

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/11
Date: 30 September 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

**Final written observations of the Victims' Representative in relation to the
confirmation of charges hearing**

Source: Victims' Representative

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

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Ms Sureta Chana

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Unrepresented Victims

**Unrepresented
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Introduction

1. The Single Judge's "Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings" 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").¹
2. On 15 August 2011, prior to the commencement of the confirmation of charges hearing, the victims' representative filed a document entitled "Request by the Victims' Representative for authorisation by the Chamber to make written submissions on specific issues of law and/or fact" (the "15 August 2011 request").²
3. On 19 August 2011, the Single Judge issued a "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 "19 August 2011 decision").³ That decision rejected the 15 August 2011 request. The reason for rejecting the request was, *inter alia*, that "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".⁴
4. The confirmation of charges oral hearing in this case was held in The Hague from 1 to 8 September 2011.
5. On the final day of the oral confirmation of charges hearing, the Presiding Judge indicated that the victims' representative (as well as the parties) would be given until 30 September 2011 to file final written observations. The Presiding Judge indicated that final written observations "shouldn't be

¹ ICC-01/09-01/11-249.

² ICC-01/09-01/11-263.

³ ICC-01/09-01/11-274.

⁴ *Ibid.*, para 9.

considered an obligation”, that any written observations are expected to address only issues relevant to the case and discussed during the confirmation hearing and not to address any new issues, and that any issues raised contrary to that guidance would be disregarded by the Chamber.⁵

6. On 16 September 2011, the victims’ representative filed a “Renewed Request by the Victims’ Representative for authorisation by the Chamber to make written submissions in specific issues of law and/or fact” (the “16 September 2011 Renewed Request”),⁶ seeking authorisation to make written submissions on issues of law and/or fact similar to those with which the 15 August 2011 request was concerned, but modifying the request to take account of the Single Judge’s observations in the 19 August 2011 decision.
7. On 22 September 2011, the Single Judge issued a “Decision on the ‘Renewed Request by the Victims’ Representative for authorisation by the Chamber to make submissions on specific issues of law and/or fact’” (the “22 September 2011 Decision”),⁷ granting the 16 September 2011 Renewed Request, and stating that observations on the issues proposed in the 16 September 2011 Renewed Request could be included in the victims’ representatives final observations due to be filed on 30 September 2011.
8. Pursuant to the above directions from the Pre-Trial Chamber and Single Judge, the present final written observations are filed.

General observation

9. The victims’ representative takes note of the Presiding Judge’s admonition that final written observations “shouldn’t be considered an obligation”. The victims’ representative does not unnecessarily repeat what she has already

⁵ Transcript, 8 September 2011, page 76 line 16 to page 77 line 4.

⁶ ICC-01/09-01/11-333.

⁷ ICC-01/09-01/11-338.

said at the confirmation of charges hearing, in particular in her opening and closing statements. Those observations are maintained.

Observations relating to the 16 September 2011 Renewed Request and 22 September 2011 Decision

10. The victims' representative also does not unnecessarily repeat all of the observations that she has already made on these issues in the 15 August 2011 Request, her opening and closing statements at the confirmation of charges oral hearing, and in the 16 September 2011 Renewed Request. Those observations are incorporated by reference into the present observations.
11. For all of the reasons given by the victims' representative in those previous observations referred to in the previous paragraph, it is submitted that the Pre-Trial Chamber should exercise its power under Article 61(7)(c)(ii) of the Statute to request the Prosecutor to consider amending the charges:
 - a. by expressly specifying that Count 5 and Count 6 encompass additionally acts of destruction of property, and looting, and the infliction of physical injuries; and
 - b. by adding counts of 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), in relation to the acts of destruction of property, and looting, and the infliction of physical injuries.
12. Without prejudice to the totality of the victims' representative's earlier observations, it is submitted that this is a compelling case for the Chamber to exercise that power. In particular, there is apparently no issue at all that there was widespread destruction and looting of property. Almost all of the 327 victims represented suffered from it. They will be seeking reparations for these acts, and destruction and looting of property and injury is thus of such

central importance to the case that it is difficult to see any basis upon which it could be justifiably be ignored. Judicial efficiency and the aim of avoiding an undue multiplicity of charges is hardly a justification in circumstances where there is no dispute that such acts occurred. For similar reasons, it is submitted that there is no justifiable reason for excluding acts of looting and infliction of physical injuries.

