

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/11
Date: 25 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 Communication to the Chamber pursuant to the Chamber's Decision of 5 August 2011
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Source: Victims' Representative

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Mr Luis Moreno-Ocampo
Ms Fatou Bensouda
Ms Cynthia Tai

Counsel for the Defence

Defence of William Samoei Ruto
Mr Kioko Kilukumi Musau
Mr David Hooper
Defence of Henry Kiprono Kosgey
Mr George Odinga Oraro
Mr Alan Kosgey
Defence of Joshua Arap Sang
Mr Joseph Kipchumba Kigen-Katwa
Mr Joel Kimutai Bosek

Legal Representatives of the Victims

Ms Sureta Chana

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

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

Mr Xavier-Jean Keïta

States' Representatives

Sir Geoffrey Nice
Mr Rodney Dixon

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Counsel Support Section

Mr Esteban Peralta Losilla

Deputy Registrar

Mr Didier Preira

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Ms Fiona McKay

Other

I. Background

1. Further to the response filed by the Victims' representative dated 19 August 2011¹ requesting for an extension of time until 24 October 2011 to comply with the order of the Single Judge's "Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings" of 5 August 2011² ("the 5th of August Decision") and specifically Paragraph (j) of the Order directing the victims' representative to consult with her clients and to communicate to the Chamber, "the victims' preference on the disclosure of their identity to the Defence."³
2. The victims' representative would like to communicate to the Chamber the progress made to date in the consultation process with the victims recognized as participants, ahead of the confirmation of charges hearing scheduled for 1 September 2011.
3. The victims' representative can confirm that from 22-24 August 2011, a total of 98⁴ victims were consulted regarding, *inter alia*, their preference on the disclosure

¹ ICC-01/09-01/11-282.

² ICC-01/09-01/11-249.

³ *Id.* at para. (j).

⁴ Victim numbers : (a/8330/11, a/8775/11, a/8758/11, a/8363/11, a/8359/11, a/8423/11, a/8390/11, a/8356/11, a/8381/11, a/8360/11, a/8388/11, a/8362/11, a/8398/11, a/8353/11, a/8773/11, a/8384/11, a/8382/11, a/8379/11, a/8337/11, a/8417/11, a/8405/11, a/8428/11, a/8380/11, a/8440/11, a/8437/11, a/8767/11, a/8419/11, a/8424/11, a/8438/11, a/8442/11, a/8338/11, a/8358/11, a/8397/11, a/8396/11, a/9391/11, a/8393/11, a/8331/11, a/8361/11, a/8392/11, a/8354/11, a/8334/11, a/8352/11, a/8372/11, a/8368/11, a/8332/11, a/8342/11, a/8399/11, a/8771/11, a/8367/11, a/8343/11, a/8346/11, a/8431/11, a/8436/11, a/8422/11, a/8404/11, a/8424/11, a/8350/11, a/8403/11, a/8401/11, a/8429/11, a/8784/11, a/8374/11, a/8418/11, a/8484/11, a/8767/11, a/8327/11, a/8433/11, a/8430/11, a/8770/11, a/8435/11, a/8355/11, a/8408/11, a/8402/11, a/8432/11, a/8395/11, a/8395/11, a/8409/11, a/8420/11, a/8443/11, a/8645/11, a/8646/11, a/8647/11, a/8648/11, a/8649/11, a/8650/11, a/8651/11, a/8652/11, a/8653/11, a/8654/11, a/8655/11, a/8657/11, a/8659/11, a/8661/11, a/8663/11, a/8664/11, a/8666/11, a/0041/10, a/0056/10).

of their identity to the Defence, the public or to the legal representatives exclusively.

II. Consultation Results

4. The victims' representative explained to the victims the terms of the Single Judge's order so that they could make an informed decision about their preference on the disclosure of their identity to the public or the Defence or to the legal representatives exclusively.
 5. The victims' representative confirms that after a full and detailed consultation, all 98 of the victims consulted declared their interest in not having their identity disclosed either to the public or to the Defence.
 6. The victims expressed grave personal safety concerns regarding the security situation in their home areas, especially sensitive due to the impending 2012 general elections and the Chamber's imminent decision on whether or not to confirm the charges in the present Case. Nearly all victims expressed concerns that the persons against whom proceedings are brought are powerful people with vast financial resources and that the victims themselves are disempowered, lacking in resources and of lowly status, leaving them vulnerable to reprisals or intimidation from perceived agents and communities loyal to Mr. Ruto, Mr. Kosgey and Mr. Sang.
 7. Out of the 98 victims consulted on the question of anonymity, 55 responded that they are still "living amongst the enemy" or more generally that they were still living "in the communities of the perpetrators" and hence live in fear of being targeted for cooperating with the ICC.
 8. A further 58 victims mentioned that people in the relevant communities did not understand the difference between witnesses and victims in relation to the proceedings before the Court. This misunderstanding has led to the perception
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by those communities that victims have been *materially* aiding the Prosecutor in his case against Ruto, Kosgey and Sang. Consequently, a number of victims mentioned that they have either received threats or have heard threatening remarks coming from within their communities.

9. The victims' representative notes that another 17 victims mentioned the mobilisation of communities around potential presidential candidates ahead of the 2012 elections as a reason for heightened fear, especially for those victims remaining in the communities where the alleged acts occurred.
10. Finally, the victims' representative notes that a further 6 victims mentioned being fearful of the charges being dropped in one case and confirmed in the other as this would have direct ramifications on their security due to the perceived unrest that would result.

