

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 12 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**

**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'.**

**Source: Defence**

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

**The Office of the Prosecutor**

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**Unrepresented Victims**

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**The Office of Public Counsel for  
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**REGISTRY**

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**Counsel Support Section**

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Mr. Didier Daniel Preira, Deputy Registrar

**Victims and Witnesses Unit**

**Detention Section**

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Section**

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## I. INTRODUCTION

1. On 8 March 2011, the Chamber, by majority, issued three summonses to appear in the present case and set the date for the initial appearance of the suspects for 7 April 2011 (Decision on Summonses).<sup>1</sup>
2. In the Decision on Summonses, the Pre-Trial Chamber found that “between late December 2006 and the days immediately before the 2007 presidential elections, a series of preparatory meetings were held to discuss and arrange the modalities of the implementation of the said policy”.<sup>2</sup> The policy in question was the “policy aimed at targeting members of the civilian population supporting the PNU, in order to punish them and evict them from the Rift Valley, with the ultimate goal of gaining power and creating a uniform ODM voting block”.<sup>3</sup>
3. The Chamber further found that at these meetings, crucial issues concerning the implementation were discussed and agreed, such as:
  - (i) the appointment of commanders and divisional commanders responsible for operations on the field; (ii) the production of maps marking out areas most densely inhabited by communities perceived to be or actually siding with the PNU; (iii) the purchase of weapons and their storage before the attack; (iv) the transportation of the perpetrators to and from the targeted locations; (v) the establishment of a rewarding mechanism to motivate the perpetrators to kill the highest possible number of persons belonging to the target communities as well as to destroy their properties.<sup>4</sup>

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<sup>1</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-01/09-01/11-01.

<sup>2</sup> At para. 27.

<sup>3</sup> At para. 26.

<sup>4</sup> At para. 28.

4. In support of these key findings, the Chamber cited annex 19 of the Prosecution's Article 58 Application.
5. In determining that there were reasonable grounds to believe that Mr. Henry Kosgey could be considered to be an indirect co-perpetrator, the Chamber again cited the existence of a series of meeting in which Mr. Ruto, Mr. Kosgey and Mr. Sang "agreed on a common plan to punish PNU supporters and evict them from the Rift Valley, with the ultimate goal of gaining power and to create a uniform ODM voting block."<sup>5</sup> In support of these findings, the Chamber cited annexes 11 and 19 of the Prosecution Application.
6. On 1 April 2011, the Single Judge issued the "Decision on Reclassification of Certain Documents", in which the Prosecutor was ordered to file a new public redacted version of the Article 58 Application.<sup>6</sup>
7. The Prosecution refiled a public version of its Article 58 Application in the Kenya situation on 4 April 2011. <sup>7</sup>At this point in time, annexes 11 and 19 have not been provided to the Defence whether through the on-going process of disclosures or otherwise.
8. On 4 July 2011, the 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". <sup>8</sup> In this decision, the Single Judge recognised that in order for right of the Defence under Article 67(1)(a) to be informed promptly, and in detail, of the nature, cause and content of the charges to be fulfilled in the interim period before the filing of the Document Containing the Charges (DCC), the Defence required more information concerning the nature of the charges.

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<sup>5</sup> At para. 41.

<sup>6</sup> ICC-01/09-01/11-2.

<sup>7</sup> ICC-01/09-30-Red2

<sup>8</sup> Order to the Prosecutor to File a Proposed New Redacted Version of the Article 58 Application, ICC-01/09-01/11-157 at page 6.

9. On 7 July 2011, the Prosecution filed a public redacted version of its request for redactions to revised version of the Article 58 Application (the Prosecution Request).<sup>9</sup>

10. 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 proportionate, and will in any event be remedied with the Prosecution’s filing on 1 August 2011 of the Document Containing the Charges.<sup>10</sup>

11. On 11 July 2011, the Defence for Mr. Ruto and Mr. Sang filed a response, in which they strongly oppose the requested redactions on the ground that the requested redactions:

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<sup>9</sup> 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.

<sup>10</sup> Prosecution Request at paras. 18 and 19.

