

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 11 July 2011

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single 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 Document

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

Decision 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 Samoei Ruto

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

Counsel for Henry Kiprono Kosgey

George Odinga Oraro

Counsel for Joshua Arap Sang

Joseph Kipchumba Kigen-Katwa

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States Representatives

Amicus Curiae

Other

REGISTRY

Registrar & Deputy Registrar

Silvana Arbia, Registrar
Didier Preira, Deputy Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Ekaterina Trendafilova, acting as Single Judge on behalf of Pre-Trial Chamber II (the “Chamber”) of the International Criminal Court (the “Court”),¹ renders this decision on the “Defence Application for Extension of Time to Submit Information on *Viva Voce* Witnesses to be Called at the Confirmation Hearing” (the “Request”),² filed by the Defence of William Samoei Ruto (“Mr Ruto”) and Joshua Arap Sang (“Mr Sang”).

1. On 8 March 2011, the Chamber, by majority, decided to summon Mr Ruto, Henry Kiprono Kosgey (“Mr Kosgey”) and Mr Sang to appear before it (the “Summonses to Appear”).³ Pursuant to this decision, the suspects voluntarily appeared before the Court at the initial appearance hearing held on 7 April 2011 during which, *inter alia*, the Chamber set the date for the commencement of the confirmation of charges hearing for 1 September 2011.⁴

2. 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” (the “Calendar for Disclosure”), whereby the Single Judge, *inter alia*, established a calendar for the conduct of the disclosure proceedings.⁵ The Single Judge established three deadlines, depending on the time when each piece of evidence had been collected by the Prosecutor, either for the disclosure to the Defence of the evidence for which no redaction was needed or for the request to the Chamber to authorize properly justified proposals for redactions. The Single Judge also ordered the Prosecutor to disclose to the Defence the evidence for which redactions were to be requested no later than five days after the Chamber's decision regarding such redactions.

¹ Pre-Trial Chamber II, “Decision Designating a Single Judge”, ICC-01/09-01/11-6.

² ICC-01/09-01/11-168.

³ Pre-Trial Chamber II, “Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang”, ICC-01/09-01/11-01.

⁴ ICC-01/09-01/11-T-1-ENG page 17, lines 12 to 25.

⁵ Pre-Trial Chamber II, ICC-01/09-01/11-62.

3. On 2 May 2011, the Prosecutor filed the “Prosecution’s Application for Extension of Time Limit for Disclosure”,⁶ wherein, *inter alia*, he informed the Chamber that, at that moment of time, 97% of his evidence had been collected before 15 December 2010 – therefore falling under the first group of evidence – while the remaining 3% had been collected between 15 December 2010 and 31 March 2011 – thus falling under the second category. Consequently, and in accordance with the Calendar for Disclosure, the Prosecutor was requested, by 3 June 2011, to disclose or to apply for redactions to what at the time of his submission dated 2 May 2011 constituted the entirety of the evidence which he intended to rely upon for the purposes of the confirmation of charges hearing.

4. On 9 May and 3 June 2011, the Prosecutor disclosed to the Defence all the evidence upon which he intends to rely for the purposes of the confirmation hearing that was collected before 31 March 2011 and for which, in his view, no redaction was necessary.⁷

5. On 23 May 2011, in compliance with the Calendar for Disclosure as subsequently amended by the Single Judge,⁸ the Prosecutor submitted his first application for redactions with respect to the evidence collected before 15 December 2010,⁹ while on 3 June 2011 he submitted his second application to the same effect with respect to the evidence collected between 15 December 2010 and 31 March 2011.¹⁰

6. On 24 and 28 June 2011, the Single Judge issued, respectively, the first and the second decision on the Prosecutor’s requests for redactions, whereby she ruled on all requests for redactions advanced by the Prosecutor within the first two deadlines

⁶ ICC-01/09-01/11-77.

⁷ ICC-01/09-01/11-80 and annexes attached thereto and ICC-01/09-01/11-104 and annexes attached thereto.

⁸ Pre-Trial Chamber II, “Decision on the ‘Prosecution’s Application for Extension of Time Limit for Disclosure’”, ICC-01/09-01/11-82.

⁹ ICC-01/09-01/11-96-Conf-Exp and annexes A1 to O. A public redacted version of the application has also been filed by the Prosecutor, see ICC-01/09-01/11-96-Red.

