



Original: English

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

Date: 15 August 2011

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR v. WILLIAM SAMOEI RUTO, HENRY KIPRONO KOSGEY
AND JOSHUA ARAP SANG

Public Document

**Request by the Victims' Representative for authorisation by the Chamber to make
written submissions on specific issues of law and/or fact**

Source: Victims' Representative

Document 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 the Defence

Counsel for William Samoei Ruto
Joseph Kipchumba Kigen-Katwa, David
Hooper 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

Ms Sureta Chana

Legal Representatives of the Applicants

Ms Liesbeth Zegveld
Mr Peter Njenga Mwangi
Mr Francis Kissinger Kakai
Mr Nicholas Kaufman
Ms Sarah Pellet

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Silvana Arbia

Deputy Registrar

Didier Preira

Counsel Support Section

Victims and Witnesses Unit

Fiona McKay

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Single Judge's "Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings"¹ of 5 August 2011 (the "5 August 2011 Decision") appointed a common legal representative of all the victims admitted to participate by that decision (the "victims' representative").
2. Paragraph 101 of the 5 August 2011 Decision states 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.
3. Pursuant to this paragraph of the 5 August 2011 Decision, the victims' representative makes the present application to make written submissions on the specific issues of law and/or fact detailed below.
4. Having only been appointed on 5 August 2011, and having only been provided with the documents in the case in The Hague on 11-12 August 2011, the victims' representative has not yet had an opportunity to communicate with the victims that she represents. A mission to Kenya is to take place in the week commencing 15 August 2011.
5. However, given the very short time remaining before the confirmation of charges hearing, the present document is filed without delay, without prejudice to the right of the victims' representative to make further applications in due course. The prompt filing of the present request is

¹ ICC-01/09-01/11-249.

intended to give as much notice of the victims' position as possible to the Pre-Trial Chamber, the parties and other participants, in the interests of the orderly administration of justice.

The issue affecting the victims' personal interests

6. The victims' representative represents 327 victims.
7. In their requests for participation in proceedings and reparations, virtually all of these victims have indicated that they have suffered loss as a result of destruction of property. At this early stage, it appears to the victims' representative that there are only one or two victims who have not done so.
8. The Pre-Trial Chamber's "Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang"² of 8 March 2011 (the "8 March 2011 Decision") indicates that the Prosecutor, when requesting the Pre-Trial Chamber to issue summonses in this case, contended that there were reasonable grounds to believe that the accused had committed four crimes within the jurisdiction of the court, namely the crimes against humanity of (1) murder, (2) deportation or forcible transfer of population, (3) torture and (4) persecution.³ It appears from that Decision that the Prosecutor considered the crime of persecution to consist exclusively of murder, torture, and deportation or forcible transfer of population.⁴
9. In the 8 March 2011 Decision⁵, the Pre-Trial Chamber was satisfied that there are reasonable grounds to believe that William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang are criminally responsible for certain acts constituting crimes against humanity, namely (1) murder (article 7(l)(a) of

² ICC-01/09-01/11-01.

³ ICC-01/09-01/11-01, *see especially* para 13.

⁴ ICC-01/09-01/11-01, *see especially* para(s) 13 and 32.

⁵ ICC-01/09-01/11-01, para 57.

the Statute), (2) forcible transfer of population (article 7(l)(d) of the Statute) and (3) persecution (article 7(1)(h) of the Statute).

10. The 8 March 2011 Decision refers expressly to the evidence of destruction and burning of property.⁶ However, the paragraphs of that Decision referring to the count of persecution do not expressly refer to destruction or burning of property as an aspect of the acts of persecution. (See especially paragraph 32 of that Decision: “the Chamber finds that there are reasonable grounds to believe that persecution as a crime against humanity, was committed in connection with and through *acts of murder and forcible transfer*” [emphasis added]).
11. On 1 August 2011, the Prosecution filed the “Prosecution’s Document Containing the Charges and List of Evidence submitted pursuant to Article 61(3) and Rule 121(3)” (the “Charges Document”)⁷ . The Annex to that Document (the “Charges Document Annex”)⁸ again refers expressly to the evidence of destruction and burning of property.⁹ However, the paragraphs of the Charges Document Annex referring to the count of persecution do not expressly refer to destruction or burning of property as an aspect of the acts of persecution. (See especially paragraph 133, wording of Counts 5 and 6 : “... persecution, when coperpetrators and/or persons belonging to their group intentionally and in a discriminatory manner targeted civilians based on their political affiliation, committing *murder, torture, and deportation or forcible transfer of population*” [emphasis added]).
12. It is thus not clear that the destruction and/or burning of property has been included within the scope of the proposed charges.

⁶ ICC-01/09-01/11-01 at paras 17, 18, 19, 31, 42 and 46.

⁷ ICC-01/09-01/11-242.

⁸ ICC-01/09-01/11-242-AnxA.

⁹ ICC-01/09-01/11-242-AnxA at paras 26(6), 31, 37, 39, 41, 44, 74, 75, 79, 81, 85, 88, 89, 94, 101.

13. In circumstances where virtually the entirety of such a large number of victims in a case have suffered loss as a result of destruction and/or burning of property, and have specifically indicated an intention to seek reparations for such loss, and in circumstances where the evidence relied on in support of the charges clearly includes evidence of destruction and/or burning of property, it must be a matter of most serious concern that destruction and/or burning of property has not been clearly included in the charges proposed to be brought by the Prosecutor.
14. The concerns are not necessarily confined to the failure clearly to include destruction and/or burning of property. The Charges Document Annex also refers for instance to evidence of infliction of injuries¹⁰ and looting,¹¹ yet these acts are also not clearly included in the proposed charges.

The issue on which the victims' representative seeks authorization to make written submissions

15. The victims' representative requests authorization to make written submissions on the following specific issues of law and/or fact:
- a. Whether acts of destruction and/or burning of property, infliction of injuries and looting can amount to the crime against humanity of persecution (article 7(1)(h) of the Statute).
 - b. Whether acts of destruction and/or burning of property, infliction of injuries and looting can amount to the crime against humanity of 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).

¹⁰ ICC-01/09-01/11-242-AnxA at paras 21, 38, 39, 89.

¹¹ ICC-01/09-01/11-242-AnxA at paras 31, 37, 85, 88, 94, 101.

- c. Whether, at a confirmation of charges hearing under article 61 of the Statute, the Pre-Trial Chamber has the power, on its own motion or on the motion of a party or at the request of a victim's representative:
- i. to confirm a charge additional to the charges specified by the Prosecutor where there is sufficient evidence to support the additional charge;
 - ii. when confirming a charge that has been specified by the Prosecutor, to confirm or clarify that the charge includes acts in addition to those specified by the Prosecutor as being included in the charge;
 - iii. to order, direct, request or invite the Prosecutor to add additional charges, or to include additional acts within the scope of an existing charge.
- d. Whether, if the Pre-Trial Chamber has powers referred to in c. above, such powers should be exercised in the circumstances of this case.



Sureta Chana

Dated this 15th day of August 2011

At London, United Kingdom