- 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.<sup>11</sup>

12. On the same day, the Single Judge also issued her 'Decision on the "Defence Application for Extension of Time to Submit Information on Viva Voce Witnesses to be Called at the Confirmation Hearing"', in which the Single Judge granted the Defence teams until 19 July 2011 to indicate whether they intend to call live witnesses, and if so, information detailing the subject matter and the scope of the proposed testimony of each witness.<sup>12</sup>

13. The Defence for Mr. Henry Kosgey hereby files its response to the Prosecution Request, in which it adopts the arguments of the Defence for Mr. Ruto and Mr. Sang, and further submits that failure to disclose to the Defence, the information concerning the dates and details of the alleged meetings is highly prejudicial and denies the Defence the opportunity to prepare for the confirmation of charges hearings. Without knowledge of the alleged dates the Defence is not able to determine whether Mr Kosgey was at the meeting or at all. Additionally, the mention of the date alone in a meeting alleged to be attended by a number of persons cannot compromise the identity of the attendants. Accordingly, the redaction of the dates is highly disproportionate to the expressed intention to protect the identity of witnesses. It further

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<sup>11</sup> 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', ICC-01/09-01/11-174.

<sup>12</sup> Decision on the "Defence Application for Extension of Time to Submit Information on Viva Voce Witnesses to be Called at the Confirmation Hearing", ICC-01/09-01/11-176.

inhibits the Defence from being able to make a timely and informed choice as to the convocation of *vive voce* witnesses, or the submission of Defence evidence.

## II. OBSERVATIONS

14. It is clear from the Pre-Trial Chamber's Decision on Summonses that the Prosecutions' submissions concerning the dates and details of meetings and rallies comprise a key element of the Prosecution case concerning the individual responsibility of Mr. Kosgey.
15. Indeed, given the Pre-Trial Chamber's repeated reference to these meetings and the Chamber's heavy reliance on annexes 11 and 19, one could properly surmise that the Prosecution would have been unable to obtain the issuances of the summonses if it had not submitted this information before the Chamber.
16. In light of the fact that the Chamber has been exposed to this information, and has rendered preliminary factual findings in connection with this material, it would be a complete contravention of the adversarial process to deprive the Defence of the opportunity of viewing this material, and challenging the underlying factual assumptions concerning the responsibility of Mr. Kosgey.
17. The ICC Appeals Chamber has held in the Bemba case that "in order to secure equality of arms and an adversarial procedure, the defence must, to the largest extent possible, be granted access to documents that are essential in order effectively to challenge the lawfulness of detention, bearing in mind the circumstances of the case."<sup>13</sup> Although the Appeals Chamber recognised that the entitlement to disclosure was not absolute, "this legitimate goal [of

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<sup>13</sup> Prosecutor v. Bemba, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled "Decision on application for interim release, 16 December 2008, ICC-01/05-01/08-323, at para 32.

ensuring that there is no tampering of evidence or obstruction of the investigation] cannot be pursued at the expense of substantial restrictions on the rights of the defence".<sup>14</sup>

18. Although the Pre-Trial Chamber issued summonses and not an arrest warrant, the attendant conditions nonetheless restrict the liberty of Mr. Kosgey in a multitude of ways. Moreover, the initiation of criminal proceedings against Mr. Kosgey has significant personal, professional, and reputational consequences, which cannot be remedied through monetary compensation. The Defence therefore submits that the right of a defendant to challenge the underlying basis for an Article 58 Application, and to obtain the underlying factual basis for the Chamber's decision on the Application, should apply *mutatis mutandis* to a defendant, who has been summoned rather than arrested.

19. This is consistent with the fact that the House of Lords of the United Kingdom has held that ECHR case law concerning the right to obtain disclosure in order to challenge the Court's decision that there was reasonable suspicion to arrest or detain the person, also applies to persons, who are the subject of control orders, rather than formal detention.<sup>15</sup> The ECHR has also held that even if the person is now at liberty, the person must still have a founded complaint if the non-disclosure of the information affected the overall fairness of the proceedings and the right to adversarial proceedings.<sup>16</sup>

20. In the current case, the Prosecution is not seeking discrete redactions to non-essential aspects of its Application; it is seeking to redact wide swathes of information which constitute the *sine qua non* of the Prosecution Article 58

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<sup>14</sup> Prosecutor v. Bemba, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled "Decision on application for interim release, 16 December 2008, ICC-01/05-01/08-323, at para 31, citing Garcia Aha v. Germany, no. 23541/94, 13 February 2001, para. 42.

