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

Date: 10 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 Henry Kiprono Kosgey to the 'Prosecution's Application
for Extension of Time for Disclosure'**

Source: Defence

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

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INTRODUCTION

1. On 6th April 2011, the Pre-Trial Chamber issued its “*Decision Setting the Regime for Evidence Disclosure and Other Related Matters* [the ‘First Decision on Disclosure’].¹ The Decision set out clear guidance on *inter alia*, modalities for pre-trial disclosure. It ordered the parties to submit the evidence for disclosure in due time, preferably much earlier than the deadlines as envisaged in Rule 121 (3) (6) and (9) of the Rules.

2. The Prosecution has sought to challenge the First Decision on Disclosure in two ways:
 - (i) Seeking leave to appeal the Decision, on 13 April 2011, by filing the ‘*Prosecution’s Application for Leave to Appeal the ‘Decision Setting the Regime for Evidence Disclosure and Other Related Matters’*.²

 - (ii) Applying to the Pre-Trial Chamber to postpone disclosure until final resolution of the Government of Kenya's Application, on 14 April 2011, by filing the ‘*Prosecution’s Application Requesting Disclosure after a Final Resolution of the Government of Kenya’s Admissibility Challenge’*.

3. The Pre-Trial Chamber issued its *Decision on the “Prosecution’s Application Requesting Disclosure after Final Resolution of the Government of Kenya’s Admissibility Challenge” and “Establishing a Calendar of Disclosure Between the Parties* [the ‘Second Decision on Disclosure’] on 20th April.³ In this Decision, the Chamber established a timetable and set out various time limits, the earliest being 13 May 2011, for disclosure and other related matters, based on

¹ Pre Trial Chamber 11”Decision Setting out the Regime for Evidence Disclosure and Other Related Matters”; ICC-01/09-10/11-44; 6 April 2011

² Pre Trial Chamber “Application for Leave to Appeal the Decision Setting the Regime for Evidence Disclosure and Other Related Matters; Pre Trial Chamber II; ICC-01/09-01/11-44

³ Decision on the ‘Prosecutor’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’ [Prosecutor’s Application]; ICC-01/09-01/11-62.

the date the evidence was collected. The Decision further ordered the Prosecution, *inter alia*, to submit properly justified proposals for redactions, if any, with respect to the evidence that had been collected prior to 15 December 2010, not later than Friday 13 May 2011.

4. The Prosecution originally challenged the Second Decision on Disclosure by seeking leave to appeal the Decision on 26 April 2011, by filing the *Prosecution'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 of Disclosure"*.⁴
5. The Prosecutor's Application for Leave to Appeal the First Decision on Disclosure was refused by the Pre-Trial Chamber by a decision dated 2 May 2011, *Decision on the "Prosecution's Application for Leave to Appeal the 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters'*.⁵
6. The decision on the Prosecution's Application for leave to appeal the Second Decision on Disclosure is currently outstanding. In the meantime, the Prosecutor has requested for extension of time, for compliance with the Second Decision in its 2 May 2011 *Prosecution Application for Extension of Time for Disclosure* [the 'Prosecutor's Application'].⁶
7. This Response sets out the Defence position as to the effect of what amounts to the Prosecutor's fourth challenge to the Pre Trial Chamber's Decisions on Disclosure.
8. For the reasons set out herein, it is submitted that the Prosecution's Application should be dismissed. In sum, the Defence position is as follows:

⁴ ICC-01/09-01/11-66

⁵ ICC-01/09-01/11-74

⁶ ICC-01/09-01/11-77

- i. The Prosecution's Application is designed to circumvent orders which have been carefully considered and properly made by the Pre-Trial Chamber;
- ii. The Prosecution's Application could jeopardize both the fairness and expeditiousness of the proceedings as well as the current timetable for the confirmation of charges hearing.

THE PROSECUTION'S APPLICATION

9. In essence, the Prosecutor's Application asserts that the Pre-Trial Chamber's Second Decision on Disclosure adversely affects the Prosecution's right to a fair trial, including the right to most efficiently and effectively present its case on the grounds that:

- i. It "requires the Prosecution, to review the bulk of its evidence for redaction in relatively short period of time and months before the legal deadline;⁷
- ii. It "forces the Prosecution to decide on the evidence it intends to rely on at the hearing during a period when it cannot conduct new investigations⁸, an issue already determined by the Second Decision;
- iii. "Additionally, because [of] the current security situation in Kenya, the decision imposes the need to heavily redact evidence to be disclosed, excluding a substantial proportion of its incriminating value".

