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

Date: 11 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 ‘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:

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Introduction

1. On 29 June 2011, the Pre-Trial Chamber issued '*Decision Requesting the Parties to Submit Information for the Preparation of the Confirmation of Charges Hearing*' [The 'Decision']. The Decision requires both the Prosecution *and* the 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'.¹
2. On 8 July 2011, the Defence for Mr Ruto and Mr. Sang filed the '*Defence Application for Extension of Time to Submit Information on Viva Voce Witnesses to be Called at the Confirmation Hearing*'.² The Defence submitted that it was 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.'³
3. The circumstances set out in the Ruto and Sang's said Request with respect to the manner and form of disclosures so far made by the Prosecution apply to Mr. Kosgey. Accordingly, the Defence of Mr Kosgey files these observations in support of the aforesaid Request by Mr Ruto and Mr Sang and requests that the extension sought be granted so as to apply in favour of Mr. Kosgey as well.

Relevant Procedural History

4. On 7 April 2011 the Pre-Trial Chamber set the date for the commencement of the confirmation of charges hearing as 1 September 2011.

¹ ICC-01/09-01/11-153

² ICC-01/09-01/11-168

³ ICC-01/09-01/11-168 p. 5 para. 11.

5. At the Status Conference on 18 April 2011 the Prosecution indicated an intention to call '*no more than 10 live witnesses*' for the purpose of confirmation.⁴ The Defence for Mr Ruto estimated that they would call a minimum of 15 live witnesses.⁵ On behalf of Mr Sang it was tentatively indicated that, similarly, 15 live witnesses may be called.⁶
6. On behalf of Mr Kosgey, in relation to the request for an indication as to how many live witnesses may called at the confirmation hearing, the following was said:

First and foremost, as the Chamber is well aware, the application for summons was based on evidence which was very heavily redacted. So as we are, we are not conversant with the evidence which will be led against the suspect, and once we have the evidence we shall be compelled to investigate, test, to consider and see how many witnesses we can summon.

The only proposition we can make for the moment is that as the Prosecution have indicated that they intend to call witnesses, we shall definitely call witnesses in rebuttal to the extent that any evidence by those witnesses implicate our client.⁷

7. Thus, on behalf of Mr Kosgey, it was clearly indicated that the number of live witnesses to be called on his behalf was dependent upon knowing (i) the details of the case against him and (ii) details of witnesses to be called by the Prosecution that directly implicate Mr Kosgey. As things stand, neither the complete detail of the case against Mr Kosgey, nor the nature of any evidence to be relied upon against him at confirmation is fully known.

⁴ Transcripts p. 8 line 16.

⁵ Transcripts p. 10 line 25 to p. 11 line 1.

⁶ Transcripts p. 12 line 14.

⁷ Transcripts p. 12 lines 1-9.

8. Previously, the Pre-Trial Chamber ordered, in *'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'*,⁸ that the Prosecution, *inter alia*:
- (i) Disclose to the Defence any evidence collected prior to 15 December 2010 on which it intends to rely for the purpose of confirmation and submit to the Chamber properly justified proposals for any redactions of such evidence - by 13 May 2011.⁹
 - (ii) Disclose to the Defence any evidence collected between 15 December 2010 and 31 March 2011 on which it intends to rely for the purpose of confirmation and submit to the Chamber properly justified proposals for any redactions of such evidence - by 3 June 2011.
 - (iii) Disclose to the Defence any evidence collected after 31 March 2011 on which it intends to rely for the purpose of confirmation and submit to the Chamber properly justified proposals for any redactions of such evidence - by 8 July 2011.
 - (iv) In each case, to disclose to the Defence the evidence for which redactions will be requested no later than 5 days after the Chamber's decision regarding such redactions.
9. It is of note that the Prosecution only submitted *'Prosecution's First Application Pursuant to Rule 81(2) and Rule 81(4) for Redactions to Statements of Witnesses and Related Materials to be Relied Upon at the Confirmation Hearing'* on 23 May 2011 (with an addendum on 26 May 2011). The Pre-Trial Chamber issued its decision on 29 June 2011, in which the Prosecution were granted, in relation to

⁸ 20 April 2011

⁹ Later varied to 23 May 2011 in Single Judge's *'Decision on the 'Prosecution's Application for Extension of Time for Disclosure'*.

some of the redacted transcripts of various witness interviews, until 8 July 2011 to disclose such transcripts to the Defence.

