



Original: **English**

No.: **ICC-01/09-01/11**
Date: **9 November 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

Communication pursuant to the Single Judge's Decision of 5 August 2011

Source: Victims' Representative

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
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

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**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Silvana Arbia

Deputy Registrar

Didier Preira

Counsel Support Section

Victims and Witnesses Unit

Fiona McKay

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Single Judge's "Decision on Victims' Participation at the Confirmation of Charges Hearing and in the Related Proceedings" of 5 August 2011¹ (the "**5 August decision**") appointed a common legal representative of all 327 victims admitted to participate in the confirmation of charges proceedings.
2. Paragraph (j) of the orders made in the dispositive part of the 5 August 2011 Decision ordered the victims' representative:

... upon consultation with her clients, to communicate to the Chamber, by no later than Monday, 22 August 2011, the victims' preference on the disclosure of their identity to the Defence.
3. By a filing dated 19 August 2011,² the victims' representative advised the Chamber that she was on mission in Kenya, that arrangements had been made for her to meet approximately 150 of the victims that she represents, that it would not be possible during the course of that mission to meet with any of the other victims, that alternative means of contacting the remaining victims had not been identified, and that it would therefore not be possible to consult with all 327 victims by the 22 August 2011 deadline. That filing added that it was expected to be possible to communicate to the Chamber the preference of all of the victims on the disclosure of their identities to the Defence by 24 October 2011. The filing requested an extension of time to comply with the order referred to in paragraph 2 above, and submitted that until completion of the consultations with the victims, it should be assumed that all 327 victims do not wish their identities to be disclosed to the Defence.
4. By a subsequent filing dated 25 August 2011,³ the victims' representative advised the Chamber that on 22-24 August 2011, she had met a total of 98 victims, and that after a full and detailed consultation, all 98 of the victims declared their interest in not having their identity disclosed either to the

¹ ICC-01/09-01/11-249.

² ICC-01/09-01/11-282, "Communication to the Chamber pursuant to the Chamber's Decision of 5 August 2011".

³ ICC-01/09-01/11-292, "Communication to the Chamber pursuant to the Chamber's Decision of 5 August 2011".

public or to the Defence. That filing also requested the Chamber to assume, until such time as the remaining 229 victims had been consulted, that the remaining 229 victims do not wish their identities to be disclosed to the Defence, or even to the Defence Counsel exclusively. That filing again stated that it was expected that the consultation of all victims would be completed by 24 October 2011.

5. Further to those previous two filings, the victims' representative hereby communicates to the Chamber the further progress made to date in the consultation process with the victims regarding their preference on the disclosure of their identity to the Defence.

Views of the further victims who were consulted

6. The victims' representative undertook a further mission to Kenya in October 2011.
7. On 12 and 18 October 2011, a further 126 victims⁴ were consulted regarding, *inter alia*, their preference on the disclosure of their identity to the Defence, to the public or to Defence counsel exclusively.
8. The victims' representative explained to the victims the terms of the 5 August 2011 Decision so that they could make an informed decision about their preference on the disclosure of their identity.

⁴ Victim numbers : a/8657/11, a/8780/11, a/8655/11, a/8782/11, a/8654/11, a/8797/11, a/8653/11, a/8821/11, a/8659/11, a/8955/11, a/8661/11, a/8957/11, a/8440/11, a/8959/11, a/8758/11, a/8961/11, a/8767/11, a/8962/11, a/8770/11, a/8960/11, a/8771/11, a/8983/11, a/8773/11, a/8994/11, a/8774/11, a/9001/11, a/8775/11, a/8776/11, a/9055/11, a/9054/11, a/9053/11, a/9052/11, a/8902/11, a/9051/11, a/9046/11, a/9044/11, a/9043/11, a/8846/11, a/9041/11, a/9040/11, a/9039/11, a/9038/11, a/9037/11, a/9036/11 , a/9035/11, a/9033/11, a/9031/11, a/9030/11, a/9029/11, a/9028/11, a/9024/11, a/9023/11, a/9022/11, a/9021/11, a/9020/11, a/9016/11, a/9013/11, a/9010/11, a/9006/11, a/9004/11, a/8991/11, a/8989/11, a/8988/11, a/8987/11, a/8955/11, a/8952/11 ,a/8947/11, a/8946/11, a/8945/11, a/8940/11, a/8924/11, a/8922/11, a/8920/11, a/8916/11, a/8914/11, a/8910/11, a/8909/11, a/8908/11 a/8905/11, a/8904/11, a/8901/11, a/8895/11, a/8873/11, a/8869/11, a/8968/11, a/8861/11, a/8859/11, a/8846/11, a/8836/11, a/8738/11, a/8727/11, a/8724/11, a/8720/11, a/8719/11, a/8718/11, a/8717/11, a/8716/11, a/8711/11, a/8709/11, a/8386/11, a/8058/11, a/8057/11, a/8056/11, a/8054/11, a/8045/11, a/8042/11, a/8039/11, a/8038/11, a/8037/11, a/8032/11, a/8026/11, a/8025/11, a/8023/11, a/8021/11, a/8020/11, a/8017/11, a/8016/11, a/0051/11, a/0045/11, a/0041/11, a/8936/11, a/8028/11, a/8030/11, a/8855/11, a/8966/11, a/9018/11.

