

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 4 July 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

**Order to the Prosecutor to File a Proposed New Redacted Version of the Article 58
Application**

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

Counsel for Joshua Arap Sang

Joseph Kipchumba Kigen-Katwa

Legal Representatives of the Victims

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”)¹ of the International Criminal Court (the “Court”), hereby renders the order to the Prosecutor to file in the record of the case a proposed new redacted version of the “Prosecutor’s Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang” (the “Article 58 Application”).

1. On 15 December 2010, the Prosecutor submitted the Article 58 Application.²
2. On 8 March 2011, the Chamber, by majority, decided to summon William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang to appear before the Court.³
3. On 1 April 2011, the Single Judge issued the “Decision on Reclassification of Certain Documents”, whereby, *inter alia*, the Prosecutor was ordered to file a new public redacted version of the Article 58 Application, while the Registrar was ordered to copy this document from the record of the Situation in the Republic of Kenya into the record of the case.⁴ The current public redacted version is accessible in the record of the Situation in the Republic in Kenya under the registration number ICC-01/09-31-Red2, while the original application has been copied into the record of the case, under registration number ICC-01/09-01/11-26-Conf-Exp.
4. On 6 April 2011, the Single Judge issued the “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”, whereby, *inter alia*, principles as to the disclosure of evidence between the parties and its communication to the Chamber have been established.⁵
5. On 20 April 2011, the Single Judge issued the “Decision on the ‘Prosecution’s application requesting disclosure after a final resolution of the Government of

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

² ICC-01/09-30-Conf-Exp.

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 Pre-Trial Chamber II, ICC-01/09-01/11-23.

⁵ Pre-Trial Chamber II, “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”, ICC-01/09-01/11-44.

Kenya's admissibility challenge' and Establishing a Calendar for Disclosure Between the Parties" (the "Calendar for Disclosure"),⁶ whereby the Single Judge, *inter alia*, established an articulate calendar for the conduct of the disclosure proceedings.

6. The Single Judge notes articles 21(3), 54(3)(f), 57(3)(c), 58, 61(3)(a), 67(1), 68(1) of the Rome Statute (the "Statute"), rule 121(3) of the Rules of Procedure and Evidence (the Rules) and regulation 23*bis* of the Regulations of the Court (the "Regulations").

7. The Single Judge underlines that the principle of publicity of proceedings is an indispensable component of the right to a fair trial, and is enjoyed by the suspects in the case pursuant to article 67(1) of the Statute as well as on the basis of internationally recognized human rights applicable by virtue of article 21(3) of the Statute. Therefore, as a general rule, all documents related to the proceedings before this Court shall be public.

8. Nevertheless, the Statute places upon the Court an obligation to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.⁷ The restriction of access by the Defence and/or the public to certain documents or parts of documents in the record of the case is one such mechanism which the Chamber may use to protect the interests of victims and witnesses. Additionally, regulation 23*bis* of the Regulations recognizes the power of the Chamber, on application or on its own motion, to review the classification of documents in the case. In applying such measures, the Chamber must balance the needs for protection of victims and witnesses on the one hand, and the fair trial rights of the suspects on the other hand.

9. However, the right to publicity of proceedings is not the only relevant interest of the Defence. Additionally, the right to be informed promptly and in detail of the nature, cause and content of the charge, enshrined in article 67(1)(a) of the Statute, must equally be taken into account. While charges are only definitely laid out in the

⁶ Pre-Trial Chamber II, ICC-01/09-01/11-62.

⁷ Article 68(1) of the Statute; see also article 57(3)(c) of the Statute.

document containing the charges pursuant to article 61(3)(a) of the Statute and rule 121(3) of the Rules (the "DCC"), a considerable period of time may elapse between the start of the process of disclosure of evidence, and the receipt by the Defence of the DCC. During this time, access to the application under article 58 of the Statute may enable the Defence to understand better the charges, and thereby give flesh to article 67(1)(a) of the Statute during this particular stage of proceedings.

10. In the present case, the Single Judge has, prior to the initial appearance of the suspects, ordered the Prosecutor to reduce the extent of redactions to the Article 58 Application.⁸ The Single Judge stated:

[The] current assessment of the factual and legal basis for the classification of certain documents, is conducted taking due account of the limited purpose and scope of the initial appearance hearing. Notwithstanding the findings in the present decision regarding the classification of documents, the Single Judge, following the initial appearance hearing and during forthcoming disclosure proceedings, may later re-assess whether the factual and legal bases for classification continue to exist. Indeed, the Single Judge remains alert to the need to balance interests in order to ascertain the continued necessity and proportionality of any classifications.⁹

11. The Single Judge considers that at the present point in the proceedings, when a substantial amount of evidence has already been disclosed to the Defence but the DCC is yet to be filed, pursuant to the Calendar for Disclosure and in accordance with the applicable law, on 1 August 2011,¹⁰ there is a need to review the current level of classification of the Article 58 Application.

12. At the same time, the Single Judge considers that, because of the ongoing disclosure of evidence to the Defence, some information that is currently redacted in the Article 58 Application may already be in possession of the Defence, possibly rendering purposeless the redaction of the same information in the Article 58 Application, at least *vis-à-vis* the Defence.

⁸ Pre-Trial Chamber II, "Decision on Reclassification of Certain Documents", ICC-01/09-01/11-23.

⁹ Pre-Trial Chamber II, "Decision on Reclassification of Certain Documents", ICC-01/09-01/11-23, para. 8.

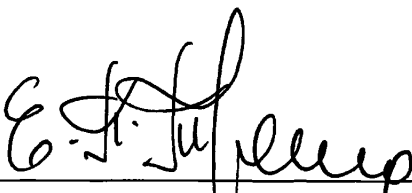
¹⁰ Pre-Trial Chamber II, "Decision on the 'Prosecution's application requesting disclosure after a final resolution of the Government of Kenya's admissibility challenge' and Establishing a Calendar for Disclosure Between the Parties", ICC-01/09-01/11-62, p. 13.

13. In light of the foregoing, the Single Judge, bearing in mind the obligations of the Prosecutor under article 54(3)(f) of the Statute, considers that it is appropriate to order the Prosecutor to provide information as to what redactions of the Article 58 Application, whether *vis-à-vis* the Defence or the public, are still necessary and proportionate, in order for the Chamber to be able to take an informed decision on the matter. Therefore, the Prosecutor is expected to submit a proposal for a new public, or if deemed necessary confidential, redacted version of the Article 58 Application, and to provide justification for the proposed redactions. Following review of the Prosecutor's proposal, the Single Judge will be able to rule whether any redactions are still justified.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

orders the Prosecutor to file in the record of the case a proposed new public, or if deemed necessary confidential, redacted version of the Article 58 Application, and to provide justification of redactions proposed, by no later than Thursday, 7 July 2011.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Monday, 4 July 2011

At The Hague, The Netherlands