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No.**: ICC-01/09-02/11**
Date: **16 August 2011**

PRE-TRIAL CHAMBER II

Before: **Judge Ekaterina Trendafilova, Single Judge**

SITUATION IN KENYA

THE PROSECUTOR
v.
FRANCIS KIRIMI MUTHAURA
UHURU MUIGAI KENYATTA &
MOHAMMED HUSSEIN ALI

PUBLIC

with Confidential Annex 1, Confidential *ex parte* Annexes 2 and 3, and Public Annex 4

Defence Observations on 245 Applications for Victim Participation in the Proceedings

Source: Counsel for Francis Kirimi Muthaura (the "Applicant")

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

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I. Background

1. On 8 March 2011, Pre-Trial Chamber II ("Chamber"), by majority issued three summonses to appear in the present case. The Chamber found reasonable grounds to believe that murder; forcible transfer; rape ; persecution; and other inhumane acts were committed from on or about 24 January 2008 until 31 January 2008 in locations, including Nakuru town (Nakuru District, Rift Valley Province) and murder; forcible transfer; persecution; and other inhumane acts constituting crimes against humanity were committed in Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya.[1]

2. On 30 March 2011, the Single Judge, acting on behalf of the Chamber, issued the "First Decision on Victims' Participation in the case,"[2] in which the Single Judge spelt out the legal and procedural framework regulating applications for victim participation in the case.

3. On 28 July 2011, the Registry provided the Defence with 245 redacted Applications for participation by filing the "Second Transmission to the parties and legal representatives of redacted applications to participate in the proceedings."[3]

4. Pursuant to Rule 89(1) of the Rules of Procedure and Evidence ("Rules"), the Defence hereby submits its observations on the 245 redacted applications for participation in the proceedings as victims.

[1] ICC-01/09-02/11-01.
[2] ICC-01/09-02/11-23.
[3] ICC-01/09-02/11-200.

II. Legal Qualification of "Victim" and Criteria for Determining "Victim" Status to Participate in the Case

5. In accordance with Rule 85(a) of the Rules, "victims" mean natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court. For an individual to be granted victim status: (i) the victim must be a natural person; (ii) he or she must have suffered harm; (iii) the crime from which the harm resulted must fall within the jurisdiction of the Court; and (iv) a causal link between the harm and the crime must exist.[4]

III. Completeness of Applications

6. Consistent with the jurisprudence of the Court, applicants must provide adequate proof of identity to prove their status as natural persons.[5] In her decision, the Single Judge considered the specific situation in Kenya and concluded that she will accept the following documentation as proof of identity and/or proof of kinship: (i) Passport; (ii) National Identity Card; (iii) Birth Certificate and; (iv) Driver's Licence.[6] Where such documentation is not available to victim applicants, the Single Judge directed that she will accept substitute forms of identification, including National ID Waiting Card; (ii) Chief's Identification Letter, which provides certain basic information, bearing the name and signature of the Chief; (iv) Notification of Birth Cards (for minors); (v) Clinic cards (for minors); (vi) Kenya Police Abstract Form (for lost national identity cards or Kenyan passports); (vii) a signed declaration from two witnesses attesting to the identity of the victim applicant, and where

[4] ICC-01/09-02/11-23 adopting Pre-Trial Chamber III's " Fourth Decision on Victims' Participation," ICC-01/05-01/08-320, paras 33-78. See also; ICC-01/04-01/06-228-tEN, p.7; ICC-01/04-101, paras 77 -94; ICC-02/05-111-Corr, para 2.
[5] This requirement has been put in place by all Chambers as a minimum requirement to guaranteeing the accuracy of the applications. See for instance; PTC 1, ICC-01/04-374; PTC II, ICC-02/04-01/05-252, paras 16 – 21 and TC 1, ICC-01/04-01/06-1119, para 87.
[6] ICC-01/09-02/11-23, para 8.

relevant the relationship between the victim applicant and the person acting on his or her behalf. Such declarations shall be accompanied by proof of identity of the two witnesses.[7]

IV. Defence Observations

7. The Defence provides the following submissions on (a) its factual analysis of each application and; (b) general observations arising from its review of the 245 redacted applications for participation in the proceedings.

