

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 5 August 2011

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single Judge

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
THE PROSECUTOR *v.* FRANCIS KIRIMI MUTHAURA, UHURU MUIGAI
KENYATTA AND MOHAMMED HUSSEIN ALI**

Public

Proposal for the common legal representation of victims

Source: Registry

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

Mr Francis Kakai Kissinger

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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Ms Fiona McKay

Other

The Registrar of the International Criminal Court ("the Court");

NOTING the Prosecutor's Request on 26 November 2009 for authorization of an investigation pursuant to Article 15.¹

NOTING the Chamber's order on 10 December 2009 to the Victims Participation and Reparations Section Concerning Victims' Representations Pursuant to Article 15(3) of the Statute.²

NOTING the Chamber's Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya of 31 March 2010 (the "Article 15 Decision");³

NOTING the Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigi Kenyatta and Mohammed Hussein Ali;⁴

NOTING the Decision on the Prosecutor's Application for Summons to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali;⁵

NOTING the Decision Designating a Single Judge;⁶

NOTING the First Decision on Victims' Participation in the Case (the "First Decision");⁷

NOTING the instructions of the Single Judge that recommendations for common legal representation be submitted by 19 August 2011;⁸

¹ ICC-01/09-3.

² ICC-01/09-4.

³ ICC-01/09-19.

⁴ ICC01/09-31-Red2

⁵ ICC-01/09-02/11-1.

⁶ ICC-01/09-02/11-9.

⁷ ICC-01/09-02/11-23.

⁸ Email from Associate Legal Officer, PTCII to Associate Legal Officer VPRS, 19 July 2011.

NOTING article 68(3) of the Rome Statute, rules 16(1)(b) and 90 of the Rules of Procedure and Evidence (the "RPE"), regulations 23*bis*, 79 and 86(9) of the Regulations of the Court; and regulations 112 and 113 of the Regulations of the Registry;

CONSIDERING that following the Chamber's Article 15 Decision,⁹ the Registry met with victims and community leaders in order to discuss with them the decision, the work of the Court and victim participation, including issues of legal representation.

CONSIDERING that further discussions with counsel and victims were held during subsequent Registry activity in Kenya, in accordance with rule 16(1)(b) of the RPE and with the Chamber's Decision on Victims' Participation in Proceedings Related to the Situation in the Republic of Kenya.¹⁰

CONSIDERING that the Registry has taken steps to implement the Single Judge's First Decision, in which the Registry was instructed "to take appropriate steps with a view to organizing common legal representation for the purposes of the confirmation of charges hearing."¹¹

CONSIDERING that Annex 5 to the present document is classified as confidential *ex parte* in order to preserve the anonymity of the candidate for common legal representative proposed by the Registry so that the Chamber is in a position to freely decide on the current proposal without prejudicing the candidate's reputation;

TRANSMITS the following proposal on the organisation of common legal representation to the Chamber.

⁹ ICC-01/09-19.

¹⁰ ICC-01/09-24, paragraph 23.

¹¹ ICC-01/09-02/11-23, paragraph 24.

1 Introduction

1. The present document reports on the steps taken and the arrangements proposed by the Registry for the common legal representation of victims, in accordance with the Single Judge's instructions¹² and rule 90 of the RPE.

2 The Registry's approach to organizing common legal representation

2. The Registry takes note of its mandate in respect of the organization of legal representation, as set out in rule 16(1)(b) and rule 90 of the RPE. The details of this mandate and the established practice of the Registry in this regard are explained in Annex 1 to the present report.
3. Bearing in mind the difficulties described in Annex 1, the Registry has now commenced a process of establishing a systematic approach to common legal representation which aims to incorporate:
 - (a) early action on common legal representation;
 - (b) meaningful consultation with victims; and
 - (c) an open transparent and objective selection process.
4. The Registry notes that in the present case it has yet to fully realise this approach, particularly because of the short period of time available before the confirmation hearing. However basic aspects of the proposal have been implemented , including:
 - a. Victim grouping has been determined taking into account views and information provided by victims and intermediaries and bearing in mind the advantages of minimising the number of groups.

