

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 26 August 2011

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,
UHURU MUIGAI KENYATTA AND MOHAMMED HUSSEIN ALI**

**Public Document
With a Confidential Annex**

**Decision on Victims' Participation at the Confirmation of Charges Hearing and in
the Related Proceedings**

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

The Office of the Prosecutor
Luis Moreno-Ocampo, Prosecutor
Fatou Bensouda, Deputy Prosecutor

Counsel for Francis Kirimi Muthaura
Karim Khan, Kennedy Ogetto and Essa
Faal

Counsel for Uhuru Muigai Kenyatta
Steven Kay and Gillian Higgins

Counsel for Mohammed Hussein Ali
Evans Monari, John Philpot and
Gershom Otachi Bw'omanwa

Legal Representative of the Victims
Morris Azuma Anyah

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**
Paolina Massidda

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar & Deputy Registrar
Silvana Arbia, Registrar
Didier Preira, Deputy Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**
Fiona McKay

Others
Francis Kakai Kissinger

Judge Ekaterina Trendafilova, acting as Single Judge on behalf of Pre-Trial Chamber II (the “Chamber”) of the International Criminal Court (the “Court”),¹ hereby renders this decision on victims’ participation at the confirmation of charges hearing and in the related proceedings.

I. Introduction

1. The present decision addresses in a comprehensive manner the issues relating to the participation of victims at the confirmation of charges hearing and in the proceedings related thereto. The decision therefore follows an articulate structure that, for the sake of clarity, is laid out hereunder.

2. The Single Judge will at first recall the relevant procedural history (Section II) and the applicable law (Section III). Subsequently, the Single Judge will address a number of preliminary matters (Section IV). Thereafter, the observations submitted by the parties on the victims’ applications will be addressed (Section V) and the criteria for the recognition of the applicants as victims participating in the present proceedings will be laid out and analyzed (Section VI). In conclusion of this part of the decision, the Single Judge will provide general explanation of the main reasons for her decision to grant or, conversely, to deny the applicants the status of participants in the present case (Section VII).

3. Upon identification of the victims admitted to participate in the instant proceedings, the Single Judge will then address the matter of the victims’ common legal representation (Section IX.A.) and specify the participatory rights which the victims can exercise through their legal representative(s) at the confirmation of charges hearing and in the related proceedings (Section IX.B).

4. The Single Judge wishes to clarify that the present decision is classified as “public” although it refers to the existence of documents and, as the case may be, to a limited extent to their content, which have been submitted and are currently treated

¹ Pre-Trial Chamber II, “Decision Designating a Single Judge”, ICC-01/09-02/11-9.

as confidential. The Single Judge considers that the references made in the present decision are required by the principle of publicity and judicial reasoning. Moreover, those references are not inconsistent with the nature of the documents referred to and have been kept to a minimum. Therefore, with a view to protecting the applicants' safety, this decision outlines the principles applied and delineates the approach taken in assessing the applications, by way of referring to them in light of their common features. An individual assessment of all applications for participation transmitted to the Chamber is provided in the confidential annex attached to the present decision.

II. Procedural History

5. On 8 March 2011, the Chamber, by majority, decided to summon Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali to appear before the Court.² Pursuant to this decision, the suspects voluntarily appeared before the Court at the initial appearance hearing held on 8 April 2011,³ during which, *inter alia*, the Chamber scheduled the commencement of the confirmation of charges hearing for Wednesday, 21 September 2011.⁴

6. On 30 March 2011, the Single Judge issued the "First Decision on Victims' Participation in the Case", whereby she instructed the Victims Participation and Reparation Section (the "VPRS") with a view to properly and expeditiously assisting the Chamber in the preparation of the forthcoming proceedings in relation to victims' issues (the "30 March 2011 Decision").⁵ In the said decision, the Single Judge also ordered the parties to submit their observations, if any, on the victims' applications within a time limit of two weeks upon notification of the concerned applications.

² Pre-Trial Chamber II, "Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali", ICC-01/09-02/11-01.

³ ICC-01/09-02/11-T-1-ENG.

⁴ ICC-01/09-02/11-T-1-ENG, page 14, lines 11 to 15.

⁵ Pre-Trial Chamber II, ICC-01/09-02/11-23.

7. On 31 May 2011, the Registrar submitted to the Chamber 4 victims' applications, together with a report prepared pursuant to regulation 86(5) of the Regulations of the Court (the "Regulations") and transmitted those applications, in a redacted form, to the parties (the "First Transmission").⁶

8. On 13 June 2011, in compliance with the deadline set up in the 30 March 2011 Decision, the Defence teams of each of the suspects submitted their respective observations on the victims' applications of the First Transmission.⁷ The Prosecutor filed his observations on the 4 victims' applications on 15 June 2011.⁸

9. On 8 July 2011, the Single Judge issued the "Decision on the Defence Requests in Relation to the Victims' Applications for Participation in the Present Case", addressing the two requests advanced by the Defence of Mr. Kenyatta in its observations on the victims' applications included in the First Transmission.⁹

10. On 28 July 2011, the Registrar transmitted to the Chamber and to the parties additional 245 victims' applications for participation in the present proceedings (the "Second Transmission").¹⁰

11. On 5 August 2011, the Registrar filed the "Proposal for the common legal representation of victims" (the "Proposal on Common Legal Representation").¹¹

12. On 10 August 2011, the Single Judge, upon request of the Defence of Mr. Ali,¹² issued the "Decision on the 'Urgent Defence Motion for Extension of Time to File

⁶ ICC-01/09-02/11-97 – "First transmission to the Pre-Trial Chamber of applications to participate in the proceedings" and "confidential *ex parte*" annexes attached thereto; ICC-01/09-02/11-98 – "First Transmission to the parties and legal representatives of redacted applications to participate in the proceedings" and "confidential *ex parte*" annexes attached thereto; and ICC-01/09-02/11-99-Conf-Exp – "First report on applications to participate in the proceedings" and annexes attached thereto.

⁷ ICC-01/09-02/11-115-Conf, and ICC-01/09-02/11-117, with confidential annex.

⁸ ICC-01/09-02/11-126.

⁹ Pre-Trial Chamber II, ICC-01/09-02/11-164.

¹⁰ ICC-01/09-02/11-199 – "Second transmission to the Pre-Trial Chamber of applications to participate in the proceedings" and "confidential *ex parte*" annexes attached thereto; ICC-01/09-01/11-200 – "Second Transmission to the parties and legal representatives of redacted applications to participate in the proceedings" and "confidential *ex parte*" annexes attached thereto; and ICC-01/09-01/11-201-Conf-Exp – "Second report on applications to participate in the proceedings" and annexes attached thereto.

¹¹ ICC-01/09-02/11-214 and its annexes.

Observations on Applications to Participate in the Proceedings’”, wherein the deadline for Mr. Ali to submit observations on victims’ applications of the Second Transmission was extended until 16 August 2011.¹³ The same extension of the deadline was then granted, upon request,¹⁴ to the Defence of Mr. Muthaura.¹⁵

13. On 11 August 2011, the Prosecutor filed the “Prosecution’s Observations on 245 Applications for Victims’ Participation in the Proceedings”.¹⁶

14. On 16 August 2011, the Defence for Mr. Muthaura filed the “Defence Request for extension of page limit pursuant to Regulation 37(2) of the Regulations of the Court (the “Request for Extension of Page Limit”)¹⁷ and the “Defence Request for extension of Time Pursuant to Regulation 35(2) of the Regulations of the Court (the “Request for Extension of Time”)¹⁸ to submit their observations on the victims’ applications of the Second Transmission. On the same date, the Defence of Mr. Ali and the Defence of Mr. Muthaura filed their respective observations on the victims’ applications of the Second Transmission.¹⁹

15. On 19 August 2011, the Prosecutor filed the document containing the charges brought against the suspects (the “DCC”).²⁰

III. The Applicable Law

16. For the purposes of the present decision, the Single Judge has considered a number of provisions of the applicable law. In particular, the Single Judge notes articles 21, 57(3)(c), 61, 67 and 68 of the Rome Statute (the “Statute”), rules 16, 85, 89 to 92 and 121 of the Rules of Procedure and Evidence (the “Rules”), regulation 35(2),

¹² ICC-01/09-02/11-224.

¹³ Pre-Trial Chamber II, ICC-01/09-02/11-227.

¹⁴ ICC-01/09-02/11-229.

¹⁵ Pre-Trial Chamber II, “Decision on the Extension of Time Limit to File Observations on Applications for Victims’ Participation in the Proceedings”, ICC-01/09-02/11-234.

¹⁶ ICC-01/09-02/11-231.

¹⁷ ICC-01/09-02/11-247.

¹⁸ ICC-01/09-02/11-249.

¹⁹ ICC-01/09-02/11-246-Conf; ICC-01/09-02/11-248 and its annexes.

²⁰ ICC-01/09-02/11-257 and its annexes.

37(2) and 86 of the Regulations. The Single Judge will recall the relevant provisions within the context of the different sections of the present decision.

17. The Single Judge wishes to point out that the scope of the present decision is limited to the participation of victims at the confirmation of charges hearing and in the related proceedings. In this respect, reference is made to article 61(7) of the Statute, which clarifies the limited purpose and scope of the confirmation hearing in providing that “[t]he Pre-Trial Chamber shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged”. Therefore, whilst at the trial stage a determination on the innocence or guilt of the accused is made, what is at stake at the confirmation of charges is whether the evidence placed before the Chamber shows substantial grounds to believe that the suspects committed the crimes charged and, accordingly, shall be committed to trial or not.

IV. Preliminary Matters

18. At the outset, the Single Judge deems it appropriate to address the Request for Extension of Time²¹ and the Request for Extension of Page Limit²² filed by the Defence of Mr. Muthaura.

19. As for the Request for Extension of Time, the Defence team of Mr. Muthaura submits that in the process of filing, within the established deadline of 16 August 2011, their observations on the victims’ applications submitted as part of the Second Transmission, as well as the annexes attached thereto, “it encountered certain technical issues which account for [...] approximately 20 minute delay in submitting the filing and annexes to CMS”.²³ These technical obstacles, in the view of the Defence, were generated by the need to reduce the size of the annexes to be filed, in order for them to fit with the transmission capacity of the Court’s e-mail system, as

²¹ ICC-01/09-02/11-249.

²² ICC-01/09-02/11-247.

²³ ICC-01/09-02/11-249, para. 5.

well as by some difficulties in the communication between the Kenya-based Defence team and the Case Manager in The Hague.²⁴ In light of this, the Defence therefore requests the Single Judge to “extend the time limit for the proper receipt of the Defence’s Observations and its [...] Annexes by 20 minutes”.²⁵

20. The Single Judge notes regulation 35(2) of the Regulations, which states that “[a]fter the lapse of a time limit, an extension of time may only be granted if the participant seeking the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control”. At the outset, the Single Judge considers the significance of the parties’ observations on the victims’ applications for participation pursuant to rule 89(1) of the Rules. The Single Judge is satisfied that the Defence has demonstrated that it was effectively unable to meet the deadline established for reasons outside its control. In addition, the Single Judge is of the view that, in light of the *de minimis* extension of time requested, such extension, as submitted by the Defence of Mr. Muthaura, “does not prejudice any of the parties or participants to these proceedings”.²⁶ In light of the foregoing, the Request for Extension of Time is to be granted.

