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

Date: **11 August 2011**

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single Judge

SITUATION IN KENYA

THE PROSECUTOR

v.

**FRANCIS KIRIMI MUTHAURA
UHURU MUIGAI KENYATTA &
MOHAMMED HUSSEIN ALI**

PUBLIC

**Defence Observations on 245 Applications for Victim Participation in the
Proceedings**

Source: Counsel for Ambassador Francis Kirimi Muthaura

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

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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

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**Victims Participation and Reparations
Section**

Other

I. BACKGROUND

1. On 8 March 2011, Pre-Trial Chamber II (“Chamber”), by majority issued three summonses to appear in the present case.¹
2. On 6 April 2011, the Single Judge issued her “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”, which sets out the principles governing disclosure and stated that a calendar containing the relevant deadlines was “to be issued in due course.”²
3. On 8 April 2011, the initial appearance took place. At this hearing, the Chamber scheduled the confirmation hearing to take place on 21 September 2011.
4. On 20 April 2011, the Single Judge issued the “Decision on the ‘Prosecution’s application requesting disclosure after a final resolution of the Government of Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure Between the Parties,” in which she rejected the Prosecution’s application for deferral of disclosure and established the calendar for disclosure setting out the various time limits for disclosure by the Prosecution and the Defence.³
5. Between 3 June and 11 August 2011, the Prosecution disclosed to the Defence various sets of evidentiary materials which it intends to rely on for the purposes of the confirmation hearing.⁴
6. On 20 July 2011, the Single Judge issued the “Decision Requesting the Parties to Submit Information for the Preparation for the Confirmation Hearing” in which the Single Judge ordered the parties to indicate by 5 August 2011,

¹ ICC-01/09-02/11-1.

² ICC-01/09-02/11-48.

³ ICC-01/09-02/11-64.

⁴ These various disclosures have been effected in compliance with Decision ICC-01/09-02/11-64. See ICC-01/09-02/11-221 containing materials disclosed to the Defence as recently as 10 August 2011.

whether they intended to call *viva voce* witnesses at the confirmation hearing, and if so to further inform the Chamber of the subject-matter and scope of the testimony of the witnesses.⁵

7. On 28 July 2011, the Registry provided the parties with 245 redacted Applications for participation by filing the “Second Transmission to the parties and legal representatives of redacted applications to participate in the proceedings.”⁶
8. Pursuant to Rule 89(1) of the Rules of Procedure and Evidence (“Rules”), the Defence provides the following observations on the 245 applications for participation in the proceedings as victims.

II. DEFENCE OBSERVATIONS

9. The Defence has reviewed the 250 applications and has concluded in light of the multiple deadlines it has to comply with that it would be unable to make *meaningful* observations on *each* application before the commencement of the confirmation hearing on 21 September 2011. In the circumstances, the Defence proposes that the Single Judge proceed to: (i) judicially determine the applications for participation and grant “interim status” to any victim applicants in this case that appear to merit such status so as to ensure their participation at the upcoming confirmation hearing and; (ii) permit the Defence an opportunity to file its observations on the final status of these victim applicants after the confirmation hearing and before the issuance of the

⁵ ICC-01/09-02/11-181.

⁶ ICC-01/09-02/11-200.

confirmation decision, after which filing the the Single Judge may determine the final status of the said victim applications.⁷

10. These proposals are reasonable and proportionate given the current stage of the proceedings. Viewed individually and collectively, each proposal ensures the participation of victims in the proceedings while at the same time respecting the rights of the Defence to prepare effectively for the confirmation hearing with minimum difficulties. Similarly, the proposal ensures that the confirmation hearing takes place in a timely manner and without avoidable delay. Consequently, the Defence respectfully submits that no prejudice arises from the adoption of the present proposals to either the Prosecution, the victims or the Defence.

11. The reasons motivating this conclusion are multiple. First, as noted in the background section above, the Single Judge has issued various orders imposing time limits for disclosures and related procedures, exercise of which in a timely fashion would materially advance these proceedings and ensure that the confirmation hearing takes place as scheduled. This Defence has complied with all decisions and orders imposing time limits to date.

12. Second, the Defence has been and is also currently undertaking investigations in preparation for both the confirmation hearing as well as ensuring compliance with Single Judge's 5 August 2011 deadline to provide a list of *viva voce* witnesses it intends to present at the confirmation hearing.⁸ In order to comply with this latter order, the Defence expedited its investigation even without the benefit of the Document Containing the Charges ("DCC") or clear particulars of certain core allegations. Notwithstanding these significant constraints, the Defence complied with the 5 August 2011 order. Whilst this

⁷ Other subsequent applications for victim participation in this case may be treated in the manner proposed herein to ensure that the confirmation hearing takes place as scheduled.

⁸ ICC-01/09-02/11-181.

may be expected of any reasonable defence, the investigative process has been heightened with every set of disclosure materials received from the Prosecution because the defence has had to review such disclosure and respond to allegations or inferences the Prosecution seems to making in incremental and piecemeal fashion.⁹

13. Furthermore, the Disclosure Decision imposes time limits on the Defence for seeking protective measures such as redactions as well as disclosure of evidence, which the Defence intends to rely on at the confirmation hearing.¹⁰ These processes require reasonable time – time that must be carved out by the Defence from its other work of investigating and preparing for the confirmation of charges hearing.
14. Ensuring both the timely and efficient conduct of both the confirmation hearing and defence investigations requires the Defence to have adequate time and facilities to conduct its investigations and present its case. In these circumstances, any process which limits the defence's ability to conduct its investigations in a timely manner would be inconsistent with the rights of the suspect guaranteed by Article 67(1) of the Statute. Notwithstanding this, the Defence does not consider filing observations on victims' applications to be any such restrictive measure. Rather, the Defence considers that such filings are designed to ensure that participation is consistent with the rights of the suspect.
15. However, considering the large volume of applications in relation to the proximity of the confirmation hearing scheduled for 21 September 2011, the Defence submits that the proposals detailed in the present application are reasonable in that they will ensure timely conduct of the hearings, while at the

⁹ As an illustration, the Defence received disclosure on 10 August 2011, which is as recently as yesterday and has to initiate investigative activity in response to same in order to mount an effective defence which will assist the Chamber in its determinations. See ICC-01/09-02/11-221.

¹⁰ ICC-01/09-02/11-181, para. 22.

same time ensuring participation of victim applicants in a manner consistent with the rights of the Defence. Ensuring victim participation in these circumstances will further the aims and objectives of the Statute because participation on an interim basis would not hamper the ability of the defence to effectively present its case at the upcoming confirmation hearing.¹¹

III. CONCLUSION

16. In light of the foregoing, the Defence respectfully requests that the Single Judge: (i) judicially determine the applications for participation and grant “interim status” to any victim applicants in this case that appear to merit such status so as to ensure their participation at the upcoming confirmation hearing and; (ii) permit the Defence an opportunity to file its observations on the final status of these victim applicants after the confirmation hearing and before the issuance of the confirmation decision after which filing the the Single Judge may determine the final status of the said victim applications.

17. In the alternative, the Defence respectfully requests an extension of time to submit summary observations with respect to those victims whom the Defence submit do not qualify for victim status in the case.

Respectfully submitted,



Karim A. A. Khan QC

Lead Counsel for Ambassador Francis K. Muthaura

Dated this 11th Day of August 2011

At Nairobi, Kenya

¹¹ Such a measure would be consistent with Article 68(3) of the Statute.