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

Date: **28 May 2012**

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' Submissions in Response to the Order Scheduling a Status Conference

Source: Victims' Legal Representative

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

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I. INTRODUCTION

1. On 14 May 2012 the Trial Chamber, acting in accordance with Rule 132(1) of the Rules of Procedure and Evidence (“Rules”), issued an *Order scheduling a status conference*¹ in the case for 12 June 2012 at 1:00 p.m.
2. With a view towards facilitating adequate preparations for the status conference, the Order delineated an agenda for the status conference and requested written submissions from the parties (defined as “the Office of the Prosecutor... and the defence, as well as the legal representatives of victims and the Registry”²), regarding agenda items which are of relevance to them not later than 28 May 2012.³ The Order also left it to the discretion of the Common Legal Representative whether or not to make submissions, in respect of items A-C of the agenda⁴: i.e., the date of trial, the languages to be used in the proceedings and the anticipated length of the presentation of evidence at trial.⁵
3. Furthermore, the Order invited the parties, the Legal Representative of Victims, and the Registry to indicate in their written submissions, any additional items they wish to be included as part of the agenda for the status conference.⁶
4. Lastly, the Order requested the parties, the Legal Representative of Victims, and the Registry, to bring any other issue that requires resolution before the commencement of the trial to the attention of the Chamber.⁷
5. The Legal Representative for Victims hereby makes the following submissions in response to the Order.

II. SUBMISSIONS ON ITEMS A TO C OF THE AGENDA

A. Date of the trial

¹ *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, “Order scheduling a status conference” (Hereinafter, the “Order”), ICC-01/09-02/11-422, 14 May 2012.

² Order, para. 2.

³ Order, para. 3.

⁴ *Ibid.*

⁵ Order, paras. 2 and 3.

⁶ Order, para. 4.

⁷ *Ibid.*

6. The Legal Representative acknowledges at the outset, that information critical to determining with better certainty the appropriate date for the beginning of the trial is not available to the victims at this stage of the proceedings. Among other matters, the victims are currently not aware of the volume of evidence the Prosecution and the Defence intend to rely on at trial, how much of that evidence will be disclosed (or ordered disclosed) to the Legal Representative, the number of witnesses the Prosecution and the Defence intend to call, when the Prosecution will be discharging its disclosure obligations, whether the Prosecution intends to apply for protective measures for certain witnesses and, to that end, how long would be required for any such measures to be implemented, to name but a few.
7. There is the additional observation that the amount of time the Legal Representative will require in order to adequately prepare for trial depends significantly on whether the Trial Chamber elects to exercise its discretion, as envisaged under Regulation 56 of the Regulations of the Court ("Regulations"), to call witnesses and examine evidence for the purposes of a decision on reparations at the same time as for the purposes of trial.
8. The foregoing notwithstanding, the victims are of the considered view that it is objectively reasonable to set a date for the commencement of the trial that is within one calendar year of the date on which Pre-Trial Chamber II rejected the Defence applications for leave to appeal the Decision on the Confirmation of Charges⁸ -- i.e., 9 March 2012. Affording the parties and the victims such duration of time to prepare and commence the trial is, in the victims' view and in the totality of the circumstances, objectively reasonable and entirely appropriate. Accordingly, the victims propose that the trial in this case be set for commencement on a working date not later than 9 March 2013.

⁸ *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, "Decision on the Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges," ICC-01/09-02/11-406, 9 March 2012.

9. The setting of such a date for the commencement of the trial would provide parties and participants, alike, with adequate time to prepare for trial, while simultaneously ensuring the fair and expeditious conduct of the proceedings, in compliance with the Trial Chamber's obligations under Article 64(2).

B. Languages to be used in the proceedings

10. The Legal Representative anticipates that he will be seeking authorization from the Chamber to call certain victims to testify and/ or to express their views and concerns during trial. At this stage of the proceedings, however, the Legal Representative is still in the process of identifying those victims regarding whom leave will be sought for purposes of testimonial evidence before the Chamber.
11. Nonetheless, and bearing in mind the face-to-face meetings held by the Legal Representative with his client-victims during his various missions to Kenya, the vast majority of his clients would only be able to testify if authorised to speak Luo, or Kiswahili, or Kalenjin, or Luhya. French may be excluded as a language applicable to any currently participating victim, and the number of participating victims who would be capable of testifying or expressing their views and concerns before the Court in the English language constitute a significant exception. Consequently, the Legal Representative envisions that currently participating victims who may be authorized to testify before the Court will speak Luo, or Kiswahili, or Luhya, or Kalenjin, and only exceptionally English.
12. Furthermore, and subject to the Legal Representative being afforded the opportunity of suggesting that the Chamber call certain witnesses who are not victims, the Legal Representative anticipates that those witnesses will very likely be able to testify in English.