21. As for the Request for Extension of Page Limit, the Single Judge notes that the Defence of Mr. Muthaura essentially avers that due to high number of victims’ applications of the Second Transmission, on which the Defence wishes to provide observations, “it is simply not possible [...] to reply in a substantive manner to each application [...] within 20 pages”, as laid down in regulation 37(1) of the Regulations.²⁷ The Defence submission is therefore that the present situation constitutes “exceptional circumstances” within the meaning of regulation 37(2) of the Regulations, this warranting “an extension of page limit from 20 to a maximum of 84 pages, including an Annex 1 with substantive submissions”.²⁸

²⁴ *Ibid.*, paras 5 and 6.

²⁵ *Ibid.*, para. 10.

²⁶ *Ibid.*, para. 8.

²⁷ *Ibid.*, para. 7.

²⁸ *Ibid.*, para. 12.

22. The Single Judge notes regulation 37(2) of the Regulations, according to which “[t]he Chamber may, at the request of a participant, extend the page limit [of a document filed with the Registry] in exceptional circumstances”. The Single Judge also notes the provision of rule 89(1) of the Rules which establishes that the Defence “shall be entitled to reply” to the victims’ applications transmitted by the Registry. Therefore, in light of the said right to make meaningful observations as accorded to the parties by the Court’s legal texts and considering that the Second Transmission comprises of 245 applications, the Single Judge is of the view that “exceptional circumstances” within the meaning of regulation 37(2) of the Regulations are shown in the present circumstances and that the Request for Extension of Page Limit shall thus be granted.

23. Accordingly, the Single Judge decides that the observations submitted by the Defence of Mr. Muthaura on the victims’ applications submitted to it as part of the Second Transmission shall be considered as duly filed and taken into consideration for the purposes of the present decision.

IV. The Issues Raised by the Parties in their Observations on the Victims’ Applications

24. The Single Judge recalls that, pursuant to rule 89(1) of the Rules, the parties have had the opportunity to provide observations on all 249 applications of victims wishing to participate in the present case. Observations of a general nature will be analysed and addressed in the present decision, while specific comments submitted by the parties in respect of individual applications are addressed, where applicable, in the assessment of each application provided in the confidential annex appended hereto.

A. The Prosecutor's Observations

25. As recalled above, the Prosecutor duly filed his observations on all victims' applications transmitted in the present case within the deadline established by the Single Judge in the 30 March 2011 Decision.

26. The Prosecutor submits that 226 applicants²⁹ out of 249 should be granted authorization to participate as they meet all requirements for participation in the present proceedings.³⁰ With regard to 23 applications,³¹ the Prosecutor contends that further information or documentation should be provided in order to clarify deficiencies and to assess whether or not the applicants qualify as victims.³² This concerns instances where the applicant(s): (i) does not provide sufficient proof to establish his or her identity and/or does not explain why he or she relies on a

²⁹ All applicants part of the First Transmission (*i.e.* applicants a/8278/11, a/8280/11, a/8281/11 and a/8285/11) and the following applicants whose applications were submitted as part of the Second Transmission: a/0642/10, /1203/10, a/8445/11, a/8447/11, a/8448/11, a/8451/11, a/8452/11, a/8454/11, a/8457/11, a/8484/11, a/8490/11, a/8495/11, a/8501/11, a/8502/11, a/8503/11, a/8505/11, a/8506/11, a/8507/11, a/8509/11, a/8510/11, a/8521/11, a/8531/11, a/8532/11, a/8533/11, a/8534/11, a/8535/11, a/8536/11, a/8537/11, a/8538/11, a/8546/11, a/8547/11, a/8549/11, a/8550/11, a/8578/11, a/8580/11, a/8583/11, a/8590/11, a/8606/11, a/8609/11, a/8610/11, a/8611/11, a/8612/11, a/8613/11, a/8614/11, a/8615/11, a/8617/11, a/8618/11, a/8619/11, a/8621/11, a/8622/11, a/8624/11, a/8626/11, a/8669/11, a/8670/11, a/8671/11, a/8672/11, a/8674/11, a/8687/11, a/8688/11, a/8689/11, a/8691/11, a/8692/11, a/8693/11, a/8694/11, a/8701/11, a/8787/11, a/8791/11, a/8792/11, a/8793/11, a/8794/11, a/8795/11, a/8796/11, a/8799/11, a/9060/11, a/9061/11, a/9062/11, a/9064/11, a/9065/11, a/9066/11, a/9067/11, a/9068/11, a/9069/11, a/9070/11, a/9072/11, a/9073/11, a/9074/11, a/9075/11, a/9076/11, a/9080/11, a/9081/11, a/9082/11, a/9083/11, a/9084/11, a/9085/11, a/9086/11, a/9087/11, a/9088/11, a/9089/11, a/9090/11, a/9096/11, a/9097/11, a/9098/11, a/9101/11, a/9103/11, a/9105/11, a/9106/11, a/9107/11, a/9108/11, a/9110/11, a/9111/11, a/9136/11, a/9138/11, a/9139/11, a/9140/11, a/9141/11, a/9143/11, a/9144/11, a/9145/11, a/9153/11, a/9184/11, a/9185/11, a/9186/11, a/9187/11, a/9189/11, a/9192/11, a/9193/11, a/9194/11, a/9208/11, a/9209/11, a/9210/11, a/9211/11, a/9212/11, a/9213/11, a/9214/11, a/9215/11, a/9216/11, a/9217/11, a/9218/11, a/9219/11, a/9220/11, a/9221/11, a/9222/11, a/9223/11, a/9224/11, a/9227/11, a/9228/11, a/9229/11, a/9230/11, a/9236/11, a/9248/11, a/9249/11, a/9250/11, a/9251/11, a/9252/11, a/9253/11, a/9254/11, a/9255/11, a/9256/11, a/9257/11, a/9258/11, a/9268/11, a/9275/11, a/9276/11, a/9277/11, a/9279/11, a/9280/11, a/9283/11, a/9284/11, a/9285/11, a/9286/11, a/9287/11, a/9288/11, a/9289/11, a/9290/11, a/9293/11, a/9294/11, a/9295/11, a/9297/11, a/9298/11, a/9299/11, a/9300/11, a/9301/11, a/9302/11, a/9306/11, a/9309/11, a/9311/11, a/9316/11, a/9322/11, a/9326/11, a/9329/11, a/9330/11, a/9331/11, a/9334/11, a/9335/11, a/9337/11, a/9338/11, a/9342/11, a/9352/11, a/9364/11, a/9365/11, a/9370/11, a/9371/11, a/9372/11, a/9373/11, a/9374/11, a/9378/11, a/9379/11, a/9380/11, a/9382/11, a/9383/11, a/9387/11, a/9388/11, a/9389/11, a/9391/11, a/9392/11, a/9393/11, a/9396/11, a/9398/11, a/9399/11, a/9404/11, a/9406/11 and a/9407/11.

³⁰ ICC-01/09-02/11-231, para. 2.

³¹ Applicants a/8455/11, a/8483/11, a/8508/11, a/8530/11, a/8542/11, a/8579/11, a/8591/11, a/8616/11, a/8620/11, a/8673/11, a/8800/11, a/9059/11, a/9071/11, a/9104/11, a/9109/11, a/9137/11, a/9191/11, a/9265/11, a/9266/11, a/9390/11, a/9394/11, a/9397/11 and a/9408/11.

³² ICC-01/09-02/11-231, paras 9 and 18.

substitute form of identification;³³ (ii) indicates a birth year on the application form different from the birth year on the attached identity card;³⁴ (iii) does not provide proof of identity of the direct victim(s) as well as the link between them;³⁵ (iv) does not provide information on the person on whose behalf he or she is applying;³⁶ (v) does not state who assisted him or her in completing the application form, given that English is not included among his or her spoken languages;³⁷ (vi) does not provide sufficient information concerning the circumstances in which he or she suffered harm and claim to have lost all belongings but does not claim to have suffered that injury due to a crime charged;³⁸ and (vii) does not specify the date of the crimes of which he or she is allegedly a victim.³⁹

B. The Defence Observations

27. In their respective observations on the victims' applications for participation in the proceedings, the Defence teams of the suspects submit that a number of applications should be rejected since, allegedly, they do not fulfill the requisite criteria. The Single Judge will hereunder address the main issues raised by the Defence teams.

1. Link between the harm suffered and the crimes charged

28. All three Defence teams of the suspects draw the attention of the Single Judge on the fact that a number of applicants claim economic and financial loss – in particular the destruction of their property – as harm suffered in connection to the crimes which they were allegedly victims of.⁴⁰ In the view of the Defence, economic loss,

³³ Applicants a/8455/11, a/8508/11, a/8530/11, a/8579/11, a/8591/11, a/8673/11, a/9059/11, a/9071/11, a/9104/11, a/9109/11, a/9137/11; a/9191/11 and a/9390/11.

³⁴ Applicants a/8483/11 and a/8542/11.

³⁵ Applicant a/8616/11.

³⁶ Applicant a/9390/11.

³⁷ Applicant a/9397/11.

³⁸ Applicants a/8620/11 and a/8800/11.

³⁹ Applicants a/9265/11, a/9266/11, a/9394/11 and a/9408/11

⁴⁰ ICC-01/09-02/11-115-Conf, paras 10, 13 and 19 (where the Defence for Mr. Ali refers to applicants a/8278/11, a/8280/11 and a/8285/11 from the First Transmission); ICC-01/09-02/11-117-Conf-Exp, para.

including loss of property, falls outside the scope of the charges presented by the Prosecutor in the DCC.⁴¹

29. As elaborated below in the section dealing with the victims' eligibility criteria, the Single Judge is of the view that economic and/or financial loss do fall within the notion of "harm", within the meaning of rule 85(a) of the Rules, as long as such loss is a consequence of the commission of the crimes charged. Therefore, even in the event that destruction or loss of property does not constitute the material conduct of one of the crimes charged, as is in the present case, this does not exclude such damages from the compass of the alleged economic loss suffered as a result of the crimes charged against the suspects, should the relevant causal link be satisfactorily established. This is, for example, the case when the applicant relied on the financial support of the direct victim of murder or when material harm resulted from the forcible transfer allegedly committed against an applicant.

30. Therefore, the Single Judge is not persuaded by the arguments advanced by the Defence teams that claims of economic loss fall outside the scope of the present case since the suspects are not charged with pillaging or destruction of property. To the contrary, at least in principle, economic and/or financial loss may constitute material harm resulting from the commission of any of the crimes with which the suspects are charged. The victims' applications for participation will be individually assessed accordingly.

2. Identification of perpetrators and persons responsible for the alleged crimes

31. The Single Judge notes that the Defence of Mr. Kenyatta⁴² and the Defence of Mr. Muthaura⁴³ argue that a number of applications should be rejected since the

24 (where the Defence for Mr. Kenyatta refers to applicant a/8280/11 from the First Transmission); ICC-01/09-02/11-246-Conf, paras 15-17 (where the Defence for Mr. Ali refers to applicants a/9290/11 and a/9184/11 from the Second Transmission); ICC-01/09-02/11-248-Conf-Anx1 (where the Defence of Mr. Muthaura refers to almost the entirety of the applications from the Second Transmission).

