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

Date: **12 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

**Kosgey's Joinder to Ruto and Sang's Urgent Defence Application for
Postponement of Confirmation
and Extension of Time to Disclose and List Evidence**

Source: Defence for Mr. Henry Kiprono Kosgey

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Legal Representatives of the Victims

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Unrepresented Victims

Unrepresented Applicants
(Participation/Reparation)

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Victims**

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Other

I. Introduction

1. On 8 March 2011, the Chamber, by majority, issued three summonses to appear in the present case and set the date for the initial appearance of the suspects for 7 April 2011 (Decision on Summonses).¹
2. 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* in which *inter alia*, 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"².
3. On 11 August 2011 the Defence for Mr. Ruto and Mr. Sang' filed an "Urgent Defence Application for Postponement of Confirmation and Extension of Time to Disclose and List Evidence" ("Application").
4. In the Application, the Ruto and Sang defences request a six-week postponement of the Confirmation Hearing—currently scheduled to commence 1 September 2011—and related deadlines for disclosure of evidence and for filing the Defence List of Evidence.³ Alternatively, and at a minimum, the Ruto and Sang defences request a one-week extension pursuant to Regulation 35(1) of the deadline for disclosure of evidence to the Prosecution. The Kosgey Defence adopts the request for relief as set forth in the Application in its entirety.
5. The Defence for Henry Kosgey ("Defence") respectfully moves to join the Defence for Mr. Ruto and Mr. Sang' in their request aforesaid. Despite the

¹ 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.

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 See "Urgent Defence Application for Postponement of Confirmation and Extension of Time to Disclose and List Evidence", ICC-01/09-01/11-255, 11 August 2011. The Defence recognises 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).

Defence's best efforts to diligently comply with the orders of the Court, different legal and logistical factors—outside of the Defence's control—militate against its timely preparation for the current Confirmation start date and related disclosure deadlines.

6. Similar to the Ruto and Sang defences, the Kosgey defence faces substantive and procedural challenges, outside of the Defence's control, that individually—and even more so in the aggregate—prevent the Defence from preparing for the commencement of Confirmation in a timely fashion. The Defence submits that the following reasons necessitate a postponement of Confirmation or alternatively provide “good cause”⁴ for an extension of the disclosure deadline:

- i. Challenges and delays, not within the Defence's control, in securing key pieces of evidence needed for Confirmation from both the Kenyan government and other actors;
- ii. Challenges and delays, not within the Defence's control, in producing the written testimony of certain key witnesses central to the Defence's case at Confirmation;
- iii. The large volume of disclosures, victim applications, and other filings in this case that need to be processed, analysed and submitted by a small (and geographically disparate) staff and that has cut away at the time remaining for Confirmation preparations; and
- iv. The numerous logistical limitations facing the Defence (including lack of office space and access to ICC systems and software) that have substantially slowed an already stretched staff in the analysis and processing of volumes of disclosure and Defence preparations in advance of Confirmation.

7. In regards to reasons (iii) and (iv) above, the Kosgey defence adopts in full the reasoning advanced by the Ruto and Sang defences in paragraphs 18-20 and paragraphs 16-17 of the Application, respectively. The Defence also adopts all

⁴ Regulation 35(2).

legal reasoning and supporting jurisprudence as set forth in the Application justifying postponement.

8. Additionally, the Defence is experiencing challenges and delays unique to its case in securing critical pieces of evidence and witness testimony, as outlined in more detail below. Unless the Defence is given more time to resolve these issues, these legal and logistical setbacks will impede the Defence's ability to fully challenge the Prosecution case and present evidence during Confirmation—and will ultimately infringe upon the fair trial rights of Mr. Kosgey.

II. Additional Submissions

Pending Requests for Key Evidence from the Kenyan Government and Other Actors

9. The Defence has made requests to the Kenyan government and outside actors for information and materials related to core aspects of the Defendant's alleged criminal liability to be challenged at Confirmation. These requests are still outstanding. However, given the nature of the delays, the Defence is certain that if the date of the Confirmation Hearing is postponed, the critical information sought can be secured in that additional time.
10. An important pending request includes the Defence's petition to the Kenyan government for raw intelligence reports from the time period outlined in the Document Containing the Charges. This material is needed to verify allegations regarding the purported role and actions of Mr. Kosgey at meetings that figure centrally in the charges. Given the sensitive and confidential nature of the material, more time is needed for the Kenyan government to declassify the information according to protocol and furnish the Defence with the requested information.⁵ The Defence has received preliminary assurances that although the materials cannot be provided in adequate time before the currently scheduled

⁵ The Defence relies on the jurisprudence set forth in paragraph 11 of the Application where the Pre-Trial Chamber in the *Katanga* case recognised that pending requests to national authorities should be given adequate time to be fulfilled prior to confirmation, so as to benefit the Defence, see *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-446, Decision on the Defence Request for Postponement of the Confirmation Hearing, 25 April 2008.

start date for Confirmation and related disclosure deadlines, it is likely to be provided within the next four weeks. It is therefore desirable and in the interests of justice that the start date for Confirmation be postponed to mid-October.

