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

Date: 6 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

**Response on behalf of Mr. William Samoei Ruto and Mr. Joshua Arap Sang to the
'Prosecution's Application for Extension of Time Limit for Disclosure'**

Source: Defence

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

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1. Introduction

1. The Single Judge has the power to modify any deadlines established by the Judge upon demonstration of good cause.¹ Nonetheless, the 'Prosecution's Application for Extension of Time Limit for Disclosure' (the Application), not only seeks to modify the deadlines applicable to the Prosecution, it also seeks to 'shrink' the amount of time available to the Defence for its preparation for the confirmation hearing.²
2. In so doing, the Prosecution's Application ultimately requires the Single Judge to reverse the previous legal findings, which underpin the disclosure calendar, in particular, as concerns the right of the Defence to adequate time and facilities to prepare for the confirmation hearing. This aspect of the Application should therefore be subject to the more stringent requirements that apply to requests for reconsideration.³
3. None of the reasons cited by the Prosecution constitute good cause to vary the deadline, and the Prosecution has failed to demonstrate that compliance with the Single Judge's findings is predicated on clear legal errors or that it would manifestly affect the fairness of the proceedings. To the contrary, rather than promoting the fairness of the proceedings, the Prosecution's request to extend the deadline for filing redaction requests, whilst at the same time, maintain the date for the confirmation hearing and the applicable disclosure dates for the Defence, would in fact frustrate it by depriving the Defence of the right to adequate time and facilities to prepare its case.

¹ Regulation 35(2) of the Regulations of the Court.

² ICC-01/09-01/11-77, 2 May 2011.

³ In the Prosecutor v. Lubanga, the standard has been described as requiring the party to demonstrate that the legal reasoning is manifestly unsound or that reconsideration is required to prevent manifestly unsatisfactory consequences. Decision on the defence request to reconsider the "Order on numbering of evidence" of 12 May 2010, ICC-01/04-01/06-2705, 30 March 2011, at para. 18.

4. The Prosecutor's Application is a fourth attempt to achieve orders to avoid or otherwise delay and or compromise disclosure, after motions to the same effect have already been rejected by the Court on three previous instances. The Prosecutor's initial three instances to avoid or otherwise delay and/or compromise disclosure are firstly the application made orally at the initial appearance on **7 April 2011** rejected by the court at the same sitting;⁴ secondly the application dated **14 April 2011** seeking to stay disclosure pending decision on Government of Kenya's application on Admissibility dismissed by the Pre-Trial Chamber II on the ground that a motion of admissibility stays investigations, not proceedings;⁵ and thirdly, the application dated **13 April 2011** seeking leave to appeal.⁶ The Prosecutor's application herein is a creative design to circumvent orders already deprived and withheld by the Court and borders on abuse of court process.

2. Procedural History

5. On 7 April 2011, the Honourable Single Judge issued her 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters' (the First Disclosure Decision), which set out general principles concerning disclosure.⁷
6. On 20 April 2011, the Single Judge 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' (the Second Disclosure Decision), in which the Single Judge set out

⁴ Transcript of 7 April 2011, at page 18.

⁵ 'Prosecution's application requesting disclosure after a final resolution of the Government of the Republic of Kenya's admissibility challenge', ICC-01/09-01/11-52.

⁶ 'Prosecution's Application for leave to Appeal the "Decision Setting the Regime for Evidence Disclosure and Other Related Matters"', ICC-01/09-01/11-50.

⁷ ICC-01/09-01/11-44.

specific deadlines by which the parties were to disclose materials, and file requests for protective measures before the Chamber.⁸

7. On 2 May 2011, the Prosecution filed its Application for Extension of the Time Limit for Disclosure, in which the Prosecution requested the Single Judge to revert back to the deadlines allegedly established by the First Disclosure Decision, as concerns the filing of requests for protective measures before the Chamber.
8. The Defence of Mr. Ruto and Mr. Sang (the Defence) hereby files its response.

3. Submissions

9. The Defence firstly observes that the Prosecution's Application is based on a false premise: that the "Second Disclosure Decision requires the Prosecution to disclose 97% of its evidence 80 days in advance of the deadline originally established by the first disclosure decision".⁹
10. In the First Disclosure decision, the Single Judge very clearly stated that:

" it is the view of the Single Judge that the deadlines established by rule 121 of the Rules are only indicative of the minimum time limits that a party can avail itself to comply with its disclosure obligations. This conclusion finds support in the express wording of "no later than", reflected in rule 121(3)-(6) and (9) of the Rules. Thus, the early initiation of the process of disclosure better guarantees the expeditiousness of the proceedings, guided by the overarching principle of fairness. For these reasons, the Single Judge encourages the parties to fulfill their disclosure

⁸ ICC-01/09-01/11-62.

