



Original: English

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

Date: 11 August 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, Annexes A, C & D
and Confidential Annexes B & E**

**Urgent Defence Application for Postponement of the Confirmation Hearing
and Extension of Time to Disclose and List Evidence**

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:

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Unrepresented Applicants
(Participation/Reparation)

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Victims**

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I. Introduction

1. During the initial appearance of Mr. Ruto, Mr. Kosgey and Mr. Sang on 7 April 2011, the Single Judge set the date for the commencement of the confirmation of charges hearing (“Confirmation” or “Confirmation Hearing”) for 1 September 2011.¹ Thereafter, 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*.² Therein, the Single Judge ordered the Defence “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”.³
2. Pursuant to Rule 121(7), the Defence for Mr. Ruto and Mr. Sang hereby requests a six-week postponement of the Confirmation Hearing and the related deadlines for disclosure of evidence and for filing the Defence List of Evidence.⁴ The Defence is endeavouring to be in a position to disclose some materials and file a partial list of evidence by 23 August 2011, and therefore also requests a minimum one-week extension pursuant to Regulation 35(1) of the deadline for disclosure. Without a likewise adjournment of Confirmation, however, the Defence would be in breach of the 15-day rule as regards its list of evidence.
3. The Defence has made every effort to comply diligently with the orders of the Court. However, a combination of factors makes it impossible for the Defence to commence the Confirmation Hearing on 1 September and meet the related deadlines as scheduled. The Defence submits that the following reasons (of both a legal and logistical nature) necessitate a postponement of Confirmation or alternatively provide “good cause”⁵ for an extension of the disclosure deadline:
 - i. The Single Judge has ordered that the Defence can only call two *viva voce* witnesses each during the Confirmation Hearing,⁶ thus the Defence has had to

¹ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-T-1-ENG, 7 April 2011.

² *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**”).

³ Decision on the Disclosure Calendar, p. 13.

⁴ The Defence recognizes that while the deadline for disclosure was set by the Single Judge in her Decision on the Disclosure Calendar, the deadline for filing the list of evidence fifteen days prior to Confirmation is mandated by Rule 121(6).

⁵ Regulation 35(2).

⁶ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-221, Order to the Defence to Reduce the Number of Witnesses to Be Called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of Viva Voce Witnesses, 25 July 2011 (“**Order to Reduce Witnesses**”).

spend more time than expected to take statements from individuals that it had intended to call to testify live;

- ii. The Government of Kenya has yet to respond to several informal and formal requests for information sent by the Defence, which relate to evidence critical to aspects of the Defence case at Confirmation;
 - iii. Several other investigative requests are pending with various Kenyan institutions and authorities, to which the Defence expects to have substantive responses within the next 5 to 40 days;
 - iv. The statements and other evidence already in its possession which the Defence intends to list and disclose are still in Kenya and for logistical reasons and security concerns cannot be sent over email or via a mail carrier such as DHL, thus the Defence has been trying (unsuccessfully to date) to arrange a visa for a team member to travel to The Netherlands with the material;
 - v. The Registry has still not provided an office(s) for the Defence to use, which has handicapped the Defence's ability to organize itself efficiently and to use the ICC systems and software including a team shared drive, RingTail and E-Court;
 - vi. The Defence has not yet received training on how to import the metadata into the E-Court system or on how to export documents for disclosure from RingTail, both of which are time-consuming prerequisites to being able to effect disclosure on the 16th; and
 - vii. The cumulative impact of the volume of disclosure to analyze, victims applications to review, filings on admissibility and other pre-confirmation issues, and preparation and investigations for the Defence case at Confirmation, exacerbated by the constraints enumerated above 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 Mr. Ruto and Mr. Sang.
4. The Defence has been given assurances by the Defence team for Honourable Henry Kosgey that it does not oppose this request for a postponement. Furthermore, as the suspects are not in detention and are the ones requesting a minimal postponement, any balancing test between the suspects' right to be tried without undue delay and the right to have adequate time to prepare meaningfully for Confirmation should be resolved in favour of the latter.
5. Consequently, and given the current impediments to preparations and investigations, the Defence respectfully requests a postponement of Confirmation until at least mid-October

(or later if necessary due to the confirmation of charges hearing scheduled to begin in *Prosecutor v. Muthaura, Kenyatta and Ali* on 21 September 2011). It requests an attendant delay of the dates for disclosure of evidence and filing of its list of evidence. The Defence has reason to believe that by this time, the logistical and investigative constraints it currently faces will be resolved.

