



Original: English

No.: ICC-01/09-01/11  
Date: 23 September 2011

**PRE-TRIAL CHAMBER II**

**Before: Judge Ekaterina Trendafilova, Single Judge**

**SITUATION IN THE REPUBLIC OF KENYA  
IN THE CASE OF THE PROSECUTOR V. WILLIAM SAMOEI RUTO, HENRY  
KIPRONO KOSGEY AND JOSHUA ARAP SANG**

**Public  
Urgent**

**Second Decision on the “Request by the Victims’ Representative for access to  
confidential materials”**

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 William Samoei Ruto**

Joseph Kipchumba Kigen-Katwa, David  
Hooper and Kioko Kilukumi Musau

**Counsel for Henry Kiprono Kosgey**

George Odinga Oraro, Julius Kemboy  
and Allan Kosgey

**Counsel for Joshua Arap Sang**

Joseph Kipchumba Kigen-Katwa, Joel  
Bosek and Philemon Koech

**Legal Representatives of the Victims**

Sureta Chana

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

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

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar & Deputy Registrar**

Silvana Arbia, Registrar  
Didier Preira, Deputy Registrar

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

**Judge Ekaterina Trendafilova**, acting as Single Judge on behalf of Pre-Trial Chamber II (the “Chamber”) of the International Criminal Court (the “Court”)<sup>1</sup> hereby issues this Decision on the “Request by the Victims’ Representative for access to confidential materials”.

1. On 8 March 2011, the Chamber, by majority, decided to summon William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang (collectively the “Suspects”) to appear before it.<sup>2</sup> Pursuant to this decision, the Suspects voluntarily appeared before the Court at the initial appearance hearing held on 7 April 2011 during which, *inter alia*, the Chamber set the date for the commencement of the confirmation of charges hearing for 1 September 2011.<sup>3</sup>

2. On 5 August 2011, the Single Judge issued the “Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings” (the “5 August 2011 Decision”) wherein she decided, *inter alia*, to admit 327 victims as participants in the confirmation of charges hearing and in the related proceedings and appointed Ms. Sureta Chana as the common legal representative of all the victims admitted to participate.<sup>4</sup> In addition, the Single Judge established the principle approach towards victims’ procedural rights in the confirmation of charges hearing and in the related proceedings. Apart from the rights accorded to the victims *expressis verbis* by the Court’s statutory documents, other rights may be granted to the victims, either *proprio motu* by the Chamber or “upon specific and motivated request submitted by the legal representative”, provided that the personal interests of the victims are affected by the specific issue(s) under consideration.<sup>5</sup>

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<sup>1</sup> Pre-Trial Chamber II, “Decision Designating a Single Judge”, ICC-01/09-01/11-6.

<sup>2</sup> Pre-Trial Chamber II, “Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang”, ICC-01/09-01/11-1.

<sup>3</sup> ICC-01/09-01/11-T-1-ENG.

<sup>4</sup> Pre-Trial Chamber II, “Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings”, ICC-01/09-01/11-249, pp. 46-49 letter (a) and (c) of the operative part.

<sup>5</sup> Pre-Trial Chamber II, “Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings”, ICC-01/09-01/11-249, paras 83-101, specifically at paras 84-85 and 92.

3. With specific regard to the rights of the victims to access decisions, filings and evidence that are classified as confidential, the Single Judge has held in the 5 August 2011 Decision that “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”,<sup>6</sup> whether to grant the victims’ legal representative access to such material.

4. On 1 September 2011, as scheduled, the confirmation of charges hearing commenced.<sup>7</sup>

5. On 20 September 2011, the Chamber received the “Request by the Victims’ Representative for access to confidential materials” (the “Request”), in which the legal representative of victims requested access to the following confidential documents:

a. Annex B to the “Prosecution’s Amended Document Containing the Charges and List of Evidence submitted pursuant to Article 61(3) and Rule 121(3), (4) and (5)” of 15 August 2011;

b. Annexes A to E to the “Prosecution’s submission of comprehensive in-depth analysis chart of evidence included in the list of evidence” of 1 August 2011;

c. Annex A to the “Prosecution’s submission of the confidential redacted version of the Article 58 Application” of 26 July 2011;

d. Versions of each of the Prosecutor’s communications to the Defence of incriminating evidence pursuant to Article 61(3)(b) of the Statute, in the form in which they were provided by the Prosecutor to the Defence;

e. Versions of each of the Prosecutor’s communications to the Defence of potentially exculpatory evidence and/or material for the preparation of the

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<sup>6</sup> Pre-Trial Chamber II, “Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings”, ICC-01/09-02/11-249, para. 92.

<sup>7</sup> ICC-01/09-01/11-T-5-ENG.