¹⁰ ICC-01/09-01/11-105 and annexes A1 to H. A public redacted version of the application has also been filed by the Prosecutor, see ICC-01/09-01/11-105-Red.

established in the Calendar for Disclosure.¹¹ The Single Judge also ordered that each piece of evidence subject to one of those two decisions must be disclosed to the Defence within 5 days from the notification of the respective decision, with the exception of the transcripts of witness interviews which contain Swahili text elements which must be disclosed within 10 days of notification.

7. On 29 June 2011, the Single Judge issued the “Decision Requesting the Parties to Submit Information for the Preparation of the Confirmation of Charges Hearing” (the “29 June 2011 Decision”),¹² whereby she ordered the Prosecutor 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”.¹³

8. On 4 July 2011, pursuant to a request of the Prosecutor¹⁴, the Single Judge issued the “Decision on the ‘Prosecution’s request for extension of the third disclosure deadline of 8 July 2011’”, wherein she authorised the Prosecutor to request redactions to a number of pieces of evidence by 13 July 2011.¹⁵

9. On 8 July 2011, the Defence of Mr Ruto and Mr Sang filed the Request, seeking an extension of time to comply with the 29 June 2011 Decision. In particular the Defence requests that information on *viva voce* witnesses to be called at the confirmation of charges hearing be submitted only fifteen days after receipt of the final package of disclosure from the Prosecutor.

10. On 11 July 2011, the Defence of Mr Kosgey submitted its “Response on Behalf of Henry Kiprono Kosgey to ‘Defence Application for Extension of Time to Submit

¹¹ Pre-Trial Chamber II, “First Decision on the Prosecutor’s Requests for Redactions and Related Requests”, ICC-01/09-01/11-145-Conf-Exp; Pre-Trial Chamber II, “Second Decision on the Prosecutor’s Requests for Redactions and Related Requests”, ICC-01/09-01/11-152 -Conf-Exp.

¹² Pre-Trial Chamber II, ICC-01/09-01/11-153.

¹³ ICC-01/09-01/11-153, p. 8.

¹⁴ ICC-01/09-01/11-155-Red.

¹⁵ Pre-Trial Chamber II, ICC-01/09-01/11-161.

Information on *Viva Voce* Witnesses to be Called at the Confirmation Hearing”,¹⁶ wherein it requests that “grant the request sought by Mr Ruto and Mr Sang [...] and that the same be extended to Mr Kosgey as well”.¹⁷

11. The Single Judge notes articles 61 and 67 of the Rome Statute (the “Statute”), rules 121 and 122 of the Rules of Procedure and Evidence (the “Rules”) and regulation 35 of the Regulations of the Court (the “Regulations”).

12. At the outset, the Single Judge recalls that, according to regulation 35 of the Regulations, the Chamber may grant an application for extension of time limit “if good cause is shown”. Accordingly, the Single Judge is called upon to determine whether the grounds on which the variation of time limit is sought by the Defence show the existence of good cause for it to be granted.

13. In this respect, the Defence submits that good cause for the extension sought is shown by the fact that: (i) the Defence has been preparing its case in light of the 15 days deadlines provided for by rule 121(6) of the Rules and recalled by the Single Judge in her Calendar for Disclosure; (ii) the Document Containing the Charges (the “DCC”) is yet to be filed and the Defence will be given such document only on Monday 1 August 2011; and (iii) the Prosecutor has not yet finalized the fulfillment of his disclosure obligations.

14. The Single Judge considers that, whilst it is true that rule 121(6) of the Rules mandates that a list of the evidence that the Defence intends to present for the purposes of the confirmation hearing is to be submitted no later than 15 days before the date of the hearing, this does not prevent the Chamber from establishing intermediate deadlines throughout the disclosure proceedings with a view to

¹⁶ ICC-01/09-01/11-173.

¹⁷ ICC-01/09-01/11-173, para. 25.

properly organizing the proceedings leading to the confirmation of charges hearing, as was done with respect to the Prosecutor's disclosure of evidence.

15. In the same vein, the fact that the DCC is to be filed by the Prosecutor by Monday, 1 August 2011 is of limited relevance for the purposes of the information to be submitted by the Defence in accordance with the 29 June 2011 Decision. In fact, the scope of the case is at this stage mainly shaped according to the Summonses to Appear issued by the Chamber on 8 March 2011.