¹² ICC-01/09-02/11-23, paragraph 24.

- b. Selection criteria and the respective weight accorded to them have been established, taking into account the views and information provided by victims and intermediaries as well as the previous experience of the Registry.
- c. An invitation has been distributed through the Registry's list of counsel inviting lawyers to express their interest in representing victims in the Kenya cases. The Registry notes that this is the first time that such a step has been taken by it in the process of recommending victims' legal representation.
- d. The work performed to date by legal representatives already involved in the case has been taken into account.
5. The Registry notes its concern that it has been possible only to undertake limited consultations with victims in the present case. The Court's texts give clear importance to victims' views in the appointment of their counsel, including where common legal representation is arranged,¹³ and this has also been recognized by Chambers.¹⁴ Victims' views should be considered when deciding procedural questions (the steps to be followed and criteria to be used) as well as on the substantive questions of victim grouping and the selection of counsel.
6. Where, as in the present case, common legal representation is organized before victims are accepted to participate in proceedings, there is a risk that victims' views may be sidelined. The Registry has sought to address this by relying on views expressed on legal representation by members of various victim communities throughout the Registry's work in Kenya. While this approach has its limitations, the Registry considers that it has been able to establish an understanding of victims' preferences regarding their legal representation.

¹³ Rule 90(1) and (2), rule 79(2).

¹⁴ ICC-01/04-01/06-1119, paragraph 126; ICC-01/05-01/08-322, paragraph 9; ICC-01/05-01/08-1005, paragraph 14.

7. Indeed the Registry considers such an approach preferable to relying on consultations with existing legal representatives, as has occurred in previous cases.¹⁵ While existing counsel may provide relevant information, their input cannot replace direct consultations with victims, not least because there is a real risk of a conflict between the interests of victims and those of their current counsel when common legal representation is arranged. In addition, victims may be understandably reluctant to speak frankly with their existing counsel regarding any concerns they may have about their legal representation to date.

8. Notwithstanding that the Registry did take into account views presented by victims during earlier engagements with them, it is recognized that the present process did not include a tailored and specific consultation on the organization of common legal representation. This has principally been a result of the resource constraints faced by the Registry in the area of victims' participation and the need to prioritize the receipt of applications and supplementary information ahead of the deadlines set by the Chamber for transmissions in the two Kenya cases. The Registry considers this lack of a tailored consultation to be regrettable and emphasizes that its preferred means of operating would involve a much greater emphasis on discussions with the applicants and victim communities.

3 The organization of common legal representation in the present case

3.1 Identification of victim groups

9. As noted in Annex 1, the rule 90 process is intended to promote efficiency in the proceedings.¹⁶ As each legal team representing a victim group may separately seek to make submissions, question witnesses and lead evidence, efficiency is

¹⁵ See for example the following Registry reports: ICC-01/04-01/06-1501-Conf-Exp, paragraph 17; ICC-01/04-01/06-1584-Conf-Exp, paragraphs 8-20; ICC-01/04-01/07-765, pages 10 to 11; ICC-01/04-01/07-1373-Conf-Exp, paragraphs 7-11; ICC-01/05-01/08-806-Conf-Exp, paragraphs 31-35.

¹⁶ ICC-01/04-01/06-1119, paragraph 125; see also ICC-01/04-01/07-1328, paragraph 10(b); ICC-01/05-01/08-1005, paragraph 9.

increased by reducing the number of groups and teams. Representation through one legal team would also maximise the prospects of coherent strategy. In addition it is financially more efficient to constitute one large team than to appoint multiple small teams (each led by separate lead counsel). These factors all indicate advantages in arranging victims' representation through as few groupings and corresponding legal teams as are appropriate in a given case.

10. However the Registry also notes the important principle enshrined in rule 90(4), namely the need to protect the "distinct interests of the victims" and ensure that "any conflict of interest is avoided." The Registry's approach is therefore to seek to identify whether victims appear to have, among themselves, any conflicting or substantially "distinct interests" such as would justify their separate representation. Where no such conflict or distinct interests exist the Registry considers it appropriate that all participating victims share one legal team for the purpose of representation in the proceedings.

