

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 10 May 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 Document

**Decision on the “Prosecution’s Application for Extension of Time Limit for
Disclosure”**

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”) of the International Criminal Court (the “Court”),¹ renders this decision on the “Prosecution’s Application for Extension of Time Limit for Disclosure” (the “Prosecutor’s Request”).²

1. On 15 December 2010, the Prosecutor submitted the “Prosecutor’s Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang”.³

2. 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.⁴ Pursuant to this decision, the suspects voluntarily appeared before the Court at the initial appearance hearing held on 7 April 2011.⁵

3. On 31 March 2011, the Chamber received the “Application on Behalf of the Government of the Republic of Kenya Pursuant to Article 19 of the ICC Statute”, whereby the Government of the Republic of Kenya requested the Chamber to determine that the case against the suspects is inadmissible (the “Admissibility Challenge”).⁶

4. On 7 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 (the “Disclosure Decision”).⁷

5. During the initial appearance hearing held on 7 April 2011, the Chamber, *inter alia*, set the date for the commencement of the confirmation of charges hearing for 1

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

² ICC-01/09-01/11-77.

³ ICC-01/09-30-Conf-Exp and its Annexes.

⁴ 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-01/09-01/11-01.

⁵ ICC-01/09-01/11-T-1-ENG.

⁶ ICC-01/09-01/11-19.

⁷ Pre-Trial Chamber II, “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”, ICC-01/09-01/11-44.

September 2011 and convened a status conference with a view to discussing matters relevant for the purposes of establishing an adequate calendar of the disclosure proceedings.⁸ The status conference took place on 18 April 2011 in the presence of the Prosecutor, the Defence teams of the suspects and the representatives of the Registrar.⁹

6. 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 Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure”, whereby the Single Judge, *inter alia*, rejected the Prosecutor’s request to suspend the disclosure proceedings until a final determination of the Admissibility Challenge and established an articulate calendar for the conduct of the disclosure proceedings (the “Calendar for Disclosure”).¹⁰ According to the Calendar for Disclosure, the evidence on which the Prosecutor intends to rely for the purposes of the confirmation hearing is to be divided into three groups on the basis of the time when each piece of evidence has been collected by the Prosecutor. Three deadlines have been established, depending on the group under which each piece of evidence falls, either for the disclosure to the Defence of the evidence for which no redaction is needed or for the request to the Chamber to authorize properly justified proposals for redactions. The three deadlines established are the following: Friday, 13 May 2011 for the evidence collected before 15 December 2010; Friday, 3 June 2011 for the evidence collected between 15 December 2010 and 31 March 2011; and Friday, 8 July 2011 for the evidence collected after 31 March 2011.

7. On 2 May 2011, the Prosecutor filed his Request. The relief sought thereby is the following:

The [Prosecutor] requests the Chamber to authorize the disclosure of the witnesses statements collected that require redactions after a proper reevaluation

⁸ ICC-01/09-01/11-T-1-ENG.

⁹ ICC-01/09-01/11-T-2-ENG.

¹⁰ Pre-Trial Chamber II, ICC-01/09-01/11-62.

of the security in Kenya within the time frame adopted in the First Disclosure Decision.

The [Prosecutor] will disclose other evidence in accordance with the Second Disclosure Decision. The [Prosecutor] undertakes to submit proposals for redactions in two stages, the first group on 3 June and the second group on 8 July 2011.¹¹

8. On 5 May 2011, the counsel for William Ruto and Joshua Sang filed the “Response on behalf of Mr. William Samoei Ruto and Mr. Joshua Arap Sang to the Prosecution’s Application for Extension of Time Limit for Disclosure” requesting that the Prosecutor’s Request be rejected and, in the alternative, should the deadline for the Prosecutor to file his request for redactions be extended, that also the deadlines for the Defence established in the Calendar for Disclosure be modified accordingly in order to “maintain the amount of time established in the Second Disclosure Decision between [the] deadlines [for the Prosecutor], and the equivalent deadlines for the Defence” (the “Defence Request”).¹²

9. The Single Judge notes articles 51(5), 54, 61, 67 and 68 of the Rome Statute (the “Statute”), rules 76-83 and 121 of the Rules of Procedure and Evidence (the “Rules”) and regulation 35 of the Regulations of the Court (the “Regulations”).

10. The Single Judge is of the view that, by his Request, the Prosecutor is essentially seeking a reconsideration of the Calendar for Disclosure. This is shown by the arguments put forward by the Prosecutor with respect to the prejudice allegedly caused by the Calendar for Disclosure to his fair trial right as well as the relief sought in the Prosecutor’s Request.

11. In this respect, the Single Judge recalls that, as consistently held by the established jurisprudence of the Pre-Trial Chambers of the Court, the statutory framework set out by the Statute and the Rules do not provide for a motion for reconsideration as a procedural remedy against any decision taken by the Chamber

¹¹ Prosecutor’s Request, paras. 32 and 33.

