

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 21 July 2011

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***

PUBLIC

**Prosecution's Response to the Defence submissions in preparation of the
Confirmation of Charges Hearing and Request for Re-classification**

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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I. Introduction

1. Pursuant to Regulation 23 *bis* (3) of the Regulations of the Court, the Office of the Prosecutor (“Prosecution”) requests that the Pre-Trial Chamber (“Chamber”) re-classify as confidential the annexes of the Defence filings indicating live witnesses for the Confirmation of Charges Hearing on behalf of Mr. Ruto¹ and Mr. Sang² (“Defence filings”). The Defence submitted these annexes on 19 July 2011 as “confidential and *ex parte* (Pre-Trial Chamber only)”.

2. There is no basis supporting the *ex parte* submission of this information. Therefore, reclassifying the submission to confidential is appropriate.

3. Moreover, the Defence misconstrues the purpose of the confirmation hearing, as well as the Single Judge’s request to resort to live witness testimony only where documentary evidence would not suffice.

II. Procedural Background

4. On 29 June 2011, in order to ensure the proper preparation of the Confirmation of Charges Hearing, 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.³

¹ ICC-01/09-01/11-203, Filing on behalf of Mr. William Samoei Ruto Indicating Live Witnesses for the Confirmation of Charges Hearing, 19 July 2011, para. 13.

² ICC-01/09-01/11-204, Filing on behalf of Mr. Joshua Arap Sang Indicating Live Witnesses for the Confirmation of Charges Hearing, 19 July 2011, para. 13.

³ ICC-01/09-01/11-153, Decision Requesting the Parties to Submit Information for the Preparation of the Confirmation of Charges Hearing, 29 June 2011, p. 8.

5. On 8 July 2011, the Defence for Mr. Ruto and Mr. Sang requested an extension of the deadline set by the Single Judge.⁴ On 11 July 2011, the Single Judge partially granted the Defence requests and ordered the Defence teams to indicate whether they intend to call live witnesses, and if so, to submit information detailing the subject matter and the scope of the proposed testimonies by 19 July 2011.⁵

6. On 19 July 2011, the Defence for Mr. Ruto and Mr. Sang filed the requested information. In public filings they stated that they intended to call witnesses, without identifying even the number, and they further made clear that they have not yet contacted their would-be witnesses so their proposal is merely tentative. In two annexes classified as confidential and *ex parte*⁶ the Defence presumably has provided the numbers and names of their prospective witnesses.

III. The Defence submissions should be reclassified to permit Prosecution access

7. The Prosecution requests that the annexes to the Defence filings be reclassified as “confidential”. The Defence has failed to provide any valid legal basis supporting their *ex-parte* submission to the Chamber. Assuming that the Defence withholding of the information is in response to the Prosecution’s protective measures with respect to its witnesses, concerns that their witnesses might be identified and put at risk does not apply to disclosure to the Prosecution.

⁴ ICC-01/09-01/11-168, Defence Application for Extension of Time to Submit Information on Viva Voce Witnesses to be Called at the Confirmation Hearing, 8 July 2011.

⁵ ICC-01/09-01/11-176, Decision on the "Defence Application for Extension of Time to Submit Information on Viva Voce Witnesses to be Called at the Confirmation Hearing", 11 July 2011, p. 9.

⁶ ICC-01/09-01/11-203 and ICC-01/09-01/11-204.

8. Providing access to these materials will enable the Prosecution to fulfil its duty pursuant to Article 54(1)(a) of the Statute to investigate incriminating and exonerating circumstances equally. This is particularly significant given their direct assertions that they need to call their witnesses in order to demonstrate that the Prosecution's witnesses are lying. It will also enable the Prosecution to prepare for the upcoming confirmation hearing, both in calculating how long it may be expected to take and in preparing to effectively cross-examine the witnesses.

9. By their submission, the Defence is withholding the very information that the Single Judge requested.

IV. Submissions related to the Evidentiary Standards of the Confirmation Hearing

10. The filings submitted by the Defence do not comply with the Single Judge's request to rely on live witnesses only as far as their oral testimony at the hearing cannot be properly substituted by documentary evidence or witnesses' written statements.⁷ The Defence wholly fails to recognize the "limited scope of the confirmation of charges hearing, as well the limited evidentiary debate to take place therein".⁸ 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.⁹

11. Moreover, the contention of the Defence that they need to call live evidence in order to challenge the credibility of the Prosecution's evidence is

⁷ ICC-01/09-01/11-153, para. 9.

⁸ ICC-01/09-01/11-153, para. 9.

⁹ 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.

misguided in light of the limited purpose of the confirmation hearing. The confirmation hearing is designed to determine if the Prosecution's evidence is prima facie sufficient to permit the case to proceed, and ordinarily the Chamber should not be called upon at this stage to assess the credibility of competing witness testimony. In addition, evidence offered by the Defence which does no more than contradict the Prosecution's evidence will generally not be sufficient to defeat confirmation. Accordingly, when seeking to call live witnesses at the confirmation hearing, the Defence should be required to demonstrate with specificity how the live evidence of the witness might bear on the determination that is required of the Chamber at the confirmation stage. The Prosecution suggests that it should be a rare circumstance that such evidence by the Defence is appropriate.

V. Relief Sought

12. In light of the foregoing, the Prosecution respectfully requests the Chamber to re-classify the annexes of the Defence filings to confidential.



Luis Moreno-Ocampo, Prosecutor

Dated this 21 July 2011

At The Hague, the Netherlands