

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **11 July 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

**Defence Response to the 'Prosecution's Submissions on the Order to the
Prosecutor to File a Proposed New Redacted Version of the Article 58 Application'**

Source: Defence

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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**Unrepresented Applicants
(Participation/Reparation)**

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**Victims Participation and Reparations
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Other

I. Procedural History

1. On 4 July 2011, the Honourable Single Judge ordered the Prosecution to file “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”.¹
2. In so doing, the Single Judge cited the defendants’ “right to be informed promptly and in detail of the nature, cause and content of the charge”,² and noted that 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 [Document Containing the Charges]. 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”.³
3. On 7 July 2011, the Prosecution filed a public redacted version of its request for redactions to revised version of the Article 58 Application (“Prosecution Request”).⁴
4. In the Prosecution request, the Prosecution sought:

to maintain redactions to all of section G.2.II., titled “Planning Meetings and Rallies”. This section describes a series of events in chronological order, specifying the dates and details of each event. Revealing this section would vitiate many of the redactions approved and ordered by the Single Judge, which sought to protect the identities of witnesses by redacting the dates of most of these events, and certain details of these events which could reveal the identity of the source. Redacting the dates of these events in the Article 58 Application would not suffice to protect witnesses, as their placement in chronological order would indicate the dates on which these events occurred and could lead to the identification of witnesses. As such, the Prosecution requests that the entire section remain redacted.

The Prosecution submits that any prejudice that may be occasioned by the maintenance of these redactions to the Article 58 Application is necessary and

¹ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-157, Order to the Prosecutor to File a Proposed New Redacted Version of the Article 58 Application, page 6.

² At para. 9.

³ At para 9.

⁴ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-165-Red, Prosecution’s Submissions on the “Order to the Prosecutor to File a Proposed New Redacted Version of the Article 58 Application”, 7 July 2011.

proportionate, and will in any event be remedied with the Prosecution's filing on 1 August 2011 of the Document Containing the Charges.⁵

5. In response, the Defence for Mr. Ruto and Mr. Sang strongly oppose the requested redactions on the ground that the requested redactions:
 - i. are unnecessary as concerns meetings or rallies at which several persons were present, or as concerns witnesses who have been relocated; and,
 - ii. are disproportionately prejudicial to the rights of the Defence insofar as they would impinge upon the defendants' right to be informed of the nature and detail of the charges, and prevent the Defence from tendering any evidence in response to the allegations concerning the existence or nature of such meetings, and from raising a positive alibi defence.

II. Submissions

The requested redactions are not necessary

6. Redactions must be determined on a case by case basis, taking into consideration the particular circumstances of the statement or witness in question, and the defendants.⁶ In contravention of these requirements, the Prosecution has impermissibly requested redactions to an entire section of its Article 58 Application, and has made no distinction between rallies, which may have been public (and attended by many persons) and reported in the media, private meetings with multiple persons, private meetings which may have been referred to in the statements provided by Mr. Ruto, and private meetings, with very few attendees. It is only the latter category of meetings which could conceivably attract the type of redactions requested by the Prosecution, and even then, only if the witness or source in question has not been relocated.
7. As concerns the proposed redactions to the dates and details concerning public rallies, if several persons attended these rallies, or the events were described in media reports, NGO reports or any public findings of the Waki Commission, disclosure of this

⁵ Prosecution Request, paras 18 and 19.

⁶ *Prosecutor v. Lubanga*, ICC-01/04-01/06-568, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision establishing general principles governing applications to restrict disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence", 13 October 2006, para. 39; *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-475, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 13 May 2008, para.69.

information to the Defence will neither identify the source of the information as a particular person, nor cause any risk to the person who provided the information to the Prosecution.