13. As was stated in the 16 September 2011 Renewed Request, if the Pre-Trial Chamber makes such a request of the Prosecutor, and if the Prosecution accedes to that request, there would be no need for the Pre-Trial Chamber to consider the questions whether it has the power under Article 61 of the Statute, on its own motion or on the motion of a party or at the request of a victim's representative:

- a. to confirm a charge additional to the charges specified by the Prosecutor where there is sufficient evidence to support the additional charge;
- b. 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;
- c. to order the Prosecutor to add additional charges, or to include additional acts within the scope of an existing charge.

14. The victims' representative submits that it would be premature and inappropriate to address at this stage the question of what might occur in the event that the Pre-Trial Chamber were to make the request under Article 61(7)(c)(ii) of the Statute but the Prosecutor were to fail to accede to that request.

15. In the hypothetical event that the Prosecutor were to fail to comply with a request of the Pre-Trial Chamber under Article 61(7)(c)(ii) of the Statute, the victims' representative would request that she be given at that stage an opportunity to address the questions referred to at paragraph 13 above.

16. In this respect it is noted that in paragraph 7 of the 19 August 2011 Decision, the Single Judge stated that “the Chamber does not have power either to confirm a charge that is not specified by the Prosecutor or to ‘clarify that the charges include acts in addition to those specified by the Prosecutor as being included in the charge’”. It is acknowledged that such a power is not *expressly* conferred on the Chamber by Article 61. However, at this early stage in the history and development of the International Criminal Court, it cannot be considered that all relevant issues of interpretation of Article 61 and related articles, and the full scope of the Pre-Trial Chamber’s powers at a confirmation hearing, are settled law.
17. It is noted, for instance, that in the *Lubanga* case, the Prosecution sought to appeal against the Pre-Trial Chamber’s decision on the confirmation of charges, contending that the Pre-Trial Chamber had exceeded its powers under Article 61(7) by amending the legal characterisation of the charges at the confirmation of charges hearing. The Pre-Trial Chamber refused permission to appeal.⁸ This therefore remains an unexplored issue in the case law.
18. Indeed, at this stage, there is still only limited case law on the meaning of the words “request the Prosecutor to consider” in Article 61(7)(c) of the Statute. In the submission of the victims’ representative, these words do not mean that the Pre-Trial Chamber can merely make a suggestion to the Prosecutor, which the Prosecutor has a complete discretion to act on or not, as the Prosecutor alone sees fit. It is submitted that Article 61(7)(c)(ii) of the Statute is one of the provisions of the Statute giving effect to the principle of *iura novit curia*. That principle is also reflected, for instance, in Regulation 55 of the Regulations of the Court, pursuant to which the Trial Chamber can at the trial stage, change the legal characterisation of the facts and circumstances described in the

⁸ ICC-01/04-01/06-915, *Prosecutor v Thomas Lubanga Dyilo*, “Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges”, Pre-Trial Chamber I, 24 May 2007.

charges. The Appeals Chamber has ruled that Regulation 55 is consistent with the Statute.⁹