III. Previous Responses to Question 40 of the Victim Participation Form

11. The victims' representative recalls that approximately 60 applicants⁵ (who have since been accepted to participate in the Case) had failed to state any security concerns in their application forms; mentioned only their concerns about information being disclosed to the public; or stated that they had no reason to fear the disclosure of their identity at all.

⁵ Victim numbers : (a/0056/10, a/8067/11, a/8091/11, a/0356/10, a/0578/10, a/0590/10, a/8332/11, a/8333/11, a/8336/11, a/8339/11, a/8343/11, a/8347/11, a/8381/11, a/8358/11, a/8370/11, a/8379/11, a/8380/11, a/8400/11, a/8407/11, a/8422/11, a/8425/11, a/8429/11, a/8435/11, a/8438/11, a/8440/11, a/8775/11, a/8776/11, a/8777/11, a/8778/11, a/8779/11, a/8780/11, a/8781/11, a/8782/11, a/8784/11, a/8785/11, a/8836/11, a/8836/11, a/8855/11, a/8868/11, a/8873/11, a/8897/11, a/8999/11, a/9001/11, a/9004/11, a/9010/11, a/0266/10, a/0574/10, a/8721/11, a/8722/11, a/8723/11, a/8724/11, a/8767/11, a/8771/11, a/8773/11, a/8774/11).

12. After direct consultation with all but 21⁶ of these individuals, it is clear to the victims' representative that the victims consulted either: misunderstood the question; answered the question with reckless disregard for their own personal safety or the safety of their families; or thought disclosure a necessary requirement for participation and/or reparation.
13. Victim a/0056/10, for example, explained to the victims' representative that although his response to question 40 of the application for participation appeared to indicate concern regarding his identity being disclosed to the public only, the victim made it clear that he has serious concerns for his personal safety and that he failed to appreciate that mentioning only the public in his response would result in the Defence's argument that his identity should be disclosed to all interested parties in the proceedings. After the victims' representative explained the various options for disclosure, the victim stated unequivocally that he does not want his identity disclosed to the Defence.
14. Another set of victims responded to the victims' representative's queries about disclosure by saying that they did not fear disclosing their identities to the Defence or the public because they essentially had nothing left to lose. This set of victims expressed such desperation from the harm that they have suffered that, in their minds, nothing more could be taken from them. Once the victims' representative explained that security concerns must be given proper consideration the victims opted for non-disclosure to the public, the Defence or exclusively to the legal representatives.
15. Finally, the victims' representative notes that a small number of victims initially opted for disclosure to the Defence because they thought that that was the only

⁶ Victim numbers: (a/8067/11, a/8091/11, a/0356/10, a/0578/10, a/0590/10, a/8836/11, a/8836/11, a/8855/11, a/8868/11, a/8873/11, a/8897/11, a/8999/11, a/9001/11, a/9004/11, a/9010/11, a/0266/10, a/0574/10, a/8721/11, a/8722/11, a/8723/11, a/8724/11.)

way they would be considered for a possible future reparations award. When the victims' representative explained that disclosure of identity to the Defence was not a prerequisite for being considered for reparations and that indeed all victims accepted to participate in the Case had been given a number that corresponded with their names, the victims expressed their desire to keep their names out of the public domain and away from the Defence or exclusively to the legal representatives.

IV. Victims not Consulted on Disclosure Issue

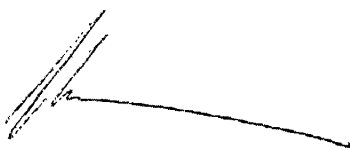
16. As was mentioned in the previous extension of time request, the victims' representative made every endeavour to meet with all of her clients in the time allotted before the confirmation of charges hearing. The victims' representative notes however, that a priority was placed on ensuring the safety and security of the victims admitted to participate in the Case and that those considerations necessarily lead to delays in the mobilisation of large numbers of victims.
17. The victims' representative would also like to acknowledge the sensitivity of the transition process from the former legal representatives and the intermediaries that they are working with on the ground to the common legal representative herself. Many of the intermediaries that the legal representative met in the past week made mention of the fact that individuals have been there are individuals in Uasin Gishu district and the greater Eldoret area purporting to be ICC staff for the purposes of either collecting information on the victims or spreading misinformation. This development has reportedly resulted in a climate of mistrust that has made modes of communication like the telephone, impractical and unsafe.
18. It was thus out of an abundance of caution that the victims representative decided to rely on personal introductions made by persons who enjoy a relationship of trust with the victims before engaging with the victims on matters of importance to the Court. The intermediaries who have a relationship of trust

with the victims and with whom they have been in contact, it was not possible in the limited time available to organise a meeting with the remaining victims.

19. The legal representative also would also like to alert the Chamber at this time that certain former representatives failed to respond in a timely manner to her request to facilitate the transfer of representation and the case files of the victims as ordered by the Chamber.⁷

V. Prayer for Relief

20. It is further respectfully submitted that the appropriate course for the victims who have not been consulted thus far be that the Chamber assume that they do not wish their identities to be disclosed to the Defence or to the legal representatives exclusively, even in those cases where a victim has expressed a different preference in their application for participation. The victims' representative respectfully requests that this assumption holds only until each of the victims accepted to participate in the Case has had the benefit of being consulted by their legal representative. This consultation process is expected to be completed by Monday, 24 October 2011 with the resulting communication to the Chamber on the subject of the preference of the remaining 229 victims being filed immediately thereafter.



Sureta Chana

Dated this 25th of August 2011
At Nairobi, Kenya

⁷ Paragraph 81 of the 5 of August Decision