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No.: ICC-01/09-02/11
Date: 15 November 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,
with Confidential *Ex Parte* (Legal Representative Only)
Annexes A, B, C, D, E, F, G, H, I, J, K and L**

Observations in Relation to the Current Number of Participating Victims

Source: Victims' Legal Representative

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

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Legal Representative of the Victims

Mr. Morris Anyah

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

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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 the 26 August 2011.¹ The undersigned Legal Representative was appointed in common to all participating victims by the Decision.²

2. The Legal Representative notified the Chamber on 31 October 2011 that two hundred and twenty-nine victims remain as participants in these proceedings.³

3. In particular, the Legal Representative informed the Chamber that Victim a/8278/11 and Victim a/9316/11 are deceased.⁴ The Legal Representative undertook to provide further notice and official documents to the Chamber regarding the deaths of both victims as soon as official records were obtained.⁵

4. Additionally, the Legal Representative informed the Chamber that 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.⁶

5. The Legal Representative brings forth these observations with a view towards (i) complying with his undertaking in the Second Notification, (ii) requesting the Chamber to authorize Victim a/8278/11's daughter and Victim a/9316/11's husband to

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 See, "Notification to the Chamber and Request for Re-Notification by 5 December," ICC-01/09-02/11-362, 31 October 2011, ("Second Notification"), para. 6.

⁴ Second Notification, para. 5.

⁵ Second Notification, f.n. 7.

⁶ Ibid., para. 5.

participate in these proceedings on behalf of the said victims and (iii) requesting the Chamber to consolidate the three applications related to the same victim - a/8285/11, a/9275/11, and a/9404/11 - into one application, taking into account their intrinsic consistency and in order to avoid any ambiguity in the record of the case.

II. FURTHER NOTICE REGARDING THE DEATHS OF VICTIMS a/8278/11 AND a/9316/11 AND THE RESUMPTION OF THEIR ACTION BEFORE THE COURT

6. Victim a/8278/11 and Victim a/9316/11 were admitted as participants in the present proceedings by the Decision.⁷

7. Victim a/9316/11 died on 20 June 2011 of, *inter alia*, malaria, as is indicated in the copy of her Certificate of Death which has been submitted to the Chamber.⁸

8. The said victim's husband has conveyed his keenness and willingness to act on behalf of his wife in relation to the action she initiated before this Court. A declaration signed by the victim's husband, as well as by two witnesses, is provided to the Chamber as proof of both the marital relationship between the deceased victim and her husband and of the husband's willingness to pursue the action in place of his wife.⁹ The marital relationship between the deceased victim and her husband is also supported by a signed declaration provided by the Church to which the victim belonged.¹⁰ Additionally, a copy of the identity cards of all signatories to the submitted documents is being provided to the Chamber.¹¹

⁷ Decision, para. (c), pages 45 – 46.

⁸ Confidential and *Ex Parte* Annex A.

⁹ Confidential and *Ex Parte* Annex B.

¹⁰ Confidential and *Ex Parte* Annex F.

¹¹ Confidential and *Ex Parte* Annexes C, D and E. It should be said that the deceased victim's husband is also a participating victim in this case in his own right. His applicant number or pseudonym is a/9331/11.

9. Victim a/8278/11 passed away on 19 October 2011 due to numerous health issues and inadequate health care. A burial permit is being submitted to the Chamber as proof of her death and in lieu of a Certificate of Death.¹²

10. The daughter of Victim a/8278/11 has expressed her wish to participate in the present proceedings on behalf of her deceased mother. A declaration signed by the victim's daughter and two witnesses is being submitted to the Chamber as proof of the family relationship between the deceased victim and her daughter. Additionally, the declaration establishes the wish of the victim's daughter to continue the action that was initiated by her mother before this Court.¹³ A copy of the identity cards of the daughter and the two witnesses is also being provided to the Chamber.¹⁴

11. There is currently no provision in the Statute or other organic legal instruments of the Court that deals with the question of whether the close relatives of a deceased victim-participant can participate on the behalf of the decedent in continuing the action that was initiated before the Court by the decedent.

12. That question has, however, been answered in the affirmative by the Trial Chamber in the *Prosecutor v. Katanga and Ngudjolo*. In that case, the Chamber maintained that:

[l]es proches parents de la victime peuvent décider de poursuivre l'action que cette dernière avait engagée devant la Cour mais qu'ils ne peuvent le faire qu'au nom de la victime décédée et dans la limite des vues et préoccupations exposées par celle-ci dans sa demande initiale.¹⁵

¹² Confidential and *Ex Parte* Annex G.

¹³ Confidential and *Ex Parte* Annex H.

¹⁴ Confidential and *Ex Parte* Annexes I, J and K.

