

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 14 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**

**Decision on the "Defence Request for Disclosure of Article 67(2) and Rule 77  
Materials"**

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**

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**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”),<sup>1</sup> hereby renders the decision on the “Defence Request for Disclosure of Article 67(2) and Rule 77 Materials” (the “Request”).<sup>2</sup>

1. 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.<sup>3</sup> 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.<sup>4</sup>

2. 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.<sup>5</sup>

3. 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 Between the Parties”, whereby the Single Judge, *inter alia*, established a calendar for the conduct of the disclosure proceedings.<sup>6</sup>

4. On 10 June 2011, the Defence of Mr Ruto and Mr Sang jointly submitted the Request. The Defence requests that the Chamber order the Prosecutor to disclose, “in accordance with the disclosure calendar”, information outlined in the Request as

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

<sup>2</sup> ICC-01/09-01/11-117 and Annexes 1-3.

<sup>3</sup> 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.

<sup>4</sup> ICC-01/09-01/11-T-1-ENG.

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

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

well as in its previous electronic mail messages sent to the Prosecutor.<sup>7</sup> The Request concerns information divided into five categories: (i) information concerning the alleged co-perpetrators and physical perpetrators of the crimes with which the suspects are charged;<sup>8</sup> (ii) any information suggesting that prosecution evidence was collected in violation of the Rome Statute (the “Statute”), the Rules of Procedure and Evidence (the “Rules”), or the relevant domestic requirements for collection of evidence;<sup>9</sup> (iii) information concerning contacts between prosecution witnesses and sources, and intermediaries, the credibility and reliability of intermediaries, and the existence of accountability mechanisms;<sup>10</sup> (iv) information concerning the credibility of prosecution witnesses;<sup>11</sup> and (v) information, statements and evidence from the case of *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* which concerns any alleged crimes committed by the Mungiki and the Party of National Unity, which concerns a similar time frame and locations as the present case, or which impacts the credibility of prosecution evidence in the present case.<sup>12</sup>

5. In support of the above, the Defence argues that, as confirmed by the Appeals Chamber, the Prosecutor’s “duty to disclose exculpatory and relevant materials is an essential component of the fairness of the proceedings, and is one of the mechanisms by which the Court aims to promote equality of arms”.<sup>13</sup> In support of the Request, the Defence also cites extensively the jurisprudence of this Court, as well as of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone.

6. On 4 July 2011, the “Prosecution’s Response to the ‘Defence Request for Disclosure of Article 67(2) and Rule 77 Materials’” (the “Prosecutor’s Response”) was

<sup>7</sup> ICC-01/09-01/11-117, para. 31.

<sup>8</sup> ICC-01/09-01/11-117, paras 10-20.

<sup>9</sup> ICC-01/09-01/11-117, para. 21.

<sup>10</sup> ICC-01/09-01/11-117, paras 22-26.

<sup>11</sup> ICC-01/09-01/11-117, para. 27.

<sup>12</sup> ICC-01/09-01/11-117, paras 28-29.

<sup>13</sup> ICC-01/09-01/11-117, para. 7 (footnote omitted).

filed, wherein it is requested that the Chamber reject the Request.<sup>14</sup> The Prosecutor argues that the Defence blanket approach and far-reaching disclosure request are contrary to the applicable law and practice, as well as unfeasible.<sup>15</sup> Finally, he avers that the legal authorities cited in the Request in fact do not support the Defence's argument.<sup>16</sup>

7. The Single Judge notes articles 21(1)(a) and (3), 61(3) and 67(2) of the Statute and rules 77 and 121(2) of the Rules.

8. The Single Judge recalls that the scope of disclosure of evidence between the parties is regulated by various provisions of the applicable law. In this respect, it is worth clarifying at the outset that when a provision provides for an obligation of disclosure, any such items which may fall within its scope shall be disclosed to the Defence by virtue of that provision itself. For the purposes of the present decision, article 67(2) of the Statute and rule 77 of the Rules are of particular relevance. Article 67(2) of the Statute obliges the Prosecutor to disclose to the Defence such evidence in his possession or control which he or she believes shows or tends to show the innocence of the accused, to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence; and rule 77 of the Rules requires the Prosecutor to permit the Defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are, *inter alia*, material to the preparation of the Defence. Consequently, if a piece of evidence is to be disclosed to the Defence by virtue of any such provision it is not necessary that an order to this effect be issued by the Chamber.

9. Nevertheless, the principle that disclosure takes place pursuant to the Statute and the Rules and that no order by the Chamber is necessary to create disclosure obligations for the Prosecutor does not mean that the Chamber will never be able to issue orders compelling the Prosecutor to disclosure. To the contrary, in case that the

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<sup>14</sup> ICC-01/09-01/11-158, para. 20.

<sup>15</sup> ICC-01/09-01/11-158, para. 12.

<sup>16</sup> ICC-01/09-01/11-158, paras 15-19.

Prosecutor fails to properly disclose evidence, the Chamber is called, pursuant to article 61(3) of the Statute and rule 121(2) of the Rules, to issue such orders as may be necessary for disclosure to proceed satisfactorily. Equally, pursuant to article 67(2), the Chamber shall decide in case of doubt as to the application of the said article. For this purpose, the Defence has to allege in concrete terms how the Prosecutor has violated his disclosure obligations. In the present instance, however, the Defence does not allege that any particular contravention of disclosure obligations occurred. Therefore, the Single Judge considers that the Request cannot be granted under article 61(3) of the Statute and rule 121(2) of the Rules.

10. Finally, the Single Judge notes that the Defence relies extensively on the jurisprudence of other Chambers of this Court as well as of other courts, in order to establish a general principle by which the Prosecutor would be required to provide the Defence with certain categories of information as claimed in its Request.<sup>17</sup> However, the Single Judge considers that the references to jurisprudence are misplaced. Namely, the cited decisions were taken in situations of particular case-specific disputes at the confirmation of charges hearing or at trial, where the Defence, upon review of the evidence disclosed and/or upon conducting its own investigation, challenged the prosecution case, by contesting the admissibility or credibility of prosecution evidence. In such circumstances, certain case-specific orders by the Chambers were needed in order to resolve the dispute and enable the Chamber to make its determination on the merits of the case. Accordingly, in the view of the Single Judge, the cited jurisprudence cannot be understood to create new disclosure obligations upon the Prosecutor, apart from those established by the Statute and the Rules.

11. In light of the above, the Single Judge is of the view that the information and/or evidence requested by the Defence and entirely defined in the abstract are either not subject to disclosure – as falling outside the scope of the Prosecutor’s statutory obligations of disclosure – or shall be disclosed to the Defence, to the extent

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<sup>17</sup> ICC-01/09-01/11-117, paras 10-26.

provided by the law without the need for an order to that effect issued by the Chamber, given the absence of any failure by the Prosecutor to comply with his statutory duties. In both scenarios, the Single Judge considers that the Request must be rejected.

**FOR THESE REASONS, THE SINGLE JUDGE HEREBY**

**rejects the Request.**

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



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Judge Ekaterina Trendafilova  
Single Judge

Dated this Thursday, 14 July 2011

At The Hague, The Netherlands