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

Date: 2 May 2011

PRE-TRIAL CHAMBER II

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

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

***THE PROSECUTOR v. WILLIAM SAMOEI RUTO, HENRY KIPRONO KOSGEY
AND JOSHUA ARAP SANG***

Public

**Henry Kiprono Kosgey Response to Prosecutor's Application for Leave to Appeal
the 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**

Source: Defence

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

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
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**Victims Participation and Reparations
Section**

Other

Introduction

1. The Defence respectfully requests the Pre-Trial Chamber to reject the Prosecution's Application for leave to appeal on the grounds:¹
 - The request by the Prosecution does not meet the statutory criteria for leave to appeal.
 - The single issue raised by the Prosecution is whether the Prosecution's fair trial rights have been affected by the decision to proceed with Disclosure before the determination of the Admissibility Challenge by the Government of Kenya.

Procedural History

2. On 15th December, 2010, the Prosecutor submitted the "Prosecutor's Application pursuant to Articles 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang" (the "Prosecutor's Application")²
3. On 8th March, 2011, the Chamber issued its decision on the Prosecutor's Application, whereby the Chamber by majority decided to summon William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang (jointly, "the Suspects") to appear before it.³ The Suspects voluntarily appeared before the court on 7th April, 2011.
4. On 31st March, 2011, the Government of Kenya (the "Government") filed an Application requesting the Pre-Trial Chamber to determine that the case against the Suspects is inadmissible (the "Admissibility Challenge")⁴

¹ Decision on the Prosecution's Application Requesting Disclosure after a Final Resolution of the Government of Kenya's Admissibility Challenge. ICC-01/09-01/11-62, 20th April, 2011

² ICC-01/09-01-09/11

³ 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.

⁴ ICC-01/0-01/11-19.

5. On 4th April, 2011, the Chamber issued the “Decision on the Conduct of Proceedings” following the Application by the Government pursuant to Article 19 of the Rome Statute in which it required written observations on the Admissibility Challenge to be made by parties not later than Thursday 28th April, 2011. The Chamber additionally observed that, “being keen to expedite the proceedings and avoid any unnecessary delay, deems it sufficient to confine the engagement of the parties in the Article 19 proceedings to providing written observations.”⁵
6. On 26th April, 2011, the Prosecution filed “the Prosecution’s Application Requesting Disclosure after a Final Resolution of the Government of Kenya’s Admissibility Challenge and Establishing a Calendar for Disclosure”⁶
7. The Defence hereby files its response.

Submissions

The Application does not meet the statutory criteria for Leave to Appeal

8. The Admissibility Challenge under Article 19 and the Confirmation Hearing are separate and concurrent proceedings under the Statute. The Admissibility Challenge can be brought by the Suspect or the State prior to the commencement of a trial. However, for the State, the Application ought to be made as soon as possible. In the event the Court may grant leave for an Admissibility Challenge to be made thereafter in exceptional circumstances. Confirmation Hearings on the other hand commences with the surrender or appearance of the Suspect before the Court, which confers upon him the

⁵ Pre-Trial Chamber II, Decisions on the conduct of the Proceedings following the Application of the Government pursuant to Article 19 of the Rome Statute” ICC-01/09-011-31 para 10

⁶ Prosecution’s Application for leave to appeal the “Decision on the prosecutions Application requesting disclosure after a final resolution of the Government of Kenya’s Admissibility Challenge and Establishing a Calendar for Disclosure” ICC-01-09-01/11-66

protection afforded by Article 67 and by Rule 121 of the Rules of Procedure and Evidence which requires the Chamber to set the date on which it intends to hold a hearing to confirm the charges.⁷

9. Although the Statute suspends investigations upon an Admissibility Challenge by the State, such suspension does not affect the validity of investigations conducted by the Prosecutor prior to the Application, and in any event, the Prosecutor can, with leave of the Court, pursue necessary investigative steps or complete statement or testimony of witnesses.⁸

10. The procedures to be followed in both the Admissibility Challenge and the Confirmation Hearings have been determined⁹ with the view to expediting the proceedings with the intention of fulfilling the statutory mandate in respect of each proceeding.

11. The Prosecution's Request for Leave to Appeal is based, *inter alia*, on grounds of novelty of the Government of Kenya's Admissibility Challenge in the belief that such challenge should suspend the proceeding in respect of Confirmation. On that ground, a claim is being made in aid of suspending the disclosure obligation by the Prosecutor on the grounds that such disclosure cannot be made without exceptional protective measures which may be negated in the event of success of the challenge, The express statutory provisions under Article 19 permit such challenge to be made in the course of the proceedings or trials, and in that event, the Chamber has discretion under Rule 58, either to join the challenge to the Confirmation or trial or otherwise but in either case

⁷ Article 19 (2)(4)(5). See Article 61 and Rule 12 requiring the Pre-Trial Chamber to hold a hearing to confirm the charges within a reasonable time without limitations.

⁸ Article 19(7) and (8) suspends investigation but allows the Prosecutor to seek the authority of the court to seek necessary investigative steps, or take a statement from a witness or complete collection and examination of evidence began prior to the challenge or in co-operation with the state prevent the absconding of persons.

⁹ Decision on the conduct of the Proceedings Following the Application of the Government of Kenya pursuant to Article 19 of Rome Statute. ICC-01/09-01/11 - 31

proceed concurrently without undue delay. In these proceedings, however, the point is moot, the Chamber having made the necessary decision.

