

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/11
Date: 2 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 Urgent Submission Concerning Defence Public
Disclosure of Confidential Witness Information"**

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

Counsel for Joshua Arap Sang
Joseph Kipchumba Kigen-Katwa, Joel
Bosek and Philemon Koech
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

Registrar & Deputy Registrar
Silvana Arbia, Registrar
Didier Preira, Deputy Registrar

Defence Support Section

Victims and Witnesses Unit
Maria Luisa Martinod-Jacome

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 Urgent Submission Concerning Defence Public Disclosure of Confidential Witness Information” (the “Prosecutor’s Application”).²

The present decision is classified as public, although it refers to the existence of documents and, as the case may be, to a limited extent to their content, which have been submitted and are currently treated as confidential *ex parte*, Victims and Witnesses Unit only (the “VWU”). The Single Judge considers that the references made in the present decision are required by the principle of publicity and judicial reasoning. Moreover, those references are not inconsistent with the nature of the documents referred to and have been kept to a minimum.

1. On 8 March 2011, the Chamber, by majority, decided to summon William Samoei Ruto (Mr. 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 of submitting written observations, whereby the Defence teams of the Suspects were granted until 24 October 2011 to do so.⁵

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 ET WT, p. 77.

3. On 24 October 2011, the Chamber received the written submissions of the Suspects.⁶

4. On 27 October 2011, the Chamber received a public redacted version of the Prosecutor's Application, in which he alleges that, in the written submission, the Defence of Mr. Ruto disclosed confidential information concerning the identity of witness 4.⁷ According to the Prosecutor, the information revealed in the written submission, which was discussed in a private session during the Hearing was not supposed to be referred to in a public filing, given that it also violates the Code of Professional Conduct for counsel (the "Code of Conduct") and "breaches the security protections [...] and clearly may increase the security risks to the witness".⁸ Consequently, the Prosecutor requests: 1) the VWU to assess whether this disclosure increases the risk to witness 4; and 2) to instruct and remind Mr. Katwa who wrote the brief that "information which could lead to the identification of the anonymous witness is not to be discussed publicly".⁹

5. The Single Judge notes articles 57(3)(c) and 68(1) of the Rome Statute (the "Statute") and articles 8, 31(a), and 34(1)(a) of the Code of Conduct.

6. According to articles 57(3)(c) and 68(1) of the Statute the Chamber is duty bound to take the necessary measures for the protection and safety of victims and witnesses who may be at risk. In this regard, the Single Judge took note of the Prosecutor's concerns, and being concerned about the safety of the said witness, she immediately requested the VWU to verify the security situation of the witness and to submit an updated report on the matter.

7. Based on the report informally received on 28 October 2011 and officially notified to the Chamber on 31 October 2011, the VWU found that there "is no evidence of any

⁶ ICC-01/09-01/11-353 and its annex ; ICC-01/09-01/11-354 and its annexes; ICC-01/09-01/11-355 and its annex.

⁷ ICC-01/09-01/11-358-Conf-Red, pp. 3-4.

⁸ ICC-01/09-01/11-358-Conf-Red, paras 5-6.

⁹ ICC-01/09-01/11-358-Conf-Red, para. 8.

negative impact on the security situation of this witness or [the person's] family resulting from the disclosure [of information]".¹⁰

8. In this context, the Single Judge wishes to point out that, the fact that the VWU's report shows that the said witness is not at risk as a result of the Defence's disclosure of information, does not mean that Mr. Katwa is not in breach of his obligations under the Court's statutory provisions. The mere disclosure of information discussed in a private session, is in itself, a breach of article 8 of the Code of Conduct, which constitutes misconduct under article 31(a) of the Code of Conduct. In the view of the Single Judge, this finding empowers the Chamber to submit a complaint to the Registrar pursuant to article 34(1) of the Code of Conduct which she will refrain from doing at this point in time, given the extent of the violation and the information available that the said witness or his or her family is not at risk. Nonetheless, the Single Judge reminds Mr. Katwa of his duties and obligations, which include the respect of confidentiality of information, and emphasizes that she will resort to fulfill her duties as specified in article 34(1) of the Code of Conduct if a future violation of this nature is committed.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

Grants the Prosecutor's Application to the extent reflected in this decision.

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

¹⁰ ICC-01/09-01/11-359-Conf-Exp.



Judge Ekaterina Tsendafilova
Single Judge

Dated this Wednesday, 2 November 2011

At The Hague, The Netherlands