

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/09-01/11**
Date: **26 October 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

**Decision on the Issuance of the Decision Pursuant to
Article 61(7) of the Rome Statute**

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, Julius Kemboy
and Allan Kosgey

Counsel for Joshua Arap Sang

Joseph Kipchumba Kigen-Katwa, Joel
Bosek and Philomen Koech

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**

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

States Representatives

Amicus Curiae

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”)¹ of the International Criminal Court (the “Court”), hereby renders this decision on the issuance of the decision pursuant to article 61(7) of the Rome Statute (the “Statute”).

1. On 8 March 2011, the Chamber, by majority, decided to summon William Samoei Ruto, Henry Kiprono Kosgey, and Joshua Arap Sang to appear before it.² 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 (the “Hearing”) for 1 September 2011.³

2. On 8 March 2011, the Chamber, by majority, also decided to summon Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali to appear before it.⁴ Pursuant to a decision of the Chamber,⁵ the suspects of this case also appeared before the Court at the initial appearance hearing held on 8 April 2011 during which, *inter alia*, the Chamber set the date for the commencement of the Hearing for 21 September 2011.⁶

3. Between 1 and 8 September 2011 the Hearing was held in the present case, *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* (the “Case 1”). During the Hearing, the Chamber granted the parties and participating victims the possibility to lodge written observations after the close of the Hearing.⁷

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

² 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-01/09-01/11-1.

³ ICC-01/09-01/11-T-1-ENG ET, p. 17, lines 12 to 25.

⁴ Pre-Trial Chamber II, “Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali”, ICC-01/09-02/11-01.

⁵ Pre-Trial Chamber II, “Decision Setting a New Date for the Initial Appearance”, ICC-01/09-02/11-8.

⁶ ICC-01/09-02/11-T-1-ENG ET WT, p. 14, lines 11 to 15.

⁷ ICC-01/09-01/11-T-12-ENG ET WT, p. 76 line 6 to p. 77 line 13.

4. Between 21 September and 5 October 2011, the Hearing was held in the case of the *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* (the “Case 2”).

5. On 29 September 2011, the Registrar submitted a confidential report *ex parte* on her visit to the Republic of Kenya providing further information on the security situation.⁸

6. On 30 September 2011, the legal representative of victims⁹ and the Prosecutor¹⁰ lodged their final written submissions in relation to the Hearing in Case 1.

7. On 24 October 2011, the Defence submitted its final written submissions in relation to the Hearing in Case 1.¹¹

8. The Single Judge notes articles 61, 57(3)(c), and 68(1) of the Statute and regulations 35 and 53 of the Regulations of the Court (the “Regulations”).

9. The Single Judge notes that in accordance with regulation 53 of the Regulations the decision pursuant to article 61(7) of the Statute, namely to confirm or decline to confirm the charges or adjourn the Hearing, “shall be delivered within 60 days from the date the confirmation hearing ends”. Mindful of the fact that the Defence has been given the opportunity to provide its last observations on the Hearing in Case 1 in writing by 24 October 2011, the 60-day time limit shall commence from the date the Defence submissions have been lodged.

10. However, the time limits set by the Regulations or by the Chamber may be subject to change if exceptional circumstances so warrant. Regulation 35 of the Regulations provides for this remedy which reads, in relevant part:

“1. Applications to extend or reduce any time limit as prescribed in these Regulations or as ordered by the Chamber shall be made in writing or orally to the Chamber seized of the matter setting out the grounds on which the variation is sought.

⁸ ICC-01/09-01/11-342-Conf-Exp.

⁹ ICC-01/09-01/11-344.

¹⁰ ICC-01/09-01/11-345.

¹¹ ICC-01/09-01/11-353 and annex; ICC-01/09-01/11-354 and annexes; ICC-01/09-01/11-355 and annexes.

2. The Chamber may extend or reduce a time limit if good cause is shown and, where appropriate, after having given the participants an opportunity to be heard. (...)."

