

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/11
Date: 4 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

Decision on the "Prosecution's Application to File Additional Authority"

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

Legal Representatives of the Victims
Sureta Chana

Counsel for Joshua Arap Sang
Joseph Kipchumba Kigen-Katwa, Joel
Bosek and Philemon Koech
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”) of the International Criminal Court (the “Court”)¹ hereby issues this Decision on the “Prosecution’s Application to File Additional Authority” (the “Prosecutor’s Application”).²

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.³ 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 (the “Hearing”).⁴

2. On 1 September 2011, the Hearing commenced and lasted until 8 September 2011. In the course of the Hearing, the Chamber granted the parties and participants the possibility to submit written observations, whereby the Prosecutor and the Legal representative of Victims were granted until 30 September 2011 to do so.⁵

3. On 30 September 2011, the Chamber received the “Prosecution’s Written Submissions Following the Hearing on the Confirmation of Charges” (the “Written Submissions”).⁶

4. On 1 November 2011, the Chamber also received the Prosecutor’s Application, in which he states that subsequent to the Hearing, the *Procuración General de la Nación* of the Republic of Argentina issued “an official legal” guiding opinion for the federal prosecutors dealing with cases concerning past large-scale human rights violations.⁷ According to the Prosecutor the said opinion is relevant to the issue of cumulative

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

² ICC-01/09-01/11-358-Conf-Red.

³ 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.

⁴ ICC-01/09-01/11-T-1-ENG.

⁵ ICC-01/09-01/11-T-12-ENG, p. 76, line 25 ; p. 77, lines 1-4.

⁶ ICC-01/09-01/11-345.

⁷ ICC-01/09-01/11-360, para. 2.

charging addressed in his Written Submissions, and accordingly, he requests leave to submit it to the Chamber pursuant to regulation 28 of the Regulations of the Court (the "Regulations").⁸

5. On 3 November 2011, the Chamber received "Kosgey Response to Prosecution Application to File Additional Authority".⁹

6. The Single Judge notes article 21(1)(a), (2) and (3) of the Rome Statute and regulation 28(1) of the Regulations according to which "[a] Chamber may order the participants to [...] provide additional details on any document within a time limit specified by the Chamber".

7. In this regard, the Single Judge takes note of the Appeals Chamber's judgments of 13 and 27 May 2008, in which the Appeals Chamber considered that regulation 28 of the Regulations, may be triggered not only by the Chamber acting *proprio motu* but also in response to a request put forward by a party or participant.¹⁰ In particular, the Single Judge acknowledges that the Appeals Chamber has previously permitted the submission of "supplementary list of authorities" and the "details of a [...] decision [issued] by the Appeals Chamber of the ICTY" after the filing of the primary submissions by the parties.¹¹ However, the Single Judge wishes to point out that the Appeals Chamber endorsed the interpretation whereby the parties may trigger the submission of supplementary or additional authorities pursuant to regulation 28 of the Regulations. The Appeals Chamber further clarified that permitting the submission of supplementary material is subject to a *case-by-case* assessment, i.e. when

⁸ ICC-01/09-01/11-360, para. 3.

⁹ ICC-01/09-01/11-363.

¹⁰ Appeals Chamber, "Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-trial Chamber I entitled 'Decision on the Defence Request Concerning Languages'", ICC-01/04-01/07-522, para. 16; "Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-trial Chamber I entitled 'First Decision on the Prosecution Request for Authorisation to redact Witness Statements'", para. 18.

¹¹ Appeals Chamber, "Decision on the "Prosecution Request for Leave to Present Additional Authority Regarding Defence Appeal Against 'Decision on the Defence Request Concerning Languages'", ICC-01/04-01/07-402; "Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-trial Chamber I entitled 'Decision on the Defence Request Concerning Languages'", ICC-01/04-01/07-522, paras 14-16.

“it may be of assistance to the Appeals Chamber in deciding on [...] [the appeal *sub judice*].” This finding suggests that the determination is discretionary to the Chamber dealing with the case and the relevant request. Further, the Appeals Chamber’s finding in this regard has no binding effect on the Chamber, pursuant to article 21(2) of the Statute. Thus, the issue *sub judice* is whether, in the Chamber’s opinion, the submission of said legal opinion may be of assistance in the determination, if any, of the question of cumulative charging.

8. In this respect, the Single Judge does not consider that the legal opinion issued by the *Procuración General de la Nación* of the Republic of Argentina is necessary for any determination on this question, given that the Prosecutor has already developed extensively in the Written Submissions his arguments on cumulative charging. Accordingly, the Single Judge finds no compelling reason to accept additional submissions on a matter that was supposed, in principle, to be fully addressed either at the Hearing or at the latest in the parties’ final submissions.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

rejects the Prosecutor’s Application.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Friday, 4 November 2011

At The Hague, The Netherlands