A. Factual Analysis of the Applications

8. The Defence appends as Annex 1 to this submission, its factual analysis and conclusion on each application for participation in this case. The analysis and conclusions contained in Annex 1 have been guided by the findings of the Chamber in relation to (a) the scope of the charges contained in the Decision Issuing Summonses To Appear[8] and; (b) the applicable jurisprudence setting out the criteria for determining victim status developed by the Single in the First Decision on Victims Participation in the case.[9]

B. General Observations on the Redacted Applications

9. The Defence recalls that in the "First Decision on Victims' Participation in the case"[10] the Single Judge developed elaborate guidelines and directions for the conduct and recording of information in victim application forms. More specifically, the Single Judge emphasised the importance of establishing a link between the alleged victimisation and the present case. The Single Judge directed that the alleged incident must relate to the offences alleged in the

[7] *Ibid.*
[8] ICC-01/09-02/11-01.
[9] ICC-01/09-02/11-23.
[10] ICC-01/09-02/11-23.

summons to appear, or at a later stage in the proceedings, the document containing the charges.[11] Accordingly, the Single Judge concluded that a victim applicant may be recognised as a victim to participate in this case if he or she has shown that the alleged crime against humanity was committed from on or about 24 January 2008 until 31 January 2008 in locations, including Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya.[12]

10. Despite this, the Defence observes that the vast majority of the applications present information which is inconsistent with the Single Judge's direction[13] and which, if not addressed would render victim participation meaningless and wholly inconsistent with the rights of the suspects in this case. Failure to follow the safeguards erected by the Single Judge would result in opening a floodgate to applicants unconnected with the events under investigations, thereby diluting the process of victim participation. For similar reasons, failure to adhere to the Single Judge's guidelines would exclude genuine victims who have a right to participate in these proceedings. In these circumstances, the intervention of the Single Judge in enforcing her clear and reasonable guidelines developed for this purpose is warranted to preserve the integrity of these proceedings.

11. The need for greater circumspection and exercise of due diligence is warranted by highlighting some issues disclosed by a review of the applications. A noticeable trend emerging from a review of the second batch of victim applications is the recording of information from victim applicants which mirrors the legal findings in the Decision Issuing the Summons to appear in this case[14]. As an illustration, a sizeable number of applicantions

[11] ICC-01/09-02/11-23, para 6.
[1212] *Ibid*, para 6.
[13] *Ibid.*
[14] ICC-01/09-02/11-1.

were only submitted after the suspects in this case were publicly named. Given the wide media coverage in Kenya, a degree of cicumspection is merited, in the Defence submission, in relation to this category of applicants so as to be sure that applicants are giving an account of what they perceived or experience rather than one they have read about in the newspapers or other media in Kenya. In addition, various applicants refer to the publicly named suspects as the persons responsible for the harm they allegedly suffered during the events under investigations for the reasons stated in the Decision Issuing Summons to Appear.[15] Notably, they do so without proper basis for their knowledge justifying their stated belief that the named suspects were responsible for the post election violence.

12. Of further concern is the repeated failure of the interviewers or the Victims Participation and Reparation Section ("VPRS") to adhere to the Single Judge's Decision requiring that a nexus be established between the alleged victimisation and the present case.[16] Despite the absence of a charge of destruction of property or looting amounting to persecution as a crime against humanity in this case,[17] there is a repeated reference to economic and financial loss alleged as harm suffered by the vast majority of applicants. While the Defence acknowledges the sufferings caused to many by the post-election violence, economic loss including loss of property falls outside the scope of the charges in this case.