11. That said, the Chamber may vary the 60-day time limit stipulated by regulation 53 of the Regulations in case "good cause" for the variation of time exists.

12. To this end, the Single Judge recalls the concerns expressed by the legal representative of victims during the Hearing in Case 1, namely that the victims continue to feel vulnerable and threatened.¹² Security concerns of that kind have been raised equally by the victims in Case 2 who have further specified that the outcome of the proceedings in both cases have a direct bearing on their security.¹³ In fact, the legal representative of victims in Case 2 case put forward a request, within the meaning of regulation 35 of the Regulations, that the decisions pursuant to article 61(7) of the Statute in the two cases be issued at the same time as it is considered to be "helpful (...) if everything [was] resolved at the same time".¹⁴ Even though the request to issue the decisions simultaneously was made by a participant in the framework of Case 2, the Single Judge considers that this request must be taken into consideration in the context of Case 1 too, as it directly impacts on the time schedule of both cases. Furthermore, the Single Judge is convinced that the request was made in the interest of all victims of the situation which have raised the same security concerns in both cases.

13. Apart from the above, the Single Judge emphasizes the responsibility of the Chamber assigned to it by law to protect the safety and well-being of victims and witnesses (articles 57(3)(c) and 68(1) of the Statute). To that end, the Single Judge has ensured that the Chamber receive regular reports on the security situation in the Republic of Kenya. Accordingly, the Registrar has informed the Chamber in a report

¹² ICC-01/09-01/11-T-5-ENG ET WT, p. 79, lines 24-25.

¹³ ICC-01/09-02/11-T-15-Red-ENG WT, p. 26, lines 14-22.

¹⁴ ICC-01/09-02/11-T-15-Red-ENG WT, p. 27, lines 1-6.

of the continued risk of violence and instability in the Republic of Kenya.¹⁵ The Registrar has drawn the attention of the Single Judge to the fact that if the article 61(7) decisions in the two cases are issued separately, and whatever is decided in the first case, it is likely that a rise in tension may occur, and speculations or potentially heated public debate might take place with an expectation of the same result in the second case. Thus, according to the Registrar, issuing the decisions simultaneously could make a significant difference on how the Kenyan population reacts to the decisions.¹⁶ Lastly, the Registrar also confirmed that witnesses have expressed security concerns in case the article 61(7) decisions in the two cases were issued consecutively.¹⁷

14. In light of the above, the Single Judge believes that these factors constitute “good cause” warranting exceptionally the variation of time limit in the present case. Consequently, the 60-day time limit, within which the decision under article 61(7) of the Statute is to be rendered in Case 1, shall be varied to the effect that the decision in Case 1 will be issued at the same time as the article 61(7) decision in Case 2.

15. Lastly, the Single Judge reiterates her appeal previously made in the Hearing in Case 2¹⁸ to all concerned and citizens of the Republic of Kenya to respect the life, security and property of victims and witnesses and to refrain from engaging in any activities that are likely to trigger or exacerbate tension and violence in the Republic of Kenya.

¹⁵ Reference is made, albeit to a limited extent, to the content of the Registrar’s report which is classified and currently treated as “confidential, ex parte - Registry only”. The Single Judge considers that the references made in the present decision are required by the principle of publicity and judicial reasoning. Moreover, those references are not inconsistent with the nature of the documents referred to and have been kept to a minimum.

¹⁶ ICC-01/09-01/11-342-Conf-Exp, para. 4.

¹⁷ ICC-01/09-01/11-342-Conf-Exp, para. 5.

¹⁸ ICC-01/09-02/11-T-15-Red-ENG WT, p. 89, lines 5-10.

FOR THESE REASONS THE SINGLE JUDGE HEREBY

decides to vary exceptionally the time limit prescribed by regulation 53 of the Regulations to the effect that the 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.

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



Ekaterina Trendafilova
Single Judge

Dated this Wednesday, 26 October 2011

At The Hague, The Netherlands