11. Additionally, the Defence is currently negotiating with television broadcasters in Kenya to secure video evidence pertaining to allegations set forth in the Document Containing the Charges. These media outlets have thus far been reluctant to disclose this footage on account of copyright issues and concerns about the legal implications of issuing these materials to the Defence and the Prosecution for use in an International Criminal Court proceeding.
12. While these concerns on the part of the broadcasters has resulted in a delay in the release of the materials, the Defence is confident that through on-going negotiations, a resolution can be reached in time for use of the materials at a postponed Confirmation start date of mid-October.

Challenges in Taking Written Statements from Witnesses

13. In addition to the challenges in securing critical documentary evidence necessary for the Defence case in Confirmation, the Defence has also experienced recent setbacks in securing important written testimonial evidence from witnesses. These range from a request for further particulars and explanation of the ICC processes and the implications on them personally if they volunteered as witnesses, requests for more time to consult with members of their families, expected obligations on their part to the ICC process and anticipated length of time, and general anxiety of participating in a foreign court with the stature of the ICC. These setbacks can be overcome with time and the Defence is hopeful that the requested postponement of the Confirmation start date will avail the necessary opportunity for the Defence to engage further with the potential witnesses and allay some of these concerns.
14. Specifically, during the visit by a VWU official to Nairobi on 5th August 2011 to explain the requirements of VWU on the Witnesses, the Defence was informed that a mandatory medical examination must be undertaken. The Defence was not

aware of this requirement and since it is significantly material, efforts were made to bring this to the attention of the potential witnesses. Regrettably, a number of key witnesses who were slated to produce written testimonies in support of the Defence have suddenly demurred from giving evidence, out of a fear they will be forced to submit to a requisite medical examination should they ultimately be called to The Hague to testify. The evidence of these witnesses would have addressed factual issues of significant import to the Defence case at Confirmation—the witnesses included alleged attendees at meetings where violence was allegedly planned as well as persons stationed at medical facilities where victims of the violence were brought in and treated.

15. As the Chamber can appreciate, dealings with witnesses are sensitive matters and perceptions of the treatment an individual will face should they choose, or be compelled, to take the witness stand can sometimes be overstated or even distorted. Regardless of the cause of apprehension, the Defence is now in a position in which it cannot with certainty rely on the evidence of these key witnesses. The Defence therefore needs time to re-strategise and secure other witness testimony to advance its points at Confirmation—a process which, as outlined in detail by the Ruto and Sang Application, cannot happen in a matter of a few days.
16. Alternatively, should there remain a possibility that the witness testimony of the previously secured witnesses can still be obtained, additional time beyond the current Confirmation state date and related disclosure deadlines is still needed. The Defence therefore needs time not only to speak to these witnesses to give them adequate assurances regarding the process, but to also properly take their statements should they concede to give evidence.
17. A number of other potential witnesses who owing to certain specific roles they played in the itinerary of Mr. Kosgey during the period under consideration are not replaceable, have tentatively agreed to provide written testimonies subject to an approval from their employers. Some work for the Government of Kenya while others work for multinational corporations. The Defence has been informed

that due to latent bureaucracies in these organizations, it is unlikely that such authorizations can be granted within the current Confirmation start date and disclosure deadlines.

Large Volume of Disclosures and Other Filings and Constraints on Staff

18. As submitted above, the Kosgey defence adopts in full the reasoning advanced by the Ruto and Sang Defences in paragraphs 16-20 of the Application, namely that additional time is needed to process the raft of disclosures and other filings given (a) the heavy volume and (b) the constraints posed by limited court resources on the ability of staff to process the disclosure quickly and efficiently.

19. In particular, the Prosecution's disclosures notwithstanding the sheer volume entailed a maze of confusing arrangements of documents where one witness records numerous transcripts and statements, makes references to various exhibits all disclosed as separate documents without any linkage chart thereby creating a mammoth task on the Defence to marry documents for purposes of a meaningful analysis. This has not only placed serious constraints on the limited staff available to the Defence but it has also caused considerable difficulty in identifying relevant factual issues that require evidentiary rebuttal.

20. The Defence further notes that in the matter of the *Prosecutor v. Muthaura, Kenyatta and Ali*, the Single Judge of the Pre-Trial Chamber recognised that the large number of victims' applications in the Kenyan cases, coupled with the "staff constraints" faced by the Defence team for Mr. Ali, constituted "good cause" for an extension in the deadline for Mr. Ali to file observations on victims' applications to participate in the proceedings.⁶ The amount of filings and the staff constraints faced by the *Ruto et al* case have been similar—and have cut away at the time needed for analysis of disclosure and investigations in preparation for Confirmation.

⁶ *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, para. 11.

21. Consequently, the Defence humbly submits that these factors taken individually and even more so in the aggregate prevent it from meeting the Confirmation start date and disclosure deadlines as currently set by the Single Judge.

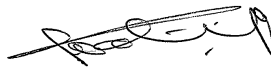
IV. Conclusion & Request for Relief

22. As noted above, the Defence adopts the request for relief set forth by the Ruto and Sang defences at paragraphs 21 of the Application in full, namely:

- i. that the Pre-Trial Chamber postpone the Confirmation Hearing for six weeks;

AND additionally seeks:

- ii. that the Defence be granted a Three week extension of time to disclose its evidence to the Prosecution.



George Odinga Oraro
On behalf of Henry Kiprono Kosgey

Dated this 12th day of August 2011

At Nairobi, Kenya