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Date: **13 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 MOHAMED HUSSEIN ALI

Public Document

With confidential, Ex parte, only available to OPCV Annex 1 and Public Annex 2

**Observations of Victim-Applicants on the Place of the Proceedings for the
Purposes of the Confirmation of Charges Hearing**

Source: Office of Public Counsel for Victims

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

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INTRODUCTION

1. The victim-applicants oppose holding the confirmation of charges hearing in Kenya. The security situation and governmental apparatus presently in place are not conducive to a proper hearing. Holding the confirmation hearing in Kenya could increase the risk of violence, including against those who might be suspected of being actual or potential victim-applicants in the proceedings.

PROCEDURAL HISTORY

2. The hearing to confirm the charges on which the defendants may be tried is scheduled to commence on 21 September 2011.¹ The Pre-Trial Chamber announced on 3 June 2011 that it was “in the process of assessing the desirability and feasibility of conducting the confirmation of charges hearing on the territory of the Republic of Kenya” and requested observations from, *inter alia*, “victims who have applied for participation”.²

SUBMISSIONS

3. The victim-applicants in the present case unanimously oppose holding the confirmation of charges hearings in Kenya.³ They believe that witnesses would not be able to testify freely and with confidence if obliged to testify in Kenya, and that the truth, under these circumstances, is more likely to be spoken in The Hague. This

¹ Transcript of the hearing held on 8 April 2011, ICC-01/09-02/11-T-1-ENG ET WT p. 14.

² “Decision Requesting Observations on the Place of the Proceedings for the Purposes of the Confirmation of Charges Hearing”, ICC-01/09-02/11-102, 3 June 2011, para. 7. The Pre-Trial Chamber appointed the Office of Public Counsel for Victims to submit observations on behalf of the victim-applicants.

³ The present submissions are made after consultation with six of the eight victim-applicants represented by the Office. One could not be contacted in time for these submissions, and contact with another has been postponed until certain security issues have been resolved.

view is particularly salient considering that the Prosecution has announced its intention to rely on the oral testimony of ten witnesses, some or all of whom may already have been relocated outside of Kenya.⁴ Requiring them to return to Kenya to testify in person at the confirmation hearing would pose a serious risk of disclosure of their identities – if only because of immigration formalities – and would increase the risk that they or their families might be intimidated. Resort to video-link testimony, even assuming that that could be an effective means of protecting the witnesses' identity, would largely defeat the purpose of having hearings closer to the communities most affected by the crimes.

4. The risk of witness intimidation in this case is real. One victim-applicant reported that she had herself been harassed and threatened as a result of perceptions that she might be a potential complainant or witness in one or more of the various processes underway to address the post-election violence. Others, while not saying that they had themselves been harassed or threatened, expressed fear that they would be if their involvement in the proceedings were to become known. These opinions were based on their own perceptions of the atmosphere in their immediate communities.

5. These concerns are consistent with reports by sources that cannot legitimately be accused of bias or partiality. Former United States Ambassador to Kenya Michael E. Ranneberger wrote in a confidential cable on 5 January 2010 that “we have noted a steady rise in the number of individuals threatened or killed for political reasons. A number of witnesses who testified before the Commission to Investigate Post-Election Violence, also known as the Waki Commission, have already been threatened.”⁵ He went on to say that “multiple sources indicate that implicated political leaders, notably cabinet ministers William Ruto and Uhuru Kenyatta, are

⁴ Transcripts of the hearing held on 18 April 2011, ICC-01/09-02/11-T-2-ENG ET WT, pp. 6, 18.

⁵ <http://wikileaks.ch/cable/2010/01/10NAIROBI11.html> (accessed on 11 June 2011), para. 4.

directing a campaign of intimidation against potential witnesses.”⁶ State witness protection mechanisms were assessed to be insufficiently independent to ensure the security of those under its protection.⁷

6. Amnesty International, though acknowledging recent amendments to the witness protection regime, has expressed concern that:

the law is not yet fully operational and that it is too soon to determine whether it will offer effective protection for victims and witnesses of the post-election violence. As of last year, up to 22 witnesses who testified before a 2008 official inquiry into the post-election violence, who might be called to testify in future ICC or other court trials, were reported to be living in fear as a result of threats to their lives or security. An unknown number of other potential witnesses have had to flee Kenya in the last three years because of similar threats against them.⁸

7. Two organizations with extensive experience working with victims in Kenya have reported overt acts of violence, as well as threats and intimidation. (The unsolicited reports of these organizations are annexed, one of which has been redacted pursuant to Regulation 23*bis* of the Regulations of the Court, and on the basis of consultations with the authors to preserve the privacy and safety of the

⁶ *Ibid.* para. 6.