⁴¹ ICC-01/09-02/11-246-Conf, para. 15; ICC-01/09-02/11-248, para. 12.

⁴² ICC-01/09-02/11-117-Conf-Exp, para. 21. The Defence of Mr. Kenyatta refers to applicants a/8280/11, a/8281/11 and a/8285/11.

applicant fails to identify the suspects (or groups to which the suspects allegedly belonged) as responsible for the crimes as a result of which the harm was suffered.

32. In this respect, the Single Judge notes the provision of regulation 86(2) of the Regulations, according to which the application form shall contain “the identity of the person or persons the victim believes to be responsible” but only “to the extent possible”. Accordingly, and concurring with the findings of other Chambers of the Court,⁴⁴ the Single Judge, in her 30 March 2011 Decision, did not insert the identification of perpetrators among the information necessary for the applications submitted to be considered complete.⁴⁵

33. Furthermore, the Single Judge agrees with the finding of Trial Chamber III which stated that at times it will inevitably be impossible for the applicants to establish precisely who committed the relevant crime(s) and that, consequently, it would be an unfair burden to require the applicant victims to identify the actual perpetrator(s) of the crime(s) allegedly causing them harm within the meaning of rule 85(a) of the Rules.⁴⁶

34. In light of the above, the Single Judge takes the view that the identification of the perpetrators is not a requirement for a victim’s application for participation to be considered complete.

⁴³ ICC-01/09-02/11-248, para. 14; ICC-01/09-02/11-248-Conf-Anx1. In particular, the Defence of Mr. Muthaura mentions applicants a/9065/11, a/9083/11, a/9090/11, a/9103/11, a/9136/11, a/9138/11, a/9185/11, a/9215/11, a/9252/11, a/9253/11, a/9254/11, a/9256/11, a/9257/11, a/9258/11, a/9265/11, a/9266/11 and a/9275/11 and a/9289/11.

⁴⁴ See e.g., Pre-Trial Chamber I, “Decision on the Requests of the Legal Representative of Applicants on application process for victims’ participation and legal representation”, ICC-01/04-374, para. 12; Pre-Trial Chamber I, “Public Redacted Version of the ‘Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case’”, ICC-01/04-01/07-579, para. 44; Pre-Trial Chamber III, “Fourth Decision on Victims’ Participation”, ICC-01/05-01/08-320, para. 81; Pre-Trial Chamber I, “Decision on the 34 Applications for Participation at the Pre-Trial Stage of the Case”, ICC-02/05-02/09-121, para. 7; Trial Chamber II, “Decision on the treatment of applications for participation”, ICC-01/04-01/07-933-tENG, para. 28; Trial Chamber III, “Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties’ observations on applications for participation by 86 applicants”, ICC-01/05-01/08-699, paras 35 and 36.

⁴⁵ Pre-Trial Chamber II, 30 March 2011 Decision, para. 19.

⁴⁶ Trial Chamber III, “*Corrigendum* to Decision on the participation of victims in trial and on 86 applications by victims to participate in the proceedings”, ICC-01/05-01/08-807-Corr, para. 94.

3. Issues related to the credibility of the applicants

35. The Defence of Mr. Muthaura submits that “[a] noticeable trend emerging from a review of the second batch of victim applicants is the recording of information from victim applicants which mirrors the legal findings in the Decision Issuing the Summons to appear in this case” and that a sizeable number of applications were only submitted after the suspects in the case were publicly named, and that, consequently, “a degree of circumspection is merited [...] so as to be sure that applicants are giving an account of what they perceived or experience[d] rather than one they have read about in the newspapers or other media in Kenya.”⁴⁷ In addition, the Defence attaches certain material to its observations, illustrating the measures taken by the government of Kenya in Nakuru and Naivasha to address the consequences of the post-election violence, including compensation to and relocations of alleged victims,⁴⁸ and warns the Single Judge against the phenomenon of “fake IDPs” allegedly arising in Kenya after the post-election violence.⁴⁹ In this light, the Defence avers that “it would be perilous to simply assume that all victim applicants are genuine”⁵⁰ and that there is a “need for greater circumspection and exercise of due diligence”.⁵¹

36. The Single Judge takes notice of the Defence’s observations in this regard. However, since the Defence does not refer to concrete facts or precise information that would cast doubts as to the credibility of specific applicants, the concerned allegations cannot, as such, lead to the rejection of any particular applications.

4. Redactions to Victims’ Applications

37. The Defence of Mr. Muthaura contends that, with respect to a number of applications, the redactions of locations where the crimes allegedly occurred, as well

⁴⁷ ICC-01/09-02/11-248, para. 11.

⁴⁸ ICC-01/09-02/11-248, para. 16; ICC-01/09-02/11-248-Conf-Exp-Anx2.

⁴⁹ ICC-01/09-02/11-248, para. 17; ICC-01/09-02/11-248-Anx4.

⁵⁰ ICC-01/09-02/11-248, para. 17.

⁵¹ ICC-01/09-02/11-248, paras 16-18.

of “the places where allegedly criminal meetings took place”, hamper the Defence’s ability to provide meaningful observations.⁵²

38. In this regard, the Single Judge recalls articles 68(1) and 57(3)(c) of the Statute, which mandate the Court to take appropriate measures to protect, *inter alia*, the safety, privacy, physical and physiological well-being of victims. The Single Judge is as well cognizant that, in accordance with the principle of proportionality enshrined in article 68(1) of the Statute, measures taken pursuant to this provision may restrict the rights of the suspect only to the extent necessary.

39. In light of the nature, purpose and circumstances of the current proceedings, the Single Judge is convinced that the redactions applied in the concerned victims’ applications are limited to what is strictly necessary in light of the security situation in Kenya and the applicants’ safety and do not amount to an unnecessary restriction of the rights of the Defence. Indeed, the Single Judge considers that the Defence has been provided with sufficient information in order to determine whether the relevant criteria for an applicant to qualify as victim are fulfilled. Those redactions applied to some relevant information in the few victims’ applications which the Defence refers to are the only available measures to protect the applicants concerned.⁵³

VI. The definition of victims under rule 85(a) of the Rules

40. In order to participate in the present proceedings, it must first be determined whether the applicant qualifies as a victim of the case, within the meaning of rule 85 of the Rules. The Single Judge notes that all applications in the present case are submitted under rule 85(a) of the Rules. This provision defines victims as “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court”. The Single Judge considers that the said provision, as

⁵² ICC-01/09-02/11-248, para. 18; ICC-01/09-02/11-248-Conf-Exp-Anx1. The Defence of Mr. Muthaura mentions applicants a/8610/11, a/9086/11, a/9145/11, a/9229/11, a/9257/11, a/9258/11, a/9265/11 and a/9266/11, a/9288/11.

⁵³ See also Pre-Trial Chamber II, “Decision on the Defence Requests in Relation to the Victims’ Applications for Participation in the Present Case”, ICC-01/09-02/11-164, para. 18.

interpreted by the different Chambers of the Court,⁵⁴ mandates the recognition of an applicant as “victim” in the present case provided that: (i) his or her identity as a natural person appears duly established; (ii) the events described in the application for participation constitute the crime(s) within the jurisdiction of the Court with which the suspects are charged; and (iii) the applicant has suffered harm that appears to have arisen “as a result” of the crime(s) charged.⁵⁵

41. The Single Judge will hereunder address these requirements in turn.

1. The applicants’ identity as natural persons

42. The first requirement is that the applicant proves satisfactorily his or her identity as a natural person.

(a) General

43. The Single Judge recalls the 30 March 2011 Decision which, in light of the established jurisprudence of the Court, allows the submission of any of the following documents as proof of the applicant’s identity: (i) Passport; (ii) National Identity Card; (iii) Birth Certificate; and (iv) Driver’s Licence. Furthermore, as indicated, the Single Judge considers acceptable, for the purposes of satisfactorily establishing the identity of the applicant, the submission of other less reliable forms of identification,

⁵⁴ See e.g. Pre-Trial Chamber I, “Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6”, ICC-01/04-101-tEN-Corr, para. 79; Pre-Trial Chamber I, “Décision sur les demandes de participation à la procédure a/0004/06 à a/0009/06, a/0016/06 à a/0063/06, a/0071/06 à a/0080/06 et a/0105/06 dans le cadre de l’affaire le Procureur c. Thomas Lubanga Dyilo”, p. 8; Pre-Trial Chamber II, “Public Redacted Version of ‘Decision on victims’ applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06’”, ICC-02/04-01/05-252, para. 12; Pre-Trial Chamber I, “Public Redacted Version of the ‘Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case’”, para. 65; Pre-Trial Chamber III, “Fourth Decision on Victims’ Participation”, ICC-01/05-01/08-320, para. 30; Pre-Trial Chamber I, “Decision on the 34 Applications for Participation at the Pre-Trial Stage of the Case”, ICC-02/05-02/09-121, para. 11; Pre-Trial Chamber I, “Decision on Victims’ Participation at the Hearing on the Confirmation of the Charges”, ICC-02/05-03/09-89, para. 2; Trial Chamber III, “Decision on 772 applications by victims to participate in the proceedings”, ICC-01/05-01/08-1017, para. 38.

⁵⁵ The Single Judge notes that various Chambers have interpreted this as four requirements, but considers that, in substance, their understanding of the requirements of rule 85(a) does not depart from that taken in the present decision.

insofar as they are accompanied by a brief explanation of the reason why any of the above-mentioned documents was not available.⁵⁶ Within such category of substitute forms of identification, the Single Judge included, in a non-exhaustive manner, the following documents: (i) National ID Waiting Card; (ii) Chief's Identification Letter which provides certain basic information: (a) the full name, date and place of birth, and gender of the victim applicant; and (b) the name of the Chief, his or her signature and the use of an official stamp; (iii) Notification of Birth Cards (for minors); (iv) Clinic Cards (for minors); (v) Kenya Police Abstract Form (for lost national identity cards or Kenyan passports); (vi) a signed declaration from two witnesses – accompanied by their proof of identity – attesting to the identity of the victim applicant.

44. The Single Judge wishes to add that, pursuant to rule 89(3) of the Rules, an application for participation 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”. In this case, the identity of both the victim and the person acting with his or her consent or on his or her behalf must be duly established by the documentation referred to in the previous paragraph. Furthermore, in case of an application submitted on behalf of a victim who is a child or is disabled, also the link between the victim and the person acting on his or her behalf must be satisfactorily proven through the above-mentioned documentation.

(b) Deceased Persons

45. The Single Judge notes that applicant a/0642/10 submitted an application to participate in the proceedings on behalf of his deceased brother.

⁵⁶ Pre-Trial Chamber II, 30 March 2011 Decision, para. 9.

46. At the outset, the Single Judge observes that different Chambers of this Court advanced conflicting interpretations on whether an application for participation in the proceedings could be submitted on behalf of a deceased person.⁵⁷

47. For the reasons set out below, the Single Judge is of the view that a deceased person cannot participate, through his or her relatives, in the proceedings before the Court. Therefore, an application for participation cannot be submitted on behalf of a deceased person. However, this does not prevent a member of the immediate family of the deceased to participate, as indirect victim, for the harm suffered as a result of the death of the said person, in accordance with paragraphs 68 and 69 below.

