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No.: ICC-01/09-01/11  
Date: 22 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**

**Prosecution's Observations on the "Request by the Victims' Representative for  
access to confidential materials"**

**Source:** Office of the Prosecutor

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

**The Office of the Prosecutor**

Mr. Luis Moreno-Ocampo, Prosecutor  
Ms. Fatou Bensouda, Deputy Prosecutor

**Counsel for the Defence**

Mr. Kioko Kilukumi Musau, Mr. Joseph Kipchumba Kigen-Katwa, Mr. David Hooper QC, Mr. Kithure Kindiki, Mr. George Odinga Oraro, Mr. Julius Kipkosgei Kemboy, Mr. Allan Kosgey, Mr. Joel Kimutai Bosek and Mr. Philemon K.B. Koech

**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**

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

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms. Silvana Arbia

**Deputy Registrar**

Mr. Didier Preira

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**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

1. The common Legal Representative requests access, on behalf of all the victims in this case, to the Prosecution's List of Evidence in order to determine the adequacy of the Prosecution's investigation. The Prosecution hereby opposes access being granted for that basis.
2. The Prosecution considers that victims' participation is a right, but such right does not include the ability to evaluate the adequacy of the investigation.
3. Additionally, the List of Evidence includes non-public confidential information, and the Prosecution opposes disclosure of that information at this stage.

## **I. Background**

4. 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>1</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>2</sup>
5. 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")<sup>3</sup> 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.
6. Additionally, in this decision, the Single Judge established the principal approach towards victims' procedural rights in the confirmation of charges hearing and in the related proceedings. Apart from the rights accorded to the

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<sup>1</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>2</sup> ICC-01/09-01/11-T-I-CONF-ENG ET.

<sup>3</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.

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 by the legal representative” and provided that the personal interests of the victims are affected by the specific issue(s) under consideration.<sup>4</sup>

7. On 1 September 2011, as scheduled, the confirmation of charges hearing commenced.
8. 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>5</sup>
9. On 20 September 2011, the common Legal Representative for Victims filed a request for access to confidential materials filed in the record of the case and exchanged between the parties ('the Request').<sup>6</sup> One of the items to which the Legal Representative seeks access is the Prosecution's List of Evidence (ICC-01/09-01/11-261-Conf-AnxB).<sup>7</sup>
10. On 21 September 2011, Judge Trendafilova, acting in her capacity as Single Judge of Pre-Trial Chamber II ('the Single Judge') requested the Prosecutor to submit by 4pm on Thursday 22 September 2011 whether he objected to granting the Legal Representative access to its List of Evidence.<sup>8</sup> The Single Judge rejected the Request to the extent that it concerned access to all other items.<sup>9</sup>

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<sup>4</sup> ICC-01/09-01/11-249, paras. 83-101, specifically at paras. 84-85 and 92.

<sup>5</sup> ICC-01/09-01/11-T-12-CONF-ENG ET, pp. 76-77.

<sup>6</sup> ICC-01/09-01/11-335.

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

<sup>8</sup> ICC-01/09-01/11-337, page 7, see (b).

<sup>9</sup> ICC-01/09-01/11-337, page 7, see (a).

## II. Submissions

11. Victims' right of access to information at this stage of the proceedings is governed by Rule 121(10) of the Rules of Procedure and Evidence. The Rome Statute and the Rules do not provide that the victims should have unfettered access to the entire record of the case or situation. Nor is there any provision that anonymous victims shall be given access to non-public information. Various Chambers, including this Chamber, have accordingly restricted access to anonymous victims.
12. Rule 121(10) explicitly makes victims' access to the record "[s]ubject to any restrictions concerning confidentiality". Access to confidential material should not be granted except on a case-by-case basis, and only when the victims demonstrate that the material relates to issues specific to their interests, the Chamber determines that the interests of the victims outweigh the need to retain the confidentiality of the information, and the victims themselves are not anonymous.
13. In the Request, the Legal Representative submits that the diligence and adequacy of the investigation carried out by the Prosecutor in the present case "affect[s] the interests of the victims in the most direct way" and seeks access to confidential materials filed in the record of the case and exchanged between the Parties in order "to form any view on whether, as contended by the Defence, the Prosecution investigation has been wholly inadequate".<sup>10</sup>
14. In the Prosecution's submission, the stated justification for access is not included in the Statute. Additionally, the adequacy or otherwise of the Prosecution's investigation is not before the Chamber. No Defence challenge on that basis is pending, and the Chamber is now simply deciding if the Prosecution has made a prima facie showing sufficient to commit the Suspects for trial on the pending charges. Accordingly, it is not an issue on which it

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

would be appropriate for the Legal Representative to present the views and concerns of the victims.

### **III. Conclusion**

15. In light of the foregoing, the Prosecution submits that the Request for access to the Prosecution's List of Evidence should be denied.

A handwritten signature in blue ink, appearing to read 'Luis Moreno-Ocampo', is positioned above a horizontal line.

Luis Moreno-Ocampo, Prosecutor

Dated this 22nd day of September 2011

At The Hague, the Netherlands