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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. WILLIAM SAMOEI RUTO, HENRY KIPRONO
KOSGEY AND JOSHUA ARAP SANG***

Public

**Public redacted version of
"Prosecution's Observations on 105 Applications for Victims' Participation in
the Proceedings", 11 July 2011, ICC-01/09-01/11-178-Conf**

Source: Prosecution of the Prosecutor

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

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(Participation/Reparation)**

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Introduction

1. Pursuant to Rule 89(1) of the Rules of Procedure and Evidence ('Rules') and the "First Decision on Victims' Participation in the Case" ('the Decision'),¹ the Prosecution submits the following observations on 105 applications for participation in the pre-trial proceedings in the present case.
2. For the reasons detailed below, the Prosecution supports the Single Judge granting authorisation to participate as victims in the above-mentioned proceedings, pursuant to Article 68(3) to the following applicants: a/0153/10; a/0234/10; a/0275/10; a/0356/10; a/0578/10; a/0590/10; a/2080/10; a/8327/11; a/8328/11; a/8329/11; a/8330/11; a/8331/11; a/8332/11; a/8333/11; a/8334/11; a/8336/11; a/8338/11; a/8339/11; a/8342/11; a/8343/11; a/8345/11; a/8346/11; a/8347/11; a/8349/11; a/8350/11; a/8351/11; a/8352/11; a/8355/11; a/8356/11; a/8358/11; a/8359/11; a/8361/11; a/8362/11; a/8365/11; a/8366/11; a/8367/11; a/8368/11; a/8369/11; a/8370/11; a/8373/11; a/8375/11; a/8379/11; a/8380/11; a/8381/11; a/8382/11; a/8383/11; a/8384/11; a/8386/11; a/8387/11; a/8388/11; a/8391/11; a/8392/11; a/8393/11; a/8394/11; a/8395/11; a/8397/11; a/8398/11; a/8400/11; a/8401/11; a/8402/11; a/8403/11; a/8404/11; a/8405/11; a/8407/11; a/8408/11; a/8409/11; a/8413/11; a/8415/11; a/8416/11; a/8417/11; a/8418/11; a/8419/11; a/8422/11; a/8423/11; a/8424/11; a/8425/11; a/8426/11; a/8428/11; a/8429/11; a/8430/11; a/8431/11; a/8432/11; a/8433/11; a/8434/11; a/8435/11; a/8436/11; a/8437/11; a/8438/11; a/8440/11; a/8442/11; a/8443/11; a/8420/11.
3. The Prosecution submits that Applicants a/8337/11; a/8348/11; a/8354/11 and a/8360/11 should be requested to provide further information or documentation proving their identity.
4. The Prosecution submits that redactions applied to the applications submitted by Applicants a/8335/11; a/8337/11; a/8353/11; a/8363/11; a/8372/11; a/8374/11; a/8376/11; a/8390/11; a/8396/11 and a/8399/11 make it difficult to determine whether they meet all the requirements for participation. The Prosecution does not object to the Single

¹ ICC-01/09-01/11-17, 30 March 2011.

Judge determining that non-redacted versions of the applications satisfy the requirements or requesting additional information.

Background

5. On 21 March 2011, Pre-Trial Chamber II (the “Chamber”) designated Presiding Judge Ekaterina Trendafilova as Single Judge responsible for carrying out all functions of the Chamber, subject to Article 57(2)(a) of the Statute, with respect to the case of *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*.²
6. On 30 March 2011, the Single Judge ordered the Registry to transmit redacted applications for participation as victims in the present case to the Prosecution and the Defence, and invited the parties to submit their observations thereto within two weeks of notification thereof.³
7. On 24 June 2011, the Registry provided the parties and legal representatives with 105 redacted applications.⁴
8. All 105 Applicants are natural persons.

Request for Confidentiality

9. Pursuant to Regulation 23bis of the Regulations of the Court, the Prosecution requests the Chamber to receive these observations confidentially as it refers herein to information contained in applications for victim participation that were transmitted to the parties under the same classification.

Legal criteria for victim participation in the proceedings

10. The Prosecution considers that victims’ participation before the Court is an essential feature of the Statute and the Rules and an important contribution to international justice. Under the Statute, victims are participants in the administration of

² ICC-01/09-01/11-6.

³ ICC-01/09-01/11-17.

⁴ ICC-01/09-01/11-142 (with 105 redacted applications provided to the parties and legal representatives as confidential ex parte annexes to ICC-01/09-01/11-141).

international justice and, therefore, are afforded legal representation, rather than merely taking part in this process – if at all – as witnesses. At the ICC, their participation is a statutory right, not a privilege bestowed on a case-by-case basis.

