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Date: **1 July 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**

**Urgent
Public Redacted Version**

Prosecution's request for extension of the third disclosure deadline of 8 July 2011

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

Luis Moreno-Ocampo, Prosecutor
Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Mr. Kioko Kilukumi Musau, Mr. Joseph Kipchumba Kigen-Katawa, Mr. David Hooper QC, Mr. Kithure Kindiki, Mr. George Odinga Oraro, Mr. Julius Kipkosgei Kemboy, Mr. Allan Kosgey, Mr. Joel Kimutai Bosek and Mr. Philemon K.B. Koech

Legal Representatives of the Victims

Ms. Paolina Massidda

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

Sir Geoffrey Nice QC
Mr. Rodney Dixon

Amicus Curiae

REGISTRY

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Ms Silvana Arbia

Deputy Registrar

Mr. Didier Preira

Victims and Witnesses Unit

Defence Support Section

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. The third disclosure deadline established by the Single Judge of Pre-Trial Chamber II (the 'Single Judge') for the disclosure of materials collected after 31 March 2011, is 8 July 2011.¹ Unfortunately, given the volume and particular nature of the evidence [REDACTED] the Prosecution is compelled to request a brief extension pursuant to Regulation 35 of the Regulations of the Court for the disclosure of a limited number of materials generated through witness interviews. The Prosecution will disclose the rest of the materials on 8 July 2011, as ordered by the Single Judge.
2. This extension is necessary to ensure that the interviews are accurately transcribed and that the Prosecution has sufficient time to identify and apply appropriate redactions. The Prosecution contends that the reasons underlying this request constitute good cause warranting that the disclosure deadline be extended to 15 July 2011. Furthermore, since the Prosecution is disclosing the bulk of its materials by the 8 July deadline, the Prosecution submits that the requested delay in producing these discrete additional documents will not unduly prejudice the rights of the suspects to have adequate time for a meaningful preparation of their defence.

II. Background

3. On 8 March 2011, Pre-Trial Chamber II (the 'Chamber'), by majority, decided to summon William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang (collectively, the "suspects") to appear.² Pursuant to this decision, the

¹ "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", 20 April 2011, ICC-01/09-01/11-62, para. 19 and order (b)(ix).

² "Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang", 8 March 2011, ICC-01/09-01/11-1.

suspects voluntarily appeared before the Court on 7 April 2011.³ During the initial appearance, the Chamber, *inter alia*, set the date for the commencement of the confirmation of charges hearing for 1 September 2011.⁴

4. On 6 April 2011, the Single Judge issued the “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”, establishing guidelines for the disclosure of evidence between the parties and to the Chamber (the ‘First Disclosure Decision’) for the purposes of the Confirmation Hearing.⁵
5. 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” (the ‘Second Disclosure Decision’).⁶ Three disclosure deadlines were established: 13 May 2011 for evidence collected before 15 December 2010; 3 June 2011 for evidence collected between 15 December 2010 and 31 March 2011; and 8 July 2011 for evidence collected after 31 March 2011.
6. On 2 May 2011, the Prosecution requested an extension to the 13 May 2011 disclosure deadline.⁷ On 10 May 2011, the Single Judge granted the application in part and allowed the Prosecutor until 23 May 2011 to submit proposals for redactions to evidence collected prior to 15 December 2010.⁸
7. The Prosecution has thereafter complied with the deadlines set down by the Single Judge in respect of disclosure and submission of properly justified redaction proposals.

³ ICC-01/09-01/11-T-1-ENG.

⁴ ICC-01/09-01/11-T-1-ENG, page 17.

⁵ ICC-01/09-01/11-44.

⁶ ICC-01/09-01/11-62.

⁷ “Prosecution’s Application for Extension of Time Limit for Disclosure”, 2 May 2011, ICC-01/09-01/11-77.

⁸ “Decision on the ‘Prosecution’s Application for Extension of Time Limit for Disclosure’”, 10 May 2011, ICC-01/09-01/11-82.

II. Submissions

8. The Prosecution has been conducting investigations since 31 March 2011 as authorized by the Chamber.⁹ However, during of the pendency of the admissibility challenge by Kenya, its investigative ability was limited. After the Chamber denied the admissibility challenge, the Prosecution was restored to its full investigative authority.
9. Amongst the evidence [REDACTED] are audio recordings of re-interviews of witnesses 0015, 0016 and 0028. The audio recordings require transcription, quality control, review and redaction implementation.
10. Pursuant to Regulation 35, the Prosecution requests an extension to the deadline for the disclosure of the transcripts of the three re-interviews, until 15 July 2011. The Prosecution also requests an extension until 15 July for disclosure of any other witness-related materials to be collected between today and 15 July as part of the Prosecution's ongoing investigations. This request does not cover any additional evidence – in other words, the Prosecution will timely disclose all other evidence collected after 31 March 2011 on which it intends to rely at the confirmation of charges hearing, including transcripts of the original witness interviews, in accordance with the Second Disclosure Decision.
11. Regulation 35(2) of the Court provides that a chamber may grant applications for extensions of a time limit “if good cause is shown”. The Prosecution submits that the volume and particular nature of these materials, together with the necessity and importance of having sufficient time to accurately identify and implement redactions before disclosing this evidence to the Defence, constitutes “good cause”. The labor and time intensive exercise of

⁹ [REDACTED] ICC-01/09-01/11-101 [REDACTED]
[REDACTED]
[REDACTED]

transcribing audio recordings of interviews and then identifying and applying properly justified redactions is necessary to ensure that the Defence receives the information in as complete and accurate form as possible, while also making sure that the disclosure does not jeopardize the safety and security of those witnesses and other persons referred to in the materials. The Prosecution notes that the Single Judge has previously acknowledged and endorsed the Prosecution's submission as to the need for intensive and careful work to be conducted in order to provide proper and accurate materials.¹⁰