10. Moreover, it is of note that on 1 July 2011 the Prosecution filed a request to extend the deadline for disclosure of materials collected after 31 March 2011, specifically witnesses 0015, 0016, and 0028, as well as other witness related materials collected after 1 July 2011. The Prosecution asked that such disclosure happen on 15 July 2011, thus after the Defence are to have notified the Parties and Pre-Trial Chamber of any witnesses it intends to call live at the confirmation hearing. The Prosecution additionally sought a complete exemption from disclosing both the English and Swahili versions of the evidence disclosed.
11. On 4 July 2011, the Single Judge partially granted the Prosecution's Request, 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 said Request.¹⁰
12. At this stage it is still unclear when, precisely, Prosecution disclosure will be completed and the entirety of the case against Mr Kosgey for the purpose of confirmation known.
13. Pursuant to the Pre-Trial Chamber's original disclosure regime, as contained in '*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 Defence were required, only after completion of all Prosecution disclosure, to '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**'. Thus, the current Decision effectively varies the Pre-Trial Chamber's original decision on Defence disclosure and requires the Defence to disclose part of its case in

¹⁰ ICC-01 /09-01-11-161

advance of and prior to completion of the Prosecution disclosure process. Such decision apparently being taken without the benefit of Defence submissions as to the potential impact and unfairness of requiring disclosure of Defence witness requirements on 12 July 2011.

Submissions

14. At this stage, the Defence have not identified any witness that it intends to call live at the confirmation hearing. The situation is likely to be the same on 12 July 2011 until full disclosure is received.
15. However, it is submitted that it would be both unfair and premature to require the Defence to indicate definitively that no witness will be called live at the confirmation hearing by 12 July 2011 for the following reasons:
 - (i) From the above procedural background, it is plain that, by 12 July 2011, Prosecution disclosure will not have been completed. Moreover, details of potential witnesses directly implicating Mr Kosgey will either be unknown or only very recently disclosed.
 - (ii) Article 67(1)(b) of the Statute (Rights of the Accused) stipulates that, in relation to the determination of any charge, the accused shall have 'adequate time and facilities for the preparation of the defence'. This requirement, we humbly submit, must equally apply to the confirmation of charges stage.¹¹
 - (iii) Rule 101(1) of the Rules of Procedure and Evidence stipulates that 'in making any order setting time limits regarding the conduct of any proceedings, the Court shall have regard to the need to facilitate fair and expeditious proceedings, bearing in mind in particular the rights of the defence and the victims' [emphasis added].

¹¹ See for example Prosecutor vs. Bemba, "*Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties*", 31 July 2008, ICC-01/05-01/08-55, at para. 20.

- (iv) The Pre-Trial Chamber's earlier order on Defence disclosure indicated that no such disclosure was required until 16 August 2011. The Defence have, hitherto, been working to that timetable in terms of identifying potential witnesses.
- (v) The 12 July 2011 deadline for an indication of live witnesses considerably shortens the available time to the Defence to conduct necessary investigations and requires the Defence to respond to the Prosecution case before the full detail of the Prosecution case against Mr Kosgey is even known.
- (vi) The Pre-Trial Chamber rightly observes that the Prosecution 'has been having sufficient time for a determination as to the need to call live witnesses to be promptly made'.¹² The Prosecution has had many months to consider which witnesses it is likely to require at confirmation. By contrast the Defence will not have received all Prosecution disclosure by 12 July 2011, and such that it has had will have only been in Defence possession for a matter of days. Thus the time available to the Defence to conduct necessary investigations, especially when contrasted against that afforded to the Prosecution, has been very limited indeed.