11. The Registry has carefully considered whether any conflicts of interest arise in the present case, or whether applicants possess "distinct interest" such as would require the separate representation of two or more victim groups. The considerations which arose in this process are detailed in Annex 2.

12. The Registry's conclusion following this process is that thus far it is unable to identify any conflicting or significantly distinct interests among the applicants for participation in the present case. However the Registry considers that some caution is necessary not only because it is not yet known which issues will be contentious in the proceedings, but also owing to the historically complex context and continually changing political alliances among ethnic groups in the Rift Valley. Indeed, the Registry considers that identifying conflicting or divergent interests among victims must be an ongoing process taking into account the developing subject matter of the litigation and the interests and views of the various victims in relation to those matters.

13. Bearing these factors in mind the Registry considers that at this time a single legal team should be constituted to represent all victims accepted to participate in the proceedings, but that the common legal representative should consult with victim participants and take any other appropriate steps to establish whether or not distinct or conflicting interests exist among them. Should any conflict or significant divergence of interest be reported, either immediately or during the course of proceedings, the Registry could propose the arrangement of legal representation for a separate victim group or groups.

14. For these reasons the Registry proposes that, at least for the present time, a single group of victims be constituted and represented together in the present case.

3.2 Identification of a common legal representative

15. Given its view that all victim participants in the present case should share a single legal team, the Registry has endeavoured to select one candidate to recommend as common legal representative.

3.2.1 Criteria applied

16. As noted above the Registry has sought to establish an open, transparent and objective approach to selecting candidates to recommend as common legal representatives. This means that beyond considering the minimum requirements set out in the Court's texts,¹⁷ it is necessary to choose from among the qualified counsel on the basis of identified criteria. The Registry has therefore established a set of standard, basic criteria, based on the court's jurisprudence and the Registry's experience to date, which would be a starting point for selecting common legal representatives in most proceedings (Annex 3).

17. However the Registry also recognizes that its approach must respond to the particularities of a given case and the views of the victims who participate in it.

¹⁷Rule 22, RPE; regulation 67; Regulations of the Court.

It may be necessary in a particular case to adapt some criteria or the priority respectively accorded to them. Wherever possible this should be done based on consultation with victims. In this case, since victims have not yet been accepted to participate, efforts were made to seek the input of affected communities and the intermediaries who have facilitated applicants' communication with the Court.¹⁸

18. In the present case, the input received shows that Kenyan victims are wary of lawyers in the domestic context and prioritize legal experience at the international level over a link to the national system. They also emphasize the need for caution regarding ethnically partisan lawyers, in order to avoid potentially creating or reinforcing divisions among victims. These factors were taken into account by the Registry in according the appropriate levels of weight to the identified selection criteria as set out in Annex 4.

3.2.2 *Current legal representatives*

19. Before explaining its selection process, the Registry considers it important to explain the approach taken regarding the counsel currently representing victim applicants in the present case. The 249 applicants whose applications have been transmitted to the Chamber are currently represented as follows:

- a) 13 applicants are represented by Mr Francis Kakai Kissinger.
- b) 125 applicants were unrepresented at the time their applications were received by the Registry and the Office of Public Counsel for Victims was therefore appointed in accordance with the First Decision.¹⁹

¹⁸ Input was principally gathered through meetings held with victims and victim community leaders during VPRS missions in Kenya during 2010, and through communications with intermediaries and civil society groups between December 2009 and the present time.

¹⁹ ICC-01/09-02/11-23, paragraph 23.

20. The Registry notes that Mr Kakai Kissinger was among those who expressed an interest in acting as common legal representative and engaged in the selection process described below.

21. As explained in Annex 1, the Registry considers that there are usually benefits in maintaining continuity of legal representation. However such benefits must be assessed through the framework of the same criteria applied to other counsel. The Registry has therefore considered existing counsel according to the identified criteria. In doing so, the Registry:

- has considered whether counsel's previous involvement in the case indicates an established relationship of trust with the applicants, and/or whether it demonstrates a familiarity with ICC proceedings (see the criteria identified above in paragraph 18), particularly in the present case;
- has also sought to apply the other identified selection criteria to the current legal representatives; and
- has taken into account information available to it regarding the work conducted by these lawyers to date which might be relevant to one or more of the criteria.

