

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 25 August 2011

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*

CONFIDENTIAL

**Prosecution's Response to the Single Judge's "Order Requesting
Observations"**

Source: Office of the Prosecutor

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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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

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Registrar

Ms Silvana Arbia

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Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

1. The Prosecution hereby responds to the Single Judge's "Order Requesting Observations", concerning the use of the expression "received" in that the Prosecution asserts that it has not "received" information available to the Chamber in Ringtail, and the information about an exchange of CDs in the context of disclosure.

I. Procedural History

2. On 6 April 2011, the Single Judge issued the "Decision Setting the Regime for Evidence Disclosure and Other Related Matters" ("the First Decision").¹ In a subsequent decision issued 20 April 2011, the Single Judge ordered, *inter alia*, the Defence teams to disclose to the Prosecutor the evidence they intend to present at the confirmation hearing and the list of this evidence, no later than 16 August 2011 ("the Second Decision").²

3. On 16 August 2011, the Single Judge authorised the Defence teams to submit its evidence, in compliance with the E-Court Protocol, after hours but before midnight on 16 August 2011.³

4. At 22:38 on 16 August 2011, the Defence for Ruto and Sang filed its Lists of Evidence⁴ and shortly after midnight on 17 August 2011 provided the Prosecution with CDs of the relevant materials. These CDs were *physically* the same CDs by which the Defence for Ruto and Sang communicated the electronic versions of the disclosed documents to the Registry (not identical copies). Subsequent to that filing, and after their disclosure deadline had

¹ ICC-01/09-01/11-44.

² "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.

³ ICC-01/09-01/11-267.

⁴ ICC-01/09-01/11-268.

passed, the Defence apparently attempted to rectify the deficiencies in its 16 August 2011 disclosure by re-submitting materials and metadata to the Registry without leave of the Court.⁵

5. On 22 August 2011, the Prosecutor submitted its "Request for an Order Excluding the Evidence Intended to be Relied Upon at the Confirmation of Charges Hearing by the Defence for Ruto and Sang, and the Defence for Kosgey",⁶ bringing this matter to the Chamber's attention.

II. Request for Confidentiality

6. The Prosecution requests that this document be received by the Single Judge as "Confidential" because it contains information of a sensitive nature not currently available to the public and/or which was obtained from confidential sources.

III. Submissions

7. Throughout the process of disclosure between the parties, the Prosecution has submitted all disclosed materials to the Registry. Additionally, in compliance with its autonomous duties established by Article 61(3) of the Statute and Rule 121(2)(c) and (3), with each disclosure the Prosecution provided an identical copy of the evidence directly to each of the Defence teams on CDs identical to those given to the Registry. The Prosecution follows this practice in all cases before the Court, and communicated the use of this practice in this case to the Chamber in its filings conveying the disclosures to the Chamber. This exchange of CDs expedites the process by which the Defence receives the disclosed materials, ensuring that they have access to them, at the latest, on the dates required by the Single Judge.

⁵ ICC-01/09-01/11-278-Conf-AnxB.

⁶ ICC-01/09-01/11-278-Conf.

8. The Prosecution notes that it, without fail, disclosed the required materials directly to the Defence by the dates set by the Chamber. Often, however, it notified the Chamber afterward, filing its communication of the previous timely disclosure and transmitting the electronic version of the evidence to the Registry. The Prosecution then provided the originals of its previously disclosed evidence to the Registry as soon as practicable thereafter.

9. The Prosecution's practice thus complied with the Single Judge's First and Second Decisions, by providing the required *inter parties* disclosure, i.e. disclosing the required information directly to the Defence, on or before the due dates.⁷

10. When disclosing its evidence to the Prosecution, the Defence teams followed a similar practice, providing the disclosed materials to the Registry and to the Prosecution directly. In the case of the Defence for Ruto and Sang, the Prosecution was informed by the Defence's case manager that the Defence was providing the Prosecution with disclosure using the same *physical* CDs that the Registry was using to upload the evidence. There was one CD for evidence from Ruto and one CD for evidence from Sang.⁸

11. After 00:00 hours on 17 August 2011,⁹ the Prosecution received the first of the two CDs. Subsequently, representatives of the Prosecution waited with the Defence as the Registry uploaded the information from the second CD onto its computers, after which the Defence gave the Prosecution that physical CD as well. The Prosecution then uploaded the documents to Ringtail internally, and reviewed them.

⁷ ICC-01/09-01/11-44 p. 10, orders a), b) and d); . ICC-01/09-01/11-62, p. 1 (introductory paragraph), p. 10-13, orders (b)(i), (iii), (v), (vii), (ix), (xi), (xiii).

⁸ These CDs are still in the possession of the Prosecution, and could be provided to the Chamber upon request.

⁹ The Prosecution believes this was at approximately 00:15 or 00:20 hours, but did not make a note at the time.

12. Subsequently, on 18 August 2011, the Prosecution received the email from the Defence for Ruto and Sang, indicating that a "better version of disclosure" was ready and that this "better version" was already "in court". The Prosecution declined to accept the new materials, as the deadline for Defence disclosure had passed.¹⁰ Thus, the Prosecution considers that it did not "receive" these new materials in the initial disclosure on 17 August 2011, as they were not part of the materials originally provided to the Prosecution or Registry on that date.



Luis Moreno-Ocampo,
Prosecutor

Dated this 25th day of August 2011

At The Hague, The Netherlands

¹⁰ ICC-01/09-01/11-278-Conf-AnxB.