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

Date: 21 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

**Defence Application for Extension of Time
to Submit Properly Justified Proposals for Redactions**

Source: Defence for Mr. William Ruto and Mr. Joshua Sang

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

1. Introduction

1. 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 Establishing a Calendar for Disclosure Between the Parties*.¹ Therein, the Single Judge ordered the Defence "to submit properly justified proposals for redactions under rule 81 of the Rules, if any, no later than Friday, 22 July 2011".²
2. Pursuant to Regulation 35(1) of the Regulations of the Court, the Defence for Mr. Ruto and Mr. Sang hereby requests an extension of the 22 July 2011 deadline. The Defence submits there is "good cause"³ for an extension because:
 - i. The Defence has not been able to complete its investigations at this time, due to the fact that a less-redacted version of the Prosecution's Article 58 Application has not been made available to the Defence⁴ and the Prosecution will not file its Document Containing the Charges ("DCC") until 1 August 2011⁵;
 - ii. The Defence needs to consult with potential witnesses and sources before being in a position to know whether the information requires redactions for their benefit; and
 - iii. The inability of the Defence to request all necessary redactions by 22 July will prevent it from being able to fully challenge the Prosecution case and present evidence during the Confirmation Hearing, which ultimately prejudices the rights of the suspects.
3. The Defence does not anticipate submitting a large quantity of material requiring redactions and therefore the requested extension should not delay the Defence's ability to

¹ *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**").

² Decision on the Disclosure Calendar, p. 13.

³ Regulation 35(2).

⁴ The Prosecution submitted a confidential and *ex parte* less-redacted version of its Article 58 Application to the Pre-Trial Chamber on 7 July 2011 as ordered, but this has not been made available to the Defence. The Defence is still relying on the heavily redacted version of the Article 58 Application which was filed on 1 April 2011 in the record of the Situation (ICC-01/09-30-Red2).

⁵ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-165-Red, 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)", 7 July 2011 ("Submissions on Article 58 Application Redactions"), para. 19 (indicating that the DCC will be filed on 1 August and not before).

comply with its disclosure obligations and the filing of its list of evidence, as ordered to be filed by 16 August.⁶ As such, this request creates no prejudice to the Prosecution.

4. Consequently, and given the current state of investigations, the Defence requests an extension of the deadline until Friday, 5 August to submit justified proposals for redactions under Rule 81.

II. Applicable Legal Principles

5. Rule 81 sub-sections (1), (2), (3) and (5) are not applicable to disclosure by the Defence.

6. Rule 81(4) states:

“The Chamber dealing with the matter shall ... at the request of the accused... take the necessary steps to ensure the confidentiality of information, in accordance with articles 54, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, including the authorizing of non-disclosure of their identity prior to the commencement of the trial”.

7. Rule 81(6) states:

“Where material or information is in the possession or control of the defence which is subject to disclosure, it may be withheld in circumstances [where the disclosure of evidence or information may lead to the grave endangerment of the security of a witness or his or her family⁷], and a summary thereof submitted instead. Such material and information may not be subsequently introduced into evidence during the confirmation hearing or the trial without adequate prior disclosure to the Prosecutor”.

8. 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 pursuant to article 67(1)(b) of the Statute”.⁸

III. Submissions

Incomplete Disclosure by the Prosecution

⁶ Decision on the Disclosure Calendar, p. 13.

⁷ Article 68(5).

⁸ Decision on the Disclosure Calendar, para. 14.

9. The Defence cannot submit properly justified proposals for redactions of material intended for use at Confirmation before it receives the Document Containing the Charges. 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 been acknowledged by the Single Judge.⁹ However, the Defence appreciates that the Single Judge has also ruled that

“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”.¹⁰

10. Indeed, the Defence has been progressively preparing its case during the rolling disclosure process. The Defence is not waiting to start preparing its case; conversely the Defence is and has been busy analyzing disclosure, investigating ways to best challenge the Prosecution case and present its own case during Confirmation.

11. Respectfully, it simply stands to reason that this process cannot be complete until all of the relevant information necessary for the Defence to make an informed decision has been disclosed by the “triggering force of the proceedings”¹¹.

12. At this time, all of the counsel are currently in Kenya, making best efforts to put together a case despite not having access to a clear charging document from the Prosecution. They are collecting material for use at Confirmation but, given the limited internet and resources there, will be unable to transmit the documents and make final decisions about what needs to be redacted until a later date.

Adherence to the Current Deadline Would Defeat the Purpose of Redactions

13. Additionally, if the Defence is required to file its proposals for redactions by 22 July, there is a risk that some sensitive witness information might not be adequately protected. This would defeat the purpose of requesting redactions, which are designed to protect the safety and security of witnesses in contact with the ICC. The Defence needs additional

⁹ *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.

¹⁰ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-176, Decision on the ‘Defence Application for Extension of Time to Submit Information on Viva Voce Witnesses to be Called at the Confirmation Hearing’, 11 July 2011, para. 17.

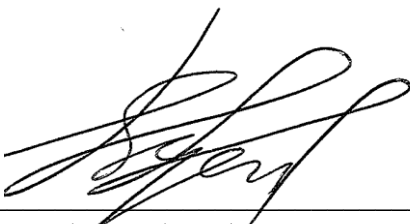
¹¹ *Id.*, para. 17 (referring to the Prosecutor as the “triggering force”)

time to consult witnesses and potential witnesses as to their security concerns and related protective measures, including non-disclosure of their identities to the Prosecutor.

14. As the Prosecutor has previously argued, it is “undisputed”¹² that the Court is responsible for “ensur[ing], as a matter of the highest priority, that witnesses are appropriately protected...”¹³ and that the Chambers have an ultimate duty and responsibility to that effect.¹⁴ In that vein, the Defence respectfully requests that it be given adequate time to submit to the Pre-Trial Chamber a proposal for redactions that adequately addresses witnesses’ security concerns and puts the Chamber in a position to fulfil its duty toward vulnerable witnesses.

IV. Conclusion & Request for Relief

15. If the Defence is required to submit its requests for redactions by 22 July, information that requires redactions and which the Defence needs to rely on at Confirmation will not be able to be considered by the Chamber. This ultimately prejudices Mr. Ruto and Mr. Sang’s ability to challenge Prosecution evidence and present evidence at Confirmation. Therefore, the Defence respectfully requests that the Pre-Trial Chamber grant an extension of time to 5 August 2011 for the Defence to submit properly justified proposals for redactions under Rule 81.



Joseph Kipchumba Kigen-Katwa
On behalf of Mr. Joshua Arap Sang and Mr. William Samoei Ruto

Dated this 21st day of July 2011

At Nairobi, Kenya

¹² Submissions on Article 58 Application Redactions, para. 13.

¹³ ICC-01/04-01/07-776 OA7, para. 101.

¹⁴ ICC-01/04-01/07-776 OA7, paras 93-98 ; ICC-01/04-01/06-2582 OA18, paras 50-51.