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No.: ICC-01/09-02/11
Date: **5 December 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 12 January 2012

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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Ms. Fatou Bensouda, Deputy Prosecutor
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Counsel for Mohammed Hussein Ali

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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 authorised 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 Defence.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 ninetyfour victims, none of whom wished to have their identity revealed to the Defence.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. On 31 October 2011, the Legal Representative informed the Chamber that 229 victims remain as participants in the proceedings and that prior to the First Notification, ninety-five (instead of ninety-four) victims had been consulted.⁷ Furthermore, and considering that one victim who had been consulted before the First Notification had passed away, the Second Notification dealt with the balance of 135 of the 229 victim-participants.⁸

5. In the Second Notification, the Legal Representative apprised the Chamber of the outcome of his consultations in Kenya with seventy-six victims, none of whom

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 The Decision, page 46, para. (e).

³ The Decision, page 47, para. (j).

⁴ Ibid.

⁵ "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.

⁷ "Notification to the Chamber and Request for Re-Notification by 5 December 2011," ICC-01/09-02/11-362, 31 October 2011 ("Second Notification"), paras. 8-9.

⁸ Ibid.

wished to have their identity disclosed to the Defence.⁹ The Legal Representative undertook in the Second Notification to report to the Chamber by no later than 5 December 2011 about the preferences of the remaining fifty-nine victims.¹⁰

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

II. NOTIFICATION

Victims Consulted Since the Second Notification

7. The Legal Representative's field staff recently consulted with forty-one of the fifty-nine victims whose preferences regarding the disclosure of their identity to the Defence had yet to be ascertained. The consultations took place between 19 November and 2 December 2011 in various parts of Nairobi and Nyanza Province, Kenya.

8. None of those consulted wished to have their identity disclosed to the Defence. The decisions of those forty-one victims were preceded by candid consideration between them and the Legal Representative's field staff about all possible ramifications of either the disclosure or non-disclosure of their identity to the Defence.¹¹ 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.¹²

9. The primary reason the victims provided for their unwillingness to have their identities disclosed were concerns about their personal security and the security situation in Kenya. The reality of these concerns emerged clearly during the mission

⁹ Second Notification, para. 10.

¹⁰ Second Notification, para. 17.

¹¹ In this regard, it should be said that two of the three field staff members of the Legal Representative's team are lawyers admitted to the Roll of Advocates of the High Court of Kenya. All three field staff members have extensive experience assisting victims in Kenya and advocating and addressing issues on their behalf. They are, consequently, duly capable of undertaking and discharging the sort of consultations that are relevant for present purposes.

¹² The victims were aware of the distinction between disclosure of their identity to the Defence versus to the public at-large.

conducted by the Legal Representative's field staff and represented a hurdle the field staff had to overcome to ensure the success of the mission. In some instances, certain victims declined to attend scheduled meetings for fear that participating in meetings related to the International Criminal Court could pose a threat to their security. The Legal Representative's field staff had to travel to the homes of such victims in order to consult with, and provide re-assurances to, them.

10. The Legal Representative's field staff were unable to consult with eighteen of the fifty-nine victims for a variety of reasons and despite their best efforts to do so. In some instances, this was due to poor record-keeping, in the sense that some intermediaries who assisted the victims with their applications for participation have not retained additional contact details for the victims. Indeed, some intermediaries have ceased to engage with victims and/ or stopped their entire operations between the application process and today. Furthermore, it appears that a number of the eighteen victims are commonly known by names which were never indicated in their applications and which are not reflected in their identity cards. The Legal Representative's field staff are consequently trying to locate these victims through creative ways, such as relying on information that is provided by new intermediaries, as well as resorting to different mobilisers within areas where the victims were said to be residing.

11. In respect of those eighteen victims yet to be consulted, 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 decision of the Chamber in the companion Kenyan case currently pending before it.¹³

¹³ 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.

III. CONCLUSION

12. The Legal Representative respectfully proposes that his field staff be allowed additional time to locate and consult with the remaining eighteen victims. Assuming the permissibility of proceeding in the manner thus contemplated, the Legal Representative undertakes to report to the Chamber about the preferences of the remaining eighteen victims by no later than 12 January 2012. 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 Decision, the Legal Representative prays that the Chamber allow him until 12 January 2012 to report on the preferences of the remaining eighteen victims.

Respectfully submitted,



Morris Anyah

Victims' Legal Representative

Dated this 5th day of December 2011

At The Hague, The Netherlands.