials take place close to the location where the crimes were committed and/or to where the surviving victims are living.⁹ It has been asserted that allowing trials to take place near where the crimes were committed helps to ensure that the local communities are familiar with the trial proceedings, have a greater sense of ownership of that process, and helps to reduce the perception of the Court as being a “foreign” court.¹⁰ However, commentators emphasise that the security of witnesses and the impartiality of the process are paramount considerations.¹¹ In the present case, holding the trial in Arusha or in Kenya would present security challenges which threaten the integrity of the trial process.
12. On the basis of the telephone consultations and in-person discussions conducted by the Common Legal Representative and his team, it is clear that the vast majority of the consulted victims have serious concerns regarding the trial process if the trial were to be held in either Arusha or Kenya and wish the trial to be held in The Hague.

⁹ See, for example, J.M Kamatali, ‘From the ICTR to ICC: Learning from the ICTR Experience in Bringing Justice to Rwandans’, *New England Journal of International & Comparative Law*, Vol. 12, p. 90-93, who argues that having trials take place where the crimes took place not only brings justice closer to victims and communities, but also fulfils a deterrence function.

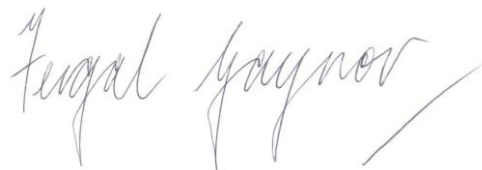
¹⁰ See for example, See J.N Clark, Peace, Justice and the International Criminal Court: Limitations and Possibilities, *Journal of International Criminal Justice* 9 (2011), p.521-545 at 532.

¹¹ For example, Kamatali highlights that the “underlying reason why trials were not organized in Rwanda was not of a psychological, moral or legal nature, but rather a practical problem of security”. Clark also contends that *in situ* trials would of course pose significant practical, logistical and in some cases security challenges.

IV. CONCLUSION

13. In light of the foregoing, the Common Legal Representative for victims submits that the trial should be held in The Hague.

Respectfully submitted,



Fergal Gaynor

Common Legal Representative for Victims

Dated this 7th day of February 2013, at Nairobi, Kenya