

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 12 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

**Decision on the Extension of Time Limit to File Observations on Victims'
Applications for Participation in the Proceedings**

Decision 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 Francis Kirimi Muthaura
Karim Khan, Kennedy Ogetto and Essa
Faal

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States Representatives

Amicus Curiae

Other

REGISTRY

Registrar & Deputy Registrar
Silvana Arbia, Registrar
Didier Preira, Deputy Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Ekaterina Trendafilova, acting as Single Judge on behalf of Pre-Trial Chamber II (the "Chamber") of the International Criminal Court (the "Court"),¹ renders this decision on the extension of time limit to file observations on applications for victims' participation in the proceedings.

1. On 8 March 2011, the Chamber, by majority, decided to summon Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (collectively the "Suspects") to appear before the Court.² Pursuant to this decision, the Suspects voluntarily appeared before the Court at the initial appearance hearing held on 8 April 2011,³ during which, *inter alia*, the Chamber scheduled the commencement of the confirmation of charges hearing for Wednesday, 21 September 2011.⁴

2. On 30 March 2011, the Single Judge issued the "First Decision on Victims' Participation in the Case" (the "30 March 2011 Decision"),⁵ in which she ordered, *inter alia*, that the parties shall provide, if they so wish, their observations to the redacted versions of victims' applications they received within a time limit of two weeks upon notification of the redacted victims' applications.⁶

3. On 31 May 2011, the Registrar submitted to the Chamber 4 victims' applications, together with a report prepared pursuant to regulation 86(5) of the Regulations of the Court (the "Regulations") and transmitted those applications, in a redacted form, to the parties (the "First Transmission").⁷

¹ Pre-Trial Chamber II, "Decision Designating a Single Judge", ICC-01/09-02/11-9.

² Pre-Trial Chamber II, "Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali", ICC-01/09-02/11-01.

³ ICC-01/09-02/11-T-1-ENG.

⁴ ICC-01/09-02/11-T-1-ENG, page 14, lines 11 to 15.

⁵ Pre-Trial Chamber II, "First Decision on Victims' Participation in the Case", ICC-01/09-02/11-23.

⁶ Pre-Trial Chamber II, "First Decision on Victims' Participation in the Case", ICC-01/09-02/11-23, p. 13.

⁷ ICC-01/09-02/11-97 and its confidential *ex parte* annexes; ICC-01/09-02/11-98 and its confidential *ex parte*; and ICC-01/09-02/11-99-Conf-Exp and its annexes.

4. On 13 June 2011, in compliance with the deadline set up in the 30 March 2011 Decision, the Defence for all the three Suspects submitted their observations on the victims' applications of the First Transmission.⁸

5. On 28 July 2011, the Registrar transmitted to the Chamber and to the parties additional 245 victims' applications for participation in the present proceedings (the "Second Transmission").⁹ According to the 30 March 2011 Decision, the deadline for the parties to submit observations on this batch of victims' applications is 11 August 2011.

6. On 11 August 2011, the Defence team for Mr. Muthaura filed the "Defence Observations on 245 Applications for Victims Participation in the Proceedings" (the "Defence's Submission").¹⁰

7. Despite the title of the filing transmitted by the Defence team for Mr. Muthaura, the Single Judge notes that the submissions therein do not constitute at all observations on the victims' applications provided to the Chamber in the Second Transmission. To the contrary, upon review of the Defence's Submission the Single Judge finds that actually the Defence team for Mr. Muthaura presents two requests.

8. First, the Defence 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 Single Judge may determine the final status of the said victim applications" (the "First Request").¹¹

⁸ ICC-01/09-02/11-115-Conf, and ICC-01/09-02/11-117, with confidential annex.

⁹ ICC-01/09-02/11-141 and its confidential *ex parte* annexes; ICC-01/09-02/11-142 and its confidential *ex parte* annexes; and ICC-01/09-02/11-143-Conf-Exp and its annexes.

¹⁰ ICC-01/09-02/11-229.

¹¹ ICC-01/09-02/11-229, para. 16.

9. Second, and in the alternative, the Defence 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” (the “Second Request”).¹²

10. At the outset, the Single Judge regrets to notice the superficiality with which the Defence team for Mr. Muthaura has addressed the Chamber on this occasion, by framing the title of their filing in a manner completely different from its actual content and by omitting any legal basis in support of the Second Request. In this regard, the Single Judge reminds that when the parties and the participants to the proceedings seize the Chamber of any matter, they should do so consistently throughout the entirety of their submissions and they should support their requests with the legal basis they deem appropriate.

11. The Single Judge will however entertain the two requests made by the Defence. The Single Judge notes article 68(3) of the Rome Statute (the “Statute”), rule 89(1) of the Rules of Procedure and Evidence (the “Rules”) and regulation 35(2) of the Regulations.