13. Similarly, a number of applicants allege that they suffered harm not as a result of any attack but because they witnessed persons being attacked or saw corpses lying on the streets or in estates.[18] Others claimed they fled their

[15] See Annexure 1 : For example, applicants KEN a/9101/11; KEN a/9184/11; KEN a/9213/11 and KEN a/9337/11.
[16] See various guidelines developed by the Single Judge in First Decision on Victim Participation in the case. ICC-01/09-02/11-23, para. 6 amongst others.
[17] The Defence notes that pillaging is a war crime under the Statute and the post election violence is characterized as a crime against humanity in the Decision Issuing Summons to Appear. Unlike the *Bemba and Abu Garda cases*, the Prosecutor did not prefer charges for economic loss in this case.
[18] For example in relation to applicants KEN a/9186/11, KEN a/9187/11 and KEN a/9189/11.

homes because they feared Mungiki attacks or were informed of likelihood of Mungiki attacks on their estates or neighbourhoods.[19] Whilst the Defence acknowledges the sufferings of these applicants, there is no nexus between the allegations and the charges in this case. Fear of an attack and witnessing persons being attacked do not justify a claim for victim participation in the circumstances of this case. If these claims were to be accepted on this basis, any individual who witnessed the commission of crimes on television in Kenya or even abroad would have an arguable claim to participate as victims in this case. This would run counter to the purpose of victim participation and would make the pool of victim participants so vast and the handling so burdensome as to be inconsistent with the rights of the suspects.[20]

14. The Defence also notes that a number of applicants do not identify the alleged perpetrators as Mungikis or pro-PNU Youths and admitted that they were only informed by fellow tribesmen of the presence of Mungikis in their neighbourhoods.[21] Other applicants fail to substantiate their claims with proper proof that should have been reasonably available to them. For example, there are many cases where there is no documentation from mortuaries, death certificates, the police or verifying accounts from other sources sufficient to support allegations of death of relatives and other victims.[22] Other applicants establish the death, but fail to establish the familial bond with the deceased through birth certificates or verifying accounts from other sources.[23] In many other cases, there are claims of deportation and forcible transfer with a complete lack of independent evidence to demonstrate that the applicant actually resided and lived in Nakuru or Naivasha. Evidence from land registers, rental payments, or even from neighbours or the police,

[19] For example in relation to applicants KEN a/8612/11, KEN a/8614/11 and KEN a/8622/11.
[20] Article 68(3) requires in part that victim participation should not be inconsistent with the rights of the defence.
[21] For example in relation to applicants KEN a/9258/11, KEN a/9265/11, KEN a/9266/11 and KEN a/9275/11.
[22] For example in relation to applicants KEN a/9277/11, KEN a/9254/11, KEN a/9189/11, KEN a/9143/11 and KEN a/9111/11.
[23] For example in relation to applicants KEN a/9194/11, KEN a/9254/11 and KEN a/9277/11.

church or other sources could have been expected to support these applications, as evidenced by the fact that other applicants have managed to submit this basic, but essential, information.[24] Whilst the Defence fully acknowledges the sufferings of these applicants, the claims such victims detailed above do not justify victim participation in this case.

15. Further, the Defence notes that the majority of the applicants fled their homes for police stations and prisons as safe havens, where they were offered protection from attacks. Some applicants state that the police organised transportation to take them to safe locations and others indicate that the Police came to their rescue, while in distress.[25] The accounts of these applicants run contrary to the key allegations in the Prosecution's case; namely that the Police were complicit in the attacks or deliberately stood aside and did nothing, in order to allow the Mungikis to carry out their attacks against persons perceived to be ODM supporters in Nakuru and Naivasha. Clearly, police protection in the circumstances described by the victim applicants does not form a proper basis for victim participation given how the charges have been framed by the Prosecutor.

16. The Defence attaches as *ex parte* and confidential Annexure 2, objective evidence which will provide the Chamber and the VPRS with an overview of the local process undertaken so far in relation to the post-election violence in Kenya in general and in Nakuru and Naivasha in particular. Annexure 2 contains a statement which provides an explanation as to what processes have been undertaken thus far in relation to victims of the post-election violence in Nakuru and Naivasha. Compensation payments and land for relocation have been made available to victims of post-election violence. As further indicated in Annexure 2 and Annexure 3[26], registers and public information are

[24] For example in relation to applicants KEN a/9276/11, KEN a/9279/11 and KEN a/9284/11.
[25] For example in relation to applicants KEN a/9228/11, KEN a/9295/11, KEN a/9213/11, KEN a/9342/11, KEN a/8590/11.
[26] In this regard the defence refers to paragraph 13 of Annexure 3.

available for VPRS to consult to guard against double compensation and claims which may be improper. Such "due diligence" or verifyings steps are encouraged by the Defence so as to ensure that victim's participation and subsequently reparation, if any, would be conducted in a manner consistent with the Statute.