¹² ICC-01/09-01/11-79.

or the Single Judge.¹³ Nevertheless, the Single Judge shall address the substance of the Prosecutor's argument in this regard, in order to emphasize the importance and proper understanding of the Calendar for Disclosure.

12. The Prosecutor seeks that the deadline for the submission of proposed redactions be withdrawn and suggests to provide the Single Judge with an *undertaking* as to his commitment to file before the Chamber proposals for redactions in two stages, the first group on Friday, 3 June 2011 and the second group on Friday, 8 July 2011. In support of this request the Prosecutor essentially argues that the deadlines set in the Calendar for Disclosure are well in advance of the legal deadlines provided by the statutory documents of the Court and are also inconsistent with the "time frame for disclosure adopted by the (...) Disclosure Decision".¹⁴

13. At first the Single Judge observes that, contrary to the Prosecutor's assertion, there is no contradiction or inconsistency between the Disclosure Decision and the Calendar for Disclosure. As clearly indicated therein, the Disclosure Decision only intended to set general principles relating to disclosure according to the legal instruments of the Court. No time frame for the disclosure proceedings has been provided thereby. To the contrary, in the Disclosure Decision it is clearly stated that "[w]ith respect to the different requests related to protective measures for witnesses including redactions, the Single Judge wishes to make clear that any such request must be submitted as soon as practicable, but no later than the date which shall be specified in a calendar to be issued in due course".¹⁵ Thereafter, the Single Judge

¹³ See, e.g., Pre-Trial Chamber II, "Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II To Redact Factual Description of Crimes from the Warrant of Arrests, Motion for Reconsideration, and Motion for Clarification", ICC-02/04-01/05-60; Pre-Trial Chamber I, "Decision on the Prosecution Motion for Redaction", ICC-01/04-01/06-123; Pre-Trial Chamber I, "Decision on the Prosecution Motion for Reconsideration and, in the alternative, Leave to Appeal", ICC-01/04-01/06-166; Pre-Trial Chamber I, "Decision on the 'Demande des représentants légaux de VPRS1, VPRS2, VPRS3, VPRS4, VPRS5, VPRS6 et a/0071/06 aux fins d'accéder au document confidentiel déposé par le Conseil de direction du Fonds d'affectation spéciale au profit des victimes le 7 février 2008'", ICC-01/04-457; Pre-Trial Chamber I, "Decision on the Defence for Mathieu Ngudjolo Chui's Request concerning translation of documents" ICC-01/04-01/07-477.

¹⁴ Prosecutor's Request, paras. 1, 3 and 20.

¹⁵ Disclosure Decision, para. 12.

convened a status conference for the specific purpose of receiving relevant information in order to establish an articulate calendar for disclosure.¹⁶ Therefore, the Calendar for Disclosure eventually issued by the Single Judge is not in conflict with the Disclosure Decision, but rather complements it.

14. Furthermore, the Single Judge recalls that the deadlines reflected in rule 121(3)-(6) of the Rules are only indicative of the minimum time limits for the disclosure of the evidence between the parties and its communication to the Chamber.¹⁷ In this respect, in the Calendar for Disclosure, the Single Judge clarified that:

In particular, rule 121(3) of the Rules mandates that the Prosecutor shall provide a document containing a detailed description of the charges together with a list of evidence, for the purposes of the confirmation hearing, *no later than 30 days before the date of the commencement of such hearing*. Therefore, the disclosure from the Prosecutor to the Defence shall be completed 30 days before the date of the hearing at the latest. However, under article 51(5) of the Statute, the provision of rule 121(3) of the Rules is to be read against the backdrop of, and subject to statutory provisions that guarantee the rights of the Defence and, in particular, the right of the suspects to have adequate time for a meaningful preparation of their defence pursuant to article 67(1)(b) of the Statute. In this respect, the Single Judge recalls article 61(3)(b) of the Statute which provides that the person shall be informed *within a reasonable time before the confirmation hearing* of the evidence on which the Prosecutor intends to rely at the hearing. In the same vein, rule 76 of the Rules establishes that the Prosecutor shall provide the Defence with the names of witnesses whom he intends to call to testify as well as the copies of any prior statements made by them *sufficiently in advance to enable the adequate preparation of the defence*.¹⁸

15. The Single Judge recalls her responsibility to ensure that the disclosure proceedings takes place under satisfactorily conditions and that the rights of the defence as enshrined in the legal instruments of the Court are fully respected. To this purpose rule 121(2) of the Rules states that the Chamber “shall take the necessary decisions regarding disclosure”. Bearing in mind the principles recalled above as set out in the Calendar for Disclosure, the Single Judge reiterates that, with a view to guaranteeing the fairness and the expeditiousness of the disclosure proceedings, specific deadlines for the submission of justified proposals for redactions are necessary. The Request cannot therefore be granted to the extent that it advocates the

¹⁶ ICC-01/09-01/11-T-1-ENG, from page 20, line 13 to page 23, line 9. The status conference took place on 18 April 2011: see ICC-01/09-01/11-T-2-ENG.

