

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 16 Nov 2011

PRE-TRIAL CHAMBER II

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

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

Source: Defence for Henry Kiprono Kosgey

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:

Kioko Kilukumi Musau, Joseph
Kipchumba Kigen-Katwa and Kithure
Kindiki, David Hooper QC

Counsel for Henry Kiprono Kosgey:

George Odinga Oraro, Julius Kemboy
and Allan Kosgey

Counsel for Joshua Arap Sang:

Joseph Kipchumba Kigen-Katwa, Joel
Kimutai Bosek and Philemon K.B. Koech

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia, Registrar

Counsel Support Section

Deputy Registrar

Mr. Didier Daniel Preira, Deputy
Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

INTRODUCTION

1. On 5 August 2011, the Single Judge issued her “Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings”¹ appointing a common legal representative to the 327 victims admitted to participate. On 1 September 2011, the Chamber commenced the Confirmation of Charges hearing. The hearings took place for 6 days, during which the parties made their submissions, adduced evidence, and presented closing oral evidence.
2. Pursuant to the Pre-Trial Chamber’s (“PTC”) oral order,² the Prosecution and the Victims’ Representative submitted their “Written Submissions Following the Hearing on the Confirmation of Charges”³ and “Final written observations of the Victims’ Representative in relation to the confirmation of charges hearing”⁴ respectively, on 30 September 2011. The Defence submitted “Kosgey’s Written Submissions Following the Hearing on the Confirmation of Charges”⁵ on 24 October 2011.
3. On 26 October 2011, the PTC notified the parties that its decision pursuant to article 61(7) of the Statute in Case 1 will be issued at the same time as the article 61(7) decision in Case 2.⁶
4. On 9 November 2011, the Victims’ Representative submitted the “Request by the Victims’ Representative for authorisation to make a further written submission on the views and concerns of the victims” (“Victims’ Request”).⁷

¹ *Prosecutor v. Ruto et al*, Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings ICC-01/09-01/11-249, 5-08-2011 (“Victims’ Participation Decision”)

² Pre-Trial Chamber 1, *Prosecutor v. Ruto et al*, Transcript, ICC-01/09-01/11-T-12-ENG ET WT 08-09-2011, 77/78 (“Transcript”)

³ *Prosecutor v. Ruto et al*, Written Submissions Following the Hearing on the Confirmation of Charges ICC-01/09-01/11-345, 30 September 2011

⁴ *Prosecutor v. Ruto et al*, Final written observations of the Victims’ Representative in relation to the confirmation of charges hearing, ICC-01/09-01/11-344, 30 September 2011 (“Victims’ Observations”)

⁵ *Prosecutor v. Ruto et al*, Kosgey’s Written Submissions Following the Hearing on the Confirmation of Charges, ICC-01/09-01/11-353 24 October 2011

⁶ *Prosecutor v. Ruto et al*, Decision on the Issuance of the Decision Pursuant to Article 61(7) of the Rome Statute ICC-01/09-01/11-357, 26-10-2011

5. The Defence for Henry Kiprono Kosgey hereby responds to the said request and humbly submits that it should be rejected.

SUBMISSIONS

6. The Defence notes that the Single Judge in her Decision of 5 August 2011⁸ granted the Victims the right to make submissions upon application to the Chamber bearing in mind the provisions of the Rome Statute. In particular, the Single Judge granted the Victims the right to make submissions upon application to the Chamber 1) only at appropriate stages determined by the Court 2) in a manner which is not prejudicial to the Suspects or inconsistent with a fair and impartial trial and 3) only if the victims “justify that their personal interests are affected by the specific issue(s) under consideration.”⁹
7. Pursuant thereto, the Pre-Trial Chamber granted the Victims’ Representative the opportunity to make submissions¹⁰ which is reflected in the “Final written observations of the Victims’ Representative in relation to the confirmation of charges hearing.”¹¹ Since all parties have in compliance with the PTC’s order filed their final written observations, and the only pending stage is the Decision of the PTC pursuant to Article 61(7) of the Statute, the “appropriate stage” for the Victims’ Representative to make a further written submission now no longer exists.
8. The Defence notes that the Victims’ Request encourages the Chamber to either a) adjourn and request further evidence from the Prosecutor, or b) confirm and request further evidence from the Prosecutor, who could thereafter apply to

⁷ *Prosecutor v. Ruto et al*, Request by the Victims’ Representative for authorisation to make a further written submission on the views and concerns of the victims, ICC-09/09-01/11-367, 9 November 2011 (“Victims’ Request”)

⁸ Victims’ Participation Decision, ICC-01/09-01/11-249 para 84. See also article 68(3).