48. First of all, the Single Judge notes that, pursuant to article 68(3) of the Statute, only “victims” may be admitted to participate in the proceedings. As held by the Appeals Chamber, “the notion of victim necessarily implies the existence of personal harm”.⁵⁸ Exceptions to such general principle are those provided for in rule 89(3) of the Rules, which, as already recalled, explicitly states that an application for participation may be submitted by a person acting on behalf of a victim either with the consent of the victim or in case the victim is a child or a disabled person. To the

⁵⁷ For an interpretation of the applicable law ruling out the recognition of applications for participation submitted on behalf of a deceased individual, see, for example: Pre-Trial Chamber I, “Corrigendum to the ‘Decision on the Applications for Participation Filed in Connection with the Investigation in the Democratic Republic of the Congo by a/0004/06 to a/0009/06, a/0016/06 to a/0063/06, a/0071/06 to a/0080/06 and a/0105/06 to a/0110/06, a/0188/06, a/0128/06 to a/0162/06, a/0199/06, a/0203/06, a/0209/06, a/0214/06, a/0220/06 to a/0222/06, a/0224/06, a/0227/06 to a/0230/06, a/0234/06 to a/0236/06, a/0240/06, a/0225/06, a/0226/06, a/0231/06 to a/0233/06, a/0237/06 to a/0239/06 and a/0241/06 to a/0250/06’”, ICC-01/04-423-Corr-tENG, paras 23-25; Pre-Trial Chamber I, “Public Redacted Version of the Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case”, ICC-01/04-01/07-579, para. 63; Trial Chamber II, “Grounds for the Decision on the 345 Victims’ Applications for Participation in the Proceedings”, ICC-01/04-01/07-1491-Red-tENG, paras 49-56. In favour of participation in the proceedings of an individual acting on behalf of a deceased person: Pre-Trial Chamber III, “Fourth Decision on Victims’ Participation”, ICC-01/05-01/08-320, paras 39-51; Trial Chamber I, Annex to “Order issuing confidential and public redacted versions of Annex A to the ‘Decision on the applications by 7 victims to participate in the proceedings’ of 10 July 2009 (ICC-01/04-01/06-2035)”, ICC-01/04-01/06-2065-Anx2, p. 15; Trial Chamber III, “Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings”, ICC-01/05-01/08-807-Corr, paras 78-85.

⁵⁸ Appeals Chamber, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432, para. 38. See also Pre-Trial Chamber III, “Fourth Decision on Victims’ Participation” ICC-01/05-01/08-320, para. 71.

contrary, no provision in the Court's legal texts permits an application for participation to be submitted on behalf of a deceased person.

49. The Single Judge is of the view that the scenarios provided for in rule 89(3) of the Rules and the instances of an application made on behalf of a deceased person are intrinsically different in nature. Indeed, participation of an individual on behalf of a victim is mainly justified in light of the explicit consent of the said victim. Only in the two cases provided for *expressis verbis* in the said provision it is possible that an application for participation be submitted by someone on behalf of the victim without the requirement of the victim's explicit consent. The Single Judge takes the view that such exceptions are grounded on the fact that a child – as well as in some instances people with serious disabilities – cannot give a legally valid consent. Accordingly, the Single Judge is of the view that the *ratio* behind the participation on behalf of a victim who is a child or a disabled cannot be applied in case of an application on behalf of a deceased person due to the essential difference between the two scenarios. In the instances referred to in rule 89(3) of the Rules an application is submitted on behalf of a victim – who is a natural person – either with the explicit consent of the victim or in the hypotheses in which no valid consent can be given either because the victim is a child or is disabled. Conversely, in the scenario *sub judice* a deceased individual cannot give consent for the submission of an application on his or her behalf.

50. In any case, even assuming *arguendo* that the submission both of applications on behalf of a child or a disabled person and on behalf of a deceased person shared one and the same *ratio*, the Single Judge is of the view that the express possibility for participation in the proceedings on behalf of a victim pursuant to rule 89(3) of the Rules – which is an exception to the general principle that only “victims” can be admitted to participate in the proceedings – cannot ground, by analogy, the possibility for participation on behalf of a deceased person.

51. Furthermore, as held by Trial Chamber II, it is also of relevance for resolving the matter *sub judice* that “a person acting on behalf of a deceased person cannot be in a position to convey the views and concerns of the deceased accurately, in the sense of article 68(3) of the Statute”.⁵⁹ Indeed, pursuant to article 68(3) of the Statute, victims’ participation in the proceedings is justified in order to permit them to express their views and concerns with regard to specific issues arising in the course of the proceedings and affecting their personal interests. In light of this, no participation within the meaning of article 68(3) of the Statute can be accorded to a person who has died before the commencement of the criminal proceedings before the Court. The deceased cannot present his or her own “views and concerns” on the particular matters arising, *in concreto*, during proceedings which have commenced and are conducted after his or her death.

52. The Single Judge notes, moreover, that both Pre-Trial Chamber III and Trial Chamber III referred to the jurisprudence of the Inter-American Court of Human Rights (IACtHR) in order to justify the participation of the successors on behalf of a deceased person.⁶⁰ The Single Judge considers that the said case-law cannot be transposed to the present case, on the basis of the following considerations: (i) human rights institutions like the IACtHR, in contrast to criminal justice bodies, such as the Court, do not deal with individual criminal responsibility, but with State responsibility for human rights violations; and (ii) the jurisprudence of the IACtHR relates to the right of the successors to receive reparation for the harm suffered by the deceased person, whilst in the system of the ICC there is a clear distinction between participation in the proceedings – whose purpose is indeed to convey “views and concerns” within the meaning of article 68(3) of the Statute – on the one hand and

⁵⁹ Trial Chamber II, “Grounds for the Decision on the 345 Victims’ Applications for Participation in the Proceedings”, ICC-01/04-01/07-1491-Red-tENG, para. 54.

⁶⁰ Pre-Trial Chamber III, “Fourth Decision on Victims’ Participation”, ICC-01/05-01/08-320, paras 44-46; Trial Chamber III, “Corrigendum to Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings”, ICC-01/05-01/08-807-Corr, para. 82. In both decisions reference is specifically made, *inter alia*, to IACtHR, *Case of Aloeboetoe et al. v. Suriname*, Judgement of 10 September 1993, para. 54.

reparation on the other hand, with the former not being a precondition for the latter.⁶¹

53. Furthermore, it is of significance that, whilst article 68(3) of the Statute only makes reference to participation of “victims” in the proceedings, article 75 of the Statute distinguishes between reparation *to* victims and reparation *in respect of* victims. The French version of the said provision specifically indicates that reparations can be accorded to both victims and “à leurs ayants droit”, thus clearly defining the potential beneficiary of reparations in respect of victims. Therefore, victims’ family members and successors are potentially entitled to receive reparation “in respect of” victims, though not having sustained personal harm(s) themselves as a result of the commission of a crime within the jurisdiction of the Court and therefore not being “victims” within the meaning of rule 85(a) of the Rules.

54. Therefore, the Single Judge takes the view that the approach of the IACtHR to the effect that “the damages suffered by the victims up to the time of their death entitle them to compensation” and that such “right to compensation is transmitted to their heirs by succession”⁶² is already envisaged in article 75 of the Statute, specifically dealing with reparations, and cannot be used to justify participation in the proceedings on behalf of a deceased person.

55. Moreover, considering that victims’ participation in the proceedings pursuant to article 68(3) of the Statute shall be distinguished from a claim for reparation under article 75 of the Statute, which can only be made if and once an accused has been found guilty, the Single Judge is not persuaded that the purpose of participation on

⁶¹ See e.g. Appeals Chamber, “Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007”, ICC-01/04-556, para. 50 (“There is yet another species of proceedings that must be distinguished from participation under Article 68(3) of the Statute. These are proceedings which the victims may initiate themselves under statutory provisions. Pursuant to the provisions of Article 75 of the Statute and Rule 94 of the Rules, they may make a request for reparations against the convicted person in the manner envisaged by the aforesaid rule”). See also, Trial Chamber II, “Grounds for the Decision on the 345 Victims’ Applications for Participation in the Proceedings”, ICC-01/04-01/07-1491-Red-tENG, para. 55.

⁶² IACtHR, *Case of Aloeboetoe et al. v. Suriname*, Judgement of 10 September 1993, para. 54.

behalf of a deceased would be that of safeguarding claims for future reparations, as stated by other Chambers of the Court.⁶³

56. Accordingly, in light of (i) a literal reading of the applicable law; (ii) the specific purpose of the exercise of participatory rights before the Chamber; and (iii) the clear distinction between participation and reparation in the system of the Court, the Single Judge is of the view that a deceased person cannot be considered as a “victim” within the meaning of article 68(3) of the Statute and rule 85(a) of the Rules for the purposes of participation and cannot therefore be admitted to participate in the proceedings, through another individual acting on his or her behalf. Accordingly, applications for participation made on behalf of deceased persons will be rejected.

57. However, the Single Judge wishes to clarify that relatives of a deceased person may be admitted, as victims themselves, to participate in the proceedings on their own behalf if they prove that they have personally suffered mental or material harm as a result of the death of said person, in accordance with the requirements provided for in rule 85(a) of the Rules as enumerated above. Accordingly, the Single Judge will only consider these applications insofar as they relate to a harm personally suffered by the applicant, and not to the harm suffered by a deceased member of the applicant’s family on whose behalf the applicant is acting.

2. The events described by the applicants appear to constitute at least one of the crimes with which the suspects are charged

58. The second requirement pursuant to rule 85(a) of the Rules is that the incidents described by the applicants appear to constitute “[a] crime within the jurisdiction of the Court”.

59. The Single Judge recalls that, for a crime to fall within the jurisdiction of the Court, it must be one of those referred to in article 5(1)(a) to (c) of the Statute and defined in articles 6, 7 and 8 of the Statute (jurisdiction *ratione materiae*) and must have been

⁶³ Pre-Trial Chamber III, “Fourth Decision on Victims’ Participation”, ICC-01/05-01/08-320, para. 46.

committed within the timeframe specified in article 11 of the Statute (jurisdiction *ratione temporis*). In addition, the crime must meet one of the two alternative conditions embodied in article 12 of the Statute, namely it must be committed either (i) on the territory of a State Party to the Statute or a State which has made a declaration provided for in article 12(3) of the Statute (jurisdiction *ratione loci*) or (ii) by a national of a State Party or a State which has made the said declaration (jurisdiction *ratione personae*).

60. However, not any incident purportedly qualifying as a crime within the jurisdiction of the Court fulfils *per se* the said criterion of rule 85(a) of the Rules. In particular, it is necessary that a link between the incident(s) described by the applicant and the case brought by the Prosecutor against the suspects be established.⁶⁴ At this stage of the proceedings, the scope of the case is delineated by the facts contained in the charges as presented by the Prosecutor in the DCC. The Single Judge is thus called upon to ascertain whether the incident(s) described by the applicants fall(s) within the factual scope of the case to be examined by the Chamber at the confirmation of charges hearing.

