

**Cour
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**International
Criminal
Court**



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

Date: **17 March 2011**

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PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF THE PROSECUTOR V. WILLIAM SAMOEI RUTO, HENRY
KIPRONO KOSGEY AND JOSHUA ARAP SANG**

Public
With confidential *ex parte* Annex A

Public redacted version of "Prosecution's provision of information to the Pre-Trial Chamber following public release of Judge Kaul's Dissenting Opinion", 17 March 2011, ICC-01/09-01/11-5-Conf-Exp

Source: Office of the Prosecutor

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

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Defence Support Section

Victims and Witnesses Unit

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Other

Statement of facts

1. On March 15 2011, Judge Kaul issued the “Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II’s ‘Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang’”(“Dissenting Opinion”). At 15:58 hours on the same day, the Prosecution received the Dissenting Opinion.¹ The Opinion was filed publicly.
2. After conducting a preliminary review of the Dissenting Opinion within an hour of receipt, Trial Attorney Cynthia Tai called the Senior Legal Advisor to the Pre-Trial Division, informing him that the Prosecution believed that the Dissenting Opinion contained sensitive information, the public dissemination of which increased the risk to persons cooperating with the Prosecution and their families. As an interim measure, the Prosecution requested that the Dissenting Opinion be removed immediately from the website given that irreparable harm might occur if the information was disclosed. The Prosecution reiterated its request in an email sent at 17:15, notifying the Senior Legal Advisor that the Prosecution would provide a formal filing that evening. This was confirmed by a subsequent call from the Prosecutions Coordinator, Sara Criscitelli, to the Senior Legal Advisor at 17:18.
3. As promised in the telephone calls and email, the Prosecution filed its Request for Temporary Restriction of Access to Dissenting Opinion of Judge Kaul in the record of the case ICC-01/09-01/11² (“Request”) at 18:19 pm, that same evening. This request identified an example of information contained in the Dissenting Opinion supporting the Prosecution’s concerns. A similar document was filed at 18:33 in the record of the case ICC-01/09-02/11.³ Because they were being filed outside office hours and given the urgent nature of the provisional relief requested, both documents were filed on an urgent basis.
4. At 2:05 am and 2:06 am on 16 March 2011, the Prosecution received notification of two decisions issued by Judge Kaul acting as duty judge (ICC-01/09-01/11-01-4-Conf-

¹ ICC-01/09-01/11-2.

² ICC-01/09-01/11-3-Conf-Exp.

³ ICC-01/09-02/11-5-Conf-Exp.

Exp and ICC-01/09-02/11-6-Conf-Exp). In both Decisions, the Prosecution's request for relief was denied.⁴

5. The Prosecution files the instant document pursuant to articles 54(3)(f) and 68(1) and in compliance with its statutory duty of protection of those persons placed at risk on account of their interaction with the Prosecution.⁵ The Prosecution is further mindful of the ruling of the Appeals Chamber emphasizing the "importance of the Prosecutor alerting the [...] Chamber of information in his possession concerning matters of protection".⁶

Submissions

6. The Prosecution is concerned by the manner in which the current process has been conducted. The Prosecution believes that the end result has created a situation of aggravated risk to persons who cooperated with the Prosecution's investigation, their families and other individuals who may be perceived to be the Prosecution's witnesses.
7. The first concern is based on the Dissenting Opinions' reference to redacted portions of the public version of the Article 58 Applications and cites to witness statements that were provided confidential ex-parte to the Chamber without any prior consultation with the Prosecution and/or (as far as the Prosecution knows) VWU. It is well recognized that "the Prosecutor is close to the relevant witnesses on the ground and in a position to see where a need for protection may arise".⁷ This places the Prosecution in an ideal position to assess risk or advise the Chamber when taking any decision concerning the protection. In fact, the Appeals Chamber has in this context emphasised "the vital importance of cooperation on all matters of witness protection".⁸

⁴ Judge Kaul stated in both Decisions that the Prosecution had not provided any legal basis for the relief sought in its Urgent Requests. The Prosecution however notes that as stated by the Appeals Chamber, Articles 57(3)(c) and 68(1) and (4) bestow the chambers of this Court with a general power to provide for such measures of protection requested by the Prosecution. See ICC-01/04-01/07-776 OA7, 26 November 2008, para. 95.

⁵ Pursuant to Regulation 23bis (2), the Prosecution submits the present filing confidential ex parte, Prosecution and Registry only, as it refers to documents that are subject to the same classification.

⁶ ICC-01/04-01/06-2582 OA18, para. 53.

⁷ ICC-01/04-01/07-776 OA7, para. 101.

⁸ Ibid.

