

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/09-01/11
Date: 9 December 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

**Decision on the "Request by the Victims' Representative for authorisation to make
a further written submission on the views and concerns of the victims"**

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

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”)¹ hereby issues this Decision on the “Request by the Victims’ Representative for authorisation to make a further written submission on the views and concerns of the victims” (the “Application”).²

1. On 8 March 2011, the Chamber, by majority, decided to summon William Samoei Ruto (“Mr. Ruto”), Henry Kiprono Kosgey and Joshua Arap Sang (“Mr. Sang”) to appear before it.³ 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 2011.⁴

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, *inter alia*, admitted 327 victims to participate in the present proceedings; appointed Ms. Sureta Ghana as common legal representative of all the victims; and specified the participatory rights which the victims can exercise through their legal representative at the confirmation of charges hearing as well as in the related proceedings.⁵

3. On 1 September 2011, as scheduled, the confirmation of charges hearing commenced.⁶

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

² ICC-01/09-01/11-367.

³ 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.

⁴ ICC-01/09-01/11-T-1-ENG.

⁵ 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) to (i) of the operative part and paras 83-101.

⁶ ICC-01/09-01/11-T-5-ENG.

4. On 8 September 2011, during the closing session of the confirmation of charges hearing, the Chamber granted the victims' legal representative up until 30 September 2011 to submit final written observations on issues discussed during the hearing.⁷

5. On 16 September 2011, the Chamber received the "Renewed Request by the Victims' Representative for authorisation by the Chamber to make written submissions on specific issues of law and/or fact" (the "Renewed Request").⁸ In her Renewed Request, the legal representative of victims sought leave to make written submissions on article 61(7)(c)(ii) of the Rome Statute (the "Statute"), with a view to suggest that the charges brought by the Prosecutor against the Suspects should reflect acts of destruction of property, looting and infliction of physical injuries and that "the Chamber should exercise its power [...] under [the said provision] to request the Prosecutor to consider amending the charges:

a. [B]y expressly specifying that Count 5 and Count 6 encompass additionally acts of destruction of property, and looting, and the infliction of physical injuries; and

b. [B]y adding counts of the crime against humanity or other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or mental or physical health (Article 7(1)(k) of the Statute), in relation to the acts of destruction of property, and looting, and the infliction of physical injuries".⁹

6. On 22 September 2011, the Single Judge issued its "Decision on Renewed Request by the Victims' Representative for authorisation by the Chamber to make written submissions on specific issues of law and/or fact", in which she granted leave to the legal representative of victims to submit observations on the issues outlined in the Renewed Request.¹⁰

7. On 30 September 2011, the Chamber received the "Final written observations of the Victims' Representative in relation to the confirmation of charges hearing" (the Victims' Final Observations"), in which the legal representative of victims, *inter alia*,

⁷ ICC-01/09-01/11-T-12-ENG, pp. 76-77.

⁸ ICC-01/09-01/11-333.

⁹ ICC-01/09-01/11-333, para. 27.

¹⁰ Pre-Trial Chamber II, "Decision on Renewed Request by the Victims' Representative for authorisation by the Chamber to make written submissions on specific issues of law and/or fact", ICC-01/09-01/11-338.

incorporated and reiterated her application to the Chamber as specified in paragraph 5 above of the Renewed Request.

8. On 9 November 2011, the Chamber received the Application, in which the legal representative of victims advances two requests. First, she seeks authorisation to file written submissions with a view to inform the Chamber about the views and concerns expressed by the victims during the consultations held on 12 and 18 October 2011 (the “First Request”).¹¹ Second, the legal representative of victims reiterates the request made in the Victims’ Final Observations as specified in paragraph 5 of the present decision (the “Second Request”).¹²

9. On 1 December 2011, the Defence of Mr. Ruto and Mr. Sang filed the “Response to Victims’ Representative’s Request for Authorization to make a further Written Submission on the Views and Concerns of the Victims”,¹³ in which the Defence requests the Single Judge to reject the Application in its entirety.¹⁴

10. The Single Judge notes articles 21(1)(a) and (3), 57 and 68(3) of the Statute.

11. At the outset, the Single Judge wishes to point out that, in the 5 August 2011 Decision, it was held that the legal representative of victims may be authorised by the Chamber to make written submissions on specific issues of law and/or fact if: (i) the legal representative of victims proves, by way of an application to that effect, that the victims’ personal interests are affected by the issue(s) at stake; and (ii) the Chamber deems such submissions 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.¹⁵

¹¹ ICC-01/09-01/11-367, para. 3.