22. Based on this evaluation, the Registry concludes that the benefits of continuity of representation are minimal in respect of the existing private legal representatives in the present case, and are significantly outweighed by other considerations. In particular, regarding the identified criteria, the Registry notes that:

- i) The Registry is not convinced that the current legal representatives have established meaningful relationships of trust with a significant number of their clients. Indeed the Registry has noted a practice on the part of some counsel, according to which they have developed a relationship with an intermediary who then ensures that the counsel's name is added to the application forms of the victims whom the intermediary has contact with.

While this may, in some circumstances, constitute the best means by which to reach large numbers of victims, particularly where legal aid has not yet been made available, it cannot be said that those who have engaged in this process have yet established a relationship with the victims themselves.

- ii) The Registry is likewise unconvinced that counsel's representation to date in this case indicates a particular familiarity with ICC proceedings. The Registry notes that no victims have yet been accepted to participate in the case. Accordingly, the current victims' representatives have thus far not had standing to present submissions, or enjoyed access to any part of the confidential record of the case. They have therefore had only minimally greater exposure to the proceedings than the public. Indeed most of the counsel involved to date have not engaged in any significant way with the Court in their capacity as the representatives of applicants in the present case.

23. The Registry therefore emphasizes that the prior representation of applicants in a case is not *of itself* a determinative factor in choosing a common legal representative. In the present case, having reviewed the information available, the Registry concludes that the involvement to date of victims' current counsel has not provided them with any material advantage over other candidates in terms of the selection criteria.

3.2.3 Selection process

24. On 17 June 2011 a document was sent to lawyers on the Registry's list of counsel (attached as Annex 4) informing them of the rule 90 process underway, and inviting persons wishing to represent victims in the present case to express their interest. Counsel were informed of the criteria to be used and asked to provide, by 1 July 2011, a *curriculum vitae* and information indicating their suitability in relation to the criteria. By the deadline set, the Registry received 72 responses. Of these 56 included the information requested.

25. An initial review of these 56 responses was carried out to ascertain whether, at a minimum level, they met the requirements and criteria. For example, counsel were excluded if their availability appeared to be manifestly insufficient.
26. The 22 counsel identified as meeting the basic requirements were requested to provide written answers to two follow-up questions concerning their proposed approach to the legal representation of victims. A further assessment taking into account these responses was then made against the identified selection criteria.
27. Lastly, 12 counsel were invited to undertake a telephone interview. These were conducted using standardized questions and carried out by a panel of Registry staff designated by the Counsel Support Section and Victims Participation and Reparations Section (the "VPRS").
28. Final deliberations were undertaken using all information supplied by the interested counsel, and a clear agreement was reached within the Registry on an appropriate counsel to be proposed as common legal representative.
29. Based on this process the Registry has proposed a counsel for the position of common legal representative in the present case. The candidate's expression of interest and *curriculum vitae* are attached as Annex 5.

3.2.4 Appropriate team structure

30. The Registry considers that the Chamber may be assisted in its decision on common legal representation by information regarding the scope and nature of the support which will be available to the appointed counsel. This factor has been borne in mind by the Registry in considering the proposed counsel's suitability for the position. The Registry considers that to ensure the effective legal representation of participating victims, there will always be a need to complement a common legal representative's skills and experience with appropriate assistance from other members of a legal team.

31. In the present case the common legal representative is likely to be reliant on the Court's legal aid scheme pursuant to rule 90(5). The Registry therefore notes that the size and nature of the legal team able to be constituted will largely depend on the resources made available for that purpose by the Registry.