19. Admittedly, the Appeals Chamber has confirmed that legal re-characterisation by the Trial Chamber under Regulation 55 is confined to facts and circumstances described in the charges and any amendment thereto.¹⁰ However, it is significant that this provision enables the Trial Chamber to undertake a legal re-characterisation of the facts, without the need for any application by the Prosecutor pursuant to Article 61(9) of the Statute for permission to amend the charges. Under Regulation 55, legal re-characterisation can be undertaken unilaterally by the Trial Chamber. The Appeals Chamber has said that the purpose of this provision “is to close accountability gaps”.¹¹
20. If the Trial Chamber has this power at the trial stage, there is no reason in principle why the Pre-Trial Chamber should have no corresponding power at the pre-trial stage. In any event, consistently with the principle of *iura novit curia*, any request by the Pre-Trial Chamber to the Prosecutor pursuant to Article 61(7)(c)(ii) should not be regarded as a mere suggestion. It is submitted that under the legal regime of the Court, there must be an expectation that the Prosecutor will act on any such request.
21. At this stage, it is submitted that it would therefore be unwarranted to contemplate the possibility that such a request under Article 61(7)(c)(ii) would not be complied with by the Prosecutor given that there appears to be no issue between the prosecution and the defence that such crimes were committed during the post-election violence.

⁹ ICC-01/04-01/06-2205, Prosecutor v Thomas Lubanga Dyilo, “Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled ‘Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court’”, Appeals Chamber, 8 December 2009 (the “Lubanga Appeal Decision”).

¹⁰ *Ibid.*, para 93.

¹¹ *Ibid.*, para 77.

Observations arising out of observations on the Defence challenge to jurisdiction

22. The victims' representative does not repeat the observations made in the "Observations of the Victims' Representative on the Defence challenges to jurisdiction" filed on 16 September 2009.¹²
23. For the reasons given in that document, it is submitted that it would be desirable for the Pre-Trial Chamber to invite the Prosecution to clarify the extent to which it is alleged that there is a connection between the plan pursuant to which the alleged crimes were committed, and the aim of securing a place in Government for the ODM and/or certain of its members following the 2007 election.¹³
24. It is suggested that the most convenient course would be for such a request to be made, and for a response to be provided by the Prosecutor, before the Chamber's final decision on the confirmation of charges. This would enable the Chamber, if it considered it appropriate in the light of the response provided by the Prosecutor, to consider exercising its power under Article 61(7)(c)(i) of the Statute, to adjourn the proceedings and to request the Prosecutor to provide further evidence or conduct further investigation with respect to this particular issue.

Observations arising out of the request for access to confidential documents

25. On 23 September 2011, the Single Judge granted in part a request by the victims' representative for access to confidential documents,¹⁴ to the extent of ordering that the victims' representative be provided with document ICC-01/09-01/11-261-Conf-AnxB.

¹² ICC-01/09-01/11-332.

¹³ See especially *ibid*, para 57.

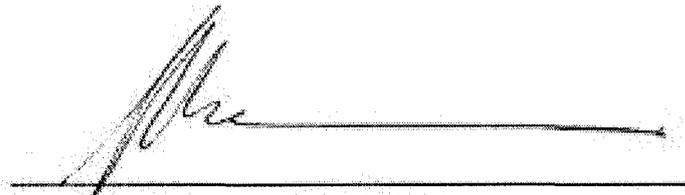
¹⁴ ICC-01/09-01/11-340, "Second Decision on the 'Request by the Victims' Representative for access to confidential materials'".

26. Although that decision was given on 23 September 2011, due to technical difficulties, the victims' representative has still not been able to access that document.
27. Once the victims' representative has been able to access that document, should it give rise to any concerns on the part of the victims, this will be raised with the Chamber at the earliest possibility.

Confidentiality of victims' identities

28. The 15 August 2011 Decision ordered the victims' representative, upon consultation with her clients, to communicate to the Chamber, the victims' preference on the disclosure of their identity to the Defence.
29. The victims' representative has so far filed two documents in response to that order.¹⁵ As indicated in the second of those filings, the victims' representative is planning a further mission to Kenya in October to meet with the remainder of her clients. It is requested that until it has been possible to conclude consultations with the remaining victims, the Chamber assume that the remaining victims 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.

¹⁵ ICC-01/09-01/11-282, "Communication to the Chamber pursuant to the Chamber's Decision of 5 August 2011", filed 23 August 2011 ; ICC-01/09-01/11-292, "Communication to the Chamber pursuant to the Chamber's Decision of 5 August 2011", filed 25 August 2011.



Sureta Chana

Dated this 30th day of September 2011
At London, United Kingdom