⁹ At para. 3.

obligations as soon as practicable and not only on the date when the deadline as provided by the statutory documents expires.”¹⁰

11. The Single Judge thus did not condone the practice of disclosing materials thirty days before the deadline. It is also entirely meaningless for the Prosecution to request the Chamber to revert back to the deadlines established in the First Disclosure Decision; the First Decisions did not set out any deadlines as concerning the filing of requests for redactions, but rather expressly stated that

“[w]ith respect to the different requests related to protective measures for witnesses including redactions, the Single Judge wishes to make clear that any such request must be submitted as soon as practicable, but no later than the date which shall be specified in a calendar to be issued in due course. This prevents unnecessary delays for the start of the confirmation hearing and ensures that the Defence is put on sufficient notice for its preparation.”¹¹

12. The Single Judge’s final order that the parties shall “submit the evidence in due time, preferably much earlier than the deadlines as envisaged in rule 121(3)-(6) and (9) of the Rules”¹² must therefore be interpreted in a manner which is consistent with these earlier findings: namely, that the Prosecution should initiate disclosure as soon as practicable, and that a separate regime for filing redactions requests would be required in order to ensure that the Prosecution would then be in a position to disclose the redacted materials sufficiently in advance of the statutory deadlines.

¹⁰ At para. 10.

¹¹ At para. 12.

¹² At page 10.

13. The Prosecution has also predicated its Application on the argument that “[t]hese proposals will better respect the Prosecution’s right to a fair trial, including the right to most efficiently and effectively present its case.”¹³ The Prosecution has not adduced any jurisprudential authority for this proposition. The principle of equality of arms and adversarial proceedings equates to a right for the Prosecution to present its case before the Court under conditions which do not place the Prosecution under a procedural disadvantage vis-à-vis its opponents.¹⁴ It does not vest the Prosecution with the right to present its case in the most effective and efficient manner, particularly if such a goal were to contravene the right of the Defence to adequate time and facilities.

14. In this regard, the Prosecution’s right to fairness has not been interpreted as a right to have the most optimum conditions to win its cases, but rather as a right to implement its duties under article 54 of the Statute as an impartial minister of justice,¹⁵ in a manner which is consistent with the rights of the Defence.¹⁶ The latter includes the Defence’s right to disclosure and right to adequate time and facilities to review such disclosure prior to the confirmation hearing.¹⁷

¹³ Application, at para. 1.

¹⁴ See Separate Opinion of Judge Pikis, Prosecutor v. Lubanga, Decision on the Prosecutor's Application for Leave to Reply to 'Conclusions de la défense en réponse au mémoire d'appel du Procureur', ICC-01/04-01/06-424, at para 6.

¹⁵ DRC situation, 'Decision On The Prosecution's Application For Leave To Appeal The Chamber's Decision Of 17 January 2006 On The Applications For Participation In The Proceedings Of Vprs 1, Vprs 2, Vprs 3, Vprs 4, Vprs 5 And Vprs 6, 31 March 2006, ICC-01/04-135, at para 39.

¹⁶ Prosecutor v. Lubanga, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 21 October 2008, ICC-01/04-01/06-1486 at para. 42.

¹⁷ Trial Chamber I has cited ECHR case law with approval in the Lubanga case to the effect that the principle of equality of arms translates to a Prosecutorial “obligation to disclose any material in their possession, or to which they could gain access, which may assist the accused in exonerating himself or in obtaining a reduction in sentence. This principle covers a wide variety of evidential possibilities, and it includes evidence which may undermine the credibility of a prosecution witness.” Prosecutor v. Lubanga, Decision on the consequences of non-disclosure of exculpatory materials covered by