32. The Registry has taken into account the principles set down by Trial Chamber II and adopted by Trial Chamber III, according to which the victims' legal team structure must, to the extent possible and within the limits available under legal aid, allow the common legal representative to keep his/her clients informed and respond to their inquiries (in a language understood by them), receive instructions and guidelines from his/her clients, maintain files regarding his/her clients, obtain qualified legal support as necessary, and store and process confidential material.²⁰ The Registry has also taken into account the factors set out in regulation 113(2).

33. In the present case the following factors appear to have particular bearing:

- (1) The relatively large number of applications for participation transmitted to the Chamber and the likelihood therefore that many victims (perhaps more than 300) will participate in the confirmation hearing, with potentially much larger numbers to participate at trial should the charges be confirmed;
- (2) The probability that establishing meaningful communication with victim participants will involve numerous challenges, including the likelihood that many applicants are of low-literacy levels, do not speak English or French, and are unfamiliar with legal proceedings;
- (3) The applicants' geographical isolation, both from urban centres and from each other, which (especially when combined with difficulties in ensuring secure communication by telephone) is likely to further hinder communication;

²⁰ ICC-01/04-01/07-1328, paragraph 17; ICC-01/05-01/08-1005, paragraphs 25-26.

(4) The fact that the proposed common legal representative does not have an established relationship with the applicants and would benefit from team members familiar with and/or trusted by the victim communities in question;

(5) The legal and factual complexity of the case, and the fact that the proposed common legal representative has not previously appeared before the Court.

34. Based on these factors the Registry is prepared, for pre-trial proceedings, to finance to a reasonable level the assistance of the following team members, who would complement the skills and attributes of the proposed common legal representative:

(1) a legal assistant, preferably a person familiar with the Kenyan context and/or experienced in working with victims;

(2) an appropriately qualified case manager;

(3) two field assistants to assist in maintaining communication with the clients of the common legal representative, preferably persons with a background in outreach or victim support, who are familiar with the work of the ICC.

35. As always, it will be essential to ensure that team members are appropriately skilled and meet the required ethical standards. The Registry notes that thorough vetting will be difficult within the time available before the confirmation hearing, but stands ready to assist the common legal representative, including by recommending appropriately qualified candidates and introducing the legal team to intermediaries and victim groups known to the Registry.

4 Further considerations

4.1 Representation of applicants

36. In addition to the 249 applications for participation already transmitted to the Chamber, the Registry has received a very large number of further applications for participation and/or reparations. The Registry expects that it will continue to

receive applications throughout the pre-trial proceedings. The Registry therefore considers that there is a need for clarity regarding the legal representation of persons whose applications have been, or are later, received by the Registry, but will not be transmitted or determined during the pre-trial proceedings.

Applicants for participation

37. Regarding the applicants for participation whose applications have not been transmitted to the Chamber (owing to their incompleteness), the Registry notes that the current status of legal representation is as follows:

- (1) A relatively small number of these applications have nominated a legal representative.
- (2) A significant number of applicants for participation did not nominate a legal representative in their applications and consequently are now represented by the OPCV in accordance with the Single Judge's First Decision;²¹

38. Many of these applicants have connections with others whose applications have been transmitted to the Chamber and who, if accepted, will be represented by the common legal representative. From this perspective, and also in order to maximize continuity of legal representation, the Registry considers that there would be advantages in appointing the common legal representative to represent applicants from the time their applications are received by the Registry.

Applicants for reparations

39. The Registry has received numerous applications, including many of those transmitted to the Chamber, requesting *both* participation and reparations. Regarding these, the Registry recommends that the common legal representation ordered be made in respect of both requests. This would:

²¹ ICC-01/09-02/11-23, paragraph 23.

- ensure that the entirety of these victims' engagement with the Court is able to be managed in a coherent way by a single legal representative;
- minimise any confusion on the part of the victims in question;
- facilitate the Registry's work by enabling it to deal with a single legal representative for notification or any other matters regarding the applicants.

40. The Registry has also received some applications which relate *only to reparations* and do not request participation. Regarding these applicants the OPCV has not been appointed and therefore they remain unrepresented.