⁷ *Ibidem.* paras. 7-14.

⁸ <https://www.amnesty.org/en/library/info/AFR32/003/2011/en> (accessed on 11 June 2011). A similarly skeptical view has been expressed by the Kenyan Section of the International Commission of Jurists: “Transmission by the Registry of both the ‘Request for leave to submit Amicus Curiae Observations on behalf of The Kenyan Section of the International Commission of Jurists Pursuant to Rule 103 of the Rules of Procedure and Evidence’ and the ‘Proposed Amicus Curiae Observations by the Kenyan Section of the International Commission of Jurists Pursuant to Rule 101 of the Rules of Procedure and Evidence’”, No. ICC-01/09-02/11-75-Anx2, para. 49 (“It is noteworthy that Power in Africa is also wielded informally and the positions that Mr. Kenyatta and Mr. Muthaura resigned from [the head of the National Security and Advisory Committee, and membership on the Witness Protection Advisory Board, respectively] are derivatives of the positions of the Head of Civil Service and Minister of Finance, which positions they have not relinquished and they therefore continue to retain considerable moral influence in the Government and will continue to influence issues relating to witness protection or national security that may eventually have a negative impact on the proper execution of investigations and prosecution of the cases before the court”).

persons concerned, as well as of victims who reside in Kenya.)⁹ Witnesses obliged to return to Kenya to give testimony at the confirmation hearing risk disclosure of their identities, which would mean that “they and their closest relatives will be in danger of inducement, intimidation or persecution.”¹⁰

8. Non-witness victims, under these unfortunate circumstances, will be no more involved in, and feel no greater ownership of, confirmation hearings held in Kenya. As one organization working with victims observed:

It is noteworthy that there is no credible infrastructure for the protection of witnesses or victims in Kenya and any exposure will significantly endanger the lives of victims, witnesses and or their close relatives. This fact is well-known to the parties before the ICC as well as the victims, the latter of whom have expressed to us that a hearing locally would make them feel endangered and thereby shun the process. Having confirmation of charges hearings will therefore be a self-defeating process.¹¹

9. Finally, holding the confirmation of charges hearing in Kenya could increase the danger of an outbreak of violence. Victim-applicants expressed concern that the hearings might be exploited for domestic political consumption, a potential that would only be exacerbated by holding proceedings in Kenya. Organizations working closely with victims echoed that concern, noting for example that “[t]here is a great danger that the hearings will be used to generate a negative public mood and to divide the nation.”¹² The least that can be said is that the hearings could have unforeseen consequences on the security situation in Kenya.

⁹ Annex 1, Memorandum of Kituo Cha Sheria, p. 2 (“The security situation for victims of the Post election violence 2007 and other victims of violence is still alarming. While there are only isolated acts of reprisal/attacks/acts of violence/incidents, in certain regions such as Eldoret IDPs stopped rebuilding their houses, as every attempt to do so is followed by threats/intimidation from the neighbourhood. One of our clients received a letter threatening murder”); Annex 2, Observations of the International Centre for Policy and Conflict, para. 11.

¹⁰ Annex 2, Observations of The International Centre for Policy and Conflict, para. 11.

¹¹ *Ibid.* See also Annex 1, Memorandum of Kituo Cha Sheria, p. 3.

¹² Annex 1, Memorandum of Kituo Cha Sheria, p. 2

10. The Pre-Trial Chamber's initiative in considering holding the confirmation hearings as close as possible to the affected communities is greatly appreciated by the victim-applicants. The unfortunate reality, however, is that such hearings would not be in the interests of justice given current circumstances.

Respectfully submitted.

A handwritten signature in black ink, appearing to read 'Ch. Gosnell', is centered on the page.

Christopher Gosnell
Counsel

Dated this 13th day of June 2011

At The Hague, The Netherlands