



Original: English

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

Date: 8 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

**Defence Application for Extension of Time to Submit Information
on *Viva Voce* Witnesses to be Called at the Confirmation Hearing**

Source: Defence

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 William Ruto

Joseph Kipchumba Kigen-Katwa,
David Hooper QC, Kioko Kilukumi
Musau and Kithure Kindiki

Counsel for Henry Kosgey

George Odinga Oraro, Julius Kemboy
and Allan Kosgey

Counsel for Joshua Sang

Joseph Kipchumba Kigen-Katwa, Joel
Kimutai Bosek and Philemon K.B. Koech

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

REGISTRY

Registrar

Ms. Silvana Arbia

Counsel Support Section

Deputy Registrar

Mr. Didier Daniel Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. On 29 June 2011, the Single Judge issued a *Decision Requesting the Parties to Submit Information for the Preparation of the Confirmation of Charges Hearing*.¹ Therein, the Single Judge ordered the Prosecution and Defence “to indicate by Tuesday, 12 July 2011 whether they intend to call live witnesses at the confirmation of charges hearing and, if so, to submit information detailing the subject matter and the scope of the proposed testimony of each witness”.² If the 12 July deadline is not extended, this will result in Mr. Ruto and Mr. Sang being unable to call any live witnesses at Confirmation.
2. Pursuant to Regulation 35(2) of the Regulations of the Court, the Defence for Ruto and Sang hereby requests an extension of the 12 July 2011 deadline. The Defence submits there is “good cause” for an extension because:
 - i. the Prosecution started disclosing redacted ICC-witness statements that they intend to rely on at Confirmation as recently as 1 July 2011;
 - ii. the Prosecution will not have fulfilled its disclosure obligations by 12 July (the Prosecution is filing a further request for redactions on 13 July);
 - iii. the Prosecution will not have filed the Document Containing the Charges by 12 July (this is anticipated by 1 August 2011); and
 - iv. the Defence has been preparing for confirmation on the understanding that it would not have to file any list of evidence (including anticipated *viva voce* witness evidence) before 16 August 2011.
3. Without this material, and without adequate time to analyze it and investigate accordingly, the Defence cannot determine whether or how many live witnesses it will need to call at confirmation, much less the scope of their anticipated testimony. A premature and rushed disclosure of such information might prejudice the right of the suspects to remain silent.
4. The Defence requests a minimum of 15 days from the time of the receipt of the final pre-confirmation Prosecution disclosure to submit such information.

II. Procedural History

5. On 20 April 2011, the Single Judge issued a *Decision on the ‘Prosecution’s application requesting disclosure after a final determination of Kenya’s admissibility challenge’ and*

¹ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-153, Decision Requesting the Parties to Submit Information for the Preparation of the Confirmation of Charges Hearing, 29 June 2011 (“**Decision**”).

² Decision, para. 8.

*Establishing a Calendar for Disclosure Between the Parties.*³ In the Decision on the Disclosure Calendar, the Single Judge established several deadlines, including that:

- i. The Prosecution must submit properly justified proposals for redactions, if any, with respect to evidence that has been collected after 31 March 2011, no later than Friday, 8 July 2011. This evidence must be disclosed to the Defence no later than five days after the Chamber's decision regarding such redactions;⁴ and
 - ii. The Defence must disclose to the Prosecutor the evidence they intend to present at the confirmation hearing, if any, and to file the list of such evidence, no later than Tuesday, 16 August 2011.⁵
6. The Single Judge noted that rule 121(3) of the Rules mandates that the Prosecution must provide a document containing a detailed description of the charges together with a list of evidence, for the purposes of the confirmation hearing, no later than 30 days before the date of the commencement of such hearing, ie. by 1 August 2011.
 7. The Prosecution has made several disclosures in line with this established calendar, but no redacted ICC-witness statements were disclosed prior to 1 July 2011 (one week ago). Only today has the Defence received from the Prosecution a table noting which statements belong to the same witness, such that the Defence can meaningfully analyze the material.
 8. On 4 July 2011, the Single Judge granted a partial extension of its 8 July 2011 disclosure deadline, such that the Prosecution now has until 13 July 2011 to submit properly justified proposals for redactions of three witness statements and any other witness related materials collected after the date of the Prosecution's application.⁶ It is not yet determined when the materials will actually be disclosed to the Defence.