11. The Prosecution supports victims' participation when all statutory requirements are met. The Prosecution considers that victims provide a unique and necessary perspective to the proceedings. For that reason, the Prosecution supports a liberal approach in permitting applicants to amend or clarify deficient applications, if possible.
12. According to the Appeals Chamber, a person has the right to participate as a victim in the proceedings under Article 68(3) if:
 - (i) he/she qualifies as a victim pursuant to Rule 85; and
 - (ii) his/her personal interests are affected by the proceedings at hand, i.e. by the issues, legal or factual, raised therein.⁵
13. With respect to first requisite in terms of Article 68(3)—qualification as a victim under Rule 85—the established jurisprudence is that the following four criteria must be satisfied for victim status to be warranted, regardless of the stage of the proceedings in which the applicants wish to participate:
 - (i) the applicant must be a natural person as set forth in Rule 85(a) or an organisation or institution as set forth in Rule 85(b);
 - (ii) the applicant must have suffered harm;
 - (iii) the crime from which the harm resulted must fall within the jurisdiction of the Court; and
 - (iv) there must be a causal link between the crime and the harm.⁶

⁵ See, e.g., ICC-01/04-556, para. 45; ICC-01/04-01/06-1335, para. 36.

14. Applicants are only required to make a *prima facie* showing that the four requirements set out in paragraph 12 are met.⁷ In reviewing applications, Chambers will generally not delve into the credibility of applicants' statements or require rigorous corroboration.⁸ Rather, Chambers will "assess the applicants' statements first and foremost on the merits of their intrinsic coherence, as well as on the basis of the information otherwise available" to the Chamber.⁹
15. The second requisite in terms of Article 68(3)—that the applicant's personal interests are affected by legal or factual issues raised in the proceedings at hand—is considered separately from the victim status.¹⁰ As indicated by the Appeals Chamber, "[c]lear examples of where the personal interests of victims are affected are when their protection is in issue and in relation to proceedings for reparations."¹¹ "An assessment will need to be made in each case as to whether the interests asserted by victims do not, in fact, fall outside their personal interests and belong instead to the role assigned to the Prosecutor".¹²
16. The established jurisprudence additionally requires that the harm suffered and the concept of personal interests must be linked to the charges: i.e. the charges confirmed against the accused or, at earlier stages in the proceedings, the offences alleged in the warrant of arrest or summons to appear or the document containing the charges.¹³

⁶ See, e.g., ICC-01/04-01/06-601-tEN, p. 9; ICC-01/04-01/06-228-tEN, p. 7. See also ICC-01/09-01/11-17, para. 6, citing Pre-Trial Chamber III, "Fourth Decision on Victims' Participation", ICC-01/05-01/08-320, paras. 33-78.

⁷ See, e.g., ICC-02/05-01/07-58, para. 7; ICC-01/04-01/07-579, para. 67.

⁸ See ICC-01/04-01/07-579, para. 67.

⁹ ICC-01/04-01/07-579, para. 67, 132.

¹⁰ See, e.g., ICC-01/04-556, para. 45; ICC-01/04-101-tEN-Corr, para. 62 (indicating that "personal interests" requirement constitutes an additional criterion to be met by victims, over and above the victim status accorded them).

¹¹ ICC-01/04-01/06-925, para. 28.

¹² *Ibid.*

¹³ ICC-01/04-01/06-1432, paras. 2, 62-65 ("For the purposes of participation in the trial proceedings, the harm alleged by a victim and the concept of personal interests under article 68(3) of the Statute must be linked with the charges confirmed against the accused.").

17. Further, “when assessing whether an applicant has suffered harm as a result of the loss of a family member, the Court requires proof of the identity of the family member and of his or her relationship with the applicant.”¹⁴
18. Where the victim is a minor,¹⁵ the application should be submitted by the minor’s next-of-kin or legal guardian—or a person designated by such persons—and proper proof of the relationship or consent should be submitted.¹⁶ Applications submitted on behalf of deceased persons cannot be granted because Rule 89(3) only permits submission of an application for participation by a person acting on behalf of the victim concerned with the victim’s consent, or on the victim’s behalf in the case of a child or a disabled person.¹⁷ However, family members of a deceased person may submit an application for participation if they have suffered personal harm as a result of the death of said person.¹⁸

Rule 85 as interpreted by the jurisprudence requires that the applicant suffered personal harm

19. The Appeals Chamber has defined “harm” within the meaning of Rule 85(a) as “loss, injury or damage”¹⁹ and explained that cognizable harm under Rule 85(a) include material, physical and psychological injuries.²⁰ The single most important requirement isolated by the Appeals Chamber for identifying “harm” is that the loss or injury must be suffered personally by the applicant.²¹ It may be inflicted on an individual or collective basis—“in a variety of different ways such as physical or

¹⁴ ICC-02/05-02/09-147-Red, para. 6; *see also* ICC-02/04-179, paras. 35-38.