10. The Prosecution "requests to disclose the witness statements collected that require redactions after a proper reevaluation of the security [situation] in Kenya...it will do it within the original deadline established by the Chamber and in accordance with the Statute", in two stages; the first group on 3rd June 2011 and the second group on 8th July 2011.⁹

⁷ Prosecution's Application; ICC-01/09-01/11; Para. 12

⁸ Prosecution's Application; ICC-01/09-01/11; Para. 4

⁹ Prosecution's Application; ICC-01/09-01/11; Para. 5 and 33

11. It is submitted by the Prosecution that allowing its request will “protect the Prosecution’s right to a fair trial, it will reduce an extremely intensive work for the Chamber and the Prosecution that could be unnecessary and will allow the Prosecutor to present the evidence required for the confirmation of the charges without exposing other witnesses whose evidence could be unnecessary to meet the standard at this stage”.¹⁰
12. The Prosecution submits that it “will disclose to the suspects all materials collected before 15 December 2011 for which no redaction is required.”¹¹

DEFENCE RESPONSE

13. The Prosecution has under the guise of making an application for extension of time, mounted a challenge to the First and Second Decisions on Disclosure having failed to obtain leave to appeal in respect of the Decisions and has additionally made this pretended application for extension without showing good or proper cause contrary to the Regulations.
 - i. The Prosecution’s Application misrepresents the orders contained within the First and Second Disclosure Decisions;
 - ii. The Prosecution’s Application is inimical to the fair hearing of the proceedings for Confirmation of the Charges and the fundamental rights of the Suspects;
 - iii. It could jeopardize the date of the confirmation of charges hearing thereby adversely impacting upon the expeditiousness of the proceedings.

Each will be dealt with in turn.

¹⁰ Prosecution’s Application; ICC-01/09-01/11; Para. 5

¹¹ Prosecution’s Application; ICC-01/09-01/11; Para. 19

Misrepresentation of Disclosure Decisions

14. The Prosecutor's Application is predicated on the inability to make an application for redaction "before the original deadline items of evidence for which redaction will be requested."¹² The First Disclosure Decision of the Pre-Trial Chamber did not establish a deadline within which the disclosure was required to be made by the Prosecutor. To the contrary, the Single Judge reminded the parties that the deadlines established by Rule 121 of the Rules are only indicative.

*"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 obligations as soon as practicable and not only on the date when the deadline as provided by the statutory documents expires."*¹³

Specific consideration was made by the Single Judge in respect of protective measures for witnesses including redactions as follows:

*"With 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 not 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."*¹⁴

In the circumstances, being minded of the necessity for expeditiousness and fairness to the Defence, the Prosecutor was directed to submit such application as soon as practicable but not later than a date to be later fixed by the Chamber taking all circumstances into account.

¹² Prosecution's Application; ICC-01/09-01/11; Para. 19

¹³ Pre-Trial Chamber II "Decision Setting the Regime for Evidence Disclosure and other Related Matters. Para. 10 ; ICC-01/09-01/11-44; 6 April 2011.

¹⁴ Pre-Trial Chamber II "Decision Setting the Regime for Evidence Disclosure and other Related Matters Para. 12 ; ICC-01/09-01/11-44; 6 April 2011.

15. By the Decision on the Prosecutor'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 Single Judge fixed such a date to be consistent with the date when the Prosecutor would disclose the evidence for which no redaction was required. The Prosecutor was required by that date to make a request to the Chamber to authorize proposed redaction in accordance with the guidelines proposed by the Appeals Chamber in that respect.¹⁵ It is for that request that the Prosecutor wishes to apply for extension of time and fix a date at its convenience.
16. The First Decision did not prescribe any time limit for making disclosure but instead directed the parties to make disclosure as soon as practicable nor did it prescribe any time limit for request for redactions. The Single Judge nevertheless drew the parties' attention to the overriding principle of procedural fairness in the statute which is expeditiousness.

