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No.: ICC-01/09-02/11
Date: **31 October 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 MOHAMMED HUSSEIN ALI

Public Document

Notification to the Chamber and Request for Re-Notification by 5 December 2011

Source: Victims' Legal Representative

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

The Office of the Prosecutor

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Mr. Morris Anyah

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Unrepresented Victims

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I. INTRODUCTION

1. Two hundred and thirty-three victims were authorized to participate in the Confirmation of Charges Hearing and related proceedings in this case, pursuant to the Single Judge's Decision of 26 August 2011.¹ The undersigned Legal Representative was appointed in common to all participating victims by the Decision.²

2. The Decision directed the Legal Representative to notify the Chamber by 12 September 2011 of victims' preferences regarding the disclosure of their respective identities to the Defense.³ Consultation with the 233 victim-participants was deemed a prerequisite to the requisite notification.⁴

3. On 12 September 2011, the Legal Representative notified the Chamber of the results of his consultations in Kenya with ninety-four victims, none of whom wished to have their identity revealed to the Defense.⁵ The Legal Representative undertook in the First Notification to report back to the Chamber by no later than 31 October 2011, regarding the preferences of the remaining 139 victims.⁶

4. Notification is hereby given by the Legal Representative in compliance with the directive in the Decision and consistent with his undertaking in the First Notification.

II. NOTIFICATION

A. Class of Participating Victims

¹ "Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings," ICC-01/09-02/11-267, 26 August 2011 ("the Decision").

² See, paragraph (e), page 46 of the Decision.

³ The Decision, page 47, para. (j).

⁴ Ibid.

⁵ See, "Notification to the Chamber and Request for Re-Notification by 31 October 2011," ICC-01/09-02/11-314, 12 September 2011 ("First Notification"), para. 3.

⁶ First Notification, para. 7.

5. The number of victim-participants has been reduced by two since the issuance of the Decision, as a consequence of the deaths of Victim a/8278/11 and Victim a/9316/11.⁷ Additionally, the Legal Representative has determined that the number of participating victims should be further reduced by two, insofar as three different intermediaries submitted application forms on behalf of the same victim to the Court's Victims Participation and Reparations Section ("VPRS"). The three applications were assigned different applicant numbers and processed as if for three different applicants, resulting in three pseudonyms being assigned to the same victim in the Decision. A review of the identification cards which accompanied applicant numbers a/9404/11, a/9275/11, and a/8285/11⁸ confirm that they pertain to the same victim.

6. Excluding both deceased victims and two of the three pseudonyms which pertain to the same victim, 229 victims remain as participants in the proceedings.

B. Revision of the Number of Victims Consulted before the First Notification

7. Preceding the First Notification was a mission to Kenya by the Legal Representative between 30 August and 4 September 2011, during which consultations were held with victims between 30 August and 2 September.⁹ Further review of the attendance registers of the meetings with victims during that period has disclosed that one victim signed the registration list twice and his name was spelt differently on the list. Additionally, it has been determined that two victims attended those meetings and conveyed their unwillingness to have their respective identities

⁷ Victim a/8278/11 died during the month of October 2011 due to ill health. The Legal Representative has determined that Victim a/9316/11 died due to ill health in mid-June 2011 before the appointment of the Legal Representative, but news of the victim's death has only now come to light. A notification will be filed with the Pre-Trial Chamber regarding both deceased victims as soon as official records of the deaths are available and/ or obtained by the Legal Representative.

⁸ It should be noted that this pseudonym was written in error as "a/8275/11" in paragraph 2 of "Victims' Observations in relation to the Confirmation of Charges Hearing," ICC-01/09-02/11-360, 28 October 2011. No participating victim has to date been assigned the pseudonym "a/8275/11." The correct pseudonym at issue is "a/8285/11."

⁹ First Notification, para. 4.

disclosed to the Defense, but failed to sign their names on the attendance register. Knowledge of this came to light during the Legal Representative's most recent visit to Kenya (between 18 and 30 October 2011) when both victims were contacted and confirmed their attendance at a previous meeting.

8. The number of victims consulted before the First Notification should, consequently, be increased to ninety-five from ninety-four, taking into account the two victims who attended a meeting but did not sign their names on the attendance register, and excluding one of the duplicative entries for the victim that signed the register twice.¹⁰

9. Accordingly, and whereas the First Notification should have pertained to ninety-five (instead of ninety-four) of the 230¹¹ then participating victims, this notification deals with the balance of 135 of the 229¹² currently participating victims.

