

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 22 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

**Redacted Decision on the Confidential 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”) of the International Criminal Court (the “Court”),¹ hereby renders the decision on the confidential 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”).²

1. On 15 December 2010, the Prosecutor submitted the Article 58 Application.
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 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 scheduled the commencement of the confirmation of charges hearing for Thursday, 1 September 2011.⁴
3. On 4 July 2011, the Single Judge ordered 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”.⁵
4. On 7 July 2011, the “Prosecution’s Submissions on the ‘Order to the Prosecutor to File a Proposed New Redacted Version of the Article 58 Application’ (ICC-01/09-01/11-157)”⁶ was filed in which the Prosecutor proposes a confidential redacted version of the Article 58 Application.⁷ According to the submission of the Prosecutor,

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

² Originally filed under registration number ICC-01/09-30-Conf-Exp; copied into the record of the case under registration number ICC-01/09-01/11-26-Conf-Exp; public redacted version available under registration number ICC-01/09-30-Red2.

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 Pre-Trial Chamber II, “Order to the Prosecutor to File a Proposed New Redacted Version of the Article 58 Application”, ICC-01/09-01/11-157, p. 6.

⁶ ICC-01/09-01/11-165-Conf-Exp and annexes A and B (confidential *ex parte*). A public redacted version of the submission has also been filed by the Prosecutor, see ICC-01/09-01/11-165-Red.

⁷ ICC-01/09-01/11-165-Conf-Exp, para. 21.

the proposed redactions are “necessary to protect the safety, physical and psychological well-being of victims and witnesses”.⁸ In particular, the Prosecutor requests, *inter alia*, the redaction of entire section G.2.II. of the Article 58 Application, entitled “Planning Meetings and Rallies”.⁹

5. On 11 July 2011, the Defence of Mr. Ruto and Mr. Sang filed the “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’”,¹⁰ wherein it is requested that the Single Judge “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.”¹¹ The Defence of Mr. Ruto and Mr. Sang argues (i) that the redactions *en bloc* are not necessary,¹² and (ii) that the information concerning the dates and details of meetings and rallies is crucial to the case against the suspects.¹³ Without this information, it is further argued, the suspects cannot be said to have been informed in relation to the nature and content of the charges, and cannot exercise their right to object to the charges and challenge the Prosecution evidence.¹⁴

6. On 12 July 2011, the “Response of the Defence of Mr. Henry Kosgey to the ‘Prosecution’s Submissions on the Order to the Prosecutor to File a Proposed New Redacted Version of the Article 58 Application’” (“Mr. Kosgey’s Response”) was filed.¹⁵ The Defence of Mr. Kosgey likewise requests the 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

⁸ ICC-01/09-01/11-162-Conf-Exp, para. 1.

⁹ ICC-01/09-01/11-165-Conf-Exp, para. 18.

¹⁰ ICC-01/09-01/11-174.

¹¹ ICC-01/09-01/11-174, para. 25.

¹² ICC-01/09-01/11-174, paras 5-11.

¹³ ICC-01/09-01/11-174, para. 17.

¹⁴ ICC-01/09-01/11-174, para. 17.

¹⁵ ICC-01/09-01/11-182.

hearing”.¹⁶ It argues that the Prosecutor’s request to redact “wide swathes of information which constitutes the *sine qua non* of the Prosecution Article 58 Application [...] effectively denies Mr. Kosgey the opportunity to exercise the rights conferred to him by Rule 79”.¹⁷

7. On 19 July 2011, the Prosecutor filed the “Prosecution’s Request for Leave to Reply to the ‘Response of the Defence of Mr. Henry Kosgey to the Prosecution’s Submissions on the Order to the Prosecutor to File a Proposed New Redacted Version of the Article 58 Application’” (the “Prosecutor’s Request for Leave to Reply”),¹⁸ wherein he requests to reply to one particular issue raised in Mr. Kosgey’s Response, namely to Mr. Kosgey’s alternative request to prohibit the Prosecutor from relying upon any allegations or evidence concerning these rallies and meetings at the confirmation of charges hearing.¹⁹

8. The Single Judge notes articles 21(1)(a) and (3), 57(3)(c), 58, 67 and 68(1) of the Rome Statute (the “Statute”), rule 81 of the Rules of Procedure and Evidence (the “Rules”) and regulations 23*bis* and 24(5) of the Regulations of the Court.