41. The Registry considers that there would be benefits in having the common legal representative also appointed to represent applicants for reparations:

- This would enable the formulation of a comprehensive and coherent strategy, taking into account information presented in applications for reparations;
- Providing access to applicants for reparations and their documents would maximize the common legal representative's ability to identify and investigate any inconsistencies in the information presented by the victims;
- If applicants for reparations later request to participate in proceedings and are accepted by the Chamber, continuity of representation would be facilitated.

4.2 Transitional arrangements

42. The Registry regrets that it has not been in a position to recommend common legal representation earlier in the proceedings, and therefore that a common legal representative will be appointed only weeks before the confirmation hearing. This is likely to hinder the common legal representative's efforts to become familiar with the proceedings to date, and also to meet and take instructions from his/her clients. The Registry considers it essential that measures are taken to mitigate the consequences of this. It proposes the following:

(i) For VPRS staff to meet with as many accepted victims and intermediaries as possible in order to provide them with information regarding the change in their legal representation. Such meetings may be held, if possible, with the assistance of former legal representatives and members of the common legal representative's legal team. The latter would then be in a position to continue this process for other victims and applicants.

(ii) For the OPCV to maintain active support to the common legal representative during pre-trial proceedings in order to ensure a smooth transition of legal representation. In order that the Registry and the Chamber can be informed of the challenges encountered and any further measures needed, the Chamber may wish to require that the OPCV report to it on the forms and extent of support provided prior to and during the confirmation of charges hearing.

43. The Registry also notes that until such time as the Chamber orders the appointment of the common legal representative, the current counsel continue to represent their respective clients. Once a common legal representative has been appointed, the currently acting counsel will be required by articles 15(2) and 18(5) of the Code of Professional Conduct for counsel to convey to the common legal representative the complete case file as well as records of communications received in relation to the representation undertaken.

4.3 Monitoring and review of common legal representation

44. The Registry notes that there will be a need to keep the representation of victims under review during pre-trial and possible future trial proceedings. For example:

- The question of victim grouping may need to be reopened if litigated questions indicate conflicting or divergent interests among the victims.
- The Registry may wish to modify the composition of the legal team which it is willing support.

The Chamber (or a future Trial Chamber) could at any point request the Registry to revisit the common legal representative's selection should it deem this appropriate.

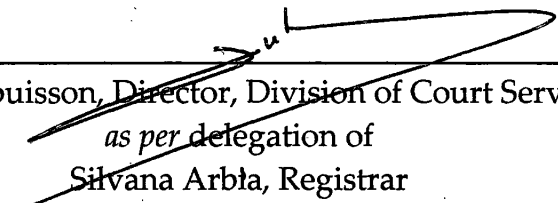
5 Recommendations

45. For the reasons set out above, the Registry recommends to the Chamber that it:

- (a) appoint the counsel identified in Annex 5 as common legal representative of all victims authorized to participate in pre-trial proceedings in the present case; and
- (b) appoint the counsel identified in Annex 5 as legal representative of all applicants for participation and/or reparations in relation to the present case, from the time that their applications are received by the Registry;
- (c) order the Registry to:
 - i) transmit to the common legal representative all applications for participation which have been transmitted to the Chamber, and any other applications for participation or reparations received by the Registry which appear to be linked to the present case;
 - ii) transmit to the common legal representative the redacted versions of those applications which have been transmitted to the parties;
 - iii) grant access to such documents filed in the record of the case as the Chamber permits him/her to access;
 - iv) commence meeting with victims of the case, and explain the reasons and process for the appointment of a common legal representative;
 - v) provide the common legal representative with assistance in identifying appropriately qualified persons to constitute his/her legal team;
 - vi) keep the arrangement of common legal representative under review;

(d) order the OPCV to provide all possible assistance to the newly appointed common legal representative, and to present a report to the Chamber on the assistance provided in this regard;

(e) order all counsel who have represented applicants in the present case to date to comply with their obligations under articles 15(2) and 18(5) of the Code of Professional Conduct for counsel and to fully cooperate with the appointed common legal representative.



Marc Dubuisson, Director, Division of Court Services
as per delegation of
Silvana Arbata, Registrar

Dated this 5 August 2011
At The Hague, The Netherlands