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**International
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Court**

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PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

SITUATION IN REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR v. WILLIAM SAMOEI RUTO AND JOSHUA ARAP SANG

Confidential

with Confidential Annex A and Confidential *Ex Parte* Annexes B - M

**Prosecution's Request to Amend the Updated Document Containing the Charges
Pursuant to Article 61(9) of the Statute**

Source: Office of the Prosecutor

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

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Introduction

1. Pursuant to Article 61(9) of the Rome Statute ("the Statute") and Rule 128 of the Rules of Procedure and Evidence ("the Rules"), the Prosecution seeks permission to amend the charges for the limited purpose of extending the temporal scope of the crimes alleged in Counts 1 to 6 in the greater Eldoret area from "1 January to 4 January 2008" to "30 December 2007 to 4 January 2008." This amendment does not seek to add additional or more serious charges. Rather in light of evidence obtained subsequent to the confirmation hearing, the Prosecution seeks to align the temporal scope of the charges contained in the Updated Document Containing the Charges (DCC)¹ with the position that it has maintained in its original DCC. Given the limited nature of the amendment, the fact that all the evidence disclosed to the Defence since 9 January 2013 has encompassed the larger temporal scope, and the fact that the Defence has had adequate notice on this issue, the Prosecution submits that the prejudice to the Defence at this stage, if any, is minimal.²

Confidentiality

2. This filing and Annex A are classified as confidential, as they contain references to statements by witnesses whose identities are not public. The Pre-Trial Chamber has been provided with unredacted copies of these statements in the confidential *ex parte* annexes. The Defence has previously been provided with redacted versions of the annexed statements, which the Defence can locate by their ERNs.

¹ And, in due course, the Pre-Trial Brief.

² The exact date of initial disclosure for all witness statements discussed in this application is provided in the citation for each statement. All statements were disclosed between 30 November 2012 and 9 January 2013.

Background

3. Each count in the Updated DCC alleges the "1 January to 4 January 2008" timeframe for crimes occurring in greater Eldoret.³ The Prosecution had originally charged that these crimes began "on or about 30 December 2007" at the pre-confirmation stage.⁴ The Pre-Trial Chamber, in its Decision on Confirmation, did not find sufficient evidence to support the earlier temporal scope for crimes in greater Eldoret, and subsequently made a factual finding limiting the timeframe to "1 January to 4 January 2008."⁵
4. On 21 August 2012, the Prosecution submitted the Updated DCC, again alleging that the crimes occurring in greater Eldoret began "on or about 30 December 2007."⁶
5. On 20 November 2012, the Trial Chamber issued an order regarding the content of the charges directing the Prosecution to submit a modified "Charges" section of the Updated DCC.⁷
6. On 28 November 2012, the Prosecution re-filed the Updated DCC which again contained language that the crimes in greater Eldoret began "on or about 30 December 2007."⁸
7. On 28 December 2012, the Trial Chamber found that the Pre-Trial Chamber had "specifically declined to confirm part of the charges in relation to the temporal scope of the crimes," and ordered the Prosecution to amend the Updated DCC to reflect the limited temporal scope contained within the Confirmation Decision.⁹
8. On 7 January 2013, the Prosecution re-submitted the Updated DCC, which conformed to the Trial Chamber's decision on its content by limiting the

³ Updated Document Containing the Charges Pursuant to the Decision on the content of the updated document containing the charges (ICC-01/09-01/11-522), ICC-01/09-01/11-533. The incidents in question are described in paragraphs 71-75 of Annex A, and are charged in each of the six counts.

⁴ Prosecution's Document Containing the Charges and List of Evidence submitted pursuant to Article 61(3) and Rule, 121(3), ICC-01/09-01/11-242 (notified on 2 August 2011).

⁵ ICC-01/09-01/11-373, paragraphs 349(b) and 367(b).

⁶ Prosecution's Updated Document Containing the Charges pursuant to the Trial Chamber's Order (ICC-01/09-01/11-439), ICC-01/09-01/11-448.

⁷ Order regarding the content of the charges, ICC-01/09-01/11-475.

⁸ Prosecution's Submissions of the Charges against William Samoei Ruto and Joshua Arap Sang, ICC-01/09-01/11-486-AnxA, Counts 1-6.