8. With respect to private meetings concerning multiple persons, disclosure of the date or details of the meeting will not alert the Defence to the fact that a particular person is testifying for the Prosecution or provided information to the Prosecution.
9. Indeed, if the details concerning the date and substance of the meeting were referred to in the statements provided by Mr. Ruto to the Prosecution, then the more logical inference would be that the Prosecution allegations are based on the information that they gathered from these interviews, rather than other sources. Moreover, to the extent that information concerning the dates and details of such meetings have already been disclosed to all three defendants *via* the disclosure of Mr. Ruto's statements, there is no foundation for redacting this information from the Article 58 Application.
10. In terms of the more narrow category of private meetings with very few attendees, disclosure of this information to the Defence would only enable the Defence to ascertain the identity of the source of this information if firstly, the private meeting was convened on a strictly confidential basis, such that the attendees would have been unlikely to have conveyed the details of the meeting to third persons, who were not present, and secondly, the defendants were either present at the meeting or had been informed of the identity of every attendee at the meeting.
11. Even if these criteria were met, the mere possibility that the defendants might be able to deduce the source of the information would not create an objective risk to this person if the person has been relocated, and the Defence is unaware of the address of the witness or source in question.
12. Although the Defence is not privy to the full factual justification for these redactions, in the public redacted version of the Prosecution Request, the Prosecution asserts that "[r]evealing this section would vitiate many of the redactions approved and ordered by the Single Judge".⁷ The Appeals Chamber has explicitly tasked the Chambers with the obligation to continuously review the necessity and propriety for maintaining redactions.⁸ The possibility that the Single Judge may have authorised similar or identical redactions at an earlier stage of the proceedings cannot in itself justify the

⁷ Prosecution Request, para. 18.

⁸ *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-476, Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 13 May 2008, para 64.

continued imposition of these redactions if the criteria of necessity and proportionality are not met.

13. Finally as concerns the necessity of the redactions, the Prosecution completely undermines its assertions concerning their necessity by indicating that the non-disclosure of this information will be remedied through the submission of the Document Containing the Charges (DCC) on 1 August 2011.⁹ If disclosure of information concerning the dates and details of meetings to the Defence in the DCC is unlikely to cause a risk to the relevant Prosecution witnesses and sources, how is it that disclosure *via* the Article 58 Application would engender an objective risk?
14. In the absence of any concrete justification for such a disparate approach between its Article 58 Application and the DCC, the Defence is concerned that the Prosecution may be seeking to utilise redactions and protective issues for strategic purposes to impede and frustrate Defence preparation and investigations in this crucial period leading up to the confirmation hearing. Whilst the Statute and Rules impose a justifiably heavy burden on the Chamber and parties to take appropriate measures for the safety and protection of witness, the Chamber should not countenance attempts by the Prosecution to invoke the concerns and safety of witness without a proper basis in order to evade the Prosecution's proper disclosure obligations towards the Defence.¹⁰

The requested redactions are disproportionately prejudicial to the rights of the Defence

15. The Prosecution case concerning whether Mr. Ruto and Mr. Sang can be considered to be individually responsible for the electoral violence under article 25(3)(a) and article 25(3)(d) respectively will turn on whether the defendants were aware of a plan to commit the violence, whether, in the case of Mr. Ruto, he participated in the formulation of that plan, and whether the defendants contributed to the preparation and execution of the plan.
16. Based on their approach at other cases before the ICC, the Prosecution will seek to request the Pre-Trial Chamber to infer that the defendants' possessed knowledge and/or intent through their attendance and statements at meetings and rallies, which

⁹ Prosecution Request, para. 19.

¹⁰ See for example, *Prosecutor v. Ntagerura*, ICTR, Trial Judgment, 25 February 2004, footnote 41 "Of course, witness protection cannot be used as a pre-text to frustrate the proper preparation of a defence", citing *Prosecutor v. Gacumbitsi*, ICTR-2001-64-I, Decision on Prosecution Motion for Protective Measures for Victims and Witnesses, 20 May 2003, para. 11 ("The protection of witnesses should not . . . serve to frustrate or hinder an effective defence.").

concerned the electoral violence, or their association with persons, who attended these meetings and rallies.

17. Information concerning the dates and details of meetings and rallies are the building blocks of the Prosecution case against the defendants, and without this information, the defendants cannot be said to have been informed in relation to the nature and content of the charges against them, nor can they implement their statutory right under article 61(6) of the Statute to object to the charges and challenge the Prosecution evidence.
18. The Defence also recalls its outstanding obligation, per Rule 79 and as noted by the Single Judge,¹¹ to notify the Prosecution of their intention, if any, to raise the existence of an alibi or to raise a ground for excluding criminal responsibility, and to present evidence upon which they intend to rely for either purpose, sufficiently in advance to enable the Prosecutor to prepare adequately and respond. If the Defence is not informed of the dates and details of these rallies and meetings, it will be impossible for the Defence to contest whether the defendants were present at these meetings and rallies, whether the defendants associated with or communicated with the persons present at these meetings and rallies during the relevant time period, whether any aspects concerning the electoral violence were in fact discussed during the meetings and rallies, whether the description of the meetings and rallies that has been conveyed to the Prosecution is accurate and reliable, and whether the rallies and meetings actually occurred within the relevant time frame for the charges.
19. In this regard, “the purpose of the confirmation hearing is limited to committing to trial only those persons against whom sufficiently compelling charges going beyond mere theory or suspicion have been brought. This mechanism is designed to protect the rights of the Defence against wrongful and wholly unfounded charges”.¹² The confirmation hearing further protects the suspect against wrongful prosecution, and ensures judicial economy by filtering out cases that should not proceed to trial.¹³ The Prosecution Request renders these important objectives nugatory by precluding the

¹¹ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-62, 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, 20 April 2011, para. 22.