C. Length of the presentation of the evidence at trial

13. The Legal Representative currently anticipates that he will be seeking authorisation from the Chamber to call between four and five victims as *viva voce* witnesses for the purpose of assisting the Chamber in the determination of the truth.
14. In addition, and consistent with the Trial Chamber's "Decision on the Modalities of Victim Participation at Trial" in the case of the *Prosecutor v. Katanga and Ngudjolo*,⁹ the Legal Representative anticipates suggesting that the Chamber call one or two witnesses other than victims, if at the end of the presentation of the respective cases of the Prosecution and the Defence, the Legal Representative is of the view that testimonial evidence by such witnesses might assist the Chamber in its search for the truth. In respect of any such witness, the Legal Representative anticipates that one day should be sufficient for questions from the Bench, examinations in-chief and/ or on cross, as applicable.

III. SUBMISSIONS ON ITEMS OF THE AGENDA RELEVANT TO VICTIMS: I, L, N and O

15. Given the inclusion of the "legal Representative[]" of victims" in the definition of "parties" in paragraph 2 of the Order, the Legal Representative hereby wishes to exercise that designation in making submissions (consistent with paragraph 3 of the Order) on additional items on the agenda for the status conference which are of relevance to his clients : namely, items I, L, N and O.

I. Whether the parties intend to call experts in accordance with Regulation 44 of the Regulations and, if so, whether they intend to give joint or separate instructions to expert witnesses

⁹ *Prosecutor v. Katanga and Ngudjolo*, "Decision on the Modalities of Victim Participation at Trial," ICC-01/04-01/07-1788, 22 January 2010, paras. 94-96.

16. The Legal Representative envisions, at the appropriate time, recommending that the Trial Chamber call certain expert witnesses, to the extent it is believed their evidence would be necessary for the establishment of the truth.

L. E-court protocol

17. To the extent of any orders which may be granted the Legal Representative by the Chamber regarding access to non-public *inter partes* disclosures/ materials, the access rights of the Legal Representative, his Case Manager, and Legal Assistant(s) within the E-court protocol would necessarily require modification to reflect the scope of authorization of any such order.

N. Whether the parties intend to make applications for a legal re-characterisation of facts under Regulation 55 of the Regulations

18. The Legal Representative hereby advises the Chamber that he would only be in a position to say whether or not he will be applying for a legal re-characterization of facts, pursuant to Regulation 55 of the Regulations, at such time as the evidence is presented.

O. Whether the parties envisage that a site visit may be necessary, and, if so, at what stage of the proceedings

19. The Legal Representative strongly recommends that the Trial Chamber undertake a site visit to Kenya, prior to the commencement of the trial. Such a site visit would provide a mental image of the locations where the charged crimes were allegedly planned and executed, and where victims took refuge and shelter. This visual perspective would be most beneficial if acquired prior to the presentation of the evidence, as it will undoubtedly enhance the ability of the Trial Chamber to put into proper context, the information received during the trial.

IV. ADDITIONAL ITEMS FOR INCLUSION ON THE AGENDA FOR THE STATUS CONFERENCE

20. In response to the invitation of the Chamber in the Order,¹⁰ the Legal Representative respectfully proposes that the following matters be added to the agenda of items for the status conference of 12 June 2012:

- a) whether the Trial Chamber intends to exercise its discretion under Regulation 56 of the Regulations. The Legal Representative submits that the early resolution of this question would be beneficial to the participants and the parties, since it will direct and guide them in their future submissions on the modalities of victim participation at trial;
- b) the prevailing procedure that the Legal Representative seek the pre-approval of the Registry (specifically, the Counsel Support Section) for any and all activities the Legal Representative wishes to undertake in the case, in order for any such activity to become eligible for remuneration under the prevailing legal aid system;
- c) the impact of the changes introduced to the legal aid remunerative system by the Decision of the Bureau of the Assembly of States Parties of 22 March 2012 on the Legal Representative's ability to receive assistance from his field staff and, indeed, to effectively represent his clients in compliance with his duties and obligations, as envisaged in the Code of Professional Conduct for Counsel; and
- d) the due date for written submissions and/ or for the convening of a status conference in relation to the modalities of victim participation.¹¹

¹⁰ Order, para. 4.

¹¹ This issue is generally bifurcated between the modalities of victims' participation in the proceedings leading up to, and during, the trial. See, e.g., *Prosecutor v. Thomas Lubanga Dyilo*, "Order setting out schedule for submissions and hearings regarding the subjects that require early determination," ICC-01/04-01/06-947, 5 September 2007, para. 3.

Respectfully submitted,



Morris Anyah

Victims' Legal Representative

Dated this 28th day of May 2012

At The Hague, The Netherlands.