61. The Single Judge notes that the three suspects are charged by the Prosecutor as follows:

Count 1 (MUTHAURA and KENYATTA)
Murder constituting a crime against humanity
 (Articles 7(1)(a) and 25(3)(a) of the Rome Statute)

From on or about 30 December 2007 to 29 February 2008, FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA as co-perpetrators, committed or contributed to the commission of crimes against humanity, namely the murder of civilian supporters of the Orange Democratic Movement political party in or around locations including Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya, in violation of Articles 7(1)(a) and 25(3)(a) of the Rome Statute.

⁶⁴ See e.g. Appeals Chamber, "Judgment on the appeals of the Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008", ICC-01/04-01/06-1432, para. 58; Pre-Trial Chamber III, "Fourth Decision on Victims' Participation" ICC-01/05-01/08-320, paras 61-63; Pre-Trial Chamber I, Pre-Trial Chamber I, "Decision on victims' modalities of participation at the Pre-Trial Stage of the Case", ICC-02/05-02/09-121, para 12; Pre-Trial Chamber I, "Decision on Victims' Participation at the Hearing on the Confirmation of the Charges", ICC-02/05-03/09-89, para. 4

Count 2 (ALI)

Murder constituting a crime against humanity (Articles 7(1)(a) and 25(3)(d) of the Rome Statute)

From on or about 30 December 2007 to 29 February 2008, MOHAMMED HUSSEIN ALI, as part of a group of persons, including FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA, acting with a common purpose committed or contributed to the commission of crimes against humanity, namely the murder of civilian supporters of the Orange Democratic Movement political party in or around locations including Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya, in violation of Articles 7(1)(a) and 25(3)(d) of the Rome Statute.

Count 3 (MUTHAURA and KENYATTA)

Deportation or forcible transfer of population constituting a crime against humanity (Articles 7(1)(d) and 25(3)(a) of the Rome Statute)

From on or about 30 December 2007 to 29 February 2008, FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA as co-perpetrators committed or contributed to the commission of crimes against humanity, namely the deportation or forcible transfer of civilian population supporting the Orange Democratic Movement political party in or around locations including Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya, in violation of Articles 7(1)(d) and 25(3)(a) of the Rome Statute.

Count 4 (ALI)

Deportation or forcible transfer of population constituting a crime against humanity (Articles 7(1)(d) and 25(3)(d) of the Rome Statute)

From on or about 30 December 2007 to 29 February 2008, MOHAMMED HUSSEIN ALI, as part of a group of persons, including FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA, acting with a common purpose committed or contributed to the commission of crimes against humanity, namely the deportation or forcible transfer of civilian population supporting the Orange Democratic Movement political party in or around locations including Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya, in violation of Articles 7(1)(d) and 25(3)(d) of the Rome Statute.

Count 5 (MUTHAURA and KENYATTA)

Rape and other forms of sexual violence constituting a crime against humanity (Articles 7(1)(g) and 25(3)(a) of the Rome Statute)

From on or about 30 December 2007 to 29 February 2008, FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA committed or contributed to the

commission of crimes against humanity, namely rape and other forms of sexual violence against civilian supporters of the Orange Democratic Movement political party in or around locations including Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya, in violation of Articles 7(1)(g) and 25(3)(a) of the Rome Statute.

Count 6 (ALI)

Rape and other forms of sexual violence constituting a crime against humanity

(Articles 7(1)(g) and 25(3)(d) of the Rome Statute)

From on or about 30 December 2007 to 29 February 2008, MOHAMMED HUSSEIN ALI, as part of a group of persons, including FRANCIS KIRIMI MUTHAURA and UHURU MUGAI KENYATTA, acting with a common purpose committed or contributed to the commission of crimes against humanity, namely rape and other forms of sexual violence against civilian supporters of the Orange Democratic Movement political party in or around locations including Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya, in violation of Articles 7(1)(g) and 25(3)(d) of the Rome Statute.

Count 7 (MUTHAURA and KENYATTA)

Other inhumane acts constituting a crime against humanity

(Articles 7(1)(k) and 25(3)(a) of the Rome Statute)

From on or about 30 December 2007 to 29 February 2008, FRANCIS KIRIMI MUTHAURA and UHURU MUGAI KENYATTA as co-perpetrators committed or contributed to the commission of crimes against humanity, namely the inflicting of great suffering and serious injury to body or to mental or physical health by means of inhumane acts upon civilian supporters of the Orange Democratic Movement civilian supporters of the Orange Democratic Movement political party in or around locations including Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya, in violation of Articles 7(1)(k) and 25(3)(a) of the Rome Statute.

Count 8 (ALI)

Other inhumane acts constituting a crime against humanity

(Articles 7(1)(k) and 25(3)(d) of the Rome Statute)

From on or about 30 December 2007 to 29 February 2008, MOHAMMED HUSSEIN ALI, as part of a group of persons, including FRANCIS KIRIMI MUTHAURA and UHURU MUGAI KENYATTA, acting with a common purpose, committed or contributed to the commission of crimes against humanity, namely the inflicting of great suffering and serious injury to body or to mental or physical health by means of inhumane acts upon civilian supporters of the Orange Democratic Movement party in or around locations including Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya, in violation of Articles 7(1)(k) and 25(3)(d) of the Rome Statute.

Count 9 (MUTHAURA and KENYATTA)
Persecution as a crime against humanity
 (Articles 7(1)(h) and 25(3)(a) of the Rome Statute)

From on or about 30 December 2007 to 29 February 2008, FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA as co-perpetrators committed or contributed to the commission of crimes against humanity, namely persecution, when co-perpetrators and/or persons belonging to their group intentionally and in a discriminatory manner targeted civilians based on their political affiliation, committing murder, rape and other forms of sexual violence, other inhumane acts and deportation or forcible transfer, in or around locations including Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya, in violation of Articles 7(1)(h) and 25(3)(a) of the Rome Statute.

Count 10 (ALI)
Persecution as a crime against humanity
 (Articles 7(1)(h) and 25(3)(d) of the Rome Statute)

From on or about 30 December 2007 to 29 February 2008, MOHAMMED HUSSEIN ALI, as part of a group of persons, including FRANCIS KIRIMI MUTHAURA and UHURU MUIGAI KENYATTA, acting with a common purpose, committed or contributed to the commission of crimes against humanity, namely persecution, when co-perpetrators and/or persons belonging to their group intentionally and in a discriminatory manner targeted civilians based on their political affiliation, committing murder, rape and other forms of sexual violence, other inhumane acts and deportation or forcible transfer, in or around locations including Nakuru town (Nakuru District, Rift Valley Province) and Naivasha town (Naivasha District, Rift Valley Province), Republic of Kenya, in violation of Articles 7(1)(h) and 25(3)(d) of the Rome Statute.

62. Victims' applications for participation in the present proceedings will thus be rejected when the events described therein fail to meet one or more of the parameters shaping the instant case. In particular, the Single Judge recalls that the suspects are charged with crimes allegedly committed from on or about 30 December 2007 to 29 February 2008. Accordingly, when the applicants refer solely to incidents allegedly occurred before and/or after these dates, the applications shall be rejected, since the events described fall outside the scope of the case before the Chamber. The same holds true for events that allegedly took place in locations other than those referred to by the Prosecutor in the charges brought against the suspects.

63. Finally, the Single Judge recalls that only the events that appear to constitute the crimes of murder, deportation or forcible transfer, rape and other forms of sexual

violence, other inhumane acts and persecution (allegedly committed through acts of murder, rape and other forms of sexual violence, other inhumane acts and deportation or forcible transfer of population), as charged, fulfil the relevant criteria for the purposes of rule 85(a) of the Rules. However, as stated above, the applicants are not required to provide a detailed legal description of the constitutive elements of a particular offence. In fact, the legal characterization of the facts included in the charges remains to be determined ultimately by the Chamber under article 61(7) of the Statute.

3. The applicant has suffered harm as a result of the alleged commission of the crime

64. The third element to be considered is the “harm” that the applicants claim to have suffered. The Single Judge notes and endorses the established jurisprudence of the Court, according to which the “harm” within the meaning of rule 85(a) of the Rules includes physical injury, emotional suffering and economic loss.⁶⁵

65. However, it is not sufficient that the harm claimed by the applicants falls within one of the categories specified above. Within the meaning of rule 85(a) of the Rules the harm must also: (i) ensue from the crime(s) with which the suspects are charged; and (ii) be personal, *i.e.* it must have been personally suffered by the applicant.

66. The Single Judge holds that the standard of causation between the crime and the harm relevant for the purposes of the present decision cannot be established with precision *in abstracto*. Conversely, this shall be assessed on a case-by-case basis in light of all the circumstances of the events as described in the applications.

⁶⁵ Appeals Chamber, “Judgment on the appeals of the Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008”, ICC-01/04-01/06-1432, para. 32. See also Pre-Trial Chamber I, “Decision on Victims’ Applications for Participation in the Proceedings”, ICC-01/04-101-tEN-Corr; Pre-Trial Chamber II, “Decision on Victims’ Applications for Participation”, ICC-02/04-01/05-252; Pre-Trial Chamber I, “Decision on the Applications for Participation in the Proceedings”, ICC-02/05-111; Pre-Trial Chamber III, “Fourth Decision on Victims’ Participation” ICC-01/05-01/08-320; Trial Chamber I, “Decision on Victims’ Participation”, ICC-01/04-01/06-1119; Pre-Trial Chamber I, “Decision on the 34 Applications for Participation at the Pre-Trial Stage of the Case”, ICC-02/05-02/09-121.

67. Further, as indicated, the second element that qualifies the harm within the meaning of rule 85(a) of the Rules is that it be *personally* suffered by the applicants. In this respect, the Single Judge recalls and endorses the findings of other Chambers of the Court, including that of the Appeals Chamber, and already recalled above, to the effect that “the notion of victim necessarily implies the existence of personal harm”.⁶⁶

68. Finally, with respect to the definition of harm, the Single Judge considers that the relevant harm within the meaning of rule 85(a) of the Rules could also be indirect under certain conditions. Indeed, as held by the Appeals Chamber, “[h]arm suffered by one victim as a result of the commission of a crime within the jurisdiction of the Court can give rise to harm suffered by other victims”.⁶⁷ In particular, the Single Judge takes the view that applicants may be admitted to participate in the present proceedings also in case they suffered harm: (i) as a result of the harm suffered by the direct victim; or (ii) whilst intervening to help direct victims of the case or to prevent the latter from becoming victims because of the commission of these crimes.⁶⁸

69. With respect to indirect victims as described in the preceding paragraph, *sub* (i), the Single Judge wishes to clarify that emotional harm may be claimed by an immediate family member of the direct victim, only insofar as the relationship between them has been sufficiently established. This could be, for example, the case where the applicant claims to have suffered emotional harm as a result of the death of a family member, which in turn occurred as a result of the crimes with which the suspects are charged. It is therefore required that a proof of the identity of the direct

⁶⁶ Appeals Chamber, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1432, para. 38. See also Pre-Trial Chamber III, “Fourth Decision on Victims’ Participation” ICC-01/05-01/08-320, para. 71.

⁶⁷ Appeals Chamber, “Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I’s Decision on Victims’ Participation of 18 January 2008”, ICC-01/04-01/06-1432, para. 32.