17. The Defence are mindful that proper victim applicants, with bona fide cases, must be assisted and even encouraged to participate in ICC proceedings. At the same time, the Defence ask the Single Judge to be mindful that various applicants may have an interest to intervene out of a belief that such intervention could lead to monetary or other compensation, or due to some political agenda of their own. It would be perilous to simply assume that all victim applicants are genuine. Certain safeguards and due diligence checks by VPRS simply must be conducted in this case in order to prevent abuse of the processes of the Court and the proper administration of justice. The existence of this danger is perhaps illustrated by the reports contained in Annexure 4 to the present observations which demonstrate the phenomenon of "fake IDP's" in Kenya[27].

18. In this regard, the Defence note that in accordance with Regulation 86(5) of the Regulations of the Court and the Single Judge's First Decision on Victims Participation, the Single Judge's "oversight [of the victim's participation issue] is exercised primarily within the limits of the information provided by the victim applicants, as collected and <u>verified</u> by the VPRS" (para. 12 of First Decision) and that the Report required from VPRS pursuant to Regulation 86(5) must "include an assessment as to which applications might be accepted, rejected, or raise difficult issues [...]" as well as "one paragraph for each victim which reflects the information contained in the application analysed in respect

[27] http://allafrica.com/stories/201106020243.html;http://www.standardmedia.co.ke/archives/InsidePage.php?id=2000027446&cid=4& ; http://www.tusijisunde.com/2011/fake-idp-what-should-you-and-i-do/; http://allafrica.com/stories/200910090859.html

of each of the requirements of rule 85 of the Rules." (para. 21 of First Decision).

Accordingly, the Defence trusts that VPRS, pursuant to its authority under Regulation 86(5) will consult the registers, public sources and the relevant Kenyan authorities in evaluating the victim applications and drafting the aforementioned report for the Single Judge. From the statement included at annexure 2 of this filing, it does not appear that this has been done to date.

The Defence also request that the Single judge review the consistency and appropriateness of the redactions being made by the VPRS prior to the transmission of such redacted applications to the Defence. As the chart in annexure 1 discloses, there are numerous redactions of locations where attacks took place, which seem to serve no purpose and indeed hamper effective and meaningful submissions by the defence. Even the names of suspected perpetrators are redacted out. In addition, there are redactions of places where allegedly criminal meetings took place. The Defence submit that none of these are justified. Such redactions become of even greater concern to the Defence in the absence of a vigorous vetting process which is capable of weeding out fraudulent and otherwise inadmissible cases.

IV. Request for Confidentiality

19. The Defence respectfully requests that the Single Judge receives annexure 1 appended to this Submission as *Confidential.* This level of confidentiality is consistent with the level of classification of the redacted applications transmitted to the Defence by the Registry.[28] The Defence also requests that Annex 2 and 3 be received as *Confidential Ex parte Chamber*, Muthaura Defence and VPRS Only. The Statements and other material constitute defence work product which is not disclosable to the Prosecution and the parties. It is

[28] The applications which were appended as Annexes were filed by the Registry as Confidential.

simply provided to the Single Judge and th VPRS in relation to the current application. This level of classification is consistent with Rule 121 (6) of the Rules and accordingly requests that it be maintained until further notice.

V. Conclusion

20. For the reasons outlined above, the Defence requests that the Single Judge;

(a) Grants victim status to those applicants assessed as qualified in Annex 1 appended to this Submission; and

(b) Rejects or in the alternative defer the applications of those victims who have not provided sufficient factual basis for participation as stated in Annex 1.

Respectfully submitted,

Karim A.A. Khan QC

Lead Counsel for Ambassador Francis K. Muthaura

Dated this 16th Day of August 2011

At Nairobi, Kenya