II. Applicable Legal Principles

6. 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”.⁷
7. According to Article 61(6), the suspects may, *inter alia*, challenge the evidence presented by the Prosecutor and present evidence. This right must be implemented in a manner that is effective and not illusory. The Single Judge has affirmed that such rights cannot be denied to the suspects and that she has the “responsibility to put the Defence in a position to meaningfully exercise them”.⁸

III. Submissions

Taking Statements for Disclosure Requires More Time than Taking Investigative Notes Prior to Live Testimony

8. The Single Judge has strictly limited the Defence’s ability to call witnesses to give testimony live at Confirmation, reducing the number of witnesses for Mr. Ruto from 25 to 2 and likewise reducing the number of witnesses for Mr. Sang from 15 to 2.⁹ The Single Judge has essentially mandated that the Defence rely primarily on written statements at Confirmation, as opposed to *viva voce* evidence.¹⁰ This order has required the Defence to revise its investigative strategy to focus more on transcribing and reviewing statements rather than simply interviewing a potential witness prior to giving oral testimony. The process of taking statements has proved onerous, despite several counsels in Kenya being tasked with the undertaking. Additionally, taking proper statements requires first a thorough knowledge of the entire Prosecution case, which case was only fully disclosed to the Defence on 1 August.

⁷ Decision on the Disclosure Calendar, para. 14.

⁸ Order to Reduce Witnesses, para. 16.

⁹ Order to Reduce Witnesses, para. 4.

¹⁰ Order to Reduce Witnesses, para. 16.

9. The Defence has identified several witnesses whom it still wishes to interview and take statements from for the purposes of Confirmation.¹¹ It is not possible to get the required clearance from VWU¹² (which has only been obtained as of this morning),¹³ meet the witnesses for interview(s), and type and review their statements and/or affidavits in sufficient time to prepare them for disclosure to the Prosecution. The Defence of course has a right against self-incrimination and consequently should not be asked to hastily submit evidence which could be relied on to its detriment. This is especially so given that once the Defence lists its evidence, everything on the list may be considered by the Pre-Trial Chamber when evaluating whether to confirm the charges.¹⁴

Pending Investigative Requests for Critical Information

10. The Defence has sent several formal and informal requests to various organs of the Government of Kenya¹⁵, civil society organizations, private institutions, etc requesting information which is critical to aspects of the Defence case at Confirmation, including questions of admissibility. The Defence has not yet received a substantive response from all of them, but has pursued the requests in person and in writing and is confident that the outstanding requests will have been primarily fulfilled if given the requested postponement. For the Single Judge's consideration, the Defence attaches a schedule of investigative requests,¹⁶ indicating the action taken by the Defence to pursue the requested materials and the anticipated time which it will take for the request to be fulfilled.
11. The Defence notes that in the *Katanga* case, the Pre-Trial Chamber recognized that pending requests to national authorities should be given adequate time to be fulfilled prior to confirmation, as such would be beneficial to the Defence.¹⁷
12. The material the Defence anticipates gathering from its investigations serve the objectives identified by counsel and by Mr. Ruto and Mr. Sang for the purposes of Confirmation, namely that:

¹¹ These witnesses are listed for the benefit of the Pre-Trial Chamber [*Ex parte and Confidential Annex A*].

¹² *Prosecutor v. Ruto et al*, ICC-01/09-01/11-86, Decision on the 'Defence Request for Variation of Decision on Summons or in the Alternative Request for Leave to Appeal', 12 May 2011.

¹³ See email exchange between VWU and the Defence, 11 August 2011 [*Confidential Annex B*].

¹⁴ Pre-Trial Chamber II, *Prosecutor v. Bemba*, Transcript, ICC-01/05-01/08-T-12-Red-ENG, 15 January 2009, p. 140-141 and Pre-Trial Chamber I, *Prosecutor v. Lubanga*, Decision on the confirmation of charges, 29 January 2008, ICC-01/04-01/06-803, at para. 40.

¹⁵ See copies of the letters sent by the Defence to organs of the Kenyan Government. The Defence only indicates such on an *ex parte* basis so as to not frustrate or jeopardize ongoing investigations [*Ex parte and Confidential Annex C*].

¹⁶ The Defence only indicates such on an *ex parte* basis so as to not frustrate or jeopardize ongoing investigations [*Ex parte and Confidential Annex D*].

¹⁷ *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-446, Decision on the Defence Request for Postponement of the Confirmation Hearing, 25 April 2008.

- i. Allegations made by the Prosecutor on the identified dates and at the identified venues involving certain co-perpetrators did not happen at all or as alleged;
 - ii. Mr. Ruto and Mr. Sang do not have a war-like or criminal character as alleged;
 - iii. The organizational structure and purported policy does not exist;
 - iv. The requirements for jurisdiction and admissibility have not been met; and
 - v. The Prosecution has not done a thorough investigation.
13. The Defence intends to rely on this evidence going to these core aspects of the Defence case at Confirmation and will not be in a position to disclose them by 16 August.