⁶⁸ Pre-Trial Chamber I, “Decision on the Applications for Participation in the Proceedings Submitted by VPRS 1 to VPRS 6 in the Case the Prosecutor v. Thomas Lubanga Dyilo”, ICC-01/04-01/06-172-t-EN, pp. 7-8; Pre-Trial Chamber I, “Public Redacted Version of the ‘Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case’”, ICC-01/04-01/07-579, para. 66; Trial Chamber I, Redacted Version of “Decision on indirect victims”, ICC-01/04-01/06-1813, para. 51; Pre-Trial Chamber I, “Decision on the 34 Applications for Participation at the Pre-Trial Stage of the Case”, ICC-02/05-02/09-121, para. 13.

victim as well as a proof of the link between the applicant and the direct victim be provided in accordance with paragraph 43 above in order for the present requirement to be met.⁶⁹

VII. Conclusion on the assessment of the applications

70. The Single Judge has reviewed all victims' applications for participation transmitted in the present case, in light of the requirements recalled in the paragraphs above. As already clarified, an individual assessment of each application is contained in the confidential annex attached to the present decision. Nevertheless, for the sake of clarity and with a view to ensuring the principle of publicity of the proceedings, the Single Judge will hereunder identify the applications for participation hereby rejected grouping them into different categories on the basis of common features. It is however to be recalled that, pursuant to rule 89(2) of the Rules, "[a] victim whose application has been rejected may file a new application later in the proceedings".

71. At first, a number of applications shall be rejected as incomplete since they do not provide the required information. In this respect, the Single Judge recalls that, according to the 30 March 2011 Decision and as held by other Chambers of the Court,⁷⁰ the following information, supported by documentation, if applicable, must be covered by the applications submitted:

⁶⁹ See Appeals Chamber, "Judgment on the appeals of the Defence Judgment on the appeals of the Defence against the decisions entitled 'Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06' of Pre-Trial Chamber II", ICC-02/04-01/05-371, para. 1 ("[W]hen a Pre-Trial Chamber is considering whether an applicant fulfils the criteria of rule 85 (a) of the Rules of Procedure and Evidence because he or she suffered emotional harm as the result of the loss of a family member, it must require proof of the identity of the family member and his or her relationship with the applicant").

⁷⁰ For example, Pre-Trial Chamber I, "Decision on the Requests of the Legal Representative of Applicants on application process for victims' participation and legal representation", ICC-01/04-374, para. 12; Pre-Trial Chamber I, "Public Redacted Version of the 'Decision on the 97 Applications for Participation at the Pre-Trial Stage of the Case'", ICC-01/04-01/07-579, para. 44; Pre-Trial Chamber III, "Fourth Decision on Victims' Participation", ICC-01/05-01/08-320, para. 81; Pre-Trial Chamber I,

- (i) the identity of the applicant;
- (ii) the date of the crime(s);
- (iii) the location of the crime(s);
- (iv) a description of the harm suffered as a result of the commission of [one of the crimes with which the suspects are charged];
- (v) proof of identity;
- (vi) if the application is made by a person acting with the consent of the victim, the express consent of that victim;
- (vii) if the application is made by a person acting on behalf of a victim, in the case of a victim who is a child, proof of kinship or legal guardianship; or, in the case of a victim who is disabled, proof of legal guardianship;
- (viii) a signature or thumb-print of the Applicant on the document, at the very least, on the last page of the application.⁷¹

72. Furthermore, the Single Judge considers that victims' applications must also contain, as a *minimum*, sufficient information to satisfactorily establish, to the extent clarified above, the requirements of rule 85(a) of the Rules.

73. Accordingly, and without prejudice to the specificities of each individual application as addressed in the confidential annex hereto, the Single Judge considers that a number of applications shall be rejected, in their entirety or in part, mainly for one or more of the following reasons:

- (i) the applicants – whether applying on their own behalf or not – do not submit an adequate proof of identity and/or kinship, when applicable, in accordance

"Decision on the 34 Applications for Participation at the Pre-Trial Stage of the Case", ICC-02/05-02/09-121, para. 7; Trial Chamber II, "Decision on the treatment of applications for participation", ICC-01/04-01/07-933-tENG, para. 28; Trial Chamber III, "Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties' observations on applications for participation by 86 applicants", ICC-01/05-01/08-699, paras 35 and 36.

⁷¹ Pre-Trial Chamber II, 30 March 2011 Decision, para. 19.

with the requirements laid out in the 30 March 2011 Decision and recalled in paragraph 43 above;⁷²

(ii) the applicant applies to participate in the proceedings on behalf of a deceased person;⁷³

(ii) the applicants claim to have suffered harm as a result of the death of a family member without adequately proving either the existence of the direct victim or the link between the two or both as required in light of paragraph 55 above;⁷⁴

(iii) the lack of intrinsic coherence within the applications themselves casts doubts on the credibility of the applicants;⁷⁵

(v) the events described in the applications fail to meet one or more of the parameters shaping the present case, as specified in paragraphs 60 to 63 above.⁷⁶

74. On the other hand, the Single Judge, as outlined in greater detail in the confidential annex, is satisfied that 233 applicants fulfil all of the criteria set out in rule 85(a) of the Rules and, accordingly, should be recognized as victims of the crimes with which the suspects are charged. They are thus admitted to participate at the confirmation of charges hearing and in the proceedings related thereto.

⁷² Applications; a/8285/11, a/8447/11, a/8452/11, a/8578/11, a/8611/11, a/8622/11, a/8793/11, a/9086/11, a/9136/11, a/9137/11, a/9185/11, a/9215, a/9219/11, a/9228/11, a/9254/11, a/9275/11, a/9330/11, a/9390/11, a/9396/11.

⁷³ Application a/0642/10.

⁷⁴ Applications: a/1203/10, a/8616/11, a/9060/11, a/9065/11, a/9141/11, a/9143/11, a/9189/11, a/9194/11, a/9311/11, a/9335/11, a/9389/11.

⁷⁵ Applications: a/0042/10; a/0064/10; a/8015/11; a/8018/11; a/8019/11; a/8022/11; a/8029/11; a/8033/11; a/8053/11; a/8055/11; a/8101/11; a/8348/11; a/2085/10; a/8714/11; a/8856/11; and a/8939/11.

⁷⁶ Applications: a/8591/11, a/8618/11, a/8687/11, a/9268/11.

VIII. Participation of victims at the confirmation of charges hearing and in the related proceedings

75. After having conducted her determination as to the applicants to be admitted to participate in the present proceedings, the Single Judge will in this section specify the procedural rights to be granted to victims acknowledged hereby as participants.

76. The Single Judge recalls that pursuant to article 68(3) of the Statute the Chamber has the authority to decide that victims' "views and concerns" be presented by their legal representatives. Furthermore, rule 91 of the Rules addresses victims' participation in the proceedings *through* their legal representatives. Before enumerating the different participatory rights that in light of the applicable law victims can exercise through their legal representative(s), the Single Judge will thus address the matter of their common legal representation.

A. Common Legal Representation of Victims

77. At the outset, the Single Judge recalls once again that the present decision addresses the issues relating to victims' participation at the confirmation of charges hearing and in the related proceedings. Therefore, in this section, the Single Judge will exclusively address the matter of common legal representation of those victims that are hereby admitted to participate in such proceedings.

78. At first, the Single Judge notes the relevant portions of rule 90 of the Rules, according to which:

2. Where there are a number of victims, the Chamber may, for the purposes of ensuring the effectiveness of the proceedings, request the victims or particular groups of victims, if necessary with the assistance of the Registry, to choose a common legal representative or representatives. In facilitating the coordination of victim representation, the Registry may provide assistance, *inter alia*, by referring the victims to a list of counsel, maintained by the Registry, or suggesting one or more common legal representatives.

3. If the victims are unable to choose a common legal representative or representatives within a time limit that the Chamber may decide, the Chamber may request the Registrar to choose one or more common legal representatives.

4. The Chamber and the Registry shall take all reasonable steps to ensure that in the selection of common legal representatives, the distinct interests of the victims, particularly as provided in article 68, paragraph 1, are represented and that any conflict of interest is avoided.

79. The Single Judge, heedful of the number of victims admitted as participants in the present proceedings and with the view to ensuring meaningful victims' participation as well as fairness and expeditiousness of the proceedings, is of the opinion that common legal representation should be provided for the victims hereby admitted as participants and that all of them should be represented by a single common legal representative. In this respect, the Single Judge takes due consideration of the conclusion of the Registrar to the effect that in the present case no distinct interests of the victims have arisen and that no conflict of interest has been reported to date.⁷⁷ Accordingly, there are no reasons for dividing the victims into different groups and appointing more than one common legal representative.

80. The Single Judge recalls that, in the 30 March 2011 Decision, she already instructed the VPRS "to take appropriate steps with a view to organizing common legal representation for the purposes of the confirmation of charges hearing, in accordance with rule 16(1)(b) and 90(2) of the Rules".⁷⁸ Accordingly, the Registrar submitted to the Chamber the Proposal on Common Legal Representation, on which the Single Judge will now resort to address the matter under consideration.⁷⁹

81. The Single Judge notes that in the present case all victims admitted to participate at the confirmation of charges hearing and in the proceedings related thereto have already either appointed a legal representative in their applications for participation or, in the absence of any such appointment, have been assisted so far by the Office of Public Counsel for Victims (OPCV) pursuant to the 30 March 2011 Decision. The Single Judge endorses the view of the Registrar that, although "it is usually

⁷⁷ ICC-01/09-02/11-214, para. 12 and ICC-01/09-02/11-214-Anx2, paras 11-12.

⁷⁸ Pre-Trial Chamber II, 30 March 2011 Decision, para. 24.

⁷⁹ ICC-01/09-02/11-214.

preferable to have continuity of legal representation”,⁸⁰ “prior representation of applicants in a case is not *of itself* a determinative factor in choosing a common legal representative”.⁸¹ Accordingly, the continuity of legal representation of victims is to be considered only as one of the criteria that are of relevance for the purposes of selecting a common legal representative of victims. This entails that other counsel may be eligible to be appointed as common legal representatives, regardless of their previous involvement in the present case.⁸²

82. In this respect, the Single Judge has considered all the criteria identified by the Registry for the selection of suitable candidates to recommend to be appointed by the Chamber as common legal representative. These criteria, which have to be adjusted to the particularities of a given case, go beyond the minimum requirements for counsel set out in the Court’s legal texts and are based on the Court’s jurisprudence and on the experience of the Registry to date.⁸³

83. First, the candidate “should demonstrate an established relationship of trust with the victims or the ability to establish such a relationship”.⁸⁴ In considering this criterion, the Registry has taken into account whether a candidate: (i) already represents the victims in the case or in the situation at stake; (ii) has an engagement with victims in other *fora*; (iii) is known to the victims as a human rights advocate or a community leader; (iv) shares cultural, ethnic, linguistic heritage with all victims, or part of them; and (v) will enable victims to speak frankly about the crimes experienced.⁸⁵

84. Second, the candidates “should demonstrate an ability and willingness to take a victim-centred approach to their work”.⁸⁶ According to this criterion, preference may

⁸⁰ ICC-01/09-02/11-214-Anx3, para. 3; ICC-01/09-02/11-214-Anx1, para. 11.