12. The Defence submits that the Prosecutor has misconstrued the effect of the Admissibility Challenge in relation to the duties and obligations to the Prosecutor. By Rule 121(1) of the Rules of Procedure and Evidence, the Suspects are subject to the provisions of Article 60 and 61 of the Statute and shall enjoy the rights set forth in Article 67 which require that at the first hearing, the Chamber sets the date on which it intends to hold a hearing to confirm the charges, now set for 1st September 2011.¹⁰ Fundamental to the rights of the Defence is the right to be informed promptly, and in detail, of the nature, causes and content of the charge and to have adequate time and facilities for the preparation of the Defence. In this respect, the Defence has to be provided with all the material specified under Articles 61, 67 of the Statute and Rules 76, 77 and 121 of the Rules of Procedure and Evidence.

13. The fact that the State has made Admissibility Challenge or indeed for that matter such challenge is made by an accused neither suspends the rights of the accused nor the obligations of the Prosecutor consequential upon such rights.¹¹

14. In the *Lubanga* case Judge Steiner held that “the final system of disclosure must satisfy the minimum guarantees provided for in Article 67 of the Statute”, among them:
 - i. The right of the Defence to know as soon and as fully as possible the evidence the Prosecution intends to rely on at the confirmation hearing and about potentially exculpatory and other materials that would assist the Defence in preparing for confirmation hearing and;

¹⁰ Rules of Procedure and Evidence, Rule 21 (11)

¹¹ Rules of Procedure and Evidence , Rule 76 (11)

ii. Adequate time and facilities to prepare the Defence.¹²

15. The Prosecution may as an adjunct to the Confirmation Proceedings continue with investigations and may amend or withdraw charges¹³ or offer additional evidence but with due notification to the Defence.

16. The other issue raised in the Prosecutor's request is the necessity to protect its witnesses and in this respect the Prosecutor claims that the choice to be made is either to take significant steps to protect the witnesses which would be costly and unnecessary if the Admissibility Challenge succeeds or redact or provide summaries of evidence. Whether the Admissibility Challenge will succeed is in the realm of conjecture and cannot form a basis for a request for leave to appeal. The necessity for providing protective measures and applying for confidentiality of any material whether by way of redaction or summary of evidence is not only provided for by Statute but has been determined by the Single Judge.¹⁴

17. There is neither inconsistency nor mutual exclusivity between the powers and duties of the Prosecutor to conduct fair investigation, collect and examine evidence and in that connection, to take measures or request for the protection of any person on the one hand, and the rights of the Defence to be fully, fairly and expeditiously, provided with the full details of the charge, the evidence and the witnesses the Prosecutor wishes to rely upon. The Statute, the Rules and the Regulations make full provision in respect thereof.

¹² Pre-Trial Chamber I; Prosecutor v. Lubanga; Decision on the final system of disclosure and the establishment of a timetable is May 2006, ICC-01/04-01/06-102

¹³ Article 61 (4) and Rules of Procedure and Evidence Rule 76 (21)

¹⁴ Decision setting the Regime for Evidence Disclosure and other Related Matters (ICC-01/09-01/11-44)

18. The scheme and arrangement for the preservation of information and evidence and in respect of the protection of persons is exhaustively prescribed by Articles 54 (3) (b), 57 (3) (c), 64 (6), 68 (5) and 93(j) of the Statute and by Rules 76 (4), 81 and 82 of the Rules of Procedure and evidence and further by Regulation 79 of the Regulations of the Registry.
19. The Prosecutor has not advanced any reason or ground to suggest that, there is any genuine concern in connection with the need for confidentiality or protective measure that cannot be addressed under the Statute. To the contrary, the submissions in connection therewith are highly exaggerated and speculative without any foundational basis whether in law or in fact.
20. As recently confirmed by the single Judge in the *Kenyatta et al* case, the right to file an interlocutory appeal under Article 82 (1) (d) of the Statute is an exceptional remedy which is only available if the party satisfies the Chamber that:
- a. The decision involves “an issue” that would significantly affect (i) both the fair and expeditious conduct of the proceedings and (ii) or the outcome of the trial; and
 - b. In the opinion of the Pre-Trial Chamber, an immediate resolution of the Appeals Chamber may materially advance the proceedings.¹⁵
21. The need to defer the interlocutory appeals until final determination except in defined circumstances as are prescribed by Statute cannot be over-emphasized. The Appeal Chamber had this to state in respect of the Situation in the Democratic Republic of Congo.

¹⁵ Prosecutor v. Kenyatta et al “Decision on the Prosecution’s Application for Leave to Appeal the Decision on the Prosecutor’s Application for Summons to Appear Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali. ICC-01/09-02/11-27, 1st April 2011, Para.6.

“Article 82(1) (d) of the Statute does not confer a right to appeal interlocutory or intermediate decisions of either the Pre-Trial or the Trial Chamber. A right to appeal arises only if the Pre-Trial or Trial Chamber is of the opinion that any such decision must receive the immediate attention of the Appeals Chamber. This opinion constitutes the definite element for the genesis of a right to appeal in essence, the Pre-Trial or Trial Chamber is vested with power to state, or more accurately still, to certify the existence of an appealable issue.”¹⁶

22. The Prosecutor has failed to satisfy any of the statutory requirements for leave to appeal and it would only serve to delay the Confirmation Proceedings and repudiate the rights of the Defence as conferred by the Statute.

Conclusion

23. For reasons set out above, the Defence of Mr. Henry Kiprono Kosgey respectfully requests that the Honorable Pre-Trial Chamber to reject the Prosecution’s request for leave to appeal on the grounds specified above.



George Odinga Oraro
On behalf of Henry Kiprono Kosgey

Dated this 2nd day of May, 2011

At Nairobi, Kenya

¹⁶ Situation in the Democratic Republic of Congo (ICC-01/04-168). Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, para.20.