9. At the outset, the Single Judge reiterates that the principle of publicity of proceedings and the right of the Defence to be informed promptly and in detail of the nature, cause and content of the charges as enshrined in article 67(1)(a) of the Statute warrant a review of the level of classification of the Article 58 Application.²⁰ However, the Single Judge is equally mindful of the Court’s continuous obligation to take appropriate measures with a view to providing for the protection of victims and witnesses within the meaning of articles 57(3)(c) and 68(1) of the Statute. In the view of the Single Judge, the interests of victims and witnesses may, by virtue of these statutory provisions, inform the decision of the Single Judge as to the proper level of classification of filings in the record of the case as public, confidential or confidential

¹⁶ ICC-01/09-01/11-182, para. 31.

¹⁷ ICC-01/09-01/11-182, para. 20.

¹⁸ ICC-01/09-01/11-206.

¹⁹ ICC-01/09-01/11-206, paras 1-2.

²⁰ Pre-Trial Chamber II, “Order to the Prosecutor to File a Proposed New Redacted Version of the Article 58 Application”, ICC-01/09-01/11-157, paras 7-13.

ex parte. By the same token, they may justify redactions to parts of documents filed in the record of the case.

10. In light of the fact that several decisions related to redactions to evidence under rule 81 of the Rules have so far been issued in the present case,²¹ the Single Judge wishes to clarify that rule 81 deals with restrictions on disclosure of evidence and is therefore not directly applicable to the question of determination of the proper level of classification of filings in the record of the case, or to the question of redactions to such filings. Nevertheless, the Single Judge opines that the two matters are related and that essentially the same guiding principles are applicable.

11. Accordingly, restriction of access to documents in the record of the case by way of a stricter level of classification or by way of redactions to filings in the record of the case is justifiable when there is an objectively identifiable risk to the relevant protected interest. Moreover, the measure must be necessary to reduce that risk as well as proportionate to the rights of the opposing party, most commonly the Defence. In this context, the right to publicity of proceedings and the right to be informed promptly and in detail of the nature, cause and content of the charge, enshrined in article 67(1) of the Statute, are of particular relevance.

12. Bearing in mind these general principles, the Single Judge turns to the proposed confidential redacted version of the Article 58 Application. The Prosecutor effectively proposes to reduce the extent of redactions, *vis-à-vis* the Defence, in the current public redacted version, wherein section G (paragraphs 46 to 203) is entirely obscured.²²

²¹ Pre-Trial Chamber II, "First Decision on the Prosecutor's Requests for Redactions and Related Requests", ICC-01/09-01/11-145-Conf-Exp and Annexes 1 and 2 (a confidential redacted version of the decision has also been filed, see "Redacted First Decision on the Prosecutor's Requests for Redactions and Related Requests", ICC-01/09-01/11-145-Conf-Red); Pre-Trial Chamber II, "Second Decision on the Prosecutor's Requests for Redactions and Related Requests", ICC-01/09-01/11-152-Conf; Pre-Trial Chamber II, "Third Decision on the Prosecutor's Request for Redactions", ICC-01/09-01/11-195-Conf.

²² See ICC-01/09-30-Red2.

13. The Prosecutor submits that “the current public redacted version satisfies the principle of publicity of proceedings vis-à-vis the public and that maintenance of redactions is necessary to protect confidential information (...) which cannot be disclosed to the public at this time”.²³ The Single Judge, in light of the nature of the information currently redacted in the Article 58 Application and considering that the present decision is taken primarily to enable the suspects to understand, before the filing of the Document Containing the Charges (the “DCC”), the nature of the case against them, considers that a new redacted version must be issued as confidential and that *vis-à-vis* the public, the current extent of redactions shall be maintained.

14. With respect to the extent of redactions to be maintained in the confidential redacted version of the Article 58 Application, the Prosecutor submits that references to information stemming from evidence already disclosed to the Defence and from public sources can be revealed to the Defence, as can the Prosecutor’s legal arguments and information for which the Prosecutor has assessed that it is not likely to prejudice the protection of victims and witnesses.²⁴ At the same time, the Prosecutor proposes the continued redaction of certain information that is likely to identify victims and witnesses as well as of other sensitive information not previously disclosed to the Defence.²⁵

15. Upon review of the proposals, considering also the nature and extent of the authorized redactions to disclosed evidence,²⁶ the Single Judge considers that the majority of the proposed redactions are justified and must be maintained. The redactions of this type concern references to information that could identify witnesses whose identity is not to be revealed to the Defence pursuant to decision of

²³ ICC-01/09-01/11-165-Conf-Exp, para. 8.

²⁴ ICC-01/09-01/11-165-Conf-Exp, para. 16.

²⁵ ICC-01/09-02/11-162-Conf-Exp, paras 15 and 17.