III. Applicable Legal Principles

9. In her Decision on the Disclosure Calendar, the Single Judge stressed the importance of the "statutory provisions which guarantee the rights of the Defence and, in particular, the right of the suspects to have adequate time for a meaningful preparation of their defence

³ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-62, Decision on the 'Prosecution's application requesting disclosure after a final determination of Kenya's admissibility challenge' and Establishing a Calendar for Disclosure Between the Parties, 20 April 2011 ("**Decision on the Disclosure Calendar**").

⁴ Decision on the Disclosure Calendar, p. 12.

⁵ Decision on the Disclosure Calendar, para. 14.

⁶ *Prosecutor v. Ruto et al*, ICC-01/09-01-11-161, Decision on the 'Prosecution's request for extension of the third disclosure deadline of 8 July 2011', 4 July 2011, p. 6 ("**Decision on Extension**"). The Defence notes that the Single Judge granted the Prosecution this decision without hearing from the Defence for Ruto or Sang and perhaps without appreciating the impact that the extension might cause to Defence preparations.

pursuant to article 67(1)(b) of the Statute”. The Single Judge made particular reference to article 61(3)(b) of the Statute, which provides that a person shall be informed *within a reasonable time before the confirmation hearing* of the evidence on which the Prosecution intends to rely at the hearing.⁷

10. The Defence recalls that article 61(6) establishes the rights of the defendants to call evidence. Article 67(1)(e) further sets out the right of the defendants to obtain the attendance of witnesses on his or her behalf under the same conditions as those called against him or her. This right must be implemented in a manner that is effective and not illusory.

IV. Submissions

11. It is not possible for the Defence to comply with the order to indicate *viva voce* witnesses and the scope of their anticipated evidence within the stipulated timeframe, as the time frame does not take into account the recent amendments to the disclosure calendar. Moreover, the time allotted is not sufficient for the Defence to prepare for Confirmation adequately and meaningfully, in such a way that Mr. Ruto and/or Mr. Sang will not be prejudiced.

Recent Disclosure of Redacted ICC Witness Statements

12. The disclosed ICC witness statements average approximately 35 pages each. The Defence is diligently reading and analyzing the statements. The statements are the most significant type of disclosure in terms of the Defence’s ability to prepare for confirmation. Given that these statements have only been disclosed to the Defence for a week, and given that more statements will be disclosed on Monday, 11 July and likely again after the deadline, the Defence is unable to evaluate meaningfully the statements and undertake necessary investigations in respect of the allegations contained therein, such that the Defence could provide a witness list by 12 July 2011 as ordered.

The Defence Cannot Indicate Viva Voce Witnesses before the Prosecution Disclosure is Complete and the Document Containing the Charges has been Received

13. The Defence should not be put in a position of indicating which witnesses it may want to call at confirmation and noting the scope of their intended testimony, prior to the

⁷ Decision on the Disclosure Calendar, para. 14.

completion of the Prosecution disclosure and the receipt of the Document Containing the Charges (“DCC”). The significance of the Document Containing the Charges cannot be underestimated, and the link between the DCC and the Defence’s ability to prepare adequately for the confirmation hearing has recently been acknowledged by the Single Judge.⁸ In this regard, and as a partial substitute for the DCC, the Defence had anticipated being able to rely on a less-heavily redacted version of the Prosecution’s article 58 application, as ordered by the Single Judge.⁹ However, the version of the article 58 application filed by the Prosecution yesterday still redacts critical information needed for investigative purposes, such as the dates of alleged meetings, the names of people alleged to be present, etc.¹⁰