16. Furthermore, the Single Judge recalls that the Calendar for Disclosure – whereby several deadlines for the disclosure of evidence by the Prosecutor were set – has a threefold purpose. First and foremost, it serves the interests of the Defence to receive in due time the evidence which the Prosecutor intends to rely upon for the purposes of the confirmation of charges hearing and therefore to have adequate time for the preparation of its case pursuant to article 67(1)(b) of the Statute. Furthermore, the Calendar for Disclosure permits that the paramount principle of expeditiousness be adequately safeguarded as well as that the proceedings be properly organized. The Calendar for Disclosure was also established in light of the responsibility vested with the Single Judge to ensure that disclosure between the parties takes place under satisfactory conditions, as provided for by rule 121(2)(b) of the Rules.

17. Therefore, if the main purpose of the Calendar for Disclosure was to permit that the Defence be provided in time, and on an ongoing basis, with the evidence which the Prosecutor intends to rely upon, it is clear that the arguments put forward by the Defence in its Request are not convincing. Indeed, it must be underlined that both parties have obligations stemming from the disclosure regime as established in the Calendar for Disclosure. Whilst the Prosecutor, being the triggering force of the proceedings, was ordered to comply with a tight set of deadlines, the Defence was expected to progressively prepare its case upon receipt of the relevant piece of evidence in accordance with the Calendar for Disclosure. If, conversely, the Defence

was to wait until the disclosure of the Prosecutor's evidence is finalized – or even until the DCC is filed – to start preparing their case, the existence of intermediate deadlines within the context of the disclosure proceedings would serve a very limited purpose, if at all.

18. This is, however, without prejudice to the Defence right to adjust its case upon receipt of the DCC from the Prosecutor, if needed. For this purpose, a final deadline for the presentation of the Defence list of evidence is established by rule 121(6) and the Defence has been granted up until Tuesday 16 August 2011 to present its final list of evidence. In order to comply with such deadline, the Defence is therefore expected to have already started the preparation of its case, in light of the different batches of evidence received by the Prosecutor. It is therefore, on the basis of the information in the possession of the Defence that the Single Judge in her 29 June 2011 Decision already concluded that "all the relevant information for an informed decision to be made will be in [the Defence] possession well in advance of the deadline established".

19. In light of the above, the Single Judge is of the view that, for the limited purpose of the information to be submitted by the Defence in accordance with the 29 June 2011, the Defence has been duly placed in a position to meaningfully comply with it. This is ensured by virtue of both the Summonses to Appear – which frames, to a large extent, the scope of the present case – and the evidence disclosed by the Prosecutor in compliance with the Calendar for Disclosure.

20. Accordingly, the Single Judge considers that the arguments presented by the Defence do not show the existence of good cause for the extension of time limit sought within the meaning of regulation 35(2) of the Regulations.

21. Furthermore, the Single Judge recalls that the purpose of requesting information related to *viva voce* witnesses is grounded on the necessity that a number of

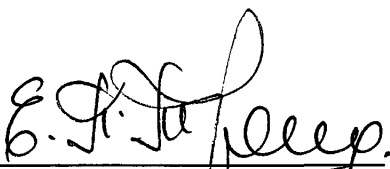
arrangements be made by the Victims and Witnesses Unit (the “VWU”) in order for the witnesses to be permitted to testify in person at the confirmation of charges hearing. In fact, as stated in the 29 June 2011 Decision, 6 weeks before the commencement of the confirmation hearing are essential in order for the VWU to finalize the necessary arrangements.

22. Notwithstanding the above, the Single Judge takes note that the transcripts of interviews of two witnesses, the redactions to which were addressed in the Second Decision on Redactions, are to be disclosed on Monday 11 July 2011 since they contain Swahili text elements. Therefore, the request for extension of time limit advanced by the Defence also in light of such deadline can be partially granted in order for the Defence to evaluate these transcripts before the information requested in the 29 June 2011 Decision be duly provided. The Single Judge considers that for such limited purpose an extension of one week suffices. In the same vein, the limited extension granted will not prejudice the capability of the VWU to finalize in time the arrangements for the testimonies to be given live at the confirmation of charges hearing, if any.

FOR THESE REASONS, THE SINGLE JUDGE

GRANTS the Defence teams until Tuesday, 19 July 2011 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.

Done in both English and French, the English version being authoritative.



Judge Ekaterina Trendafilova
Single Judge

Dated this Monday, 11 July 2011

At The Hague, The Netherlands