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

Date: 12 January 2012

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

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
Ms. Adesola Adeboyejo, Trial Lawyer

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Counsel for Mohammed Hussein Ali

Mr. Evans Monari, Mr. John Philpot, Mr. Gershom Otachi, and Mr. Gregory Kehoe

Legal Representative of the Victims

Mr. Morris Anyah

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

Ms. Paolina Massidda

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Detention Section

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Ms. Fiona McKay

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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

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.

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 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. On 5 December 2011 the Legal Representative notified the Chamber of the results of his consultations in Kenya with forty-one victims, none of whom wished to have their identity disclosed to the Defence.¹¹ The Legal Representative undertook in the Third Notification to report back to the Chamber by no later than 12 January 2012 regarding the preferences of the eighteen yet to be consulted victims.¹²

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

II. NOTIFICATION

a. Victims Consulted Since the Third Notification

8. The Legal Representative's field staff recently consulted with ten of the eighteen victims whose preferences regarding the disclosure of their identity to the Defence had yet to be ascertained. The consultations took place between 27 December 2011 and 10 January 2012 in various parts of Nyanza Province, Kenya.

9. None of those consulted wished to have their identity disclosed to the Defence. The decisions of those ten 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.¹³ The victims

⁹ Second Notification, para. 10.

¹⁰ Second Notification, para. 17.

¹¹ "Notification to the Chamber and Request for Re-Notification by 12 January 2012", ICC-01/09-02/11-380, 5 December 2011 ("Third Notification"), para. 8.

¹² Third Notification, para. 12.

¹³ 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

were then given time to reflect about the matter and to decide for themselves. These were consequently informed decisions, given intelligently and voluntarily.¹⁴

10. 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. Mindful that during previous missions those fears had prevented victims from attending scheduled meetings with the Legal Representative's field staff, the field staff made the conscious decision to travel to the homes of this group of victims, in order to ensure that they consulted with each.

11. Despite their best efforts, the Legal Representative's field staff were unable to meet with eight of the eighteen victims because their contact details remain unknown. The use of new intermediaries in an effort to determine their whereabouts did not yield the desired results. As such, the Legal Representative's field staff are currently conducting searches in locations where those victims or their relatives were last known to reside, as well as utilizing different mobilizers of victim groups in the continued effort to locate the eight victims.

12. The frequent movement of victims from place to place to secure shelter and/or make ends meet has had as one consequence, an appreciable level of difficulty ascertaining their contact details or whereabouts. When contact with the eight remaining victims will be made is difficult to predict; however, there is reason to be optimistic that they will eventually be located and consulted with, if the past experience of the Legal Representative's team is any indication.

13. In respect of those eight victims, 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 consented for his or her name to be disclosed to the Defence. Concerns about their personal security and the prevailing security situation in Kenya still

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.

¹⁴ The victims were aware of the distinction between disclosure of their identity to the Defence versus to the public at-large.

remain paramount to recently-consulted victims as they were to those previously consulted. Indeed, due notice has been taken of the prevailing security situation in Kenya in a decision of the Chamber in the companion Kenyan case currently pending before it.¹⁵

III. CONCLUSION

14. The Legal Representative notifies the Chamber that consultation with eight victims has proven impossible because their current contact details cannot be ascertained, despite all diligent efforts aimed at obtaining them. Efforts aimed at ascertaining the whereabouts of those eight victims are ongoing, but in the circumstances, providing a timeframe for a successful result is neither practical nor advisable. In lieu of requesting a specific period of time within which to locate and consult with those victims, the Legal Representative prays that the Chamber allow him to report on the preferences of those victims as soon as the relevant information becomes available to him. Indeed, the Legal Representative undertakes to keep the Chamber promptly informed of any noteworthy development regarding consultation with those victims. Nevertheless, and should the Chamber deem it necessary to have on record *instantly*, a position that reflects the wishes of the eight victims, the Legal Representative respectfully prays that the Chamber presume non-disclosure for reasons already given, until or unless the contrary is demonstrated.

¹⁵ 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.

Respectfully submitted,



Morris Anyah

Victims' Legal Representative

Dated this 12th day of January 2012

At The Hague, The Netherlands.