9. After a full and detailed consultation with these 126 victims, all 126 declared their preference not to have their identity disclosed either to the public, to the Defence or to Defence counsel exclusively.
10. After in-depth consultations regarding the different options of identity disclosure and the implications of each option, each of the victims unequivocally indicated that they desired to have their identities withheld from the public, the Defence or to Defence Counsel exclusively. This was notwithstanding that in question 40 of their application forms some had not indicated their desire to have their identities withheld from the Defence and some had desired to have their identities made available to the public.
11. The victims expressed serious concern for their personal safety and the safety of their families, especially as most of them continue to live in areas largely dominated by the tribal community from which the Suspects originate. They consider that as the cases in the Kenyan situation have developed, this community has come to see the ICC process as an instrument of persecution against that community and its ostensible leaders. Further, they consider that this community does not distinguish between those participating in the ICC process as Prosecution witnesses, and those participating as victims, and the victims fear that they may become the subject of reprisals if they were known to be registered for participation in the ICC process as victims.
12. One of the victims, for example, remarked that since his return to his area of residence in Nandi Hill after the post election violence, he has been asked severally for the reason for his return by members of the local community. The victim went on to describe the atmosphere in which he lives when he remarked that since the confirmation of charges process began he had heard it said "If at all they [the three Suspects] remain there, it is better that we [Kalenjin] fight to the death and make sure there is no Kikuyu who remains here."

The position of victims who have still not been consulted

13. The victims' representative made every endeavour to meet with all of her clients by the 24 October 2011, as anticipated in her two previous filings referred to in paragraphs 3 and 4 above. However, the safety and security concerns of the victims lead to delays in the mobilization of large numbers of victims.
14. Additionally, many of the intermediaries, especially those working with victims in the Uasin Gishu area, remarked to the victims' representative's team that they had met many people who had purported to be ICC staff and who only seemed interested in either collecting details to identify victims or spreading misinformation. They therefore approached all individuals claiming to be involved in the ICC process with extreme skepticism and mistrust. A good number of victims refrained from attending the meeting with the victims' representative due to this fear and mistrust.
15. Most of the victims have not provided personal contact information that would make them easily contactable (for instance, the great majority has not provided their personal mobile telephone numbers). Some have moved to a different location since they filed their applications to participate as victims. The most expedient means for contacting victims is through the intermediaries who have worked with and obtained the trust of the victims, most of whom have been difficult to locate and contact considering their security concerns and the climate of mistrust that has made modes of communication like the telephone, impractical and unsafe.
16. Each of the 224 (out of a total of 327) victims consulted thus far has strongly indicated their desire to have their identity withheld from the public, the Defence or to Defence counsel exclusively. There are at present no concrete plans for any further mission to Kenya to be undertaken by the victims' representative before the decision on the confirmation of charges, to seek to consult with the remaining victims regarding their preference as to the disclosure of their identity to the Defence. In the circumstances, it is again

respectfully submitted that the appropriate course would be to assume that the remaining victims who have not been consulted thus far do not wish their identities to be disclosed to the Defence, even in those cases where a victim has expressed a different preference in their application for participation.

17. It is submitted that the submissions above are reinforced by the observations in the Single Judge's "Decision on the Issuance of the Decision Pursuant to Article 61(7) of the Rome Statute" of 26 October 2010,⁵ that the victims' representative in the other Kenya case has expressed security concerns similar to those expressed by the victims' representative in the present case,⁶ and that the Registrar of the Court has informed the Chamber in a report of the continued risk of violence and instability in the Republic of Kenya.⁷
18. It is submitted that the submissions above are also reinforced by the matters referred to in the "Response by the Victims' Representative to the 'Defence Request Regarding Prejudicial Comments Made by Victims' Legal Representative Sureta Chana during Closing Statement'" of 10 October 2011.⁸



Sureta Chana

Dated this 9th day of November 2011

At London, United Kingdom

⁵ ICC-01/09-01/11-357.

⁶ *Ibid.*, at para 12.

⁷ *Ibid.*, at para 12.

⁸ ICC-01/09-01/11-348.