

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 6 April 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

**Second Decision on the Motion of Legal Representative of Victim Applicants to
Participate in Initial Appearance Proceedings and Article 19 Admissibility
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 William Samoei Ruto

Joseph Kipchumba Kigen-Katwa and
Kioko Kilukumi Musau

Counsel for Henry Kiprono Kosgey

George Odinga Oraro

Counsel for Joshua Arap Sang

Joseph Kipchumba Kigen-Katwa

Legal Representatives of the Victims

Legal Representatives of the Applicants

Liesbeth Zegveld

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**

Fiona McKay

Other

Judge Ekaterina Trendafilova, acting as Single Judge on behalf of Pre-Trial Chamber II (the “Chamber”)¹ of the International Criminal Court (the “Court”) hereby renders the decision on the “Motion to Participate in Article 60 Initial Appearance Proceedings and Article 19 Admissibility Proceedings” (the “Second Motion to Participate”),² submitted by a legal representative of seven victim applicants in the present case.

1. On 8 March 2011, the Chamber, by majority, issued three summonses to appear in the present case and set the date for the initial appearance of the suspects for 7 April 2011.³

2. On 30 March 2011, the Single Judge issued the “Decision on the Motion by Legal Representative of Victim Applicants to Participate in Initial Appearance Proceedings”⁴ denying the request of seven victim applicants to participate in the initial appearance of the suspects on 7 April 2011.

3. The same day, the Single Judge issued the “First Decision on Victims’ Participation in the Case”,⁵ putting in place the practical framework for the Victims Participation and Reparation Section to properly and expeditiously assist the Single Judge in her preparation of the upcoming proceedings in relation to victims’ issues.

4. On 4 April 2011, the Chamber issued its “Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute” (the “Decision on the Conduct of Article 19

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

² ICC-01/09-01/11-34-Anx.

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 Pre-Trial Chamber II, “Decision on the Motion by Legal Representative of Victim Applicants to Participate in Initial Appearance Proceedings”, ICC-01/09-01/11-14.

⁵ Pre-Trial Chamber II, “First Decision on Victims’ Participation in the Case”, ICC-01/09-01/11-17.

Proceedings”)⁶ after the Government of the Republic of Kenya lodged an application⁷ challenging the admissibility of the case. In that decision, the Chamber rejected the request made by the Government of the Republic of Kenya to “attend one or both of the hearings’ days of 7/8 April 2011”.⁸

5. On 5 April 2011, the Single Judge was notified of the Second Motion to Participate. The victim applicants “reiterate their strong desire to participate in the initial appearance” of William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang in case “the Government of Kenya is permitted to address the Court in relation to its admissibility challenge”.⁹ They also request to participate in the admissibility proceedings both with regard to the substance of the challenge as well as to the procedural arrangements governing the manner in which the challenge is processed.¹⁰

6. The Single Judge notes articles 19(3), 60(1) and 68(3) of the Rome Statute (the “Statute”), and rules 58(2), 59, 85 and 121(1) of the Rules of Procedure and Evidence (the “Rules”). She also takes cognizance of article 15 of the Code of Professional Conduct for counsel.¹¹

7. The Single Judge recalls article 68(3) of the Statute, which reads:

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

⁶ Pre-Trial Chamber II, “Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute”, ICC-01/09-01/011-31.

⁷ ICC-01/09-01/11-19.

⁸ Pre-Trial Chamber II, “Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute”, ICC-01/09-01/011-31, para. 11.

⁹ ICC-01/09-01/11-34-Anx, paras 2 and 8.

¹⁰ ICC-01/09-01/11-34-Anx, para. 3.

¹¹ Adopted at the 3rd plenary meeting on 2 December 2005, by consensus, ICC-ASP/4/Res.1.

8. The Single Judge also has regard to article 60(1) of the Statute which states:

Upon the surrender of the person to the Court, or the person's appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under this Statute, including the right to apply for interim release pending trial.

9. The Single Judge further recalls, in particular, rule 58(2) of the Rules, which stipulates, in relevant part:

When a Chamber receives a request or application raising a challenge or question concerning its jurisdiction or the admissibility of a case in accordance with article 19, paragraph 2 or 3, or is acting on its own motion as provided for in article 19, paragraph 1, it shall decide on the procedure to be followed and may take appropriate measures for the proper conduct of the proceedings. It may hold a hearing. (...).

10. At the outset, the Single Judge notes that the requests put forward by the victim applicants in their Second Motion to Participate have been already adjudicated by this Chamber in previous decisions. The Single Judge recalls that she has rejected the requests for participation in the initial appearance of the suspects on 7 April 2011 of both the victim applicants¹² *and* the Government of Kenya¹³. The Chamber has sufficiently made clear in previous decisions that the initial appearance serves a *limited* purpose as set out in article 60(1) of the Statute, which shall not be repeated again.¹⁴ Therefore, the request of the seven victim applicants to participate in the initial appearance of the suspects on 7 April 2011, in case the Government of Kenya attended, is without merit.