⁹ Decision on the content of the updated document containing the charges, ICC-01/09-01/11-522, paragraph 29.

temporal scope of the crimes alleged to have occurred in greater Eldoret to "1 January to 4 January 2008."¹⁰ On 25 January 2013, the Prosecution submitted a corrigendum, correcting the paragraph numbering thereof.¹¹

9. On 25 February 2013, the Prosecution submitted the "Prosecution's Updated Pre-Trial Brief," alleging that crimes in greater Eldoret began "on or about 30 December 2007, and in the wake of the announcement of the presidential elections."¹²

Submissions

10. Since the Confirmation Hearing, the Prosecution has obtained evidence from several crime base witnesses – specifically, P-0189, P-0376, P-0378, P-0405, P-0410, P-0423, P-0438, P-0469, P-0475, P-0487, P-0508, and P-0535 - that the crimes listed under "Incident 2" of the Updated DCC in Kimumu, Langas, Yamumbi, and Huruma commenced soon after the announcement of the presidential election results on 30 December 2007. This is new evidence that was not available at the time of the Confirmation Hearing. The relevant witness statements are provided as annexes to this application. The temporal scope of the crimes alleged at Kiambaa, also within greater Eldoret, is not affected by the new evidence.

New evidence

11. In Kimumu, Witness P-0189 heard gunshots and reports of Kikuyu buildings being burned on the night of 30 December 2007.¹³ Witness P-0469 was part of a group of Kikuyu forced to flee the area after seeing the targeted burning of their homes on 30-31 December 2007, and also witnessed an elderly Kikuyu man being beaten in the street by Kalenjin youths on 30 December.¹⁴ Witness P-0475 suffered similar losses and saw the same beating incident, and later heard that victim died

¹⁰ ICC-01/09-01/11-533-AnxA.

¹¹ ICC-01/09-01/11-533-AnxA-Corr.

¹² ICC-01/09-01/11-625-Conf-AnxB, paragraph 159.

¹³ Annex B, Statement of P-0189, KEN-OTP-0076-0515, at 0519. This statement was initially disclosed on 9 January 2013.

¹⁴ Annex C, Statement of P-0469, KEN-OTP-0082-0072, at 0079-0084. This statement was initially disclosed on 9 January 2013.

from his injuries.¹⁵ She also saw local Kalenjin on 31 December directing groups of Kalenjin youths arriving via lorry to burn only Kikuyu houses in Kimumu.¹⁶

12. On 31 December 2007 in Langas, Witness P-0189 saw looting, including her own home, the burning of Kikuyu property, roadblocks established by Kalenjin, and several Kikuyu who had been shot by arrows, some of whom were dead.¹⁷ Witness P-0376 states that a building of his was burned down during the night of 30 December 2007, and his house was burned the next day.¹⁸ Also on 31 December 2007, he witnessed a group of Kalenjin youths armed with bows and arrows, the selective burning of Kikuyu properties, and Kikuyu who had been killed or wounded by arrows or blunt force trauma.¹⁹ Witness P-0410 saw Kikuyu homes being looted in Langas on 30-31 December 2007, Kalenjin youth patrolling the area with grey-painted faces, and Kikuyu arriving at the Langas police station with arrow wounds.²⁰ He also heard a KASS FM broadcast on 31 December 2007 calling for the Kalenjin to "evacuate the foreigners" from the Rift Valley.²¹ Witness P-0438 saw large organised groups of Kalenjin youths passing through Langas on 31 December 2007.²² He witnessed his home and those of twenty other Kikuyu looted and burned by a group of Kalenjin, and saw a young girl hacked to death as she ran from her home.²³
13. In Yamumbi, Witness P-0378 recalls Kikuyu houses near the Kalenjin neighbourhood burning during the night of the announcement of the election results,²⁴ and the next day (31 December 2007) saw groups of Kalenjin youth with ash-covered faces, armed with bows and arrows, burning Kikuyu properties and

¹⁵ Annex D, Statement of P-0475, KEN-OTP-0082-0051, at 0056. This statement was initially disclosed on 9 January 2013.

¹⁶ *Ibid.*, at 0058.

¹⁷ Annex B, Statement of P-0189, KEN-OTP-0076-0515, at 0520-0524.

¹⁸ Annex E, Statement of P-0376, KEN-OTP-0076-0537, at 0541-0545. This statement was initially disclosed on 9 January 2013.

¹⁹ *Ibid.*

²⁰ Annex F, Statement of P-0410, KEN-OTP-0083-0348, at 0356-0359. This statement was initially disclosed on 9 January 2013.

²¹ *Ibid.*, at 0385.

²² Annex G, Statement of P-0438, KEN-OTP-0080-0315, at 0324-0330. This statement was initially disclosed on 9 January 2013.

²³ *Ibid.*, at 0328.