⁸¹ ICC-01/09-02/11-214, para. 23.

⁸² ICC-01/09-02/11-214-Anx3, para. 3.

⁸³ ICC-01/09-02/11-214, para. 16.

⁸⁴ ICC-01/09-02/11-214-Anx3, para. 2.

⁸⁵ *Ibid.*, paras 2 and 4.

⁸⁶ *Ibid.*, para. 6.

be given to candidates who have experience in working with victims or vulnerable groups.⁸⁷

85. The third criterion identified by the Registry is the familiarity of the candidate with the country where the crimes in connection to which the victims are admitted to participate in the proceedings have been allegedly committed.⁸⁸ Such familiarity may originate from the fact that the candidate is from that country, or it may be the result of professional or personal experience that the candidate could have gained.⁸⁹

86. Fourth, the candidate should have relevant expertise and experience, demonstrated by: (i) previous experience in criminal trials, at the national or international level, either before the Court or before other international tribunals; (ii) experience representing large groups of victims; and (iii) specialized study in relevant academic fields.⁹⁰

87. Fifth, the candidate needs to be ready to commit a significant time: (i) to maintain contact with a large number of clients; (ii) to follow developments in Court's proceedings; (iii) to take any appropriate steps in the proceedings; and (iv) to maintain adequate contact with the Court.⁹¹

88. Lastly, the candidate must demonstrate a minimum level of knowledge in information technology.⁹²

89. The Single Judge endorses such criteria as identified by the Registrar, as well as the conclusions of the Registrar that, in light of the said criteria, "the benefits of continuity of representation are minimal in respect of the existing private legal representatives in the present case", ⁹³ since the Registrar is not convinced either (i)

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*, para. 7.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*, para. 8. See also Trial Chamber III, "Decision on common legal representation of victims for the purpose of trial", ICC-01/05-01/08-1005, para. 12.

⁹¹ ICC-01/09-02/11-214-Anx3, para. 10.

⁹² *Ibid.*, para. 12.

⁹³ ICC-01/09-02/11-214, para. 22

that “the current legal representatives have established meaningful relationships of trust with significant number of their clients” or (ii) that “counsel’s representation to date in this case indicates a particular familiarity with ICC proceedings”.⁹⁴ Hence, the Registrar is of the view that “the involvement to date of victims’ current counsel has not provided them with any material advantage over other candidates in terms of the selection criteria”.⁹⁵

90. The Single Judge recalls that, on the basis of the said criteria and in light of the Single Judge’s order to properly organize the common legal representation of victims, the Registrar conducted an appropriate selection process in several steps, comprising of: (i) a request for expression of interest sent to the lawyers on the Registry’s list of counsel; (ii) an initial review of the candidates who provided the information requested; (iii) an evaluation of written answers to questions on the proposed approach towards legal representation of victims; and (iv) a telephone interview. Upon the said selection process, the Registrar proposes Mr. Morris Azuma Anyah for the position of common legal representative in the present case, whose expression of interest and *curriculum vitae* are attached to the Proposal on Common Legal Representation as Annex 5.⁹⁶

91. Taking into account the criteria identified by the Registrar and the proposal to discontinue the current legal representation of victims and upon evaluation of the personal information and professional skills of the proposed candidate, the Single Judge hereby decides to appoint Mr. Morris Azuma Anyah as common legal representative of all the victims admitted to participate by the present decision.

92. The Single Judge concurs with other Chambers of the Court with respect to the necessity that an appropriate legal and administrative support be provided to the common legal representative in order to perform his duties in an efficient and

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*, para. 23.

⁹⁶ *Ibid.*, para. 29.

expeditious manner.⁹⁷ In this respect, the Single Judge adopts such approach as also reiterated by the Registrar in her Proposal on Common Legal Representation, according to which a support structure to be proposed by the Registrar would allow the common legal representative to:

- a. Keep his or her clients informed about the progress of the proceedings and any relevant legal or factual issues that may concern them, in accordance with article 15 of the Code of Conduct for Counsel. The support structure should also allow the common legal representative to respond to a reasonable number of specific legal inquiries from individual victims.
- b. Receive general guidelines or instructions from his or her clients as a group and particular requests from individual victims.
- c. Maintain up to date files of all participating victims and their whereabouts.
- d. Obtain qualified legal support on a need basis.
- e. Store and process any confidential filings or other information, including the identity of his or her clients, in a safe and secure manner.
- f. Communicate with victims in a language they understand.⁹⁸

93. The Single Judge notes that, according to the Registrar, the common legal representative will presumably rely on the Court's legal aid scheme under rule 90(5) of the Rules, and, therefore, that the size and nature of the legal team to support the common legal representative "will largely depend on the resources made available for that purpose by the Registry".⁹⁹ In light of the peculiarities of the case – including the number of victims admitted to participate, the geographical and linguistic difficulties in establishing contact with the victims and the legal and factual complexity of the present case – the Registrar proposes, for the pre-trial proceedings, to finance "to a reasonable level" the assistance of: (i) a legal assistant; (ii) a qualified case manager; and (iii) two field assistants.¹⁰⁰

94. The Single Judge, mindful that the effectiveness of common legal representation depends, *inter alia*, on the assistance, in terms of financial and human resources,

⁹⁷ Trial Chamber III, "Decision on common legal representation of victims for the purpose of trial", ICC-01/05-01/08-1005, para. 25; Trial Chamber II, "Order on the organisation of common legal representation of victims", ICC-01/04-01/07-1328, para. 17

⁹⁸ ICC-01/09-02/11-214, para. 32.

⁹⁹ *Ibid.*, para. 31.

¹⁰⁰ *Ibid.*, para. 34.

provided to the common legal representative, considers the Registry's proposal appropriate and thus endorses it.

95. Turning to the matter of the transitional phase from the previous representation to the newly appointed common legal representation, the Single Judge recalls that, pursuant to articles 15(2) and 18(5) of the Code of Professional Conduct for counsel, all counsel previously representing the victims admitted to participate by the present decision shall convey to the common legal representative "any communication that counsel received relating to the representation" as well as "the entire case file, including any material or document relating to it". In this respect, the Single Judge is of the view that the Registrar shall supervise the said transitional phase, including by way of holding meetings with the victims in order to explain the reasons and the process of appointment of the common legal representative.

96. Finally, the Single Judge recalls the role of the OPCV "to provide assistance to the legal representative for victims" as provided for in regulation 81(4) of the Regulations.

B. Victims' Participatory Rights

97. As clarified above, victims may participate in the present proceedings and exercise a number of rights through their common legal representative.

98. At the outset, and as elaborated in greater detail below, the Single Judge notes that a number of provisions of the applicable law *expressis verbis* confer upon victims certain rights that they could exercise *ex lege*, through their legal representative, at the confirmation of charges hearing and in the related proceedings.

99. Furthermore, alongside the specific participatory rights expressly accorded by a number of provisions of the applicable law, the Chamber, in the course of the proceedings, could grant other rights to the victims, either *proprio motu* or upon specific and motivated request submitted by the legal representative, within the framework of article 68(3) of the Statute. The said provision states that, where their

personal interests are affected, victims may present their views and concerns at “stages of the proceedings determined to be appropriate by the Chamber and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”. The Single Judge, therefore, notes that the provision of article 68(3) of the Statute constitutes the general legal basis for victims to be granted the right to express their “views and concerns” upon an application justifying the existence of the conditions envisaged in the said provision. In particular, in order for the Chamber to grant them rights under the said legal basis, victims must justify that their personal interests are affected by the specific issue(s) under consideration. An assessment thereof cannot thus be conducted in *abstracto*, but, conversely, shall be performed on a case-by-case basis, upon specific and motivated request submitted by the legal representative of victims. Furthermore, the language of article 68(3) of the Statute gives the Chamber discretion in the determination of the manner of victims’ participation in the proceedings, which shall be established ensuring that no prejudice to the rights of the suspects and to a fair and impartial trial be caused.

100. The Single Judge wishes to clarify that, in determining whether any right pursuant to article 68(3) of the Statute shall be granted, the Chamber will also consider whether the exercise of that specific right sought by the legal representative would be prejudicial to the rights of the suspects if done on behalf of victims who are anonymous *vis-à-vis* the Defence. In this respect, it is to be recalled that the Court is vested with the obligation to take appropriate measures with a view to providing, *inter alia*, for the protection of victims within the meaning of articles 57(3)(c) and 68(1) of the Statute.

101. Accordingly, and in light of the fact that the security situation of each applicant could potentially have changed since the time of the submission of the respective application for participation, wherein the applicants’ preference as to the disclosure of his or her identity was indicated, the Single Judge finds it appropriate that, before disclosing victims’ identity to the Defence or, conversely, maintaining their anonymity, the legal representative of victims contact all his clients for the

purposes of receiving clear and updated instructions on the matter and inform the Chamber accordingly. In this respect, the Single Judge requests the legal representative to inform the victims of the availability of protective measures other than that of the complete anonymity *vis-à-vis* the Defence, such as the confidentiality of their identity towards the public, and, in doing so, to clarify the difference between disclosure of identity to the general public and disclosure thereof to the Defence.

102. The Single Judge will hereunder enumerate the procedural rights granted, pursuant to the present decision, to the victims hereby admitted to participate at the confirmation of charges hearing and in the proceedings related thereto.

1. Attendance and participation at the confirmation of charges hearing

103. The Single Judge recalls that, according to rule 91(2) of the Rules, the legal representative of victims shall be entitled to attend and participate in the proceedings. With respect to the attendance at the hearings in the present case, the Single Judge considers that the victims' legal representative has the right to attend all public sessions of the confirmation of charges hearing as well as all public hearings convened in the related proceedings. In the event that the Chamber decides to hold parts of the confirmation hearing *in camera* or *ex parte*, it retains the option to decide, on a case-by-case basis, whether to authorise, upon motivated request, the victims' legal representative to attend those sessions. The same applies to any other *ex parte* or *in camera* hearing convened in the present case.

104. Turning to the matter of participation at the hearings, the Single Judge notes that the provision of rule 91(2) of the Rules specifies that the rights of the legal representatives of victims "shall include participation in hearings, unless, in the circumstances of the case, the Chamber is of the view that the representative's intervention should be confined to written observations or submissions".

105. In the present case, the Single Judge considers that victims' legal representative may, upon motivated request specifying why and how the victims' personal interests are affected by the issues concerned, be authorized to make oral submissions during the confirmation of charges hearing, subject to any direction of the Chamber. In its determination, the Chamber will, *inter alia*, take due account of the stage of the proceedings, the nature of the issue(s) concerned, the rights of the suspects and the principle of fairness and expeditiousness of the proceedings.

106. Finally, the Single Judge recalls the provision of rule 89(1) according to which participation in the proceedings may include making opening and closing statements. Consequently, the Single Judge considers that the victims' legal representative shall be entitled to make a brief opening statement at the confirmation of charges hearing as well as a brief closing statement at the end of the hearing. The said rights shall be exercised in accordance with the schedule of the confirmation of charges hearing which will be issued in due course.

2. Access to the public record of the case

107. Pursuant to rule 121(10) of the Rules, victims or their legal representatives may consult the record of all proceedings before the Pre-Trial Chamber, created and maintained by the Registry in accordance with the said provision. However, the same provision clarifies that such right is "subject to any restrictions concerning confidentiality and the protection of national security information."