C. Victims Consulted Since the First Notification

10. The Legal Representative recently consulted with seventy-six of the 135 victims whose preferences regarding the disclosure of their identities to the Defense had yet to be ascertained. The consultations took place between 20 and 27 October 2011 in Kenya. None of those consulted wished to have their identity disclosed to the Defense.

¹⁰ Victim a/8278/11 was one of those victims that were consulted by the Legal Representative before the filing of the First Notification. The same holds true for the victim who has been assigned three different pseudonyms (a/9404/11, a/9275/11, and a/8285/11), but naturally cannot be said in respect of Victim a/9316/11, whose death preceded the appointment of the Legal Representative.

¹¹ This figure derives from the exclusion of "three" victims from the total 233 that were the subject of the Decision: Victim a/9316/11 (who died in mid-June 2011) and two of the three pseudonyms that have been assigned to the same victim (a/9404/11, a/9275/11, and a/8285/11).

¹² The reduction by one from 230 to 229 in the total number of victim-participants is as a consequence of the death of Victim a/8278/11 in October 2011. Since Victim a/8278/11 was among the ninety-five of 230 victims who were consulted before the First Notification, the number of victims who were yet to be contacted remained unchanged at 135, albeit the total number of victim-participants was reduced to 229, as a consequence of Victim a/8278/11's death.

11. The decisions of those seventy-six victims were preceded by candid consideration between them and the Legal Representative about all possible ramifications of either the disclosure or non-disclosure of their identity to the Defense. The victims were then given time to reflect about the matter and to decide for themselves. These were consequently informed decisions, given intelligently and voluntarily.¹³

12. The predominant reason given by the victims for their unwillingness to consent to the disclosure of their identities were concerns about their personal security and the security situation in Kenya.

13. The Legal Representative was unable to meet with fifty-nine of the 135 victims due to a range of difficulties associated with contacting and mobilizing them to the meetings. Many internally-displaced victims have had to move from place-to-place to secure temporary shelter, whilst the movement of other victims has been occasioned by the need to secure odd jobs to make ends meet on a daily basis. Accordingly, and even though contact was ultimately made with most of the remaining fifty-nine victims (some through intermediaries), it proved impossible to facilitate their movement to meet with the Legal Representative during the dates when he traveled to regional centers near where they previously had been situated. Additionally, the current whereabouts of two of the fifty-nine victims are unknown to the Legal Representative and his field staff in Kenya and efforts aimed at locating them are ongoing.

14. The Legal Representative has determined that meeting with victims in person is the preferred and prudent course to adopt when seeking to obtain their views and/or concerns regarding the important question of anonymity. This is due, in large measure, to the complexities associated with the inquiry at hand, the educational

¹³ The victims were aware of the distinction between disclosure of their identity to the Defense versus to the public at-large.

levels of most victims, and language issues which might otherwise arise in the absence of a face-to-face meeting.

15. The Legal Representative now has in place a fully-staffed team of three field assistants based permanently in Kenya, and those assistants are currently undertaking efforts to meet personally with each of the remaining fifty-nine victims to obtain their views regarding the question of anonymity. Some additional time is, however, required to complete the process and all indications are that all fifty-nine victims would have been met and consulted with by no later than 5 December 2011.

16. In respect of those fifty-nine victims that the Legal Representative and his field staff were unable to meet during his recent visit to Kenya, it is submitted that the *status quo ante* be maintained and non-disclosure be presumed unless otherwise indicated. That such a sensible course should be adopted is evidenced by the fact that not a single victim has thus far given consent for his or her name to be disclosed to the Defense and concerns about the prevailing security situation in Kenya have been alluded to in a recent decision of the Chamber in the companion Kenyan case currently pending before it.¹⁴

III. CONCLUSION

17. The Legal Representative respectfully proposes that his field staff be allowed to undertake consultations with the remaining fifty-nine victims between now and 5 December 2011. Assuming the permissibility of proceeding in the manner thus contemplated, the Legal Representative undertakes to report to the Chamber by no later than 5 December 2011 about the preferences of the remaining fifty-nine victims. Alternatively, and should leave of the Chamber be deemed necessary for an extension of the time period within which to comply with the directive of the

¹⁴ See, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, “Decision on the Issuance of the Decision Pursuant to Article 61(7) of the Rome Statute,” ICC-01/09-01/11-357, 26 October 2011, paras. 13 and 14.

Decision, the Legal Representative prays that the Chamber allow him until 5 December 2011 to report on the preferences of the remaining fifty-nine victims.

Respectfully submitted,



Morris Anyah

Victims' Legal Representative

Dated this 31st day of October 2011

At The Hague, The Netherlands.