15. In any case, the Prosecution has failed to demonstrate how compliance with the present deadlines would procedurally disadvantage the Prosecution vis-à-vis the Defence in terms of its ability to present its case.
16. The Prosecution has estimated that it will seek redactions for approximately 606 documents (comprising 11000 pages).¹⁸ This figure constitutes in terms of pages, approximately 85% of the entire evidential basis for the confirmation hearing.¹⁹ The Prosecution, which has a vast array of lawyers, investigators, analysts and interns who have been working on this case for several years, claims that it would be unfair to require the Prosecution to finalise its review of the protective elements of these materials by 15 May 2011, which is over almost two months after the date of the Decision and at least five months since the documents were collected by the Prosecution.
17. The Prosecution is nonetheless seeking to foist the Defence with the impossible burden of attempting to conduct a comprehensive review of these documents in connection with the substantive aspects of the case, whilst simultaneously investigating and finalising its own list of evidence, within only thirty days.
18. It thus beggars belief that the Prosecution can claim that compliance with this deadline would procedurally disadvantage the Prosecution in comparison with the ability of the Defence to present its case. To the contrary – the

Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, ICC-01/04-01/06-1401, 13 June 2008, at para 79, citing *Jespers v. Belgium*, no 8403/78, Commission's report of 14 December 1981, DR 27, paragraph 58.

¹⁸ Application, at para. 15.

¹⁹ The Prosecution has estimated that there are approximately 12976 pages of documents in total, which are relevant to the case. Application at para. 14.

prosecution is seeking to further tilt an already unbalanced playing field in its favour.

19. The Prosecution is one organ and is thus well aware of the past jurisprudence and practice of the Court concerning redactions relating to the confirmation process. These have demonstrated that filing a request for redactions before the Chamber can trigger a lengthy process of *ex parte* discussions and subsequent appellate litigation concerning the scope of redactions, which can in turn, severely delay disclosure to the Defence.

20. The Prosecution has therefore been cautioned on many occasions and in different cases that it must organise itself in such a manner that it can submit its request for protective measures timeously, well in advance of the proceedings in question.²⁰ As observed by the Single Judge,

[a]ccording to the statutory documents of the Court, the Prosecutor is the triggering force of the proceedings, in the sense that the determination as to whether, and when, an application for a warrant of arrest or a summons to appear is to be filed before the Chamber falls squarely within his prerogatives. The Single Judge thus expects that, before approaching the Chamber with his application for summonses to appear for the suspects, the Prosecutor has carefully reviewed the

²⁰ Prosecutor v. Bemba, Judgment on the appeal of Mr. Jean-Pierre Bemba Gombo against the decision of Pre-Trial Chamber III entitled Decision on application for interim release, ICC-01/05-01/08-323, 16 November 2008, at para 33; Prosecutor v. Lubanga, Decision issuing a confidential and a public redacted version of "Decision on disclosure issues, responsibilities for protective measures and other procedural matters, ICC-01/04-01/06-1311-Anx2, 8 May 2008, at paras 80-81; Prosecutor v. Katanga and Ngudjolo, Judgment on the appeal of the Prosecutor against the "Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules" of Pre-Trial Chamber I, ICC-01/04-01/07-776, 26 November 2008, at para 96. Prosecutor v. Katanga and Ngudjolo, Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, ICC-01/04-01/07-428-Corr, 21 April 2008 at para 82.

evidence in his possession at that time, both incriminating and exculpatory.²¹

21. The Defence is thus extremely concerned that the Prosecution is only now embarking upon an expedition to Kenya to determine if there are any other measures, other than redactions, which could secure the protection of its witnesses. If ultimately the Prosecution wishes to include these persons in the ICC protection scheme, then, as estimated in the Katanga and Ngudjolo case,²² it would take at least a further two to three months from the Prosecution's submission of its request for the witnesses to be included in the protection scheme until its implementation. If the Prosecution is permitted to proceed down this route, it would not be in a position to effect disclosure of the statements related to these witnesses until approximately mid-August.

22. It is therefore disingenuous for the Prosecution to claim that the Application will not impede Defence preparation for the confirmation hearing, and that it is in any way feasible to maintain the current date of the confirmation hearing, if its Application were to be granted.

23. The Defence also strongly takes issue with the Prosecution's assertion that unless the Prosecution is granted more time, then the only option will be to disclose heavily redacted statements or summaries.²³ Article 67 of the Statute does not require the Defence to choose between the right to be informed promptly of the nature, cause and content of the charge, and the right to have adequate time and facilities to prepare its case.

²¹ Second Disclosure Decision at para 17.

²² Prosecutor v. Katanga and Ngudjolo, Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, ICC-01/04-01/07-428-Corr, 21 April 2008 at para 61.

²³ See for example, Application at para 22.