²⁶ See Pre-Trial Chamber II, “First Decision on the Prosecutor’s Requests for Redactions and Related Requests”, ICC-01/09-01/11-145-Conf-Exp and Annexes 1 and 2 (a confidential redacted version of the decision has also been filed, see “Redacted First Decision on the Prosecutor’s Requests for Redactions and Related Requests”, ICC-01/09-01/11-145-Conf-Red); Pre-Trial Chamber II, “Second Decision on the Prosecutor’s Requests for Redactions and Related Requests”, ICC-01/09-01/11-152-Conf; Pre-Trial Chamber II, “Third Decision on the Prosecutor’s Request for Redactions”, ICC-01/09-01/11-195-Conf.

the Chamber.²⁷ Furthermore, they include references to evidence which has not been disclosed by the Prosecutor for the purposes of the confirmation of charges hearing, but which could identify certain individuals and put them at risk by way of creating a perception of their co-operation with the Court.

16. Nevertheless, the Single Judge considers that in a number of instances, the proposed redactions are unjustified due to the fact that they either concern information that is already available to the Defence or because revealing the information to the Defence would not create a risk for victims or witnesses.

17. This is in particular the case with witness statements which have been disclosed to the Defence. The Single Judge considers that any redaction in the Article 58 Application of the information which is in possession of the Defence by way of disclosure is futile regarding the protection of witnesses, while at the same time having a significant negative impact on the ability of the Defence to prepare for the confirmation of charges hearing. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

18. Along the same lines, the Single Judge does not accept the Prosecutor's proposal to redact entirely section G.2.II. of the Article 58 Application. Rather than redacting all information *en bloc*, the Single Judge opines that information relating to the alleged planning meetings must be distinguished on the basis of whether it has been disclosed to the Defence, in which case redactions would not be meaningful. Should the information not have been disclosed to the Defence pursuant to a decision of the Chamber to this effect, redactions in the Article 58 Application are justified.

²⁷ Pre-Trial Chamber II, "First Decision on the Prosecutor's Requests for Redactions and Related Requests", ICC-01/09-01/11-145-Conf-Exp, para. 41 and Annex I; Pre-Trial Chamber II, "Second Decision on the Prosecutor's Requests for Redactions and Related Requests", ICC-01/09-01/11-152-Conf, para. 19 and Annex I.

[REDACTED]

19. Accordingly, the Single Judge concludes that section G.2.II. of the Article 58 Application can to a large extent be revealed to the Defence. However, a limited amount of redactions, including of the dates of certain meetings, remain necessary, in light of the extent of redactions to corresponding evidence authorized by the Chamber. The Single Judge notes in this respect the Prosecutor's argument that "[r]edacting the dates of these events [...] 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",²⁹ but considers that the potential increase in the ability of the suspects to determine the dates of the meetings on the basis of the order of references to them in the Article 58 Application is not significant and that therefore redaction of the entire section related to alleged planning meetings would be disproportionate to the interests of the Defence.

20. The Single Judge wishes to clarify that while the preceding paragraphs contain the reasoning underpinning the non-approval of some of the proposed redactions, the precise list of redactions rejected is provided in the annex to this decision, filed confidential *ex parte*, Prosecutor.

21. The Single Judge considers that the non-acceptance of the Prosecutor's proposal for blanket redaction of section G.2.II. and the approval of a substantially lesser amount of redactions appropriately accommodate the arguments raised by the Defence of Mr. Ruto and Mr. Sang and the Defence of Mr. Kosgey in their respective responses. It is therefore not necessary to entertain the alternative request to "prohibit the Prosecution from relying upon any allegations or evidence concerning these rallies and meetings at the confirmation hearing".³⁰

22. In these circumstances, the Single Judge also considers that a reply from the Prosecutor is not necessary and that the Prosecutor's Request for Leave to Reply must be rejected.

²⁹ ICC-01/09-01/11-165-Conf-Exp, para. 18.

³⁰ ICC-01/09-01/11-174, para. 25; ICC-01/09-01/11-182, para. 31.

23. Finally, the Single Judge wishes to clarify that while a lesser redacted form of the Article 58 Application is warranted by the procedural rights of the Defence in preparation for the confirmation of charges hearing, an article 58 application is not a charging document. The contours of the case are at present shaped by the "Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang",³¹ while the charges against the suspects are to be set in the DCC to be filed by the Prosecutor by 1 August 2011.³²

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

- a) partially approves** the redactions proposed by the Prosecutor and **orders** the Prosecutor to file in the record of the case, by no later than **Tuesday, 26 July 2011**, a confidential redacted version of the Article 58 Application, containing redactions as proposed, with the exception of proposed redactions listed in the annex to this decision;
- b) rejects** the Prosecutor's Request for Leave to Reply.

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



Judge Ekaterina Trendafilova
Single Judge

³¹ Pre-Trial Chamber II, ICC-01/09-02/11-1.

³² 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.

Dated this Friday, 22 July 2011

At The Hague, The Netherlands