

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/09-01/11
Date: 19 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. WILLIAM SAMOEI RUTO, HENRY
KIPRONO KOSGEY AND JOSHUA ARAP SANG**

Public Document

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

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

Counsel for Joshua Arap Sang
Joseph Kipchumba Kigen-Katwa

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**
Paolina Massidda

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

States Representatives

Amicus Curiae

Other

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 renders this decision on the “Request by the Victims’ Representative for authorization by the Chamber to make written submissions on specific issues of law and/or fact” (the “Request”).²

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.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 1 August 2011, the Prosecutor filed the document containing the charges brought against the suspects.⁵ A corrected version thereof has been filed on 15 August 2011.⁶

3. On 5 August 2011, the Single Judge issued the “Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings”, whereby she, *inter alia*, (i) admitted 327 victims to participate in the present proceedings; (ii) appointed Ms. Sureta Chana as common legal representatives of all the victims; and (iii) specified the participatory rights which the victims can exercise through their legal representative at the confirmation of charges hearing and in the related proceedings.⁷ Furthermore, the Single Judge 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 proves

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

² ICC-01/09-01/11-263.

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-01/09-01/11-01.

⁴ ICC-01/09-01/11-T-1-ENG page 17, lines 12 to 25.

⁵ ICC-01/09-01/11-242-AnxA.

⁶ ICC-01/09-01/11-261-AnxA.

⁷ Pre-Trial Chamber II, ICC-01/09-01/11-249.

that the victims' personal interests are affected by the issue(s) at stake; and (ii) 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 the expeditiousness of the proceedings.⁸

4. On 15 August 2011, the victims' legal representative filed the Request,⁹ whereby she requests authorization to make written submissions on the following issues:

- 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).
- 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.¹⁰

5. The Single Judge notes article 61(7) and 68(3) of the Rome Statute (the "Statute").

6. As recalled above, the legal representative of victims requests the Single Judge to be granted the opportunity to make written submissions with respect to the possible

⁸ *Ibid.*, para. 101.

⁹ ICC-01/09-01/11-263.

¹⁰ *Ibid.*, para. 15.

legal characterization of acts of destruction of property and/or burning of property, infliction of injuries and looting. Furthermore, the legal representative of victims requests authorization to make submissions concerning the Chamber's power to modify or clarify the scope of the charges as presented by the Prosecutor and the appropriateness of the exercise of such powers in the present case.

7. At the outset, the Single Judge notes that the Suspects have not been charged by the Prosecutor with acts of destruction and/or burning of property, infliction of injuries or looting. Conversely, the Suspects are charged with murder, deportation or forcible transfer and persecution (committed through murder, torture and deportation or forcible transfer). In this respect, it is to be clarified that the Chamber is not vested with the authority to modify the charges brought by the Prosecutor against the Suspects. Indeed, according to article 61(7) of the Statute, the Chamber shall, on the basis of the confirmation of charges hearing, "determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged". On the basis of such determination, the Chamber shall then either confirm those charges or decline confirmation thereof. Accordingly, the Chamber does not have the power either to confirm a charge that is not specified by the Prosecutor or to "clarify that the charge includes acts in addition to those specified by the Prosecutor as being included in the charge". In this respect, any submission by the legal representative of victims concerning – or conditional upon – an alleged authority of the Chamber to such effect would serve no purpose.

8. However, the Single Judge recalls that article 61(7)(c)(ii) of the Statute permits the Chamber, on the basis of the confirmation of charges hearing, to adjourn the hearing and request the Prosecutor to consider "[a]mending a charge because the evidence submitted appears to establish a different crime within the jurisdiction of the Court". Only the presence of the requirements provided for by the said provision could trigger, at the appropriate stage of the pre-trial proceedings, the Chamber's request to the Prosecutor to modify the charges.

9. Therefore, an amendment of the charges could only be brought by the Prosecutor pursuant to a decision that the Chamber can issue within the framework of article 61(7)(c)(ii) of the Statute, namely on the basis of the confirmation of charges hearing and in light of the evidence submitted. Considering that the confirmation hearing in the present case is yet to take place, the Single Judge is of the view that the Request advanced by the legal representative of victims is premature at this moment of time and shall, accordingly, be rejected.

10. It is however to be clarified that the present decision is rooted on procedural grounds in light of the Court's legal system as established by the applicable law. It is therefore without prejudice for the Chamber to consider, at the appropriate stage, the arguments advanced by the legal representative of victims with respect to the possible legal characterization of acts of destruction and/or burning of property, infliction of injuries and looting.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Request.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Friday, 19 August 2011

At The Hague, The Netherlands