

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-01/09-01/11  
Date: 21 September 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 “Request by the Victims’ Representative for access to confidential materials” and Requesting Observations from the Prosecutor**

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

**Counsel for Joshua Arap Sang**

Joseph Kipchumba Kigen-Katwa  
Legal Representatives of the Applicants

**Legal Representatives of the Victims**

Sureta Chana

**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**

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**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”) of the International Criminal Court (the “Court”)<sup>1</sup> hereby issues this Decision on the “Request by the Victims’ Representative for access to confidential materials” and requesting observations from the Prosecutor.

1. On 8 March 2011, the Chamber, by majority, decided to summon William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang (collectively the “Suspects”) to appear before it.<sup>2</sup> 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 for 1 September 2011.<sup>3</sup>
2. On 5 August 2011, the Single Judge issued the “Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings” (the “5 August 2011 Decision”) wherein she decided, *inter alia*, to admit 327 victims as participants in the confirmation of charges hearing and in the related proceedings and appointed Ms. Sureta Chana as the common legal representative of all the victims admitted to participate.<sup>4</sup>
3. In addition, in the said decision, the Single Judge established the principle approach towards victims’ procedural rights in the confirmation of charges hearing and in the related proceedings. Apart from the rights accorded to the victims *expressis verbis* by the Court’s statutory documents, other rights may be granted to the victims, either *proprio motu* by the Chamber or “upon specific and motivated request submitted

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

<sup>2</sup> 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.

<sup>3</sup> ICC-01/09-01/11-T-1-ENG.

<sup>4</sup> Pre-Trial Chamber II, “Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings”, ICC-01/09-01/11-249, pp. 46-49 letter (a) and (c) of the operative part.

by the legal representative” and provided that the personal interests of the victims are affected by the specific issue(s) under consideration.<sup>5</sup>

4. On 1 September 2011, as scheduled, the confirmation of charges hearing commenced.

5. On 8 September 2011, during the closing session of the confirmation of charges hearing, the Chamber granted the victims’ legal representative up until 30 September 2011 to submit written observations on issues discussed during the confirmation hearing itself.<sup>6</sup>

6. On 20 September 2011, the Chamber received the “Request by the Victims’ Representative for access to confidential materials” (the “Request”), in which the common legal representative – pursuant to article 68(3) of the Rome Statute (the “Statute”) and the 5 August 2011 Decision – requests access to the following confidential documents:

a. Annex B to the “Prosecution’s Amended Document Containing the Charges and List of Evidence submitted pursuant to Article 61(3) and Rule 121(3), (4) and (5)” of 15 August 2011;

b. Annexes A to E to the “Prosecution’s submission of comprehensive in-depth analysis chart of evidence included in the list of evidence” of 1 August 2011;

c. Annex A to the “Prosecution’s submission of the confidential redacted version of the Article 58 Application” of 26 July 2011;

d. Versions of each of the Prosecutor’s communications to the Defence of incriminating evidence pursuant to Article 61(3)(b) of the Statute, in the form in which they were provided by the Prosecutor to the Defence;

e. Versions of each of the Prosecutor’s communications to the Defence of potentially exculpatory evidence and/or material for the preparation of the

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<sup>5</sup> Pre-Trial Chamber II, “Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings”, ICC-01/09-01/11-249, paras 83-101, specifically at paras 84-85 and 92.

<sup>6</sup> ICC-01/09-01/11-T-12-ENG, pp. 76-77.

Defence, in the form in which they were provided by the Prosecutor to the Defence; and

f. A copy of all the evidence supplied by the Prosecution to the Defence teams, in the form in which it was provided by the Prosecutor to the Defence (both incriminating evidence, and potentially exculpatory evidence).<sup>7</sup>

7. In the Request, the victims' legal representative submits that the issue of "diligence and adequacy" of the investigation carried out by the Prosecutor in the present case, as raised by the Defence teams of the Suspects, has "a very direct bearing on the interests of the victims".<sup>8</sup> The common legal representative asserts that the personal interests of the victims "would therefore clearly be directly affected if the crimes of which they were victims are not diligently and adequately investigated and prosecuted"<sup>9</sup> by the Prosecutor. It is contended that "without access to the evidence that the Prosecutor has produced to date, the victims' representative is in no position at all to form any view on whether, as contended by the Defence, the Prosecution investigation has been wholly inadequate".<sup>10</sup>

8. The Single Judge notes articles 21(1)(a), (3) and 68(3) of the Statute, rule 121(3) and (10) of the Rules of Procedure and Evidence (the "Rules").

9. At the outset, the Single Judge wishes to make two clarifications. First, in the course of the confirmation of charges hearing, the victims effectively enjoyed – through their legal representative – the rights accorded to them, either *expressis verbis* in the Statute and the Rules or pursuant to an authorization by the Chamber. Second, the victims' legal representative was able to follow the presentation of the evidence, whether public or confidential, relied on by the Prosecutor and the Defence teams of the Suspects.

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<sup>7</sup> ICC-01/09-01/11-335, para. 3.

<sup>8</sup> ICC-01/09-01/11-335, para. 16.

<sup>9</sup> ICC-01/09-01/11-335, para. 13.

<sup>10</sup> ICC-01/09-01/11-335, para. 22.

10. It follows that the victims' legal representative is now potentially in a position to identify specific issues arising out of the confirmation of charges hearing which may affect the personal interests of the victims, so as to justify a request for access to material withheld from victims under rule 121(10) of the Rules. However, the Single Judge considers that providing the victims' legal representative with access to all confidential material disclosed by the Prosecutor, particularly in the absence of knowledge by the legal representative of the nature and content thereof, would still, in principle, violate the exceptional nature of a request to access confidential material pursuant to article 68(3) of the Statute. Such requests should be made on the basis of specifically identified material and not with a view to obtaining all material on which either party intends to rely on for the purposes of the confirmation of charges hearing, regardless of its pertinence to any issue at stake. Therefore, the Request is rejected to the extent concerning access to items (b) to (f) in paragraph 6 above.

11. However, in order to identify material relevant to the issue(s) affecting the victims' interests as outlined in the Request, it is the view of the Single Judge that it might be useful for the victims' legal representative to have access to the list of evidence filed by the Prosecutor in accordance with rule 121(3) of the Rules. Thus, the Single Judge considers it appropriate to obtain the views of the Prosecutor as to whether he objects to grant the victims' legal representative access to document ICC-01/09-01/11-261-Conf-AnxB.

**FOR THESE REASONS, THE SINGLE JUDGE HEREBY**

**a) rejects** the Request to the extent concerning access to items (b) to (f) in paragraph 6 above;

**b) requests** the Prosecutor to submit by no later than Thursday, 22 September 2011 at 16:00 hours, observations as to whether he objects to grant the victims' legal representative access to document ICC-01/09-01/11-261-Conf-AnxB.

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



**Judge Ekaterina Trendafilova**  
**Single Judge**

Dated this Wednesday, 21 September 2011

At The Hague, The Netherlands