<sup>15</sup> Secretary of State for the Home Department (Respondent) v AF (Appellant) (FC) and another (Appellant) and one other action [2009] UKHL 28, per Lord Phillips at paras 63-65.

<sup>16</sup> Case of A. And Others v. The United Kingdom, (Application no. 3455/05) Judgment of 19 February 2009, at paras 111-113, 203, and 217-218.



Application. This effectively denies Mr Kosgey the opportunity to exercise the rights conferred to him by Rule 79.

21. It is also apparent that the submission of the DCC will not cure this prejudice as the Prosecution has recently indicated in response to Defence arguments that “redactions to the Article 58 application filed by the Prosecution make it unsuitable as a substitute for the DCC, since it redacts certain information (names, dates of meetings) the Defence claims is important for investigations”, that “it is unclear how having the DCC would help the Defence in this respect, since it is likely that the same information would be redacted in the DCC as well.”<sup>17</sup>

22. The Defence is extremely troubled by this statement, as it is clear that in formulating the DCC, the Prosecution does not intend to abide by its duty to promptly inform the Defence of the nature and detail of the charges. In this regard, Article 67(1)(a) of the Statute sets out the right of the defendant “to be informed promptly and in detail of the nature, cause, and content of the charge”. Article 61(3) stipulates that:

Within a reasonable time before the hearing, the person shall:

- (a) Be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and
- (b) Be informed of the evidence on which the Prosecutor intends to rely at the hearing.

The Pre-Trial Chamber may issue orders regarding the disclosure of information for the purposes of the hearing.

Finally, Regulation 52(b) of the Regulations of the Court provides that the DCC shall include a “statement of the facts, including the time and place of the

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<sup>17</sup> Prosecution’s Response to the “Defence Application for Extension of Time to Submit Information on Viva Voce Witnesses to be Called at the Confirmation Hearing”, 11 July 2011, ICC-01/09-01/11-175, at para. 11.

alleged crimes, which provides a sufficient legal basis to bring the person or persons to trial, including relevant facts for the exercise of jurisdiction by the Court’.

23. In defining the parameters of these obligations, the Pre-Trial Chamber in the *Prosecutor v. Bemba* held that the material facts underpinning the charges should be specific enough to clearly inform the suspect of the charges against him or her, so that he or she is in a position to prepare properly his or her defence. It is the duty of the Prosecutor to furnish all facts underpinning the charges and to present evidence in relation to each legal requirement of the crime. Any deficiencies cannot be compensated by the Chamber.<sup>18</sup>
24. Mr. Kosgey is not a physical perpetrator. The Prosecution has asserted that his individual contribution to the alleged crimes occurred during preparatory meetings with other co-perpetrators. Since that particular element of the crime was completed during the meetings, it follows that where the Prosecution is in possession of this information, the Prosecution would be obliged to disclose the time and place of the alleged meeting. This is consistent with the fact that the ICTR has held that the location, dates, and attendees of meetings constitute material facts, which must be specified in the indictment with sufficient precision.<sup>19</sup>
25. In terms of the prejudice, which the Defence would suffer if it were not disclosed this information as part of the Article 58 Application, the Defence adopts the arguments set out in the Ruto/Sang Response, and further observes that if the Defence calls live witnesses, the Prosecution will have an opportunity to cross-examine these persons, and elicit evidence in support of the Prosecution case. It is therefore imperative before making a decision as to

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<sup>18</sup> *Prosecutor v. Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, 15 June 2009, paras 206-209, paras 299-300 and paras 311-312.

<sup>19</sup> See *Prosecutor v. Ntawukulilyayo*, Decision On Defence Preliminary Motion Alleging Defects In The Indictment, 28 April 2009, at paras 19-22.

whether to call such persons, that the Defence can verify whether putative witnesses could potentially incriminate the defendant by placing him at a particular meeting, or rally, or associating him with co-perpetrators (the identity of which also have not been disclosed to the Defence). The Defence will not be in a position to make such an assessment if it does know the dates and details of the meetings and rallies, which the Prosecution is relying upon in support of its case.

