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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**

**URGENT
Public Document**

**Prosecution's Response to the "Defence Application for Extension of Time to
Submit Information on Viva Voce Witnesses to be Called at the Confirmation
Hearing"**

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

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I. Introduction

1. The Prosecution hereby responds to the “Defence Application for Extension of Time to Submit Information on Viva Voce Witnesses to be Called at the Confirmation Hearing” (the ‘Defence Application’).¹ The Prosecution submits that the Defence Application is not justified since the Defence has failed to show that there is good cause warranting a variation of time limits for the submission of the list of *viva voce* witnesses in light of the limited scope of the confirmation hearing and its lack of emphasis on live testimony. Such a request, if granted, has significant adverse consequences on the organization of the confirmation hearing and would confer an unfair advantage to the Defence in preparing the confirmation hearing. Therefore, the Prosecution objects to the Defence Application. In the alternative, should the Chamber decide that an extension is warranted, the Prosecution proposes that both parties comply with the Single Judge’s deadline and submit a temporary list of potential *viva voce* witnesses, on 12 July 2011, with the understanding that the parties may amend it until a new deadline imposed by the Single Judge.

II. Procedural History

2. On 8 March 2011, Pre-Trial Chamber II (the ‘Chamber’), by majority, summoned William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang (collectively, the “suspects”) to appear.² Pursuant to this decision, the suspects voluntarily appeared before the Court at the initial appearance hearing held on 7 April 2011 during which, *inter alia*, the Chamber set 1 September 2011 as the date for the commencement of the confirmation of charges hearing.

¹ ICC-01/09-01/11-168.

² “Decision on the Prosecutor’s Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang”, ICC-01/09-01/11-1.

3. On 20 April 2011, the Single Judge issued 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 Between the Parties”.³ Three disclosure deadlines were established: 13 May 2011 for evidence collected before 15 December 2010; 3 June 2011 for evidence collected between 15 December 2010 and 31 March 2011; and 8 July 2011 for evidence collected after 31 March 2011.
4. On 29 June 2011, the Single Judge requested that the parties indicate, by Tuesday 12 July 2011, whether they intend to call live witnesses at the confirmation of charges hearing and if so, to submit information detailing the subject matter and the scope of the proposed testimony of each witness.⁴ The ruling ensured that the parties and the services involved with the organization of the confirmation hearing such as the Victims and Witnesses Unit, in particular, would be in a position to make the necessary arrangements for the hearing.
5. On 8 July 2011, the Defence for Mr Ruto and Mr Sang applied for an extension to this deadline until 15 days after the receipt of the final package of Prosecution disclosure or, in the alternative, “the opportunity to be informed within a reasonable time before the confirmation hearing of the evidence the Prosecution intends to rely on”, and “the attendant adequate time to prepare meaningfully their defence”.⁵

III. Submissions

6. In the Prosecution’s submission, the extension requested by the Defence for Mr Ruto and Mr Sang fails to meet the good cause requirement as stipulated in Regulation 35 of the Regulations of the Court and frustrates the effective

³ ICC-01/09-01/11-62.

⁴ “Decision Requesting the Parties to Submit Information for the Preparation of the Confirmation of Charges Hearing”, ICC-01/09-01/11-153 (‘the Decision’).

⁵ ICC-01/09-01/11-168, paras. 20-21.

preparation of the confirmation of charges hearing set to commence on 1 September 2011.

The defence's application is not justified; no 'good cause' is shown

7. The Defence argues that the recent limited variation of the third disclosure deadline prejudices the interests of its clients because "key components of the anticipated disclosure regime are as yet unfulfilled" and for that reason its ability to make an informed decision by 12 July 2011 on which live witnesses to call is impaired. The Defence also argues that this prejudice is further compounded by the Prosecution's disclosure on 1 July 2011 of witness-related materials and the fact that it is not in possession of the Document Containing the Charges ('DCC').
8. The Prosecution contends that the Defence's arguments are specious and do not satisfy the threshold necessary for a requested variation to the time limit to submit its list of witnesses. The confirmation of charges hearing is not a trial and is intended to proceed as much as possible on documentary evidence presented by the parties and participants. The Defence has received the bulk of evidence on which the Prosecution's case rests; it is sufficient for determining whether or not to call live witnesses, if any, for the purposes of the confirmation of charges hearing. A variation to the time limit, at this stage of the proceedings, is so disruptive to the organization of the hearing that it is likely to result in an adjournment of the confirmation hearing (which is the underlying suggestion made by the Defence in its application). In fact, the Prosecution posits that the Defence Application is unrelated to the disclosure regime since the Defence filed its application on 8 July 2011 whilst the Prosecution effected disclosure of a number of witness-related materials on 1 July 2011 pursuant to the Single Judge's decision dated 29 June 2011.