Application Inimical to Fairness and Fundamental Rights of Suspects

17. As was stated in the Bemba Case:

*"The Single Judge concurs with the Pre-Trial Chamber II in saying that fairness is preserved when a party is provided with the genuine opportunity to present its case under conditions that do not place it at a substantial disadvantage vis-à-vis its opponent and to be appraised of any comment or the observations and evidence submitted to the Court that might influence its decisions."*¹⁶

The Prosecutor has at all times been alive to his obligation to disclose the evidence that the Prosecution intends to rely upon and the necessity to timeously make requests in respect of protective measures including any

¹⁵ ICC-01/09-01/11-62; Para. 16

¹⁶ Situation in the Central African Republic "In the case of the Prosecutor v. Jean-Pierre Bemba Gombo" ICC-01/05-01/08-75; 25/8/08 at Para. 14

redactions. The Prosecution cannot therefore invoke hardship as a means of avoiding its statutory obligations.

18. While the Prosecution is expected to exercise the powers and fulfill the duties under Article 54 of the Statute, these have to be considered in the context of the fundamental rights of the Defence as enshrined in Articles 61 and 67 of the Statute and Rule 76 and 121.

19. In arriving at the decision on the calendar to be adopted, the Single Judge took into account all the necessary circumstances and found that:

“According 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 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 summons to appear for the suspects, the Prosecutor has carefully reviewed the evidence in his possession at that time, both incriminating and exculpatory. Furthermore, this material has been in his domain for sufficient time for him to be able to disclose to the defence or to request redactions if need be within a short period of time.”¹⁷

It is accordingly not expected that the Prosecutor would commence the discharge of his statutory duties for protection of the witnesses and redaction of any evidence, only after the Chamber has made its decision. This would be contrary to the spirit and express provisions of the Statute.

20. The self proclaimed limitation of the Prosecutor cannot constitute sufficient cause to avoid the orders made by the Chambers.

21. The issue of review of the evidence for redaction and/or hearing was a matter within the knowledge and control of the Prosecutor at all times and

¹⁷ 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-01/11-62; Para. 17

particularly following its decision to apply for summonses. The Prosecutor has additionally failed to provide any information or evidence in connection with the alleged "security in Kenya". In the event, such information can only be of assistance to the Prosecution when making an application for protective measures or redaction which the Chamber required to be made at the earliest possible opportunity and not later than the prescribed date.

22. There is thus no foundation for the Prosecution's submission that, to make an application in respect of protective measures and/or redactions within the period prescribed by the Chamber would procedurally prejudice the Prosecutor's right to a fair trial, including the right to most efficiently and effectively present its case. To the contrary, the Application is highly prejudicial to the rights of the Suspects having appeared in response to the summons.

Expediiousness of the Proceedings

23. The other tenet to be considered in the Prosecutor's Application is the procedural right granted to the Defence to be tried without undue delay which concept is not only expressly provided for by Article 67 (1) (c) but complimented with the provisions of Article 61 (3) as read with Rules 76, 121 and others. The pedestal for such right is the setting of a date for the Confirmation of Hearing from which date the obligation of the Prosecutor to provide evidence through disclosure and apply for protective measures or redactions commences. It is no longer the discretion of the Prosecutor to determine when he can comply with the statutory provisions, and for the Prosecution to determine the terms for such request.
24. The timetable set down by the Pre-Trial Chamber in the Second Disclosure Decision was no doubt devised so that the proceedings progress in a fair, timely and expeditious manner. Despite this, the Prosecution seems intent on subverting the fair and proper progression of the case and appears to be only

now preparing to embark on an expedition to Kenya to determine if there is any other measure, other than redactions, which could secure the protection of its witnesses. It seems inevitable therefore that the extension of time sought by the Prosecution is a lengthy one as it will undoubtedly take several months for these procedures to be completed.

25. Granting the Prosecution's request would therefore, far from contributing to the fair and expeditious conduct of proceedings, result in unfairness to the Defence and could also lead to significant unnecessary and entirely avoidable delays. Indeed, the Defence has real concern if the Prosecution's Application were to be allowed that it is extremely likely that it would become necessary to significantly delay the confirmation of charges hearing in order to ensure that the Defence has adequate time to examine the evidence, conduct investigations and prepare its case for meaningful participation in these proceedings.

CONCLUSION

26. For reasons set out above, the Defence of Mr. Henry Kiprono Kosgey respectfully requests that the Honourable Pre-Trial Chamber reject the Prosecution's Application.



George Odinga Oraro
On behalf of Henry Kiprono Kosgey

Dated this 10th day of May, 2011

At Nairobi, Kenya