11. Further, the victim applicants request to participate in relation to the "procedural arrangements governing the manner in which the [admissibility challenge] is processed". The Single Judge notes that this request is made *after* the Chamber has

¹² Pre-Trial Chamber II, "Decision on the Motion by Legal Representative of Victim Applicants to Participate in Initial Appearance Proceedings", ICC-01/09-01/11-14.

¹³ Pre-Trial Chamber II, "Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute", ICC-01/09-01/11-31.

¹⁴ Pre-Trial Chamber II, "Decision on the Motion by Legal Representative of Victim Applicants to Participate in Initial Appearance Proceedings", ICC-01/09-01/11-14, para. 6; Pre-Trial Chamber II, "Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute", ICC-01/09-01/11-31, para. 11.

already taken its Decision on the Conduct of Article 19 Proceedings setting out, *inter alia*, the timeframe, the nature, and modalities for victims to participate in those distinct proceedings. The Single Judge is deeply concerned that victim applicants may not have become aware of the Chamber's previous findings. For all possible purposes, the Single Judges draws the attention of victim applicants and their legal representative to the following relevant holdings of the Chamber:

8. Given the language used in rule 58 of the Rules, the Chamber is bestowed with the necessary discretion to organize the proceedings related to an admissibility challenge in manner that best suits the circumstances of each particular case. This is clear from the reference to the phrase "shall decide on the procedure to be followed" and the discretion provided by using the verb "may take appropriate measures" and "may hold a hearing".

(...)

10. In response, the Chamber, being keen to expedite the proceedings and avoid any unnecessary delay, deems it sufficient to confine the engagement of the parties in the article 19 proceedings to providing written observations as dictated by rules 58(3) and 59(3) of the Rules. (...)

(...)

12. Concerning more generally the procedure to be followed, the Chamber shall, in accordance with rule 58(3) of the Rules allow the Prosecutor and the suspects to submit written observations on the Application within a time period determined by the Chamber. In addition, the Chamber is of the view that the victims who have communicated with the Court namely, those who submitted applications to participate in the proceedings in the present case, shall be allowed, in accordance with article 19(3) of the Statute and rule 59(3) of the Rules, to submit written observations on the Application within a time period determined by the Chamber. In order to ensure the proper and expeditious conduct of the article 19 proceedings and taking into consideration that no victim has been recognized yet in the present case, the Chamber is of the view that it is in the interest of justice to appoint the Office of Public Counsel for Victims (the "OPCV") to represent all those victims who have submitted applications to participate in the proceedings in the present case.

13. Although the Chamber has already stated in its "First Decision on Victims' Participation in the Case" that victims who have no legal representation shall be assisted by the OPCV for the purpose of participation in the proceedings, this does not deny the fact that the article 19 procedure is of a specific and limited nature and governed by *lex specialis* provisions, such as rule 59 of the Rules, which provides the Chamber with the discretion to organize the proceedings in a way that best guarantees its expeditiousness. Thus, it is the Chamber's view that for the purpose of the article 19 proceedings, the OPCV may still serve the common interest of victims who have communicated with the Court even if in the meantime they are represented by their legal representatives. The Victims Participation and Reparations Section is instructed to that effect to provide all

victims applications related to this case to the OPCV and to provide it with any necessary assistance to contact the victim applicants expeditiously.¹⁵

12. In light of the above, the request to participate in the “procedural arrangements governing the manner in which the [admissibility challenge] is processed” must equally fail.

13. The victim applicants allege to be “deeply troubled by the Single Judge’s First Decision on Victims’ Participation in the Case” as “[i]t appears that as a result of this [d]ecision the determination of victim status will suffer even further delay”. The victim applicants further claim that this delay may be “in part due to inadequate organization of ICC-organs”.¹⁶ The Single Judge notes that she has not been served with any proof by the victim applicants that this assumption holds true and has, therefore, no reason to believe that the processing of victim applications, as organized and decided by this Chamber, has been delayed hitherto.

14. Lastly, the Single Judge notes with grave concern that it appears that the victim applicants have not been properly informed and advised by their legal representative on the decisions taken by this Chamber before making their requests. To this end, the Single Judge reminds the legal representative to keep her clients informed about the progress of the proceedings and all relevant legal or factual issues that may concern them, as required by article 15 of the Code of Professional Conduct for counsel.¹⁷ Ultimately, it is the responsibility of counsel to establish such communication structures with her clients that will allow her to receive instructions from and provide qualified legal advice to them effectively and expeditiously.

¹⁵ Pre-Trial Chamber II, “Decision on the Conduct of the Proceedings Following the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute”, ICC-01/09-01/011-31.

¹⁶ ICC-01/09-01/11-34-Anx, para. 5.

¹⁷ Article 15(1) of the Code of Professional Conduct for counsel reads: “Counsel shall provide the client with all explanations reasonably needed to make informed decisions regarding his or her representation”.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

Rejects the Second Motion to Participate by the victim applicants.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Wednesday, 6 April 2011

At The Hague, The Netherlands