16. The Defence is most likely to want to call witnesses at the confirmation hearing. While, at this stage the Defence are yet to identify any witness to be called at Confirmation, the position is not definitive. This is due entirely to the less than timely Prosecution disclosure and inadequate time following receipt of any such disclosure as well as the nature and scope of redactions effected on the disclosed documents so far made. All these limitations have impeded the Defence's ability to conduct the requisite Defence investigations.

¹² Decision para. 13

17. Defence preparation and the formulation of Defence strategy is intrinsically linked to the right of the Defence under article 67(1)(a) of the Statute to be informed promptly and in detail of the Prosecution case. The Defence cannot possibly be expected to know what case it will bring if it does not know the most important details of the Prosecution case, which it must meet.
18. As of this point in time, the Defence has only received a heavily redacted public version of the Prosecution's article 58 application, and the deadline for filing the Document Containing the Charges (DCC) is 1 August 2011 (that is, more than two weeks after the expiry of the deadline for filing the names and details of Defence witnesses).
19. In a decision of 4 July 2011, the Single Judge recognised that in order for article 67(1)(a) to be fulfilled in the interim period before the filing of the DCC, the Defence required more information concerning the nature of the charges.¹³ The Single Judge therefore 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 201".¹⁴
20. On 7 July 2011, the Prosecution filed its response, in which it requested redactions to wide swathes of information in the article 58 application, including all information regarding the dates and details of meetings and rallies, and furthermore, filed the revised version of the article 58 application on an confidential *ex parte* to the Defence basis.¹⁵
21. In light of the mode of liability attributed to the defendant, the Prosecution's case concerning the knowledge, intent, and contribution of the defendant is

¹³ Order to the Prosecutor to File a Proposed New Redacted Version of the Article 58 Application, ICC-01/09-01/11-157 at para. 9.

¹⁴ Order to the Prosecutor to File a Proposed New Redacted Version of the Article 58 Application, ICC-01/09-01/11-157 at p. 6.

¹⁵ 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 at paras 18 and 18.

likely to turn on the defendant's presence or contribution to meetings and rallies relating to the electoral violence. In order to identify potential witnesses and assess whether to call them as *vive voce* witnesses, the Defence, at a minimum, would need to know:

- (i) The dates of the meetings and rallies, so that the defendant can verify whether he or other alleged co-perpetrators were present, and so that the Defence can establish whether the meeting occurred within the relevant time period of the charges;
- (ii) The attendees, as they will be able to confirm whether the defendant or other alleged co-perpetrators were present, and can therefore corroborate a possible alibi defence;
- (iii) The alleged content of the meetings; and
- (iv) The manner in which the Prosecution is alleging that the existence of such meetings and rallies prove elements of the Prosecution case.

22. Without this information and in the absence of a less redacted version of the Prosecution's article 58 application, the Defence simply does not have the necessary tools at its disposal to make an informed decision to waive its right to silence.

23. Finally, the Defence is mindful of the 6 week period required by the Victims and Witnesses Unit before the commencement of the confirmation hearing so as to make the necessary arrangements regarding the witnesses' testimony. We have however established that part of the rationale for the 6 week period timeline was informed by the approximation of the time that the Government of Kenya will take to issue passports to the prospective witnesses. Our inquiries reveal that the Government of Kenya can issue a passport within 10 days and that this can even be expedited if special arrangements are made.¹⁶

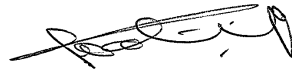
¹⁶ See

http://www.immigration.go.ke/index.php?option=com_content&view=article&id=78&Itemid=112

24. Accordingly, if, following a full review of the evidence to be relied upon by the Prosecution for the purpose of confirmation it becomes clear that the interests of justice require the calling of certain live witnesses on Mr Kosgey's behalf, every effort will be made to inform all concerned of the necessary details regarding such witnesses as soon as practically possible.

Request for Relief

25. In the event, the Defence for Mr Kosgey humbly prays that the Pre-trial Chamber do grant the request sought by Mr Ruto and Mr. Sang aforesaid and that the same be extended to Mr. Kosgey as well.



George Odinga Oraro
On behalf of Henry Kiprono Kosgey

Dated this 11 July 2011

At Nairobi, Kenya
