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

Date: 19 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

PUBLIC with CONFIDENTIAL and EX PARTE (Pre-Trial Chamber only) Annex

Filing on behalf of Mr. Joshua Arap Sang
Indicating Live Witnesses for the Confirmation of Charges Hearing

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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Defence**

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REGISTRY

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Other

I. Introduction & Procedural History

1. On 29 June 2011 the Honourable Single Judge ordered the Prosecutor and the Defence teams to indicate by 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. At the request of the Defence for Mr. Sang and Mr. Ruto,² the Single Judge extended the filing deadline for the Defence teams to 19 July 2011.³
3. The Defence for Mr. Joshua Arap Sang hereby indicates that it intends to call live witnesses at the confirmation of charges hearing (“Confirmation Hearing”), set for 1 September 2011. Additionally, Mr. Sang reserves his right to give live evidence himself. The Defence notes at the outset that it has not yet been able to contact and interview all of the listed witnesses (the Defence is liaising with the Victims and Witnesses Unit in this regard), so the number of live witnesses might need to be reduced and/or the subject matter and the scope of the proposed testimony might need to be slightly revised, after this contact is made.
4. The anticipated subject matter and the scope of the proposed testimony of each witness is listed in a Confidential and *Ex parte* Annex to this filing. The Defence submits that this is sufficient to “inform the Chamber”⁴ of its intention, as the stated purpose of so doing is to enable the Single Judge to exercise her powers “with a view to ensuring the proper organization of the proceedings, including to making any necessary determinations as to the relevance and admissibility of the evidence to be obtained through the proposed oral testimony of each witness”.⁵

II. Submissions

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 Requesting Information**”).

² *Prosecutor v. Ruto et al*, ICC-01/09-01/11-168, Defence Application of Time to Submit Information on *Viva Voce* Witnesses to be Called at the Confirmation Hearing, 8 July 2011.

³ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-176, Decision on the ‘Defence Application of Time to Submit Information on *Viva Voce* Witnesses to be Called at the Confirmation Hearing’, 11 July 2011.

⁴ Decision Requesting Information, para. 10.

⁵ Decision Requesting Information, para. 12 (noting that the Single Judge has this responsibility and authority pursuant to Article 69(4) of the Statute and Rule 63(2) of the Rules).

Necessity of Live Witnesses for Mr. Sang at the Confirmation Hearing

5. Article 61(6) gives the suspects the right to object to the charges, to challenge evidence presented by the Prosecutor, and to present evidence at the Confirmation Hearing. The mode of presentation of evidence is not restricted by the Statute in any way, thus allowing for the possibility of live testimony from defence witnesses. Furthermore, there is a precedent from the *Abu Garda* case for the Defence to call live witnesses at confirmation.
6. The Defence appreciates that the Confirmation Hearing in September has a “limited purpose and scope”⁶ and that parties would normally rely on statements or transcripts of recorded interviews for the purposes of confirmation⁷. However, the Defence also notes that it has a duty to “select [its] best pieces of evidence in order to convince the Chamber” that the charges brought against Mr. Sang should not be confirmed. The Defence submits that this can only be done if the Defence is given the opportunity to call the witnesses listed in the annex to give live testimony.
7. It is well-established that oral testimony has a greater probative value than paper evidence. For instance, the Pre-Trial Chamber in *Bemba* and *Abu Garda* noted the low probative value of summaries of witness statements, especially where the identity of the witness is unknown.⁸ Evidence given by live witnesses has the advantage of being subjected to cross-examination by the opposing party, and thus having its veracity and reliability tested. Consequently, the credibility of the witness’ evidence is more easily ascertained. The Defence sees the Confirmation Hearing as an opportunity to present compelling evidence through live witnesses as to Mr. Sang’s innocence, thereby increasing the likelihood that the case will be dismissed at the confirmation stage.
8. The Defence maintains that the witnesses who have given statements to the Prosecution implicating Mr. Sang are not being honest, for reasons best known to them. The Defence intends to counter these allegations from anonymous accusers by presenting the Chamber

⁶ Decision Requesting Information, para. 8.

⁷ Decision Requesting Information, para. 9.

⁸ See, for example, *Prosecutor v. Bemba*, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para. 50 and *Prosecutor v. Abu Garda*, ICC-02/05-02/09-243-Red, Decision on the Confirmation of Charges, 8 February 2010, paras 51-52.

with testimony from people who are willing to have their integrity and the truthfulness of their word challenged in court. The Defence submits that the effect of such oral testimony “cannot be properly substituted by documentary evidence or witnesses’ written statements”.⁹

9. Moreover, at least three witnesses on behalf of Mr. Sang¹⁰ have indicated that because they serve people of varying political affiliations, they are not willing to appear partisan by signing an affidavit which may be viewed as “supportive” of Mr. Sang and which may alienate one segment of people they are obliged to serve. The witnesses have suggested that if they were asked to give live evidence before the Court, this would seem less-partisan and they would be willing to testify.

The Desire for an Expeditious Confirmation Hearing should not Prevail over Mr. Sang’s Right to Call Live Witnesses

10. The Single Judge has drawn the Defence’s attention to the fact that *viva voce* witnesses should be “resorted to ... only to the extent necessary” and that this would permit the confirmation of charges hearing to be conducted in a more expeditious manner.¹¹ The Defence appreciates the need for an expeditious hearing, but it is not prepared to forfeit Mr. Sang’s right to present live evidence for the sake of “efficiency”.
11. Furthermore, the Defence submits that the Court would ultimately save time by allowing the Defence to call the live witnesses listed in the annex, because the evidence will demonstrate to the Pre-Trial Chamber that the case should not be confirmed.

Each of the Listed Witnesses Should be Called

12. In the annex, the Defence has set out the anticipated subject matter and scope of each witness’ testimony. The Defence submits that each of these witnesses should be called to testify, as each one has a unique perspective on the alleged involvement of Mr. Sang in the post-election violence. If the Single Judge determines that there is duplication of

⁹ Decision Requesting Information, para. 9.

¹⁰ These witnesses are marked by a “*” in the annex.

¹¹ Decision Requesting Information, para. 9.

categories of evidence for the Confirmation Hearing, the Defence respectfully requests the opportunity to decide which witnesses should remain on the list and which may be reserved, if necessary, for trial.

Confidentiality of the Summaries of the Scope of Anticipated Testimony of Live Witnesses

13. Pursuant to Article 57(3)(c), the Pre-Trial Chamber has the authority to “provide for the protection and privacy of victims and witnesses”. The Defence submits that there is a risk that the publication of the annex containing summaries of anticipated testimony of the live witnesses may disclose their identities. Consequently, and at least until the Defence is able to request specific protective measures for purposes of testimony, etc, the Defence requests that the Pre-Trial Chamber preserve the confidential and *ex parte* nature of the annex.

III. Conclusion & Requested Relief

14. The Defence for Mr. Sang respectfully indicates the anticipated subject matter and scope of testimony for each live witness to be called at the Confirmation Hearing and requests that this information remain confidential and *ex parte* at this time.



Joseph Kipchumba Kigen-Katwa
On behalf of Mr. Joshua Arap Sang

Dated this 19th day of July 2011,

At Nairobi, Kenya