Logistical Considerations Make it Impossible to Receive and Process the Evidence

14. Members of the Defence team for Mr. Ruto and/or Mr. Sang have recently come into possession of audio-visual material, statements, and other documentary materials which it wants to disclose at Confirmation. It is also in the process of acquiring further statements and/or affidavits. However, due to the poor internet connection in Kenya, the Defence is unable to access its secure ICC email addresses and is therefore unable to scan and send the confidential materials in a secure format. Likewise, the Defence has misgivings about sending such materials with a commercial mail carrier such as DHL. Consequently, the Defence is arranging for someone to travel with the materials from Kenya. This process is being complicated by visa requirements, etc and it seems unlikely that anyone will be able to travel from Kenya, if at all, before Friday of this week.
15. This is inadequate time for the Defence to prepare the documents for disclosure in compliance with the very technical E-Court Protocol¹⁸ set out by the Pre-Trial Chamber, more especially since the Defence has only been able to arrange for training on these systems for Friday, 12 August.

Lack of Office Space and Access to ICC Systems and Software

16. The Defence teams of Mr. Ruto and Mr. Sang are still operating without office space assigned to them by the Registry.¹⁹ The Defence appreciates the efforts of the Counsel Support Section in attempting to find and allocate office space to the teams, but the fact remains that the Defence are considerably disadvantaged by not having office space, ICC and EPN computers, shared drives, printers, phones, etc dedicated to them. It has made the technical aspects of processing the Prosecution disclosure more tedious and it has

¹⁸ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-44, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, 6 April 2011.

¹⁹ See email exchanges between Counsel and CSS regarding office space [**Confidential Annex E**].

made the Defence entirely dependent on the good auspices of the OPCD in order to process the Prosecution disclosure and effect its own disclosure obligations.

17. The Defence notes that the *Ngudjolo* Defence Team had similar office supplies and training constraints and that the Pre-Trial Chamber took those factors into consideration when granting a postponement of that confirmation hearing.²⁰

Cumulative Impact of Volume of Disclosure, Victims Applications, Filings and Investigations

18. The Defence has sought to engage meaningfully with all aspects of the case leading up to Confirmation, which has required a careful balancing act between analyzing Prosecution disclosure, submitting observations on victims' applications, contributing to filings (including on the pending Admissibility Appeal) and pursuing its own applications. The overall effect of this is that the Defence have not had sufficient time to prepare meaningfully for Confirmation.
19. The Prosecution has disclosed almost 9000 pages of material in addition to several audio/visual files. This includes more than 400 incriminating documents totalling more than 6200 pages. Approximately 1000 pages of incriminating and Rule 77 material were disclosed between 29 July and 1 August 2011. While the Prosecution seem to have complied with their disclosure obligations and to have met the deadlines established by the Single Judge, this amount of material takes a significant amount of time to analyze, even by their own estimates.²¹ The Defence has only had the totality of this evidence, as well as the Document Containing the Charges, for ten days. Furthermore, the Prosecution have not assigned pseudonyms to their witnesses, so every time the Prosecution refers to a piece of evidence, the Defence has to essentially translate that reference into a witness (or otherwise) before it is able to appreciate the significance of what is being alleged.
20. With respect to the volume of victims applications in the Kenyan cases, the Single Judge has already acknowledged how the number of victims' applications and the amount of procedural issues in the case justified an extension of time.²² The *Ruto et al* case has had

²⁰ *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-446, Decision on the Defence Request for Postponement of the Confirmation Hearing, 25 April 2008.

²¹ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-50, Prosecution's Application for leave to Appeal the "Decision Setting the Regime for Evidence Disclosure and Other Related Matters (ICC-01/09-01/11-44)", 13 April 2011, para. 24 (suggesting that a review of 12,000 pages would take at least 206 working days).

²² *Prosecutor v. Muthaura et al*, ICC-01/09-02/11-227, Decision on the "Urgent Defence Motion for Extension of Time to File Observations on Applications to Participate in the Proceedings", 10 August 2011. See also, *Prosecutor v. Muthaura et al*, ICC-01/09-02/11-229, Defence Observations on 245 Applications for Victim Participation in the Proceedings, 11 August 2011 (wherein the Muthaura Defence has likewise noted the difficulties in balancing competing pre-confirmation issues and how a focus on one aspect necessarily slows down progress on another aspect).

to process a similar number of applications, and was only able to do so by taking time away from analysis of disclosure and investigations.

IV. Conclusion & Request for Relief

21. If the Defence is required to disclose and list its evidence by 16 August, evidence upon which the Defence needs to rely 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 to postpone the Confirmation Hearing for six weeks, in order to allow adequate time for the Defence to disclose to the Prosecutor the evidence it intends to present at the Confirmation Hearing and to file its list of such evidence.



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

Dated this 11th day of August 2011

At Nairobi, Kenya