12. The evidence for which the Prosecution seeks an extension [REDACTED] [REDACTED] is particularly time-consuming to process; despite its best efforts, the Prosecution does not have the means to expedite the onerous transcription, quality control, review and redaction process for audio-recorded interviews. For the information of the Chamber:

- a. An 8 hour re-interview was conducted with witness 0015 in English from [REDACTED] One hour of an English-only interview generates approximately 20 pages of transcript;
- b. A 17 hour re-interview was conducted with witness 0016 in English and Swahili from [REDACTED] One hour of an English-Swahili interview generates approximately 40 pages of transcript;
- c. A 13½ hour re-interview was conducted with witness 0028 in English and Swahili from [REDACTED] and
- d. A limited number of other witness related materials may still be collected as part of the Prosecution's ongoing investigations. In the event that any such materials are collected in the very near future, the Prosecution will not be in a position to process and disclose this evidence before 8 July 2011.

¹⁰ ICC-01/09-01/11-82, para. 17.

13. On average, when performed in-house by the Office of the Prosecutor, it takes six days to transcribe and effectuate the necessary quality control per one hour of English-only interview, and three days to transcribe and perform the quality check for one hour of English interview where another language is also being spoken and interpreted (but is not transcribed). Based on these calculations, the OTP determined that it would not have the resources to complete this process to meet the 8 July 2011 disclosure deadline for the three witness interviews identified in (a)-(c) above. For that reason, the Prosecution decided to outsource the transcription of the audio-recordings in an effort to ensure that these materials were produced as quickly as possible. However, quality control and identifying and applying appropriate redactions must be performed in-house by staff trained and experienced in this type of work. Unfortunately, due to the number of pages produced, the security concerns of the particular witnesses, and the staff available for this work, the Prosecution, most certainly, will not be in a position to meet the 8 July 2011 deadline. Moreover, the same persons applying and reviewing redactions are also engaged in ensuring compliance with the Chamber's recent decisions on redactions.¹¹ The bulk of materials to be reviewed has placed unforeseeable constraints on the limited resources available to the Prosecution at this time.

14. Finally, the Prosecution requests that it be allowed to transcribe and disclose only the English portions of the English-Swahili interviews (with witnesses 0016 and 0028). The OTP does not have in-house the resources required to transcribe, conduct quality control, review and redact both English and Swahili materials and cannot outsource the transcription of Swahili materials.¹² If the Prosecution were required to provide the full transcription of these two interviews, it would need substantially more time, and be

¹¹ See ICC-01/09-01/11-145-Conf-Red and ICC-01/09-01/11-152-Conf.

¹² The OTP engages two companies for the purposes of outsourcing the transcription of English materials. To date, the OTP has not been able to find an external company that is able to perform parallel Swahili transcription that meets the quality standards required by the Court and satisfies the elevated security considerations present in this case.

compelled to request a longer extension to the disclosure deadline for these materials. The Prosecution submits that receiving the interview transcripts in English does not prejudice the Defence as the Chamber has already established that the suspects are fluent in English.¹³

15. The Prosecution submits that it has demonstrated 'good cause' warranting a one-week extension of the 8 July 2011 deadline pertaining to the disclosure of the identified materials. The Prosecution assures the Chamber that even if the extension is granted these materials will be disclosed well within the statutorily imposed timeframes.¹⁴ The Prosecution will provide all other evidence collected after 31 May 2011 on 8 July 2011.

16. Given that the suspects will be in possession of most of the materials on which the Prosecution intends to rely, the Prosecution submits that little, if any, real prejudice will result from a one week delay in the submission of three re-interviews and potentially additional, but clearly limited, other material.

17. In the Prosecution's submission, allowing the Prosecution one more week to process these select pieces of evidence strikes a reasonable balance between respecting the right of the suspects to be adequately informed of the information on which the Prosecutor intends to rely (Article 61(3)(b)) and ensuring appropriate measures are taken to protect victims and witnesses (Article 68).

III. Request for Confidentiality

18. Pursuant to Regulation 23*bis*(2) the Prosecution submits the present motion confidential *ex parte*, Prosecution only, as it refers to documents that are subject to the same classification. Furthermore, the motion contains information of a sensitive nature (such as the dates that interviews were

¹³ ICC-01/09-01/11-42; ICC-01/09-01/11-T-1-ENG ET, page 6, lines 18-25 and page 7, lines 8-12.

¹⁴ 15 July 2011 is 47 days prior to the scheduled commencement of the confirmation of charges hearing on 1 September 2011 and therefore falls within the timeframes provided for in rule 121 of the Rules of Procedure and Evidence.

conducted with witnesses) which the Prosecution has previously sought, and the Chamber has authorised, not to be disclosed to the Defence.¹⁵ A public redacted version will be filed concurrently.

IV. Relief Sought

19. In light of the foregoing, the Prosecution respectfully requests that the Chamber grant a partial extension to the third disclosure deadline established in the Second Disclosure Decision, until 15 July 2011, for the following materials:

- a. Transcript of interview with witness 0015;
- b. Transcript of interview with witness 0016;
- c. Transcript of interview with witness 0028; and
- d. any other witness related materials collected after the date of this motion.



Luis Moreno-Ocampo, Prosecutor

Dated this 1st day of July 2011

At The Hague, The Netherlands

¹⁵ See e.g. ICC-01/09-01/11-145-Conf-Red.