24. The Appeals Chamber has also repeatedly confirmed that whilst the Statute and Rules permit the Chamber to redact materials or utilise summaries for the purposes of the confirmation hearing, the “overriding principle is that full disclosure should be made.”²⁴ Moreover, the implementation of protective measures, such as redactions, should not be prejudicial to the rights of the Defence and requirements of a fair and impartial trial. As such, “if non-disclosure would result in the hearing to confirm the charges, viewed as a whole, to be unfair to the suspect, the requested redactions should not be authorised.”²⁵

25. The Prosecution is also aware that if it fails to request protective measures in due time, than it may be precluded from relying upon that evidence at the confirmation hearing.²⁶ The Prosecution has clearly stated in the proceedings before the ICC that it is willing to suffer the consequences for its own case if protective measures cannot be implemented in a timely manner.²⁷

26. The Prosecution is master of its own strategy. For reasons which are not elaborated in its Application, it has decided not to prioritise the review of these documents during the preceding months, and has deferred a full exploration of alternative options to redactions until the present juncture. The Prosecution cannot claim unfairness for the consequences of its own strategic

²⁴ Prosecutor v. Katanga and Ngudjolo, Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Request for Authorisation to Redact Witness Statements’, ICC-01/04-01/07-476, 13 May 2008 at para 64.

²⁵ Prosecutor v. Katanga and Ngudjolo, Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Request for Authorisation to Redact Witness Statements’, ICC-01/04-01/07-476, 13 May 2008 at para 63.

²⁶ Prosecutor v. Katanga and Ngudjolo, Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, ICC-01/04-01/07-428-Corr, 21 April 2008 at para 83 and page 54.

²⁷ The Prosecution has stated in court filings that it would “give up witnesses, [...] give up cases if necessary, if we think the disclosure is going to jeopardise our persons”. Prosecutor v. Lubanga, Prosecution’s Document in Support of Appeal against Trial Chamber I’s decision of 8 July 2010 to stay the proceedings for abuse of process, ICC-01/04-01/06-2544, 30 July 2010, at para. 39, citing ICC-01/04-01/06-T-312, p.8.

choices, and failure to utilise the procedural avenues available to it in a diligent manner.

27. If the deadline for filing the requests for redacted material is deferred, then this will delay the date on which the material is ultimately disclosed to the Defence, which will in turn, affect the ability of the Defence to

- determine which evidence it intends to rely upon for the confirmation hearing;
- submit its own requests for redactions in a timely manner;
- finalise its review of both incriminating and exculpatory disclosure materials prior to the confirmation hearing; and
- make an informed decision as concerns its option to lodge an application on jurisdiction and or admissibility.

28. As noted above, the time frame set out in the Second Disclosure Decision was predicated on the Single Judge's legal finding concerning the fact that the statutory deadlines should be construed as minimum deadlines, which may need to be exceeded in order to respect the Defence's right to adequate and facilities.²⁸ The Prosecution has failed to adduce any grounds which would justify a reconsideration of the Single Judge's findings concerning the amount of time required by the Defence to review these materials in advance of both the Defence's own deadline to file redactions and the list of evidence, and the date of the confirmation hearing.

²⁸ Prosecutor v. Ruto et al, 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, ICC-01/09-01/11-62, 20 April 2011, at paras. 13 and 14; Decision Setting the Regime for Evidence Disclosure and Other Related Matters", ICC-01/09-01/11-44, para. 10.

29. Accordingly, and without prejudice to any other submission made by the Defence of Mr. Ruto and Mr. Sang, even if the Chamber were to find that there is good cause to delay the Prosecution's deadline for filing redacted materials, the amount of time between these deadlines and the corresponding deadlines for the Defence should be maintained. It would therefore be necessary for the Single Judge to amend the calendar for disclosure in order to push back the corresponding dates for the Defence to file its request for redactions and its list of evidence, and the ultimate date of the confirmation hearing.

4. Relief Sought

30. For the reasons set out above, the Defence respectfully requests the Honourable Single Judge to reject the Prosecution Application.

31. In the alternative, if the Single Judge extends the deadline for the Prosecution to file its requests for protective measures, then the Defence respectfully requests the Single Judge to maintain the amount of time established in the Second Disclosure Decision between these deadlines, and the equivalent deadlines for the Defence, and also the ultimate date of the confirmation hearing.



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

Dated this 6th day of May, 2011

At Nairobi, Kenya.