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

Date: 15 August 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 "Henry Kosgey's Contingent Request for Extension of Time Limit for Disclosure in Compliance with the E-Court Protocol" and "Ruto and Sang's Joinder to Kosgey's Contingent Request for Extension of Time Limit for Disclosure in Compliance with the E-Court Protocol"

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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Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

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Didier Preira, Deputy Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

1. Minutes before the 16.00 filing deadline on 15 August 2011, the Defence teams for Henry Kosgey,¹ William Ruto and Joshua Sang² submitted applications for an extension of the 16 August 2011 time limit for disclosure by the Defence of material intended for use at the confirmation hearing. The Prosecution opposes these requests.

2. On 12 August 2011, the Single Judge rejected the last-minute Defence requests for postponement of the confirmation hearing and attendant deadline extensions.³ In reaching this decision, the Single Judge found that there appeared to be a lack of proper organization on the part of the Defence and concluded that “all of its complaints turned out to be unfounded allegations”.⁴

3. By their own admission once again, the Defence teams waited until the last possible moment to put in place the arrangements necessary to abide by their obligations as set out in the Rules of Procedure and Evidence and ordered by the Chamber. As egregiously, they also waited until the last possible moment to inform the Chamber and the Prosecution of their failure. This is not a “perfect storm” of factors “completely outside of [the Defence’s] control”; rather, it is the result of a pattern of indifference and neglect over many months.

4. The Prosecution is preparing for a confirmation of charges hearing in respect of three suspects, each of which has indicated an intention to present objections to the charges, to challenge and contradict the evidence presented by the Prosecutor and to present evidence of their own, including through six *viva voce* witnesses, two per Suspect. Any delay to the already minimum time available to the Prosecution to analyse the evidence disclosed by the Defence – made

¹ “Henry Kosgey’s Contingent Request for Extension of Time Limit for Disclosure in Compliance with the E-Court Protocol with Confidential Annexes 1-3”, ICC-01/09-01/11-262.

² “Ruto and Sang’s Joinder to Kosgey’s Contingent Request for Extension of Time Limit for Disclosure in Compliance with the E-Court Protocol”, ICC-01/09-01/11-264.

³ “Decision on the ‘Urgent Defence Application for Postponement of the Confirmation Hearing and Extension of Time to Disclose and List of Evidence’”, ICC-01/09-01/11-260.

⁴ ICC-01/09-01/11-260, see particularly paras. 11, 16.

possible only if the materials are disclosed in full compliance with the E-Court protocol – will be unfairly and unnecessarily prejudicial to the Prosecution. Moreover, it will also compromise the ability of the Chamber to be seized of the facts in dispute.

5. Accordingly, the Prosecution objects to the Defence requests and asks that the Chamber require the Defence teams to proceed with their disclosures on 16 August 2011, in a format that complies with the E-Court protocol, as ordered in the “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”.⁵ Evidence not disclosed by 16 August 2011 in full compliance with the Chamber’s decisions should be excluded at the confirmation hearing. In this regard, the Prosecution reminds the Chamber that there is no requirement that the Defence present evidence at the hearing. To the contrary, the purpose of the confirmation hearing is simply to determine if the Prosecution’s evidence on its face is sufficient to commit the Suspects for trial. Given that focused purpose, there is no prejudice to the Defence if (on account of the Defence teams’ particular failure to learn how to use the E-Court processes and submit their evidence properly and in a timely fashion) they are limited in the evidence that they may present at the hearing.



Luis Moreno-Ocampo

Prosecutor

Dated this 15th day of August 2011

At The Hague, The Netherlands

⁵ ICC-01/09-01/11-44.