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

Date: **7 February 2013**

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single Judge

**SITUATION IN THE REPUBLIC OF KENYA
IN THE CASE OF THE PROSECUTOR V. FRANCIS KIRIMI MUTHAURA AND
UHURU MUIGAI KENYATTA**

Public Document

**Victims' Observations pursuant to "Decision Requesting Observations on the
"Prosecution's Request to Amend the Final Updated Document Containing the
Charges Pursuant to Article 61(9) of the Statute"**

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

Ms. Fatou Bensouda, Prosecutor
Ms. Adesola Adeboyejo, Trial Lawyer

Counsel for Francis Kirimi Muthaura

Mr. Karim A. A. Khan, QC, Mr. Essa M. Faal, Mr. Kennedy Ogetto, and Ms. Shyamala Alagendra

Counsel for Uhuru Muigai Kenyatta

Mr. Steven Kay, QC, and Ms. Gillian Higgins

Legal Representative of the Victims

Mr. Fergal Gaynor

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

Ms. Paolina Massida

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Ms. Fiona McKay

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I. INTRODUCTION

1. The Legal Representative for Victims hereby submits the observations of the victims in this case pertaining to the "Prosecution's Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute"¹ ("Request").

II. PROCEDURAL HISTORY

2. On 28 December 2012, Trial Chamber V issued the "Decision on the content of the updated document containing the charges".² The Trial Chamber, *inter alia*, rejected a factual allegation put forward by the Prosecutor in her updated document containing the charges that gunshots were the cause of some alleged killings in Naivasha.³
3. On 22 January 2012, the Prosecutor filed the Request seeking permission from the Pre-Trial Chamber to re-insert a factual allegation that the Pre-Trial Chamber previously denied as lacking adequate factual support.⁴ The factual allegation being that "victims were also killed by gunshot" in Naivasha.⁵
4. On 29 January 2012, the Single Judge on behalf of Pre-Trial Chamber II issued the "Decision Requesting Observations on the "Prosecution's Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute"⁶, in which she requested the Legal Representative

¹ Public Redacted Version of the 22 January 2013 "Prosecution's Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute", ICC-01/09-02/11-607-Red, 31 January 2013.

² Trial Chamber V, ICC-01/09-02/11-584, paras 74-75.

³ ICC-01/09-02/11-584, paragraph 75.

⁴ The Legal Representative for Victims was granted access to the Public Redacted Version of the 22 January 2013 request, made available to him on 31 January 2013, ICC-01/09-02/11-607-Red.

⁵ ICC-01/09-02/11-607-Red, para. 1

⁶ Decision Requesting Observations on the "Prosecution's Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute", ICC-01/09-02/11-614, 29 January 2013.

for Victims to file observations on the Request no later than, Thursday 7 February 2013.

III.SUBMISSIONS

1. The victims in this case do not oppose the Request.
2. In a series of meetings held in various parts of Kenya between 28 January 2013 and 4 February 2013, the Legal Representative for victims met with 155 of the victims accepted to participate in this case and ascertained their views on a number of issues.
3. In those consultations, many of the victims expressed the view that the Trial Chamber should hear the full truth of the entirety of what took place during the post-election violence in 2007 and 2008. Some expressed the particular concern that the Government of Kenya has deliberately misrepresented the number of persons murdered during that period, and that official statistics present a number which is considerably less than the true figure of those murdered. Many also expressed the view that the Trial Chamber should know exactly what happened in Nakuru and Naivasha in the lead up to the violence in those towns. Several expressed the view that the Chamber must be made aware of the full scale of the crimes that took place in Nakuru and Naivasha, including the true number of people killed and the methods employed to kill.
4. However, the victims have expressed in the strongest terms their opposition to anything, from whatever source, which will delay the start and completion of this trial. Four of the victims accepted by Pre-Trial Chamber to participate

in this trial have died since they were granted the right to participate.⁷ Two of those, both of whom were rape victims, died from medical and psychological circumstances which appear to have arisen as a result of their rape. Others, including those who are elderly or in ill-health, have seen their own friends and relatives pass away in recent years and months, and have expressed the strongest desire to see justice in their own lifetimes. Very many of those to whom the Legal Representative for Victims spoke to expressed the view that this matter has already taken far too long to come to trial.

5. Balancing these views, the Legal Representative for Victims submits that granting the Request is in the interest of justice. It will enable the Trial Chamber to more fully appreciate the true nature and extent of the crimes allegedly committed. Granting the Request does not affect the Prosecution's main factual allegation that the Mungiki and pro-PNU youth attacked and killed perceived ODM supporters in and around Naivasha between 27 and 29 January 2008. The legal characterization of the facts remains unchanged. No unfair prejudice will arise, as the Defence teams will be well able to deal on cross-examination and during the defence phases of the trial with this allegation; therefore, no delay in the commencement and the completion of trial should arise as a result of granting the Request.

⁷ The following victims have died since being granted the right to participate in the confirmation of charges hearing: a/8278/11, a/9286/11, a/9301/11 and a/9316/11.

IV. CONCLUSION

6. In light of the foregoing, the Legal Representative of the Victims, on behalf of the victims in this case, does not oppose the Request.

Respectfully submitted,



Fergal Gaynor

Victims' Legal Representative

Dated this 7th day of February, 2012 at Nairobi, Kenya