¹² ICC-01/09-01/11-367, paras 12-14.

¹³ ICC-01/09-01/11-370.

¹⁴ ICC-01/09-01/11-370, para. 12.

¹⁵ 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, para. 101.

12. The Single Judge also stresses that the assessment of applications pursuant to article 68(3) of the Statute cannot 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.¹⁶

13. The Single Judge acknowledges the well-established rights of victims and the mandate of their legal representative to bring to the attention of the Chamber any views and concerns of victims in relation to issues which affect their interests. Consequently, the fact that the legal representative was only able to consult the victims on the issues included in the Application after the end of the confirmation of charges hearing, does not in principle preclude these views and concerns to be brought before the Chamber through the legal representative. This, however, must be subject to the conditions laid down in article 68(3) of the Statute and elaborated in the 5 August 2011 Decision.

14. With regard to the First Request, the legal representative asserts that, in the view of the victims “the [...] Prosecutor ha[s not] conducted a meaningful investigation into the eyewitness experience of victims”.¹⁷ More specifically, the Prosecutor’s “failure” to interview the victims resulted in the exclusion from the present case of a series of matters which, in the victims’ view, should have been better reflected. These matters include:

- a. The historical origins of the ethnic and political strife between [...] Kalenjin and Kikuyu, which would have put the post-election violence of 2007/2008 in context;
- b. [W]hether there was involvement in the crimes committed by persons higher up in the [...] ODM Party, including Raila Odinga [...] head of the party;

¹⁶ 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, para. 84.

¹⁷ ICC-01/09-01/11-367, para. 10.

c. [T]he omission from the charges [...] of the crimes of looting, [...] destruction of property [...] and rape;

d. [Whether] the crimes occurred as a spontaneous reaction to the announcement of the results of the Presidential election on 30 December 2007;¹⁸

15. As a matter of fairness of the proceedings, the Single Judge notes that in the Application, the legal representative quotes the views allegedly communicated to her by the victims without even referring to the numbers assigned to these victims. In this respect, the Single Judge agrees with the concerns expressed by the Defence of Mr. Ruto and Mr. Sang, according to which it is not possible to ascertain whether “the alleged views and concerns are coming from victims authorized to participate in the proceedings”.¹⁹

16. As to the merits of the First Request, the Single Judge recalls that the functions and powers of the Pre-Trial Chamber are clearly determined under article 57 of the Statute. Thus, the power to conduct investigations concerning the commission of crimes and/or to direct the Prosecutor to investigate certain offences or persons do not fall among the prerogatives of the Pre-Trial Chamber as reflected in the said provision of the Statute. Pursuant to the law the power of the Pre-Trial Chamber is to evaluate, in light of the standards of proof envisaged in the Statute, the results of such investigations, namely the evidence collected and placed before the Chamber.

17. Hence, article 54 of the Statute vests the Prosecutor with autonomous and independent investigative powers, which poses on him more concretely the obligation to: ensure effective investigation and prosecution; cover all facts and relevant evidence, in particular investigate incriminating and exonerating circumstances equally; respect the interests of victims and witnesses; and to fully respect the rights of persons arising under the Statute. Accordingly, in the view of the Single Judge and

¹⁸ ICC-01/09-01/11-367, para. 11.

¹⁹ ICC-01/09-01/11-370, para. 9.

provided the legal framework under consideration, the appropriate addressee of the victims' concerns about the alleged flaws in the investigations in the present case as described in the First Request, should be the Prosecutor.

18. In light of this consideration, the Single Judge rejects the First Request.

19. As regards the Second Request, the Single Judge has already noted that it is essentially based on the same arguments put forward by the legal representative in the Victims' Final Observations. Thus, the Single Judge clarifies that the Chamber will rule on the issues raised in the Second Request together with the request advanced in the Victims' Final Observations, in the Chamber's decision pursuant to article 61(7) of the Statute.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

a) rejects the First Request;

b) decides to address the Second Request in the Chamber's decision pursuant to article 61(7) of the Statute.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Friday, 9 December 2011

At The Hague, The Netherlands