

**Cour
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**International
Criminal
Court**



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

Date: **4 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 on behalf of Henry Kiprono Kosgey to the Prosecution's Request for
Extension of the Third Disclosure Deadline of 8 July 2011**

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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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
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Introduction

1. On 1 July 2011, the Prosecutor filed a request [the 'Prosecution's Request'] pursuant to Regulation 35 of the Regulations of Court for a one week extension of the third disclosure deadline relating to materials collected after 31 March 2011 which was established by the Single Judge of Pre-Trial Chamber II [the 'Single Judge']. The extension sought by the Prosecution specifically relates to the transcripts of interviews with witnesses 0015, 0016, and 0028 as well as other witness related materials collected after 1 July 2011. In its request for the disclosure deadline to be extended from 8 July 2011 to 15 July 2011, the Prosecutor additionally asks for a complete exemption from the requirement under rule 76 of the Rules of Procedure and Evidence that both Swahili and English versions of evidence be disclosed. The Defence for Henry Kosgey submit that the Prosecution's request should be rejected in its entirety.

Procedural Background

2. On 6 April 2011 the Pre-Trial Chamber issued its '*Decision Setting the Regime for Evidence Disclosure and Other Related Matters*' [the 'First Decision on Disclosure']. The Decision set out clear guidance on, *inter alia*, the modalities and timetable for pre-trial disclosure. It ordered the parties to submit the evidence for disclosure in due time, preferably much earlier than the deadlines as envisaged in rule 121(3)-(6) and (9) of the Rules.
3. The Prosecution unsuccessfully sought to challenge the First Decision on Disclosure in two ways:

- (i) Seeking leave to appeal the Decision, on 13 April 2011, by filing the *'Prosecution's Application for leave to Appeal the 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters'*.
 - (ii) Applying to the Pre-Trial Chamber to postpone disclosure until final resolution of the Government of Kenya's Application, on 14 April 2011, by filing the *'Prosecution's application requesting disclosure after a final resolution of the Government of the Republic of Kenya's admissibility challenge'*.
- 4. The Prosecutor's Application for leave to appeal the First Decision on Disclosure was refused by the Pre-Trial Chamber on 2 May 2011 in its *Decision on the "Prosecution's Application for leave to Appeal the 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters'*.
- 5. The Pre-Trial Chamber issued its *Decision on the "Prosecution's Application Requesting Disclosure After a Final Resolution of the Government of Kenya's Admissibility Challenge" and Establishing a Calendar of Disclosure Between the Parties* [the 'Second Decision on Disclosure'] on 20 April 2011. In this Decision, three disclosure deadlines were established:
 - (i) 13 May 2011 for evidence collected before 15 December 2010;
 - (ii) 3 June 2011 for evidence collected between 15 December 2010 and 31 March 2011;
 - (iii) 8 July 2011 for evidence collected after 31 March 2011.
- 6. The Decision also ordered the Prosecution, *inter alia*, to submit properly justified proposals for redactions, if any, with respect to the evidence that has been collected prior to 15 December 2010, no later than Friday 13 May 2011.

7. On 26 April 2011 the Prosecution unsuccessfully attempted to challenge the Second Decision on Disclosure by seeking leave to appeal the Decision in its *Application for Leave to Appeal 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 of Disclosure"*. This application was refused by the Single Judge on 11 May 2011 in its *Decision on the "Prosecution's Application for Leave to Appeal 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'"*.
8. The Prosecutor again tried to challenge the Second Decision on Disclosure by applying for an extension of time for compliance in its 2 May 2011 *Prosecution Application for Extension of Time for Disclosure*. On 10 May 2011, the Single Judge issued a *Decision on the "Prosecution's Application for Extension of Time Limit for Disclosure"* in which it granted the Prosecutor only until Monday 23 May 2011 to submit properly justified proposals for redactions, if any, with respect to the evidence that was collected prior to 15 December 2010.
9. This Response sets out the Defence position into what is, in effect, the Prosecution's fifth challenge to the Pre-Trial Chamber's Decisions on Disclosure.
10. For the reasons set out herein, it is submitted that the Prosecution's Request should be dismissed. In summary, the Defence position is as follows:
 - (i) The Prosecution's Request is designed, yet again, to try to circumvent orders which have been carefully considered and properly made by the Pre-Trial Chamber.
 - (ii) Granting the Prosecution's Request will jeopardize both the fairness of the proceedings as well as the current timetable for the confirmation of charges hearing.

Defence Position

11. The Prosecution's Application is the latest in a series of challenges designed to derail the disclosure process with protracted attacks on the Pre-Trial Chamber's clear and fair disclosure timetable. On one view, such repeated requests appear to be a cynical attempt by the Prosecution to avoid the disclosure timetable imposed by the Court, merely by making repeated requests for extensions of time that have little or no substantive merit but cause delays by requiring responses from both the Court and other parties.
12. There are several reasons why it should be refused:
 - (i) No good cause has been shown such as to make an extension of time appropriate;
 - (ii) Rather than ensure the fair trial rights of the Prosecution, granting the extension would actually result in a risk to the fair trial rights of the Defence; and
 - (iii) Granting the extension would jeopardise the date of the confirmation of charges hearing, thereby adversely impacting upon the expeditiousness of the proceedings.
13. Each is dealt with in turn, below.

No good cause has been shown to substantiate the Prosecution's Request

14. The Prosecution's Request is purportedly premised on the time intensive tasks of transcribing, quality checking and redacting the interviews of witnesses 0015, 0016 and 0028. On closer examination, by reference to paragraph 12(d) of the Prosecution's Request it appears that the extension of time is actually sought in order to ensure that materials which are yet to be collected (and which are clearly unlikely to be collected before the 8 July 2011 disclosure

deadline) may still be relied upon by the Prosecution at the confirmation of charges hearing.