¹⁷ See Disclosure Decision, para. 10 and Calendar for Disclosure, para. 13..

¹⁸ Calendar for Disclosure, para. 14 (emphasis in the text).

non-binding nature of the dates indicated by the Prosecutor for his submission of proposals for redactions.

16. The Single Judge however notes that the Prosecutor's Request also includes reference to regulation 35 of the Regulations, as a legal basis for the relief sought,¹⁹ and, thus, can be read as an application for extension of time limit under that provision. Accordingly, the Single Judge shall consider whether the requirement for extension of the time limit is met, namely whether good cause for such extension is shown.

17. In this respect, the Single Judge notes the Prosecutor's submission that 97% of his evidence has been collected before 15 December 2010²⁰ and, therefore, falls under the first group of evidence for which proposed redactions are to be submitted to the Chamber by Friday, 13 May 2011. More specifically, the Prosecutor asserts that, according to the Calendar for Disclosure, he is required to review by 13 May 2011, 595 documents, constituting 10,878 pages or nearly 99% of the total document to be disclosed in redacted form.²¹ Almost the entirety of the Prosecutor's evidence for which redactions are necessary, is thus to be reassessed, in light of the current security situation in the field, in order for the Prosecutor to comply with the first deadline established in the Calendar for Disclosure with respect to the submission of proposed redactions.²² In this respect, the Single Judge acknowledges and endorses the Prosecutor's submission as to the need for an intensive and careful work to be conducted by him with a view to submitting to the Chamber properly and accurately justified proposals for redactions.²³ Finally, the Single Judge takes note of the Prosecutor's submission that a number of redactions could turn out to be

¹⁹ Prosecutor's Request, para. 20.

²⁰ Prosecutor's Request, para. 3.

²¹ Prosecutor's Request, para. 16.

²² Prosecutor's Request, paras. 17 and 18.

²³ Prosecutor's Request, para. 27.

unnecessary, due to the possibility that lesser intrusive protective measures for witnesses other than redactions would soon be available.²⁴

18. In the view of the Single Judge, these arguments sufficiently show “good cause” within the meaning of regulation 35(2) of the Regulations for the extension of time limit with respect to the first deadline established in the Calendar for Disclosure to the extent that it refers to the submission of proposals for redactions.

19. However, the Single Judge expects that the Prosecutor has already conducted a preliminary risk assessment in relation to the witnesses on whom he intends to rely for the purposes of the confirmation hearing and that only a reassessment in light of the current factual circumstances in the field is to be conducted at this point in time. Furthermore, in case of changes of circumstances that make redactions previously authorized no longer necessary or proportionate, such redactions can be lifted by the Chamber on its own motion or upon requests of the parties. The Single Judge is therefore of the view that the 21 days of extension requested by the Prosecutor are not necessary and that the Prosecutor will be able, by Monday 23 May 2011, to complete his work with respect to the redactions to be requested for evidence that has been in his domain for a protracted period of time – *i.e.* between 5 and 13 months as this evidence was collected since 31 March 2010 until 15 December 2010. The first deadline for the submission of properly justified proposals for redactions for the evidence collected by the Prosecutor before 15 December 2010 is thus postponed to Monday, 23 May 2011.

20. In the view of the Single Judge, the postponement of this first deadline to the extent specified in the present decision does not have an impact in itself on the time when the evidence for which proposals for redactions are to be considered by the Chamber will be disclosed to the Defence. In conducting her assessment as to the proposed redactions, the Single Judge will guarantee that the right of the suspects to have adequate time for the preparation of their defence is fully respected and that no

²⁴ Prosecutor’s Request, paras. 4, 22 and 28-30.

prejudice to such right is caused by the present decision. Accordingly, the Single Judge is of the view that the corresponding deadlines for the Defence established in the Calendar for Disclosure as well as the date of the commencement of the confirmation of charges hearing must be maintained and that the Defence Request must be rejected.

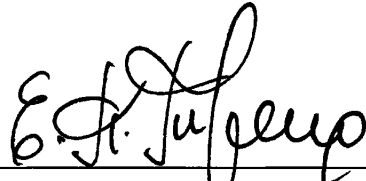
FOR THESE REASONS, THE SINGLE JUDGE HEREBY

GRANTS the Prosecutor until Monday, 23 May 2011 to submit properly justified proposals for redactions, if any, with respect to the evidence that has been collected prior to 15 December 2010;

REJECTS the remainder of the Prosecutor's Request;

REJECTS the Defence Request.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Tuesday, 10 May 2011

At The Hague, The Netherlands