

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **3 Nov 2011**

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul, Judge
Judge Cuno Tarfusser, 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 Kosgey Response to Prosecution Application to File Additional Authority

Source: Defence for Henry Kiprono Kosgey

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:

Kioko Kilukumi Musau, Joseph
Kipchumba Kigen-Katwa and Kithure
Kindiki, David Hooper QC

Counsel for Henry Kiprono Kosgey:

George Odinga Oraro, Julius Kemboy
and Allan Kosgey

Counsel for Joshua Arap Sang:

Joseph Kipchumba Kigen-Katwa, Joel
Kimutai Bosek and 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, Registrar

Counsel Support Section

Deputy Registrar

Mr. Didier Daniel Preira, Deputy
Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

INTRODUCTION

1. On 8 March 2011, the Pre-Trial Chamber (PTC), by majority, decided to summon William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, (collectively referred to as "the Suspects") to appear before it on 7 April 2011¹ on which date the PTC read the charges against the Suspects and set the date for commencement of the Confirmation of Charges hearing for 1 September 2011.
2. On 1 September 2011, the Chamber commenced the Confirmation of Charges hearing. The hearings took place for 6 days, during which the parties made their submissions, adduced evidence, and presented closing oral evidence.
3. Pursuant to the Pre-Trial Chamber's oral order,² the Prosecution submitted its "Written Submissions Following the Hearing on the Confirmation of Charges"³ on 30 September 2011, and the Defence submitted "Kosgey's Written Submissions Following the Hearing on the Confirmation of Charges"⁴ on 24 October 2011.
4. On 26 October 2011, the PTC issued the Decision on the issuance of the Decision pursuant to Article 61(7)⁵, wherein the Chamber decided that it will issue the decisions on Kenya Case 1 and Kenya Case 2 simultaneously.
5. On 1 November 2011, the Prosecutor submitted the "Prosecution's Application to File Additional Authority."⁶
6. The Defence for Henry Kiprono Kosgey hereby responds to the said request and humbly submits that the Application should be rejected.

¹ Pre-Trial Chamber II, "Decision on 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-12-ENG ET WT 08-09-2011, 77/78

³ ICC-01/09-01/11-345

⁴ ICC-01/09-01/11-353

⁵ ICC-01/09-01/11-357

⁶ ICC-01/09-01/11-360

SUBMISSIONS

7. The Defence notes that the Prosecutor seeks to further buttress its Written Submissions submitted on 30 September 2011 with the aid of the alleged opinion contained in the said *Procuracion General de la Nacion* issued by the Republic of Argentina on 7 October 2011. Such an opinion is not only unhelpful being a national jurisdiction guide, but it is clearly not definitive or conclusive on the contention before the PTC. There are therefore no exceptional circumstances to warrant the PTC to grant this extra-ordinary request.⁷
8. Furthermore, the Prosecution has not explained why it has made the request this late given the said opinion was issued on 7 October 2011. The authority's late entry to these proceedings would deprive the Defence of its opportunity under Rule 141(2) to speak last. Even assuming that the Prosecution timely submits a version translated into one of the working languages of the Court,⁸ the Defence, having already filed its Written Submissions, will be procedurally barred from challenging the applicability or merits of that authority as regards the issues in this case. As such, this additional step threatens to undermine the fairness of the proceedings.

CONCLUSION

9. For the above reasons, the Defence requests that the PTC reject the Prosecution's Application.



George Odinga Oraro
On behalf of Henry Kiprono Kosgey

⁷ While the Appeals Chamber has historically granted parties the right to submit additional details pursuant to Regulation 28, the foundational decision on that issue granted the Defence the right to apply for and thereafter submit such details due to the "exceptional circumstances" of the case. ICC-01/04-01/07-476 13-05-2008 9/41 para 20. The late emergence of this official legal opinion fails to qualify as an exceptional circumstance meriting a request pursuant to Regulation 28, because it is non-binding on this Court and seems only marginally to support arguments in the Prosecution's Written Submissions that were already cited with other authorities.

⁸ Regulation 39 of the Regulations of the Court

Dated this 3 November 2011
At Nairobi, Kenya