

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: ICC-01/09-01/11
Date: **5 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**

Confidential
With Confidential Annexes A and B

Prosecution's Submission Concerning
Disclosure of Material from 2 September 2011 Private Session to the Press

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-Katawa, 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

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

Registrar

Ms. Silvana Arbia

Deputy Registrar

Mr. Didier Preira

Defence Support Section

Victims and Witnesses Unit

Ms. Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Prosecution hereby informs the Chamber that information presented by the Prosecution at the confirmation of charges hearing during a private session held on Friday, 2 September 2011, has been leaked to the press by unknown sources.

Request for Confidentiality

2. The Prosecution requests that the Chamber receive this submission and its annexes as "Confidential" because it relates to material that is currently confidential and which has been discussed at the confirmation of charges hearing only in private session.

Submissions

3. 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.¹ On 7 April 2011, the suspects appeared as requested, and the Chamber ordered that the hearing on the confirmation of charges would begin on 1 September 2011.²
4. The confirmation of charges hearing began on 1 September 2011 as scheduled. On 2 September 2011, the Prosecution presented information in private session, which included the names of specific persons who are part of the suspects' Network during the 2007-2008 post-election violence.³ During this presentation, the Prosecution showed a visual aid of the structure of the Network. The visual aid included the names of persons who were part of the Network, including three Kenyan Ministers of Parliament ("MPs").⁴ The visual aid listed these three MPs by name under the heading "POLITICAL" but did not indicate that they were or

¹ "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.

² ICC-01/09-01/11-T-1-ENG ET, p. 17 lines 19-25.

³ ICC-01/09-01/11-T-6-CONF-ENG ET, p. 79 line 21 – 82 line 25.

⁴ This slide from the presentation is attached as Annex A. The MPs in question are "S. KOSGEY" (Sally Kosgey, Aldai MP), "F. BETT" (Franklin Bett, Bureti MP), and "Z. CHERUIYOT" (Zachayo Cheruiyot, Kuresoi MP).

are MPs. The Prosecution did not say the names of these three MPs during its presentations, nor did the Prosecution refer in open or private session to the alleged involvement of the three MPs.

5. On 4 September 2011, the Kenyan news outlet the Daily Nation published an article on its website titled, "Ocampo links more MPs to chaos militia", which stated, *inter alia*:

Three more MPs have been accused of being part of the leadership of a murderous network that planned and carried out killings, looting and evictions in the Rift Valley Province. They were named in a private session during the ongoing confirmation of charges hearings at the International Criminal Court (ICC) where three of the six people Prosecutor Luis Moreno-Ocampo accuses of bearing the greatest responsibility for the 2007 post-election violence are appearing. The prosecution accuses the three lawmakers of acting as subordinates of MPs William Ruto and Henry Kosgey, who have been named as the heads of the network. They are accused of providing the political leadership to an organisation that had military, elders and media components. [...] The three politicians are from the Rift Valley, which bore the brunt of the violence.⁵

6. The Prosecution notes Regulation 94 of the Regulations of the Registry, which states: "Measures taken pursuant to an order of a Chamber under rule 87 to protect the identity of witnesses, victims who appear before the Court and persons at risk may include, *inter alia*: [...] Private sessions, where the hearing is not open to the public and *there is no audiovisual stream broadcast outside the Court*".⁶
7. Because the Prosecution presented information that three MPs are part of the Network in private session, this information was only available to persons who were inside the courtroom on 2 September 2011. Thus, absent a technical error which permitted broadcast of the visual aid to the gallery, it appears that the

⁵ Available at <http://www.nation.co.ke/News/Ocampo+links+more+MPs+to+chaos+militia+/-/1056/1230372/-/bj7khfz/-/index.html>, last accessed 5 September 2011, attached hereto as Annex B.

⁶ Emphasis added.

Daily Nation must have obtained this information from someone who was present during the private session.

8. The Prosecution did not reveal this information to any members of the media and does not know how the Daily Nation obtained this information. The Prosecution brings this information to the attention of the Chamber immediately and requests that it determine whether it is appropriate to investigate how the information came to be publicly disclosed and to consider the imposition of sanctions upon the offending person or party.



Luis Moreno-Ocampo
Prosecutor

Dated this 5th day of September 2011
At The Hague, The Netherlands