Defence, in the form in which they were provided by the Prosecutor to the Defence; and

f. A copy of all the evidence supplied by the Prosecution to the Defence teams, in the form in which it was provided by the Prosecutor to the Defence (both incriminating evidence, and potentially exculpatory evidence).<sup>8</sup>

6. On 21 September 2011, the Single Judge issued the “Decision on the ‘Request by the Victims’ Representative for access to confidential material’ and Requesting Observation from the Prosecutor” (the “21 September 2011 Decision”), in which she decided to reject the Request to the extent concerning access to item (b) to (f) in paragraph 6 above.<sup>9</sup> In addition, the Single Judge requested the Prosecutor to submit observations “as to whether he objects to grant the victims’ legal representative access to document ICC-01/09-01/11-261-Conf-AnxB”, which is the list of evidence on which the Prosecutor intended to rely on at the confirmation of charges hearing, pursuant to rule 121(3) of the Rules of Procedure and Evidence (the “Rules”).<sup>10</sup>

7. On 22 September 2011, the Prosecutor submitted his observations in which he stated that the Request should be rejected also with regard to access to the list of evidence.<sup>11</sup>

8. The Single Judge notes articles 21(1)(a), (3) and 68(3) of the Rome Statute (the “Statute”), rule 121(3) and (10) of the Rules.

9. At the outset, the Single Judge wishes to clarify that in the present decision she shall address the remaining part of the Request, namely the part concerning access to the list of evidence.

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<sup>8</sup> ICC-01/09-01/11-335, para. 3.

<sup>9</sup> Pre-Trial Chamber II, “Decision on the ‘Request by the Victims’ Representative for access to Confidential Material’ and Requesting Observation from the Prosecutor”, ICC-01/09-01/11-337, p. 7.

<sup>10</sup> Pre-Trial Chamber II, “Decision on the ‘Request by the Victims’ Representative for access to Confidential Material’ and Requesting Observation from the Prosecutor”, ICC-01/09-01/11-337, p. 7.

<sup>11</sup> ICC-01/09-01/11-339, para. 12.

10. In the Request, the victims' legal representative submits that the issue of "diligence and adequacy" of the investigation carried out by the Prosecutor in the present case, as raised by the Defence teams of the Suspects, has "a very direct bearing on the interests of the victims".<sup>12</sup> The common legal representative asserts that the personal interests of the victims "would therefore clearly be directly affected if the crimes of which they were victims are not diligently and adequately investigated and prosecuted"<sup>13</sup> by the Prosecutor. It is contended that "without access to the evidence that the Prosecutor has produced to date, the victims' representative is in no position at all to form any view on whether, as contended by the Defence, the Prosecution investigation has been wholly inadequate".<sup>14</sup>

11. In this context, the Single Judge recalls the 21 September 2011 Decision, wherein she pointed out that, in the course of the confirmation of charges hearing, the victims effectively enjoyed – through their legal representative – the rights accorded to them, either *expressis verbis* in the Statute and the Rules or pursuant to an authorization by the Chamber. Further, the victims' legal representative was able to follow the presentation of the evidence, whether public or confidential, relied on by the Prosecutor and the Defence teams of the Suspects.<sup>15</sup>

12. As a consequence, the victims' legal representative may have identified specific issues arising out of the confirmation of charges hearing, which in her view affect the personal interests of the victims, so as to justify a request for access to material withheld from victims under rule 121(10) of the Rules. This is indeed the case with regard to the issue of "diligence and adequacy" of the Prosecutor's investigation, as outlined in the Request.

13. In his observations, the Prosecutor asserts that "[a]ccess to confidential material should not be granted except on a case-by-case basis, and only when the victims

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<sup>12</sup> ICC-01/09-01/11-335, para. 16.

<sup>13</sup> ICC-01/09-01/11-335, para. 13.

<sup>14</sup> ICC-01/09-01/11-335, para. 22.

<sup>15</sup> Pre-Trial Chamber II, "Decision on the 'Request by the Victims' Representative for access to confidential material' and Requesting Observation from the Prosecutor", ICC-01/09-01/11-337, para. 9.

demonstrate that the material relates to issues specific to their interests, the Chamber determines that the interests of the victims outweigh the need to retain the confidentiality of the information [...]”.<sup>16</sup>

14. The Single Judge observes that in the present case it appears that an issue potentially affecting the victims’ interests exists. Nevertheless, the legal representative of victims is prevented from identifying specific documents and material related to the issue at stake, since the list of evidence is confidential. If the list of evidence was always filed confidential, the victims’ legal representative would never be in a position – using the Prosecutor’s words – to “demonstrate that the material relates to issues specific to their interests”, even when the legal representative of victims has correctly identified an issue capable of affecting the victims’ rights.

15. Thus, the Single Judge is of the view that, when an issue appears to affect the victims’ rights, as asserted by the legal representative of victims, the list of evidence filed by the Prosecutor pursuant to rule 121(3) of the Rules would constitute a useful tool to select material of particular relevance for the issue under consideration.

16. In conclusion, the Single Judge considers that the Request may be granted to the extent concerning access to document ICC-01/09-01/11-261-Conf-AnxB.

17. Finally, the Single Judge wishes to point out that this is without prejudice to the determination to be made by the Single Judge as to whether or not it would be appropriate to provide the legal representative of victims with access to any further documents she could identify upon analysis of the said list.

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<sup>16</sup> ICC-01/09-01/11-339, para. 12.

**FOR THESE REASONS, THE SINGLE JUDGE HEREBY**

**orders** the Registrar to notify the legal representative of victims of document ICC-01/09-01/11-261-Conf-AnxB.

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

  
**Judge Ekaterina Trendafilova**  
**Single Judge**

Dated this Friday, 23 September 2011

At The Hague, The Netherlands