²⁴ It may thus be deduced that this would have been 31 December 2007.

chasing them from their homes.²⁵ She also saw her husband hacked to death in the street on 31 December 2007 by around 10 Kalenjin.²⁶ Witness P-0405 was warned by a Kalenjin woman on 30 December 2007 that a Kalenjin attack on Yamumbi was imminent; later that day he saw Kikuyu houses being burned and a group of about 10 Kalenjin youths with painted faces and bows and arrows moving towards Yamumbi.²⁷ The burning of Kikuyu homes by Kalenjin continued into the next day (31 December 2007), forcing the Kikuyu to flee the area.²⁸ Witness P-0423 saw his house as well as other Kikuyu homes set alight by Kalenjin youths on 30-31 December 2007, and also saw the body of his friend who had been cut to death defending his home on 31 December.²⁹

14. In Huruma, Witness P-0487 saw his Kikuyu neighbours' houses being burned on 30 December 2007 by 30-40 Kalenjin youths armed with bows and arrows.³⁰ The next day, he also saw large groups of Kalenjin youths arriving via lorry and group of Kalenjin murder a Kikuyu elder murdered using machetes and rungas.³¹ Witness P-0508³² and Witness P-0535³³ saw Kalenjin burning Kikuyu homes on 30-31 December 2007, and P-0508 also witnessed Kalenjin shooting Kikuyu with bows and arrows on 31 December 2007.

Legal basis

15. Accordingly, pursuant to Article 61(9) of the Statute and Rule 128 of the Rules, the Prosecution requests the Pre-Trial Chamber's permission to amend the final

²⁵ Annex H, Statement of P-0378, KEN-OTP-0080-0158, at 0161-0163. This statement was initially disclosed on 9 January 2013.

²⁶ *Ibid.*, at 0162-0163.

²⁷ Annex I, Statement of P-0405, KEN-OTP-0078-2216, at 2225-2232. This statement was initially disclosed on 9 January 2013.

²⁸ *Ibid.*, at 2229-2232.

²⁹ Annex J, Statement of P-0423, KEN-OTP-0080-0134, at 0140-0145. This statement was initially disclosed on 30 November 2012.

³⁰ Annex K, Statement of P-487, KEN-OTP-0085-0046, at 0055. This statement was initially disclosed on 9 January 2013.

³¹ *Ibid.*, at 0056-0058.

³² Annex L, Statement of P-0508, KEN-OTP-0088-0554, at 0557-0559. This statement was initially disclosed on 9 January 2013.

³³ Annex M, Statement of P-0535, KEN-OTP-0088-0570, at 0574-0577. This statement was initially disclosed on 2 January 2013.

Updated DCC to include the slightly wider temporal scope in all counts for crimes alleged in the greater Eldoret area.

16. Article 61(9) of the Statute provides that “[a]fter the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges.” It further specifies that “[i]f the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held.” Thus, a hearing is not required for amendments which do not fall into either of these two categories.
17. The Prosecution’s proposed amendment to the final Updated DCC does not involve the addition of new charges nor the substitution of more serious charges. The proposed amendment is a minor adjustment to the temporal scope of some of the alleged crimes by a matter of two days. This does not affect the legal characterisation of the underlying facts for the crimes against humanity consisting of murder, forcible transfer, and persecution, nor does it affect any element for establishing the individual criminal responsibility of the accused. The Prosecution’s main factual allegation is likewise unaffected – that is, the crimes in greater Eldoret consisted of the systematic targeting of Kikuyu and their property by Kalenjin. Nor does it affect the evidence which the Prosecution intends to present in support of these charges.³⁴ For these reasons, a hearing under Article 61(9) is not required.
18. If permission is granted, the Prosecution proposes to amend the Updated DCC as contained in Annex A, which is a tracked-changes version of the document.
19. The Defence has been on notice of the Prosecution’s intention to prove that the crimes in greater Eldoret began on or about 30 December 2007 since at least the Confirmation Hearing. The Prosecution has maintained that position in every subsequent filing, other than in the Updated DCC after direct order from the Trial Chamber to narrow the temporal scope of the charges. The Defence has

³⁴ Even if the temporal scope were not amended, the evidence of these witnesses would still be relevant to establishing whether crimes were subsequently committed during the period 1 – 4 January.

been provided with the statements of these new witnesses since 9 January 2013. Furthermore, the proposed amendment is a minor, technical change that does not affect the underlying facts and events constituting the actual crimes. As such, the prejudice to the Defence on its trial preparation should be negligible.

20. Conversely, the prejudice to the Prosecution if the amendment is denied is monumental. It would raise the risk of the Trial Chamber excluding a significant portion of the Prosecution's case because of a minor, correctible detail, despite the overwhelming evidence now available to support the original temporal scope. Therefore, in the interests of justice, the amendment to the charges should be permitted.

Conclusion

21. The Prosecution accordingly requests that the Pre-Trial Chamber grant permission to amend the charges as proposed in this application and illustrated in Annex A.



Fatou Bensouda, Prosecutor

Dated this 22nd day of July 2013

At The Hague, the Netherlands