¹⁵ *See, e.g.*, ICC-01/04-505, para 31; ICC-01/04-423, para. 31. *But see* ICC-01/04-01/06-1556-Corr-Anx, paras. 92-97.

¹⁶ *See* ICC-01/04-505, para 31; ICC-01/04-423, para. 31; ICC-02/05-111, paras. 32-33; ICC-01/09-01/11-17, para. 7.

¹⁷ Rule 89(3) provides: “An application referred to in this rule may also be made by a person acting with the consent of the victim, or a person acting on behalf of a victim, in the case of a victim who is a child or, when necessary, a victim who is disabled.”

¹⁸ *See* ICC-01/04-01/07-579, paras. 60-63; ICC-02/05-111, para. 36. *But see* ICC-01/05-01/08-320, paras. 39-40 finding that a victim does not cease to be a victim because of his or her death, with which the Prosecution disagrees.

¹⁹ ICC-01/04-01/06-1432, para. 31.

²⁰ ICC-01/04-01/06-1432, para. 32. *See also* ICC-02/04-164, para. 8 (“treating ‘psychological trauma’ and ‘emotional harm’ as falling within the concept of ‘mental harm’”).

²¹ ICC-01/04-01/06-1432, para. 32.

mental injury, emotional suffering or substantial impairment of his or her fundamental rights” —but the harm must always be personal to the applicant.²²

20. Similarly, a qualifying injury may be direct or indirect, so long as it is the applicant who experiences it.²³ Direct victims are those whose injury or loss is the “result of the commission of a crime within the jurisdiction of the Court,” while indirect victims are “those who suffer harm as a result of the harm suffered by the direct victims.”²⁴ Often, the indirect harm flows from injuries inflicted on a person—the direct victim—with whom the applicants have a close relationship, “such as the relationship between a child soldier and the parents of that child.”²⁵ Indirect victims include those harmed while intervening to prevent the crimes alleged against the accused, as well as persons who endured psychological suffering or material deprivation when a family member is killed or injured as a result of the crimes for which the accused is called to answer.²⁶

21. The Prosecution supports a broad characterisation of qualifying “indirect” victims. The harm suffered by indirect victims must arise “out of the harm suffered by direct victims, brought about by the commission of the crimes charged.”²⁷ The Prosecution submits that the causal nexus nevertheless does not have to be immediate. Thus, for example, where the charge at issue concerns the recruitment and use of child soldiers, those who have suffered harm as a result of crimes *committed by* child soldiers—and thus as an indirect consequence of the crime charged—should be entitled to participate.²⁸

²² ICC-01/04-01/06-1432, para. 34 (citation omitted).

²³ ICC-01/04-01/06-1432, paras. 32, 34-35.

²⁴ ICC-01/04-01/06-1813, para. 44 (citation omitted).

²⁵ ICC-01/04-01/06-1432, para. 32.

²⁶ ICC-01/04-01/06-1813, paras. 50-51.

²⁷ ICC-01/04-01/06-1813, para. 49 (emphasis added); *see* ICC-01/04-01/06-1813, para. 52.

²⁸ Contrary to the Prosecution position, TCI decided in ICC-01/04-01/06-1813, para. 52 that the person attacked by a child soldier is not an indirect victim because his or her loss is not linked the harm inflicted on the child. However, there is no judgment by the Appeals Chamber on this issue.

The established jurisprudence requires that there be a causal link between the charges and the harm

22. Whether the applicant is seeking to participate in the pre-trial or trial proceedings in a particular case, the harm suffered by the applicant must have a demonstrable link to the charges to be tried in the case.²⁹ In the Decision, the Single Judge emphasised “the importance of establishing a link between the alleged incident and the present case” and held therefore that “a victim applicant may be recognized as a victim to participate in the context of this case if he or she has shown that the alleged crime against humanity was committed from 30 December 2007 until the end of January 2008 in locations, including Turbo town, the greater Eldoret area (Huruma, Kiambaa, Kimumu, Langas and Yamumbi), Kapsabet town and Nandi Hills town in the Uasin Gishu and Nandi Districts, Republic of Kenya”.³⁰

