

**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**



Original: English

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**

**Prosecution's Request for an Order Directing the Defence to Comply with its  
Disclosure Obligations**

**Source:** Office of the Prosecutor

**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 the Defence**

Mr. Kioko Kilukumi Musau, Mr. Joseph Kipchumba Kigen-Katawa, Mr. David Hooper QC, Mr. Kithure Kindiki, Mr. George Odinga Oraro, Mr. Julius Kipkosgei Kemboy, Mr. Allan Kosgey, Mr. Joel Kimutai Bosek and Mr. Philemon K.B. Koech

**Legal Representatives of Victims**

**Legal Representatives of 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**

**REGISTRY**

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**Registrar**

Ms. Silvana Arbia

**Deputy Registrar**

Mr. Didier Preira

**Victims and Witnesses Unit**

Maria Luisa Martinod-Jacome

**Defence Support Section**

**Detention Section**

**Victims Participation and Reparations Section**

**Other**

1. At 19:55 on 11 August 2011, the Prosecution was notified of an urgent application by William Samoei Ruto and Joshua Arap Sang to delay the confirmation hearing for six weeks ("Ruto and Sang's Request").<sup>1</sup> On 12 August 2011, Henry Kosgey joined that request and also sought an extension of three weeks within which to make its required disclosures.<sup>2</sup>
2. These requests at best reflect a significant distortion of the confirmation process, transforming it excessively into a full-blown trial on the merits that is unprecedented in this Court and beyond the purpose of the hearing itself. Alternatively, they appear to be an effort to delay the proceedings for unspecified other reasons.
3. The Prosecution will oppose the Defence Requests, but it is unable to respond with detailed factual and legal arguments to these last-minute applications in a day. It will file its substantive responses, therefore, next week. In the interim, however, the Prosecution requests that the Chamber require the Defence to proceed with their disclosures on 16 August 2011, in accordance with the Single Judge's "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 Between the Parties'"<sup>3</sup> and its obligations under Rule 121(6) of the Rules of Procedure and Evidence ("the Rules").
4. This will ensure that, in the event that the Chamber denies the Defence Requests and the confirmation hearing proceeds as scheduled, the Prosecution will have had sufficient time to prepare. Directing that disclosure proceed as scheduled – preserving the status quo while the matter is under deliberation – will also give the

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<sup>1</sup> ICC-01/09-01/11-255.

<sup>2</sup> ICC-01/09-01/11-256, p. 9.

<sup>3</sup> ICC-01/09-01/11-62, p. 13.

Chamber the opportunity to reach a reasoned decision without creating serious prejudice to the Prosecution or to its own ability to prepare for the hearing.

5. Nor should an order adhering to the long-existing schedule prejudice the Defence. First, the Rule and the order both expressly state that the Defence need not offer any evidence, in line with the limited purpose of the confirmation hearing. Second, it must be presumed that the Defence has proceeded with good faith and intended throughout this process to comply with the time limits and accordingly have been preparing their case. It thus must be presumed that the Defence are in a position to identify and disclose at least that part of their evidence that does not include (a) the witness statements that the Defence has thus far failed to obtain or (b) evidence it hoped to receive in response to “informal and formal requests for information” made to unidentified Kenyan government and non-government institutions and authorities.<sup>4</sup>
6. As to Mr. Kosgey’s separate application to delay disclosure by three weeks, Rule 121(6) of the Rules provides that “if the person intends to present evidence [...] he or she shall provide a list of that evidence to the Pre-Trial Chamber no later than 15 days before the date of the hearing. The Pre-Trial Chamber shall transmit the list to the Prosecution without delay.” This is not a discretionary requirement. On 20 April 2011, the Chamber also 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”.<sup>5</sup> That Order also was not discretionary.
7. As noted above (para. 5 above), it must be presumed that the Defence for all the suspects were aware of the obligation under the Rule and the Chamber’s order; that

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<sup>4</sup> ICC-01/09-01/11-255, para. 3(iii).

<sup>5</sup> ICC-01/09-01/11-62, p. 13.

they have been working towards disclosure in a bona fide intent to comply with them; and that they should be prepared to effectuate disclosure as required. If the confirmation hearing is delayed, the Defence may request to supplement this disclosure. If the hearing proceeds according to the current schedule, the Defence need not introduce any evidence at all, but if it chooses to do so it will be limited to the use of evidence that was disclosed on time and in accordance with the Rule and the Chamber's order. Otherwise, the Prosecution and the Chamber will be severely handicapped by being required to proceed at the scheduled confirmation hearing without any notice as to the defence evidence.



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Luis Moreno-Ocampo

Prosecutor

Dated this 12th day of August 2011

At The Hague, The Netherlands