8. Second, the Prosecution is troubled by the manner in which its concerns were dealt with and ultimately dismissed. The Prosecution made three attempts to alert the Chamber of this issue, to no effect. Thereafter, the Prosecution submitted a limited formal filing on an urgent basis seeking temporary interim relief, just long enough for the Prosecution to submit a more detailed filing at the earliest opportunity. Without due regard for the Prosecution's concerns, the same judge who issued the Dissenting Opinion, acting as Duty Judge, summarily refused the temporary relief requested by the Prosecution, on the basis that the requests were unsubstantiated both in law and fact. This decision was made despite the Prosecution's explanation that the urgent filing only provided limited examples, and that a detailed and thorough submission would be submitted the following day.
9. The Prosecution considers that once Judge Kaul, acting as Duty Judge, verified that the matters raised in the Request were indeed urgent, he should have granted the temporary relief requested. Alternatively, in such an instance, if the Duty Judge is not inclined to grant it, then considering the seriousness of the matter raised by the Prosecution and that its Request – although submitted outside the Registry hours – was notified at a reasonable time, as Duty Judge he *should have consulted* with the other Judges of the Pre-Trial Chamber before deciding on the matter.
10. This is particularly critical when the Duty Judge's decision will permanently deprive the full Chamber of its prerogative to provide the relief. Here, for example, Judge Kaul's refusal to grant the interim relief rendered moot the Chamber's authority and ability to consider the merits of the issue, since any such request a day after the information was disclosed would not ameliorate the harm done by disclosure. It also deprived the Prosecution of its right to have its request considered appropriately by the full Chamber.
11. In addition, the request was rejected despite the fact that no meaningful prejudice could arise out of the temporary relief requested by the Prosecution. Had the Chamber, once the Prosecution had furnished it with detailed submissions, ultimately considered that there was no need to withhold the full version of the Opinion from the public and replace it with a redacted version, it could have re-posted the Opinion on

the Court's website. The cost – delay by one day to the public release of the Opinion – is minimal. The prejudice that may result from the failure to provide this limited measure of interim relief could, on the other hand, be substantial and potentially irreparable. If the Prosecution is correct that identifying information has been released and it is impossible to provide timely protection to persons who have no inkling that their security has been jeopardized, irreparable prejudice to the life and well-being of witnesses can ensue. Nor is it certain that the Prosecution can identify which persons might be at risk, since the public dissemination of this information creates risks to other individuals unknown to the Prosecution who may wrongly be perceived as witnesses and whom the Prosecution cannot possibly take measures to protect.

12. The Prosecution thus is deeply concerned about the decision of the Duty Judge to choose a path that poses arguable risks to persons cooperating with the Prosecution and their families, and to dismiss entirely the legitimate expressed concerns of the Prosecution. The Prosecution believes that, in a situation such as was presented here, its request for brief interim measures merely to preserve the opportunity to express in detailed fashion its concerns, is entitled to greater respect.
13. It is undisputed that the Court is responsible as a whole for “ensur[ing], as a matter of the highest priority, that witnesses are appropriately protected [...] is, pursuant to article 68 of the Statute”⁹ and that the Chambers have an ultimate duty and responsibility to that effect.¹⁰ That duty and responsibility, however, require the Chamber to follow an appropriate and adequate process to assess risks, to seek the advice from the experts on the matter, including the Prosecution and the VWU, and to err on the side of caution when it comes to protecting the safety and well-being of persons cooperating with the Court.
14. As a result of the events described above, the Prosecution is now left with a situation of aggravated risks for its witnesses and their families (and potentially others who may be suspected wrongly of being witnesses) and a compromised investigation as individuals are not likely to continue to cooperate if their identity and safety cannot be guaranteed. Given the lapse of time and the wide dissemination of the Dissenting

⁹ ICC-01/04-01/07-776 OA7, para. 101.

¹⁰ ICC-01/04-01/07-776 OA7, para. 93-98; ICC-01/04-01/06-2582 OA18, paras. 50-51.

Opinions over a period of almost 48 hours, the utility of removing the Dissenting Opinion and substituting a redacted version is moot. There is no way now to minimize the risk by reducing disclosure; instead, the Prosecution and eventually the VWU will have to handle the increased risks.

15. [REDACTED]

16. The Prosecution will proceed to take necessary steps to manage the enhanced risks to its witnesses and their families. In the future, however, the Prosecution respectfully requests that it be consulted, whenever possible, prior to the release of any sensitive information by the Chamber and given necessary time to advise the Chamber of concerns, if any, regarding disclosure. This course of action has been encouraged by the Appeals Chamber.¹⁴ The Chamber may properly decide to err on the side of caution by issuing first a confidential version of any decision referring to sensitive information, and then request submissions from the Prosecution as to the need for redactions.

17. Second, the Prosecution stresses that, should this sort of situation arise again, its request for urgent measures on the basis of its assessment that sensitive information

¹¹ "What the other ICC judge had to say", *The Standard*, 15 March 2011, <http://www.standardmedia.co.ke/InsidePage.php?id=2000031271&cid=4&>; ¹¹ <http://www.nation.co.ke/>, click "DOWNLOAD: "Judge Kaul's dissenting ruling 1". The direct link to the PDF file is <http://www.nation.co.ke/blob/view/-/1125820/data/245243/-/edqdsd/-/kaul.pdf>. (The K2 dissent is also available on the site.)

¹² [1] <http://nipate.com/ocampo-fictional-evidence-against-rutoh-and-co-t1572.html>.

¹³ "Refresh your memories" and "Dissenting Judge: I am satisfied William Ruto Made Available Guns, Grenades and Gas Cylinders", both attached as Annex A.

¹⁴ "This is not to minimise the importance of consultation, where appropriate, between the relevant organs of the Court as specified in the Court's legal texts and prior jurisprudence or the importance of the Prosecutor alerting the Trial Chamber of information in his possession concerning matters of protection. [...]" ICC-01/04-01/06-2582 OA18, para. 53, footnote 123 referring to ICC-01/04-01/07-776 OA7.

has been released is entitled to respect, particularly where the harm can be irreparable and no meaningful detrimental consequences could arise out of the relief requested.

18. The Prosecution will keep the Chamber informed of any relevant developments in the security situation of the witnesses.



Luis Moreno-Ocampo
Prosecutor

Dated this 17th day of March 2011

At The Hague, The Netherlands