⁹ *Ibid.*

¹⁰ Transcript, ICC-01/09-01/11-T-12-ENG ET WT 08-09-2011, 77/78

¹¹ Victims’ Observations, ICC-01/09-01/11-344

amend the charges.¹² Yet Article 61(7) authorizes the Chamber to determine whether the evidence is sufficient to confirm only “*on the basis of [the confirmation] hearing.*”¹³ In any event, the PTC cannot base its determination on the elusive prospect that the Prosecution might uncover sufficient evidence in the future.

9. As is evident under Article 54, the victims do not have investigative powers. Consequently, if they find it necessary to undertake certain investigative steps, they must request the Prosecution to undertake them. Such evidence will then be subject to provisions of the Statute and Rules of Procedure and Evidence governing disclosure. In this respect, the Defence respectfully recalls the PTC decision issued on 8 July 2011¹⁴.
10. The PTCs have consistently held that the legal representatives of the victims must confine themselves to the evidence that was discussed throughout the confirmation hearing. They are not allowed to bring in new evidence.¹⁵
11. The victims' other assertions—related to the historical origins of the violence, the failure to investigate other persons, and the failure to include charges such as rape, looting and destruction of property—are inappropriate at this stage and should be rejected.¹⁶ The Defence respectfully recalls the Single Judge's declaration that that the Chamber

“does not have the power either to confirm a charge that is not specified by the Prosecutor [e.g. looting, destruction of property]...In this respect, any submission by the legal representative of victims concerning - or conditional

¹² Victims' Request, ICC-09/09-01/11-367 paras 12-17. It should be noted that the Chamber also has the option to decline to confirm entirely under Art. 61(7)(b).

¹³ Rome Statute, Art 61(7). Emphasis added.

¹⁴ *Prosecutor v. Ruto et al*, Decision on the Defence Requests in Relation to the Victims' Applications for Participation in the Present Case, ICC-01/09-01/11-169, 8 July 2011, paras 9- 12

¹⁵ Pre-Trial Chamber I, *Prosecutor v. Katanga and Ngudjolo*, Transcript, ICC-01/04-01/07-T-43-ENG, 4 July 2008, p. 69-70.

Pre-Trial Chamber I, *Prosecutor v. Katanga and Ngudjolo*, Transcript, ICC-01/04-01/07-T-49-ENG, 15 July 2008, p. 18-21;

¹⁶ Victims' Participation Decision, ICC-01/09-01/11-249, paras 48-49 (rejecting applications that fell outside the parameters shaping the present case).

upon - an alleged authority of the Chamber to such effect would serve no purpose.”¹⁷

12. The Victims’ Request itself already makes substantive submissions¹⁸ without authorization from the Single Judge.¹⁹ The contents of these submissions are not “views and concerns” pursuant to Article 68.²⁰ In any event, the Victims’ rights cannot be exercised in a way that is prejudicial and inconsistent with a fair and impartial trial²¹.
13. Of grave concern is that the Request fails to indicate whether the persons cited are victims admitted for participation at the confirmation hearing, which is critical to their eligibility to make submissions pursuant to Rule 89.²²
14. The Defence therefore respectfully submits that bearing in mind the import of Article 68(3), the Victims’ Request not only fails to satisfy the Pre-Trial Chamber’s conditions as established in the Decision of 5 August 2011 but it also runs afoul of the provisions of the Rome Statute and Procedural requirements as cited above.

CONCLUSION

15. For the above reasons, the Defence humbly requests the PTC to reject the Victims’ Request.

¹⁷ *Prosecutor v. Ruto, et al*, 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," ICC-01/09-01/11-274 19 August 2011, para 7

¹⁸ See Victims’ Request, ICC-09/09-01/11-367 para.11.

¹⁹ The Appeals Chamber of the Court disapproves, and historically has rejected substantive submissions made in the absence of leave granted by the Chamber. See *Prosecutor v. Lubanga*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "Décision sur la demande de mise en liberté provisoire de Thomas Lubanga Dyilo" 13 February 2007, ICC-01/04-01/06-824 OA7, para.68; see also *Prosecutor v. Bemba*, Decision on the application of 14 September 2009 for participation as an amicus curiae 9 November 2009," ICC-01/05-01/08-602 OA2, para.9

²⁰ See Victims’ Participation Decision, ICC-01/09-01/11-249, para 107 (“The victims' applications for participation can by no means be considered as evidence”). See also Art 121(6)

²¹ Victims’ Participation Decision, ICC-01/09-01/11-249 para 84. See also article 68(3).

²² The Request does not indicate the assigned application numbers of any of the victims’ cited. See Victims’ Participation Decision, ICC-01/09-01/11-249 para 127(a)



George Odinga Oraro
On behalf of Henry Kiprono Kosgey

Dated this 16 November 2011
At Nairobi, Kenya