¹² *Prosecutor v. Lubanga*, ICC-01/04-01/06-803, Decision on the confirmation of charges, 29 January 2007, para. 37.

¹³ *Prosecutor v. Bemba*, ICC-01/05-01/08-424, Decision pursuant to article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, para. 28.

Defence from being able to raise either a positive alibi defence, or from contesting the individual criminal responsibility of the defendants.

20. This is underscored by comparison with the *Abu Garda* case, in which Pre-Trial Chamber declined to find that the defendant was an indirect perpetrator as the Prosecution had failed to establish that Mr. Abu Garda had attended meetings, during which the plan to attack Haskanita was discussed.¹⁴ In making the finding that Mr. Abu Garda was not individually responsible, the Chamber took into consideration statements tendered by the Defence, which corroborated that the defendant was not present as part of the delegation, which had participated in various meetings.¹⁵
21. In the present case, the Defence will have no ability to tender such statements as it simply will not know the date on which it is alleged that the meetings or rallies took place – it is ludicrous to expect the Defence to be able to state that the defendants were not present if the Defence does not know where they were alleged to have been, on which date. As noted by the ICTY, “[t]he absence of such information effectively reduces the defence of the accused to a mere blanket denial; he will be unable, for example, to set up any meaningful alibi, or to cross-examine the witnesses by reference to surrounding circumstances such as would exist if the acts charged had been identified by reference to some more precise time or other event or surrounding circumstance.”¹⁶
22. Reference to the *Abu Garda* case also demonstrates that the disclosure of this information to the Defence on 1 August 2011 will also be insufficient to remedy the prejudice as it will be impossible for the Defence to be able to conduct meaningful investigations (in a manner which comports to the guidelines established by the Single Judge), and request and obtain necessary protective measures for witnesses in the two week period prior to the deadline for filing Defence evidence.
23. Finally, the Defence is fully aware that at the pre-confirmation phase, the Prosecution is permitted to withhold information that would otherwise be disclosable prior to the commencement of the trial. The Appeals Chamber has nonetheless attached the strict caveat that the non-disclosure of information to the Defence should not unduly

¹⁴ *Prosecutor v. Abu Garda*, ICC-02/05-02/09-243-Red, Decision on the Confirmation of Charges, 8 February 2010, paras 168-179.

¹⁵ *Id.*, paras 213 and 214.

¹⁶ *Prosecutor v. Krnojelac*, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 February 1999, para. 40.

prejudice the Defence in its preparation for the confirmation hearing, or affect the overall fairness of the confirmation hearing.¹⁷

24. In the present circumstances, the non-disclosure of the entire section of the Article 58 Application effectively hamstrings Defence preparation at this crucial juncture, and prevents the Defence from being able to either challenge the Prosecution case as regards the individual responsibility of the defendants, or to raise its own case concerning the knowledge, intent and participation of the defendants, as evidenced by their presence or absence from such meetings and rallies. The Single Judge is therefore enjoined by appellate jurisprudence to either refuse the requested redactions, or prevent the Prosecution relying upon this evidence/allegations at the confirmation hearing.

III. Relief Sought

25. The Defence for Mr. Ruto and Mr. Sang respectfully requests the Honourable Single Judge to either reject the requested redactions to the dates and details of meetings and rallies in the Prosecution's Article 58 Application, or prohibit the Prosecution from relying upon any allegations or evidence concerning these rallies and meetings at the confirmation hearing.



Joseph Kipchumba Kigen-Katwa
On behalf of Mr. Joshua Arap Sang and Mr. William Samoei Ruto

Dated this 11th day of July 2011,

At Nairobi, Kenya

¹⁷ *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-476, Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 13 May 2008, para 63 ("if non-disclosure would result in the hearing to confirm the charges, viewed as a whole, to be unfair to the suspect, the requested redactions should not be authorised. In addition, adequate procedural safeguards should be in place to ensure that the interests of the Defence are protected so as to comply, as far as possible, with the requirements of adversarial proceedings and equality of arms").