¹⁵ *The Prosecutor v. Katanga & Ngudjolo*, Motifs de la deuxième décision relative aux demandes de participation de victimes à la procédure avec annexe confidentielle *ex parte* réservée au Greffe et aux représentants légaux, ICC-01/04-01/07-1737, 22 Décembre 2009, para. 30; see also, *The Prosecutor v. Katanga & Ngudjolo*, Decision on the applications to resume action submitted by the family members of deceased Victims a/0025/08, a/0051/08 and a/0311/09, ICC-01/04-01/07-3018, 14 June 2011, para. 20.

the close relatives of the victim can cho[o]se to take over the application the victim has introduced before the Court but that they can only do it on behalf of the deceased victim and within the limits of the views and concerns expressed by the latter in her or his initial application [unofficial translation].¹⁶

13. The *Katanga and Ngudjolo* Trial Chamber authorized close relatives of deceased victims to participate in the proceedings on the victims' behalf when proof of their family relationship with the deceased victims was provided, and their wish to act on the relevant victim's behalf was established.¹⁷

III. SUBSTANTIAL CONSISTENCY OF THE THREE APPLICATION FORMS ASSIGNED TO THE SAME VICTIM

14. The field staff of the Legal Representative have spoken to the victim in question to understand why three application forms were advanced on her behalf by three different intermediaries. A declaration which provides the explanations of the victim in being submitted as "Confidential and *Ex Parte* Annex L."

15. In the first instance, and on the basis of the victim's declaration, the Legal Representative is left with the impression that the victim was uncertain about whether her application would be sent forward to the International Criminal Court after her meetings with the first two intermediaries which resulted in two of the three forms that were ultimately submitted. The third application form arose from nothing more than the victim's need for reassurance that her views and concerns would make it to the Court as a participant in the proceedings. It was indeed the victim's keenness to participate in the proceedings before this Court that prompted her to consult with three different intermediaries, resulting in three different application forms.

¹⁶ See, No. ICC-01/04-01/07-1737, Trial Chamber II, 22 December 2009, par. 30, unofficial translation taken from Representing Victims before the International Criminal Court, A Manual for Legal Representatives, The Office of the Public Counsel for Victims, page 50, last accessed on 14 November 2011 at: <http://www.icc-cpi.int/iccdocs/PIDS/tmp/Representing%20Victims%20before%20ICC.PDF>.

¹⁷ Ibid., *The Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-1737, para. 31; *ibid.*, *The Prosecutor v. Katanga & Ngudjolo*, paras. 25, 27 and 29.

16. Secondly, the Chamber will notice that the declarations made by the victim to the three different intermediaries are substantially consistent. In particular, the Chamber will observe that the narrative of the crime suffered by the victim is, on balance, consistent in all three applications. The name and the date of birth of the victim are also the same in all three applications.

17. What discrepancies that emerge in the three applications regarding the number of the victim's dependants and the date of the alleged crime are adequately explained in the victim's declaration and, *de facto*, do not affect the substantial and fundamental consistency of the declarations of the victim.

18. There are no doubt variations in the numbers of dependants the victim has in the three application forms: five in application number a/9404/11, six in a/9275/11 and nine in a/8285/11. However, such a divergence in the victim's response can easily be a reflection of the explanation provided by the three intermediaries with regard to the definition of "dependant."

19. With regard to the date of the alleged crime, the victim states that the event occurred on 27 January 2008, "during the night hours," in application form a/8285/11. In application form a/9404/11, the event is also said to have occurred on 27 January 2008. However, and in application form a/9275/11, the event is given as having occurred one-day later on 28 January 2008. Considering that the event is said to have occurred "during the night hours" on 27 January 2008, it is most logical to infer that the event lasted through midnight and spilled over into the following day (28 January 2008), hence the reason why two different dates of incident are provided in the applications.

20. In relation to the place where the event took place, the victim states in all three applications that it occurred in Nakuru. However, in applications a/9404/11 and a/8285/11, two different areas within the Nakuru Municipality are specified by the

applicant. In this regard, it should be pointed out that these two areas border each other and are not separated by any visible or physical geographic lines; only one dirt road separates the two areas. In fact, these areas are popularly described as “estates,” owing to the cramped housing settlements therein. Thus, it is understandable that the victim referred to both these areas, given that they can be considered as one and the same.

IV. CONFIDENTIALITY¹⁸

21. The annexes to this filing have been submitted confidentially and on an *ex parte* basis, in order to protect the identity and/ or privacy interests of the victims to which they pertain, the surviving relatives of both deceased victims, others who have attested to documents relating to the victims in question and are not otherwise involved in the proceedings.

V. CONCLUSION AND RELIEF REQUESTED

22. The Legal Representative respectfully requests that the Chamber authorize the husband of Victim a/9316/11 and the daughter of Victim a/8278/11 to participate in the proceedings on the respective victim’s behalf, taking into account that their family relationship with the deceased victims, as well as their wish to act on their behalf, have been established on the basis of documents now before the Chamber.

23. The Legal Representative further requests that the Chamber consolidate the three applications, a/9404/11, a/9275/11, and a/8285/11, into a single application in order to remove any ambiguity in the record and to facilitate the ongoing participation of the victim in the proceedings.

¹⁸ See Regulation 23 *bis*, Regulations of the Court, as amended through 14 November 2007.

Respectfully submitted,



Morris Anyah

Victims' Legal Representative

Dated this 15th day of November 2011

At The Hague, The Netherlands.