12. With regard to the First Request, the Single Judge recalls that article 68(3) of the Statute stipulates that “when the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court [...]”. Moreover, rule 89(1) of the Rules provides that upon receipt of the victims’ applications, the “Registrar shall provide a copy of the application to the Prosecutor and the defence, who shall be entitled to reply within a time limit to be set by the Chamber”.

13. With regard to the first limb of the First Request, the Single Judge considers that the “interim status of victim” proposed by the Defence does not find any foundation in the legal texts of the Court nor has it been developed in the case law. Ruling on the status of victims comes into play only after the Chamber has received the parties’ observations on the transmitted applications, if they decided to submit such

¹² ICC-01/09-02/11-229, para. 17.

observations, given that it is a voluntary process. Moreover, providing observations as to whether or not the applicants qualify as victims participating in the proceedings, is an opportunity for the parties to present their views and also to contribute to the Chamber's informed decision in that regard.

14. As to the second limb of the First Request, the Single Judge wishes to point out that should either party be allowed to file observations "after the confirmation hearing and before the issuance of the confirmation decision", as requested by the Defence team for Mr. Muthaura, the whole rationale concerning the assessment of victims' applications for the purposes of their participation in the pre-trial proceedings and in particular in the confirmation of charges hearing become senseless. Accordingly, the First Request must be rejected, as it runs counter to the legal regime on victims' participation as established in the Court's statutory provisions and developed in its jurisprudence.¹³

15. As for the Second Request, despite the absence of any legal basis in support of such request, the Single Judge considers it amounting to an extension of time limit pursuant to regulation 35(2) of the Regulations. Thus, the Single Judge will adjudicate the Second Request accordingly.

16. The Single Judge recalls that pursuant to regulation 35(2) of the Regulations "[t]he Chamber may extend or reduce a time limit if good cause is shown and, where appropriate, after having given the participants an opportunity to be heard".

17. The Defence team for Mr. Muthaura essentially asserts that they have been undertaking investigations in preparation for the confirmation of charges hearing.¹⁴ Furthermore, it is contended that the disclosure calendar "imposes time limits on the Defence for seeking protective measures such as redactions as well disclosure of evidence, which the defence intends to rely on at the confirmation hearing".¹⁵ The

¹³ Pre-Trial Chamber II, "Decision on victims' participation at the confirmation of charges hearing and in the related proceedings", ICC-01/09-01/11-249, paras 39-55.

¹⁴ ICC-01/09-02/11-229, para. 12.

¹⁵ ICC-01/09-02/11-229, para. 13.

Defence further avers that “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”.¹⁶ Due to the high number of victims’ applications to be reviewed, the Defence claims that they have been unable to meet the established deadline.¹⁷

18. In light of the foregoing, the Single Judge considers that the arguments advanced show good cause, in that the circumstances under which the Defence has been working, although they constitute the normal steps of pre-trial proceedings, together with the extensive number of victim applicants, may have prevented the Defence from meeting the established deadline to file the observations on the victims’ applications in the Second Transmission. Taking into consideration the sensitivity and the importance of the issue of victims’ participation, the Single Judge considers it appropriate to grant an extension of time and establish the same deadline as the one accorded to the Defence for Mr. Ali in the “Decision on the ‘Urgent Defence Motion for Extension of Time to File Observations on Applications to Participate in the Proceedings’”.¹⁸ The Second Request is therefore granted and the deadline to file observations on victims’ applications of the Second Transmission is extended to Tuesday, 16 August 2011. However, the Single Judge’s ruling in this decision should not be perceived by any means as an acknowledgment that the Defence is justified to refrain from meeting the required deadlines established by the Chamber leading up to the confirmation of charges hearing on 21 September 2011.

¹⁶ ICC-01/09-02/11-229, para. 14.

¹⁷ ICC-01/09-02/11-229, para. 9.

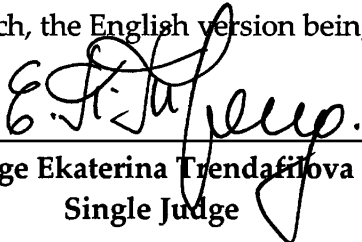
¹⁸ Pre-Trial Chamber II, “Decision on the ‘Urgent Defence Motion for Extension of Time to File Observations on Applications to Participate in the Proceedings’”, ICC-01/09-02/11-227.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

rejects the First Request;

grants the Second Request;

Done in both English and French, the English version being authoritative.



Judge Ekaterina Trendafilova
Single Judge

Dated this Friday, 12 August 2011

At The Hague, The Netherlands