26. The Prosecution has repeatedly sought to downplay Defence concerns regarding their ability to call witnesses of tender evidence by emphasising that the confirmation hearing is not a mini-trial, that it has a limited purpose, and for that reason, restrictions on the rights of the Defence to call evidence are permissible. If this is true, then it cuts both ways. The Prosecution does not have an unfettered ability to call evidence or raise allegations, particularly if it seeks to do so in a manner, which does not respect equality of arms, the adversarial process, and the right of the Defence to be informed promptly of the nature, detail and cause of the charges.
  
27. The Prosecution has cited security concerns in support of the Prosecution Request to redact the entire section concerning meetings. The Defence concurs with the submissions of the Ruto and Sang Defence concerning the extent to which such wide-ranging redactions are necessary or proportionate. Nonetheless, even if there were legitimate protective concerns in relation to the sources of this information, Article 68(1) requires the Chamber to ensure that protective measures are not prejudicial to the rights of the Defence and a fair and impartial trial. In the Lubanga case, Pre-Trial Chamber I reconciled its competing obligations under Article 68(1) of the Statute by declaring inadmissible for the purposes of the confirmation hearing any evidence which

could not be disclosed to the Defence in a comprehensible format without endangering the safety of the witnesses in question.<sup>20</sup>

28. In line with this jurisprudence, if the Pre-Trial Chamber concurs with the Prosecution that it is not possible to disclose the particular section of the Article 58 Application without endangering Prosecution witnesses, the Defence requests the Pre-Trial Chamber to prohibit the Prosecution from tendering any evidence or raising any allegations at the confirmation hearing concerning preparatory meetings and rallies.

29. Finally, the Defence observes that Single Judge has recently held that Rule 81(2) applications are inherently *ex parte* in nature, and for that reason, it is not necessary to accord the Defence a meaningful opportunity to be heard in relation to the disposition of the application.<sup>21</sup> The Appeals Chamber has underscored that a Pre-Trial Chamber cannot fetter its discretion in determining whether it is appropriate to resolve a Rule 81(2) or Rule 81(4) application in an *ex parte* manner.<sup>22</sup> The Pre-Trial Chamber is obliged to consider the particular circumstances of the application, and to render a decision which complies with internationally recognized human rights under Article 21(3) of the Statute (such as the right to adversarial proceedings). The Appeals Chamber also found that the “Pre-Trial Chamber's approach that the other participant has to be informed of the fact that an application for *ex parte* proceedings has been filed and of the legal basis for the application is, in principle, unobjectionable”.<sup>23</sup>

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<sup>20</sup> Prosecutor v. Lubanga, Decision concerning the Prosecution Proposed Summary Evidence, ICC-01/04-01/06-517, 4 October 2006 at page 6.

<sup>21</sup> Redacted First Decision Confidential on the Prosecutor's Requests Requests, 29 June 2011, CC-01/09-01/11-145-Conf-Red, at para 99.

<sup>22</sup> Prosecutor v. Lubanga, 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", ICC-01/04-01/06-568, 13 October 2006 at paras 65-67.

<sup>23</sup> Prosecutor v. Lubanga, 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", ICC-01/04-01/06-568, 13 October 2006 at para. 67.

30. In the same manner that a rigid rule that the Defence must be informed of all Rule 81(2) and Rule 81(4) applications would contravene the Single Judge's duty to exercise discretion, a rigid rule whereby the Defence could never be heard in connection with such an application would also constitute a failure to comply with the Appeals Chamber's directions concerning the need for flexibility and the requirement that the Single Judge's discretion must comport to Article 21(3) of the Statute. In light of the pending date for the filing of the Defence list of *vive voce* witnesses and the Defence list of evidence, and the fact that the Single Judge has held that she will not lift any redactions after 1 August 2011,<sup>24</sup> the right of Defence to a fair and adversarial confirmation hearing militate in favour of the Single Judge taking into consideration these observations in disposing of the Prosecution Request.

### III. RELIEF SOUGHT

31. The Defence for Mr. Henry Kosgey 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.



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George Odinga Oraro  
On behalf of Henry Kiprono Kosgey

Dated this 12<sup>th</sup> day of July 2011,  
At Nairobi, Kenya

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<sup>24</sup> Redacted First Decision Confidential on the Prosecutor's Requests, 29 June 2011, CC-01/09-01/11-145-Conf-Red, at para. 31.