



Original: English

No.: ICC-01/09-02/11  
Date: 3 February 2012

**THE APPEALS CHAMBER**

**Before:** Judge Akua Kuenyehia, Presiding Judge  
Judge Sang-Hyun Song  
Judge Erkki Kourula  
Judge Anita Ušacka  
Judge Daniel David Ntanda Nsereko

**SITUATION IN THE REPUBLIC OF KENYA  
IN THE CASE OF THE PROSECUTOR V. FRANCIS KIRIMI MUTHAURA,  
UHURU MUIGAI KENYATTA AND MOHAMED HUSSEIN ALI**

**Public Document**

**Observations on the “Directions on the submission of observations pursuant to  
article 19 (3) of the Rome Statute and rule 59 (3) of the Rules of Procedure and  
Evidence”**

**Source: Office of Public Counsel for Victims**

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

**The Office of the Prosecutor**

Luis Moreno-Ocampo, Prosecutor  
Fatou Bensouda, Deputy Prosecutor

**Counsel for the Defence**

**Counsel for Francis Kirmi Muthaura**

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

**Counsel for Uhuru Muigai Kenyatta**

Steven Kay QC and Gillian Higgins

**Legal Representatives of Applicants**

**Legal Representatives of Victims**

Morris Azuma Anyah

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

Paolina Massidda

**The Office of Public Counsel for  
Victims**

Paolina Massidda

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

**States Representative**

Sir Geoffrey Nice, QC  
Rodney Dixon

**Amicus Curiae**

**REGISTRY**

---

**Registrar & Deputy Registrar**

Silvana Arbia & Didier Preira

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. PROCEDURAL HISTORY

1. On 30 March 2011, the Single Judge of Pre-Trial Chamber I appointed the Office of Public Counsel for Victims (the “Office” or the “OPCV”) to represent unrepresented victim-applicants from the time they submit their applications for participation until a legal representative is chosen by the victims or is appointed by the Chamber.<sup>1</sup>

2. On 28 April 2011, the OPCV submitted its observations on the Government of Kenya’s Application under Article 19 of the Rome Statute on behalf of victim-applicants and generally on behalf of victims who have communicated with the Court in the case.<sup>2</sup>

3. On 23 January 2012, Pre-Trial Chamber II issued the “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”.<sup>3</sup>

4. On 30 January 2012, the Defence for Mr. Muthaura and the Defence for Mr. Kenyatta submitted appeals on jurisdiction under articles 19(6) and 82(1)(a) of the Statute.<sup>4</sup>

5. On 2 February 2012, the Appeals Chamber issued the “Directions on the submission of observations pursuant to article 19(3) of the Rome Statute and rule 59(3) of the Rules of Procedure and Evidence” (the “Directions”) whereby it invited Mr Morris Azuma Anyah, acting as Legal Representative of victims, to submit

---

<sup>1</sup> See the “First Decision on Victims’ Participation in the Case” (Pre-Trial Chamber I, Single Judge), No. ICC-01/09-02/11-23, 30 March 2011, para. 23.

<sup>2</sup> See the “Observations on behalf of victims on the Government of Kenya’s Application under Article 19 of the Rome Statute”, No. ICC-01/09-02/11-74, 28 April 2011.

<sup>3</sup> See the “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute” (Pre-Trial Chamber II), No. ICC-01/09-02/11-382-Red, 26 January 2012 (dated 23 January 2012).

<sup>4</sup> See “Appeal on behalf of Uhuru Muigai Kenyatta and Francis Kirimi Muthaura pursuant to Article 82(1)(a) against Jurisdiction in the ‘Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute’ », No. ICC-01/09-02/11-383 OA4, 30 January 2012.

consolidated observations on the documents in support of the appeals and on the responses thereto within five days of the notification of the responses or, in the event that no response is filed, the effluxion of the time stipulated for that purpose.<sup>5</sup>

6. The Office offers its submissions on behalf of victim-applicants in this case in accordance with the decision of the Pre-Trial Chamber II<sup>6</sup> and generally on behalf of victims who have communicated with the Court in the case.