15. The Defence is also concerned that as the dates of the interviews with the three witnesses are redacted that they may well have been conducted after the 23 May 2011 deadline for the Prosecution to submit requests for redactions. The Prosecution have not provided any reason as to why they were unable to organise their investigation team to collect this material in a more timely manner, and why they did not implement the redactions earlier given that they ought to have prepared such redactions in advance of the deadline for obtaining the Chamber's authorisation for such redactions.
16. Finally, the Prosecution's request to be exempted from the requirement under rule 76 that they disclose witness statements both in the original language and in a language which the accused fully understands and speaks is made without any adequate justification. Despite the suspect's proficiency in English, depriving the Defence of its right to the transcripts in their original language (which is English & Swahili) would impact detrimentally on Defence case preparation as nuances of language which may provide important contextualisation for the witnesses' answers will be lost. The omission of Swahili transcription in English-Swahili transcripts will therefore prejudice the Defence's ability to fully comprehend the Prosecution's case.
17. Not only is the Request an obvious fifth attempt to subvert the properly considered timetable for disclosure set down by the Pre-Trial Chamber, but it is completely absent good cause for an extension of time. No reason is given as to why more staff within the Office of the Prosecutor have not been adequately trained and allocated to the task of preparing redactions – it was entirely foreseeable that the preparation of redactions would be a time consuming task during this stage of pre-confirmation of charges hearing preparation. Moreover, no reason has been given as to why, when it became clear that witness interviews were being conducted in Swahili, that sufficient steps were not taken in order to ensure that a quality controlled Swahili

transcription service was either developed in-house or engaged externally. The Prosecutor's failure to adequately organise staffing and contracting matters does not give rise to good cause such as to warrant an extension of time under regulation 35.

Fairness of the proceeding

18. Contrary to the Prosecutor's submission in paragraph 16 of its Request that "little, if any, real prejudice will result from a one week delay" in its disclosure, the Defence maintain that granting the Prosecution's request for an extension of time would have adverse consequences for the 'fairness of proceedings'. Respecting the Defence's right to fairness necessitates a right to disclosure and a right to adequate time and facilities to review such disclosure prior to the confirmation hearing.¹ As the Pre-Trial Chamber rightly highlighted in the Second Disclosure Decision:

"In this respect, the Single Judge recalls article 61(3)(b) of the Statute which provides that the person shall be informed within a reasonable time before the confirmation hearing of the evidence on which the Prosecutor intends to rely at the hearing. In the same vein, rule 76 of the Rules establishes that the Prosecutor shall provide the Defence with the names of witnesses whom he intends to call to testify as well as the copies of any prior statements made by them sufficiently in advance to enable the adequate preparation of the defence."²

19. Timely Prosecution disclosure is required to enable the suspects to fully and properly participate in the confirmation of charges proceedings. Unless there is prompt disclosure, in accordance with the Court's deadlines, the

¹ DRC Situation, Decision on the Prosecution's Application for leave to appeal the Chamber's Decision of 17 January 2006 on the applications for participation in the proceedings of Vprs 1, Vprs 2, Vprs 3, Vprs 4, Vprs 5 and Vprs 6, 31 March 2006, ICC-01/04-135, para 39; *Prosecutor v Lubanga*, Judgement on the appeal of the prosecution against the decision of Trial Chamber I entitled 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with other certain issues raised at the Status Conference on 10 June 2008', 21 October 2008, ICC-01/04-01/06-1486.

² Second Disclosure Decision, ICC-01/09-01/11-62, para 14.

Prosecution maintains an improper and unfair advantage over the Defence at this crucial stage of the case. Granting the prosecution's request for an extension of time until 15 July 2011 would mean that potentially significant evidence would be shown to the suspects for the very first time less than six weeks in advance of the confirmation hearing. It would also mean serving important material after the expiration of the 12 July 2011 deadline set by the Single Judge for the defence to notify the Pre-Trial Chamber whether they intend to call live witnesses at the confirmation of charges hearing. Even a relatively short extension of one week at this crucial stage of pre-confirmation of charges hearing preparation would have serious and adverse consequences for the ability of the Defence to properly and fairly prepare its case.

Expeditionness of the proceedings

20. The timetable set down by the Pre-Trial Chamber in the Second Disclosure Decision was no doubt devised so that the proceedings progress in a fair, timely and expeditious manner. Despite this, the Prosecution seem intent on subverting the fair and proper progression of the case and appear to be only now obtaining further evidence (hence their request for post 1 July 2011 evidence to be permitted to be lodged on 15 July 2011) and transcribing witness interviews which may well have been conducted several months ago (the date of the witness interviews is redacted).
21. Granting the Prosecution's request would not assist the fair and expeditious conduct of proceedings. On the contrary, it would cause unfairness to the Defence and could also lead to entirely avoidable delays. At the very least it would require reassessment of existing deadlines imposed on the Defence. But, more significantly, the paucity of detail in the Prosecutor's case which has been disclosed to date and the apparent significance of that which remains outstanding, suggests that there is a real likelihood that the fixture for the confirmation of charges hearing may need to be vacated so that the Defence

could have adequate time to assess that material and prepare its case, prior to the hearing.

Conclusion

22. For all the above reasons, the Defence submit that the Prosecution's Request should be denied.



George Odinga Oraro
On behalf of Henry Kiprono Kosgey

Dated this 4 July 2011

At Nairobi, Kenya