The confirmation of charges hearing involves a limited evidentiary debate

9. The Single Judge reached the Decision having considered the “limited purpose and scope of the confirmation of charges hearing, as well the limited evidentiary debate to take place therein”.⁶ The Prosecution reiterates that it is accepted that the confirmation of charges hearing is not designed to be a first trial. It is instead a screen to filter cases that are not sufficiently supported by evidence.⁷ The Single Judge held that the parties should rely on live witnesses only insofar as their oral testimony cannot be properly substituted by documentary evidence.⁸ The gravity of Defence complaints should be weighed in light of these facts.

The Prosecution has met its disclosure obligations

10. The Single Judge, on 29 June 2011, noted that the Defence “have already been provided – or will be provided in the immediate future – with almost the entirety of the Prosecutor’s evidence”.⁹ It is noteworthy that the Single Judge issued this deadline fully cognizant of the disclosure deadlines imposed in her decision setting the calendar for disclosure, and related orders.¹⁰ The Prosecution has met the deadlines set by the Single Judge. It has provided the Defence with the bulk of its evidence. That the Defence complains that it continues to receive disclosure *in accordance with the calendar for disclosure*, and that this leaves it insufficient time to prepare for the confirmation hearing¹¹, is without traction.

11. The Defence’s claim that it requires access to the DCC to ascertain the theory of the case, in order to properly determine which witnesses to call, is without

⁶ ICC-01/09-01/11-153, para. 9.

⁷ ICC-01/09-01/11-153, paras. 8-9. See also *Prosecutor v. Katanga & Ngudjolo*, Judgment on Unlawful Detention and Stay of Proceedings Appeal, ICC-01/04-01/07-2259 OA10, 12 July 2010, para. 40.

⁸ ICC-01/09-01/11-153, para. 9.

⁹ ICC-01/09-01/11-153, para. 13.

¹⁰ ICC-01/09-01/11-62.

¹¹ ICC-01/09-01/11-168, para. 18.

merit. The Defence asserts that the redactions to the Article 58 application filed by the Prosecution make it unsuitable as a substitute for the DCC, since it redacts certain information (names, dates of meetings) the Defence claims is important for investigations.¹² It is unclear how having the DCC would help the Defence in this respect, since it is likely that the same information would be redacted in the DCC as well.

Upholding the deadline is necessary to prepare for the confirmation hearing set on 1 September 2011

12. The Single Judge deemed it necessary for the preparation of the confirmation of charges hearing that the parties communicate their intention to call witnesses by the deadline established. Citing the Victims and Witnesses Unit, the Single Judge held that “a period of 6 weeks before the commencement of the confirmation hearing is essential in order for the necessary arrangements regarding the witnesses’ testimony to be made.” If parties fail to communicate their intention by the deadline, “it would not be possible to finalize the necessary arrangements before the confirmation of charges hearing”.¹³

13. If the Defence Application were to be granted and the Defence decided to call a number of live witnesses, the organization of the confirmation hearing would suffer to such an extent that the entire confirmation hearing may need to be adjourned, a scenario already entertained by the Defence.¹⁴ The Prosecution submits that such an outcome should be avoided in the absence of compelling considerations, which the Defence fails to provide.

IV. Conclusion

14. Given that the Prosecution has complied with the disclosure calendar, that there is a limited evidentiary burden at the confirmation of charges hearing

¹² ICC-01/09-01/11-168, paras. 12-13.

¹³ ICC-01/09-01/11-153, paras. 10-11.

¹⁴ ICC-01/09-01/11-168, para. 19.

and that the parties are to primarily rely on documentary evidence in the upcoming proceedings, the Prosecution submits that the Defence has failed to demonstrate good cause justifying an extension. The Prosecution also notes the heavy logistical cost that could be involved in granting such a request.

V. Relief Requested

15. The Prosecution respectfully requests that the Defence Application be rejected.
16. In the alternative, the Prosecution proposes that both parties submit a temporary list on 12 July 2011 which may be amended until a new deadline established by the Single Judge.
17. Finally, the Prosecution submits that if the Chamber grants the Defence Application, it grant the same extension to both parties.



Luis Moreno-Ocampo,
Prosecutor

Dated this 11th day of July 2011
At The Hague, The Netherlands