## II. LEGAL SUBMISSIONS

7. The Office takes note of the Directions, whereby the Appeals Chamber, while referring to article 19(3) of the Statute and rule 59(3) of the Rules of Procedure and Evidence, solely invited Mr. Morris Azuma Anyah, acting as Legal Representative of victims authorized to participate in the proceedings, to submit observations on jurisdiction. Neither victim-applicants nor victims who have communicated with the Court in the present case were invited to submit observations on the issue at stake.

8. The Office submits that in accordance with paragraphs 1(b) and 3 of rule 59 of the Rules of Procedure and Evidence, *"victims who have already communicated with the Court in relation to the case or their legal representatives"* may make representation in writing on any question or challenge of jurisdiction or admissibility arising pursuant to article 19, paragraphs 1, 2 and 3 of the Statute, to the relevant Chamber within such time limit as it considers appropriate.

9. The Office contends that victim-applicants, *i.e.* victims who have applied to participate in the proceedings by submitting the standard application form duly filed

---

<sup>5</sup> See the "Directions on the submission of observations pursuant to article 19(3) of the Rome Statute and rule 59(3) of the Rules of Procedure and Evidence" (Appeals Chamber), No. ICC-01/09-02/11-394 OA4, 2 February 2012 (the "Directions").

<sup>6</sup> See the "First Decision on Victims' Participation in the Case", *supra* note 1, para. 23.

in the case record by the relevant sections of the Registry<sup>7</sup> as well as other individuals not having submitted a standard form but known to the Court should qualify as “victims who have already communicated with the Court in relation to the case” within the meaning of paragraphs 1(b) and 3 of rule 59 of the Rules of Procedure and Evidence.<sup>8</sup>

10. In this regard, the Office submits that the Appeals Chamber systematically invited victim-applicants represented by the OPCV and victims having communicated with the Court to submit observations pursuant to article 19(3) of the Statute and rule 59(3) of the Rules of Procedure and Evidence.<sup>9</sup>

**FOR THE FOREGOING REASONS** the OPCV, acting on behalf of victim-applicants in this case and generally on behalf of victims who have communicated with the Court in the present case, respectfully requests the Appeals Chamber to find that the Office is entitled to submit observations on jurisdiction pursuant to article 19(3) of the Rome Statute and rule 59(3) of the Rules of Procedure and Evidence on behalf of

---

<sup>7</sup> See the “Decision requesting observations on the ‘Defence Challenge to the Jurisdiction of the Court’” (Pre-Trial Chamber I), No. ICC-01/04-01/10-377, 16 August 2011, pp. 3-4. According to the Chamber, “consistent with the jurisprudence of the Court, victims “that have communicated with the Court” for the purposes of the current proceedings are those (i) who have been recognised as victims for the purpose of participation in the pre-trial proceedings in the case against [the suspect]; (ii) in relation to whom a decision on their applications for participation has been deferred until further information in support thereof is provided to the Chamber; (iii) who have submitted to the Registry applications for participation in the case against [the suspect], which are yet to be transmitted to the Chamber.”

<sup>8</sup> See the “Decision on victims’ application for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-101, 10 August 2007, paras. 93 and 94.

<sup>9</sup> See the “Directions on the submission of observations pursuant to article 19(3) of the Rome Statute and rule 59 (3) of the Rules of Procedure and Evidence” (Appeals Chamber), No. ICC-01/09-01/11-123, 13 June 2011; the “Instructions relatives à la soumission d’observations en vertu de l’article 19-3 du Statut de Rome et de la règle 59-3 du Règlement de procédure et de preuve” (Appeals Chamber), No. ICC-01/05-01/08-818, 12 July 2010; the “Directions on the submission of observations pursuant to article 19(3) of the Rome Statute and rule 59(3) of the Rules of Procedure and Evidence” (Appeals Chamber), No. ICC-01/04-01/07-1295 OA8, 13 July 2009 (dated 10 July 2009).

the said categories of victims, within such time limit as the Appeals Chamber considers appropriate.

A handwritten signature in black ink, which appears to read 'Paolina Massidda', is written over a horizontal line.

-  
**Paolina Massidda**  
**Principal Counsel**

Dated this 3<sup>rd</sup> day of February 2012

At The Hague, The Netherlands