Factual analysis of the applications

23. The Prosecution submits that the following Applicants meet all of the requirements under Article 68(3) for participation in the pre-trial proceedings of this case: a/0153/10; a/0234/10; a/0275/10; a/0356/10; a/0578/10; a/0590/10; a/2080/10; a/8327/11; a/8328/11; a/8329/11; a/8330/11; a/8331/11; a/8332/11; a/8333/11; a/8334/11; a/8336/11; a/8338/11; a/8339/11; a/8342/11; a/8343/11; a/8345/11; a/8346/11; a/8347/11; a/8349/11; a/8350/11; a/8351/11; a/8352/11; a/8355/11; a/8356/11; a/8358/11; a/8359/11; a/8361/11; a/8362/11; a/8365/11; a/8366/11; a/8367/11; a/8368/11; a/8369/11; a/8370/11; a/8373/11; a/8375/11; a/8379/11; a/8380/11; a/8381/11; a/8382/11; a/8383/11; a/8384/11; a/8386/11; a/8387/11; a/8388/11; a/8391/11; a/8392/11; a/8393/11; a/8394/11; a/8395/11; a/8397/11; a/8398/11; a/8400/11; a/8401/11; a/8402/11; a/8403/11; a/8404/11; a/8405/11; a/8407/11; a/8408/11; a/8409/11; a/8413/11; a/8415/11; a/8416/11; a/8417/11; a/8418/11; a/8419/11;

²⁹ ICC-01/04-01/06-1432, paras. 2, 62-65 (“For the purposes of participation in the trial proceedings, the harm alleged by a victim and the concept of personal interests under article 68(3) of the Statute must be linked with the charges confirmed against the accused.”). See also Pre-Trial Chamber II, in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo* which held that a causal link would be satisfied “when the spatial and temporal circumstances surrounding the appearance of the harm and the occurrence of the incident seem to overlap, or at least to be compatible and not clearly inconsistent”; ICC-01/05-01/08-320, paras. 75-76.

³⁰ ICC-01/09-01/11-17, para. 6.

a/8422/11; a/8423/11; a/8424/11; a/8425/11; a/8426/11; a/8428/11; a/8429/11; a/8430/11;
a/8431/11; a/8432/11; a/8433/11; a/8434/11; a/8435/11; a/8436/11; a/8437/11; a/8438/11;
a/8440/11; a/8442/11; a/8443/11; a/8420/11.

24. [REDACTED]
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[REDACTED]
[REDACTED]
[REDACTED]

Conclusion

26. The Prosecution submits that the following Applicants meet all the requirements under Article 68(3) to participate as victims in the pre-trial proceedings in this case:

a/0153/10; a/0234/10; a/0275/10; a/0356/10; a/0578/10; a/0590/10; a/2080/10; a/8327/11; a/8328/11; a/8329/11; a/8330/11; a/8331/11; a/8332/11; a/8333/11; a/8334/11; a/8336/11; a/8338/11; a/8339/11; a/8342/11; a/8343/11; a/8345/11; a/8346/11; a/8347/11; a/8349/11; a/8350/11; a/8351/11; a/8352/11; a/8355/11; a/8356/11; a/8358/11; a/8359/11; a/8361/11; a/8362/11; a/8365/11; a/8366/11; a/8367/11; a/8368/11; a/8369/11; a/8370/11; a/8373/11; a/8375/11; a/8379/11; a/8380/11; a/8381/11; a/8382/11; a/8383/11; a/8384/11; a/8386/11; a/8387/11; a/8388/11; a/8391/11; a/8392/11; a/8393/11; a/8394/11; a/8395/11; a/8397/11; a/8398/11; a/8400/11; a/8401/11; a/8402/11; a/8403/11; a/8404/11; a/8405/11; a/8407/11; a/8408/11; a/8409/11; a/8413/11; a/8415/11; a/8416/11; a/8417/11; a/8418/11; a/8419/11; a/8422/11; a/8423/11; a/8424/11; a/8425/11; a/8426/11; a/8428/11; a/8429/11; a/8430/11; a/8431/11; a/8432/11; a/8433/11; a/8434/11; a/8435/11; a/8436/11; a/8437/11; a/8438/11; a/8440/11; a/8442/11; a/8443/11; a/8420/11.

27. [REDACTED]

[REDACTED]

[REDACTED]

28.

[REDACTED]



Luis Moreno-Ocampo,
Prosecutor

Dated this 11th day of July, 2011
At The Hague, The Netherlands