108. The Single Judge thus considers that the legal representative of the victims authorised to participate pursuant to the present decision has the right, during the confirmation hearing and in the related proceedings, to have access to all public filings and public decisions contained in the record of the case. The right of access to the public record of the case extends to the public evidence filed by the Prosecutor and the Defence and contained in the record of the case, in the same format (*i.e.* unredacted versions, redacted versions or summaries, as well as electronic versions

with the *metadata* required by the e-Court Protocol) in which it has been made available to the party which has not proposed it.

109. In relation to those decisions, filings or evidence that are classified as “confidential”, the Chamber retains the option to decide on a case-by-case basis, either *proprio motu* or upon receipt of a specific and motivated request, whether to grant victims’ legal representative access thereto.

110. Finally, in light of the presence of the victims’ legal representative in the courtroom, the Single Judge is of the view that he should also have access to the transcripts of: (i) the public sessions of the confirmation of charges hearing; (ii) the sessions of the confirmation of charges hearing held *in camera* or *ex parte* which the legal representative was authorised by the Chamber to attend; (iii) the other public hearings and status conferences held in the present case; and (iii) any other *in camera* or *ex parte* hearings which the legal representative will attend pursuant to the Chamber’s authorisation. The Chamber reserves its right to decide on a case-by-case basis, on its own motion or upon receipt of a specific and motivated request, whether to grant the victims’ legal representative access to the transcripts of non-public sessions of the confirmation of charges hearing or of non-public hearings and status conferences that the legal representative will not have been authorised to attend as well as to the transcripts of non-public hearings or status conferences held before the issuance of the present decision.

111. Despite the absence of any such request at this moment of time, the Single Judge is of the view that, in order for the legal representative of victims to duly perform his duties as well as to meaningfully exercise his rights as established in the present decision, the victims’ legal representative shall be granted *proprio motu* access to the redacted and unredacted versions of the applications for participation submitted by the victims hereby admitted to participate at the confirmation of charges hearing and in the related proceedings. The Registry is thus instructed accordingly.

3. Notification of filings and decisions

112. According to rule 92(5) and (6) of the Rules, the victims' legal representative shall be notified by the Registrar of all decisions and filings filed during the proceedings in which they are admitted to participate. In light of this provision and mindful of the restriction to the access to confidential information as set forth in rule 121(10), the Single Judge holds that the legal representative of victims is entitled to be notified, on the same basis as the Prosecutor and the Defence, of: (i) all requests, submissions, motions, responses and other "documents" within the meaning of regulation 22 of the Regulations which are filed as "public" in the record of the case; (ii) all the public decisions of the Chamber in the present proceedings; and (iii) of the confirmation of charges hearing and any postponement thereof, as well as the date of delivery of the decision in accordance with rule 92(5) of the Rules.

113. The Chamber, however, considers that if a party or a participant in the present proceedings wishes to notify a document classified as "confidential" to the victims' legal representative, it may do so by including in the said document the name of the legal representative to be notified thereof. The Registry shall then notify the legal representative accordingly.

114. The Single Judge considers that, despite the classification as "confidential" of the annex attached to the present decision, the notification thereof to the common legal representative of victims is essential. The Registry is thus instructed to notify the said annex to the legal representative of victims.

4. Questioning of witnesses

115. The Defence has informed the Chamber of its intention to call a total of 6 witnesses to testify at the confirmation of charges hearing.¹⁰¹

¹⁰¹ ICC-01/09-02/11-238-Conf-Exp; ICC-01/09-02/11-243 and confidential *ex parte* annex; ICC-01/09-02/11-244 and its annex.

116. The Single Judge takes note of the provision of rule 91(3) of the Rules, which, in principle, allows victims' legal representatives to question witnesses and experts called to testify before the Chamber. The very same provision, however, clarifies that the questioning of witnesses by the victims' legal representative can take place only pursuant to an authorisation of the Chamber and subject to a number of restrictions.

117. Therefore, if the legal representative of victims wishes to question witnesses called to testify at the confirmation of charges hearing, he must make an application to the Chamber, which shall include demonstration of personal interests that are affected by the issue(s) under consideration. In this regard, rule 91(3)(a) of the Rules entrusts the Chamber with the authority to request the legal representative to provide, together with the request to question a witness, a written note of the questions, which shall be communicated to the Prosecutor and, if appropriate, to the Defence, in order for them to make observations thereto. The Chamber will then decide on the application, taking into account, as provided for by 91(3)(b) of the Rules, *inter alia*, the stage of the proceedings, the rights of the suspects, the interests of the witness and the principle of fairness and expeditiousness of the proceedings. If a request to question a witness is granted, the Chamber, in accordance with rule 91(3)(b) of the Rules, will also decide at that point of time on the procedure to be followed.

5. Filing of written submissions

118. Finally, the Single Judge considers that the legal representative of the victims admitted to participate in the present proceedings may be authorised by the Chamber to make written submissions on specific issues of law and/or fact. This right may be employed if the legal representative proves, by way of an application to that effect, that the victims' personal interests are affected by the issue(s) at stake and the Chamber deems it appropriate, in light of, *inter alia*, the stage of the proceedings, the nature of the issue(s) concerned, the rights of the suspects and the principle of fairness and expeditiousness of the proceedings.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

a) GRANTS the Request for Extension of Time advanced by the Defence of Mr. Muthaura;

b) GRANTS the Request for Extension of Page Limit advanced by the Defence of Mr. Muthaura;

c) DECIDES to admit the following victims as participants at the confirmation of charges hearing and in the related proceedings: a/8278/11; a/8280/11; a/8281/11; a/8285/11; a/1203/10; a/8445/11; a/8447/11; a/8448/11; a/8451/11; a/8452/11; a/8454/11; a/8455/11; a/8457/11; a/8483/11; a/8484/11; a/8490/11; a/8495/11; a/8501/11; a/8502/11; a/8503/11; a/8505/11; a/8506/11; a/8507/11; a/8508/11; a/8509/11; a/8510/11; a/8531/11; a/8532/11; a/8533/11; a/8534/11; a/8535/11; a/8536/11; a/8537/11; a/8546/11; a/8550/11; a/8578/11; a/8579/11; a/8580/11; a/8583/11; a/8590/11; a/8606/11; a/8609/11; a/8610/11; a/8611/11; a/8612/11; a/8613/11; a/8614/11; a/8615/11; a/8616/11; a/8617/11; a/8619/11; a/8620/11; a/8621/11; a/8622/11; a/8624/11; a/8626/11; a/8669/11; a/8670/11; a/8671/11; a/8672/11; a/8673/11; a/8674/11; a/8688/11; a/8689/11; a/8691/11; a/8692/11; a/8693/11; a/8694/11; a/8701/11; a/8791/11; a/8792/11; a/8793/11; a/8794/11; a/8795/11; a/8796/11; a/8799/11; a/8800/11; a/9059/11; a/9060/11; a/9061/11; a/9062/11; a/9064/11; a/9065/11; a/9066/11; a/9067/11; a/9068/11; a/9069/11; a/9070/11; a/9071/11; a/9072/11; a/9073/11; a/9074/11; a/9075/11; a/9076/11; a/9080/11; a/9081/11; a/9082/11; a/9083/11; a/9084/11; a/9085/11; a/9086/11; a/9087/11; a/9088/11; a/9089/11; a/9090/11; a/9096/11; a/9097/11; a/9098/11; a/9101/11; a/9103/11; a/9104/11; a/9105/11; a/9106/11; a/9107/11; a/9108/11; a/9109/11; a/9111/11; a/9136/11; a/9138/11; a/9139/11; a/9140/11; a/9141/11; a/9143/11; a/9144/11; a/9145/11; a/9153/11; a/9184/11; a/9185/11; a/9186/11; a/9187/11; a/9189/11; a/9191/11; a/9192/11; a/9193/11; a/9194/11; a/9208/11; a/9209/11; a/9210/11; a/9211/11; a/9212/11; a/9213/11; a/9214/11; a/9215/11; a/9216/11; a/9217/11; a/9218/11; a/9219/11; a/9220/11; a/9221/11; a/9222/11; a/9223/11; a/9224/11; a/9227/11; a/9228/11; a/9229/11; a/9230/11; a/9236/11; a/9248/11; a/9249/11; a/9250/11; a/9251/11; a/9252/11; a/9253/11; a/9254/11; a/9255/11; a/9256/11; a/9257/11; a/9258/11; a/9265/11; a/9266/11; a/9275/11;

a/9276/11; a/9277/11; a/9279/11; a/9280/11; a/9283/11; a/9284/11; a/9285/11; a/9286/11; a/9287/11; a/9288/11; a/9289/11; a/9290/11; a/9293/11; a/9294/11; a/9295/11; a/9297/11; a/9298/11; a/9299/11; a/9300/11; a/9301/11; a/9306/11; a/9309/11; a/9311/11; a/9316/11; a/9322/11; a/9326/11; a/9329/11; a/9330/11; a/9331/11; a/9334/11; a/9335/11; a/9337/11; a/9338/11; a/9342/11; a/9342/11; a/9364/11; a/9365/11; a/9370/11; a/9371/11; a/9372/11; a/9373/11; a/9374/11; a/9378/11; a/9379/11; a/9380/11; a/9382/11; a/9383/11; a/9387/11; a/9388/11; a/9389/11; a/9390/11; a/9391/11; a/9392/11; a/9393/11; a/9394/11; a/9396/11; a/9397/11; a/9398/11; a/9399/11; a/9404/11; a/9406/11; a/9408/11.

d) DECIDES to reject the applications for participation submitted by applicants: a/0642/10; a/8521/11; a/8530/11; a/8538/11; a/8542/11; a/8547/11; a/8549/11; a/8591/11; a/8618/11; a/8687/11; a/8787/11; a/9110/11; a/9137/11; a/9268/11; a/9302/11; a/9407/11.

e) DECIDES to appoint Mr. Morris Azuma Anyah as common legal representative of all the victims admitted to participate by the present decision;

f) GRANTS the legal representative of victims the right to attend all public sessions of the confirmation of charges hearing as well as all public hearings convened in the related proceedings;

g) GRANTS the legal representative of victims the right to make brief opening and closing statement at the confirmation of charges hearing in accordance with the schedule thereof;

h) ORDERS the Registrar to provide the legal representative of victims with access to the public record of the case, including public evidence disclosed by the parties;

i) ORDERS the Registrar to notify the common legal representative of victims of all public decisions and filings, effective as to the date of the present decision;

j) ORDERS the Registrar to notify the common legal representative of victims of the confidential annex attached to the present decision;

k) **ORDERS** the Registrar to transmit to the common legal representative of victims the redacted and unredacted versions of the applications for participation submitted by the victims hereby admitted to participate at the confirmation of charges hearing and in the related proceedings;

l) **ORDERS** the legal representative of victims, upon consultation with his clients, to communicate to the Chamber, by no later than Monday, 12 September 2011, the victims' preference on the disclosure of their identity to the Defence.

Done in both English and French, the English version being authoritative.



Judge Ekaterina Trendafilova
Single Judge

Dated this Friday, 26 August 2011

At The Hague, The Netherlands