14. Until these charging documents and all of the Prosecution disclosure have been received, the Defence cannot fully appreciate the specifics of the case against Mr. Ruto and Mr. Sang. Given that the Prosecution only has to submit a request for redactions by 13 July 2011 (after the 12 July deadline), it is clear that the Defence will not receive this additional disclosure for some time. This further handicaps Defence preparations.
15. Even once the disclosure and the DCC are in hand, the Defence will need time to reflect on and determine what witnesses need to be called in response. The need for reasonable time to determine *viva voce* witnesses is aggravated by the fact that the Prosecution’s disclosure of incriminating evidence is heavily redacted and thus requires more effort to analyze. It is only following this analysis that the Defence can contact and interview potential witnesses in earnest.
16. Specifically, the Defence of Mr. Ruto and Mr. Sang intend to challenge admissibility as part of the confirmation process, yet the Defence has not received disclosure about the status of the national investigations, which may be in the possession of the Prosecution. Without this information, the Defence cannot determine which witnesses relating to admissibility may need to give *viva voce* evidence at confirmation. Separate filings in relation to an admissibility challenge will be completed soon.
17. The reality is that the Prosecution has had many months to investigate the case and make strategic choices concerning the debate of whether to call live witnesses, and if so, which ones. If the 12 July deadline is not extended, the Defence will only have had a matter of days to review an incomplete set of Prosecution disclosure and charging documents.

⁸ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-154, Decision on the ‘Prosecution’s Request for extension of page limit for the Document Containing the Charges’, 1 July 2011, para. 5.

⁹ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-157, Order to Prosecutor to File a Proposed New Redacted Version of the Article 58 Application, 4 July 2011.

¹⁰ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-165, Prosecution’s Submissions on the ‘Order to the Prosecution to File a Proposed New Redacted Version of the Article 58 Application’, 7 July 2011.

Failing to accord the Defence adequate time to identify potential witnesses equates to a denial of the right of the Defence to call *viva voce* witnesses,¹¹ as envisioned by articles 61 and 67 of the ICC Statute.

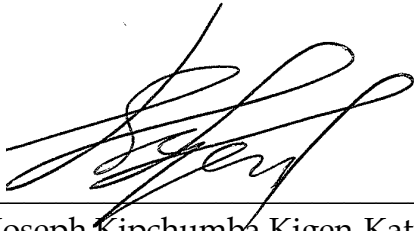
Defence has been preparing for confirmation in light of the 16 August deadline

18. The intention of the Defence is not to delay the confirmation. However, the Defence cannot allow deadlines and incomplete disclosure to prejudice the interests of its clients. Furthermore, the Defence has been making preparations with a view to delineating the contours of its case by 16 August rather than by indicating anything with respect to *viva voce* witnesses by 12 July. As it stands, however, given that key components of the anticipated disclosure regime are as yet unfulfilled, even this 16 August deadline may not be feasible.
19. The Defence for their part are moved to consider that given the circumstances it would be fairer for the suspects' confirmation hearing to be adjourned if necessary to give them sufficient time to prepare.

V. Conclusion & Request for Relief

20. Consequently, the Defence respectfully requests that the Pre-Trial Chamber grant an extension of time whereby Mr. Ruto and Mr. Sang will have fifteen days after receipt of the final package of Prosecution disclosure to indicate whether they intend to call live witnesses at the confirmation of charges hearing and, if so, to submit information detailing the subject matter and the scope of the proposed testimony of each witness.
21. In the alternative, and without prejudice to the request above, the Defence requests that the Single Judge exercise her discretion so as to afford Mr. Ruto and Mr. Sang the opportunity to be informed within a reasonable time before the confirmation hearing of the evidence the Prosecution intends to rely on, pursuant to article 61(3)(b), and the attendant adequate time to prepare meaningfully their defence pursuant to article 67(1)(b).

¹¹ See, for example, *Prosecutor v. Kanyarukiga*, ICTR, Decision On The Prosecution's Appeal Against Decision On Referral Under Rule 11bis, 30 October 2008, para 33. Therein the ICTR appeals chamber held that the rights of the accused would not be respected in circumstances in which the defence is forced to rely on video-link testimony or written statements to respond to a Prosecution allegations based on *viva voce* testimony.



Joseph Kipchumba Kigen-Katwa

On behalf of Mr. Joshua Arap Sang and Mr. William Samoei Ruto

Dated this 8 July 2011

At The Hague