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

Date **15 June 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

**Prosecution's Observations on Four Applications for Victims' Participation in the
Proceedings**

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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Introduction

1. Pursuant to Rule 89(1) of the Rules of Procedure and Evidence (“Rules”) and the Single Judge’s First Decision on Victims’ Participation in the Case (“the Decision”),¹ the Prosecution submits the following observations on four (4) applications for participation in the proceedings in the case of The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali.²
2. For the reasons detailed below, the Prosecution supports the Single Judge granting authorisation to the four applicants to participate as victims in the above-mentioned proceedings, pursuant to article 68(3) of the Statute.

Background

3. On 21 March 2011, Pre-Trial Chamber II (the “Pre-Trial Chamber”) designated Judge Ekaterina Trendafilova as Single Judge responsible for carrying out of the functions of the Chamber in the case of The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali.³
4. On 30 March 2011, the Single Judge requested that the parties submit their observations on applications for participation as victims in the case of Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali and ordered the Registry to transmit them to the Prosecution and the Defence in redacted form.⁴
5. On 30 May 2011, the Registry provided the Prosecution with four redacted applications.⁵
6. All four applicants are natural persons.

¹ ICC-01/09-02/11-23.

² ICC-01/09-02/11.

³ ICC-01/09-02/11-9.

⁴ ICC-01/09-02/11-23, para. 22.

⁵ ICC-01/09-02/11-98.

Legal criteria for victim participation in the proceedings

7. The Prosecution considers that victim(s)' participation before the Court is an essential feature of the Statute and the Rules and also an important contribution to international justice. Under the Statute, victims are actors in the administration of international justice rather than its passive subjects. Their participation is a statutory right, not a privilege bestowed on a case-by-case basis.
8. The Prosecution supports victims' participation when all statutory requirements are met. Consistent with its view of the unique and necessary perspective victims lend to the proceedings, the Prosecution supports a liberal approach in permitting applicants to amend or clarify deficient applications, if possible.
9. According to the Appeals Chamber, a person has the right to participate as a victim in the proceedings under Article 68(3) if:
 - (i) he/she qualifies as a victim pursuant to Rule 85; and
 - (ii) his/her personal interests are affected by the proceedings at hand, i.e. by the issues, legal or factual, raised therein.⁶
10. With respect to first requisite in terms of Article 68(3)—qualification as a victim under Rule 85—the established jurisprudence is that the following four criteria must be satisfied for victim status to be warranted, regardless of the stage of the proceedings in which the applicants wish to participate:
 - (i) the applicant must be a natural person as set forth in Rule 85(a) or an organisation or institution as set forth in Rule 85(b);
 - (ii) the applicant must have suffered harm;
 - (iii) the crime from which the harm resulted must fall within the jurisdiction of the Court; and

⁶ See, e.g., ICC-01/04-556 [AC], para. 45; ICC-01/04-01/06-1335 [AC], para. 36.

(iv) there must be a causal link between the crime and the harm.⁷

11. Applicants are only required to make a *prima facie* showing that the four requirements set out above are met.⁸ In reviewing applications, Chambers will generally not delve into the credibility of applicants' statements or require rigorous corroboration.⁹ Rather, Chambers will "assess the applicants' statements first and foremost on the merits of their intrinsic coherence, as well as on the basis of the information otherwise available" to the Chamber.¹⁰
12. The second requisite in terms of Article 68(3)—that the applicant's personal interests are affected by legal or factual issues raised in the proceedings at hand—is considered separately from the victim status.¹¹ As indicated by the Appeals Chamber, "[c]lear examples of where the personal interests of victims are affected are when their protection is in issue and in relation to proceedings for reparations."¹² "An 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".¹³
13. The established jurisprudence additionally requires that the harm suffered and the concept of personal interests must be linked to the charges: i.e. the charges confirmed against the accused or, at earlier stages in the proceedings, the offences alleged in the warrant of arrest or summons to appear or the document containing the charges.¹⁴

Factual analysis of the applications

⁷ See, e.g., ICC-01/04-01/06-601-tEN [PTCI], p. 9; ICC-01/04-01/06-228-tEN [PTCI], p. 7.

⁸ See, e.g., ICC-02/05-01/07-58 [PTCI], para. 7; ICC-01/04-01/07-579 [PTCI], para. 67.

⁹ See, ICC-01/04-01/07-579 [PTCI], para. 67.

¹⁰ ICC-01/04-01/07-579 [PTCI], para. 67, 132.

¹¹ See, e.g., ICC-01/04-556 [AC], para. 45; ICC-01/04-101-tEN-Corr [TCI], para. 62 (indicating that "personal interests" requirement constitutes an additional criterion to be met by victims, over and above the victim status accorded them).

¹² ICC-01/04-01/06-925 [AC], para. 28.

¹³ Ibid.

¹⁴ ICC-01/04-01/06-1432 [AC], paras. 2, 62-65 ("For the purposes of participation in the trial proceedings, the harm alleged by a victim and the concept of personal interests under article 68(3) of the Statute must be linked with the charges confirmed against the accused.").

14. On the strength of the legal principles outlined above, having taken due cognisance of the broad guidelines enunciated by the Single Judge in the Decision, the Prosecution submits that the Applicants namely: a/8278/11, a/8280/11, a/8281/11 and a/8285/11 meet all of the requirements under Article 68(3) for participation in the proceedings of this case.

Conclusion

15. The Prosecution submits that the Applicants namely: a/8278/11, a/8280/11, a/8281/11 and a/8285/11 meet all the requirements under Article 68(3) to participate as victims in the proceedings of this case.



Luis Moreno-Ocampo,
Prosecutor

Dated this 15th day of June, 2011
At The Hague, The Netherlands