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**International
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Date: **23 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 Redacted Version
With Confidential Annexes A & B**

**Prosecution's Request for an Order Excluding the Evidence Intended to be Relied
Upon at the Confirmation of Charges Hearing by the Defence for Ruto and Sang,
and the Defence for Kosgey**

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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Section** **Other**

1. The Prosecution hereby requests Pre-Trial Chamber II (“the Chamber”) for an order precluding the Defence for Ruto and Sang and the Defence for Henry Kosgey (“Defence for Kosgey”) from relying at the confirmation hearing on: (i) items which are included in either the List of Evidence and/or the IDACs, but were not disclosed and (ii) items which are not in a working language of the Court and for which there is no translation. Further, the Prosecution asks the Chamber to order the Defence for Ruto and Sang to produce information on the anticipated testimony of its witnesses, as the Defence for Kosgey did with respect to its witness.

I. Procedural History

2. On 6 April 2011, the Single Judge issued the First Disclosure Decision, specifically ordering that

“when submitting any evidence to the Registry, the parties shall provide [...]

3. An analysis of each piece of evidence reflecting its relevance as described in part III of this decision”.¹

3. On 20 April 2011, the Single Judge issued a further decision (the ‘Second Disclosure Decision’), wherein she ordered, *inter alia*, the Defence teams to disclose to the Prosecutor the evidence they intend to present at the confirmation hearing and the list of this evidence, no later than 16 August 2011.²

4. On 16 August 2011, the Single Judge authorised the Defence teams to submit its evidence, in compliance with the E-Court Protocol, after hours but before midnight on 16 August 2011.³

5. On 16 August 2011, the Defence for Kosgey filed its List of Evidence and in-depth analysis chart.⁴ The List did not include any Defence evidence registration

¹ ICC-01/09-01/11-44, pp. 10-11.

² “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, p. 13.

³ ICC-01/09-01/11-267.

numbers. That same day, the Defence for Kosgey effected disclosure of the relevant materials at approximately 18:30 and provided the Prosecution with the name of its *viva voce* witness via email at 18:47. The next day (i.e., after the due date), the Defence for Kosgey filed what it described as a “Corrigendum to ‘Defence of Mr. Henry Kiprono Kosgey’s Submission of List of Evidence and Analysis’”, which added evidence registration numbers for each document in the table.⁵ The filing of the corrigendum does not comply with the Court’s requirements.

6. On 19 August, after hours, the Defence of Mr. Kosgey filed yet a new corrigendum, with perhaps a new List of Evidence and Analysis.⁶ It was just notified to the Prosecution on 22 August, at 14:38, and the Prosecution has not had an opportunity to compare it with earlier filings and determine what, if anything, is new.

7. At 22:38 on 16 August 2011, the Defence for Ruto and Sang filed its Lists of Evidence⁷ and shortly after midnight on 17 August 2011 provided the Prosecution with CDs of the relevant materials. The Defence for Ruto and Sang had earlier indicated to the Prosecution (by email at 18:19) that it had been unaware of the obligation to prepare an IDAC and accordingly would not provide one to the Chamber.⁸ However, at 23:36 on 16 August 2011, it filed a five-page document which it referred to as “an analysis of evidence that the Defence for Ruto and Sang intends to rely on at the confirmation of charges hearing” (“the First IDAC”).⁹ Two days later (i.e., two days after the due date), the Defence for Ruto and Sang filed a “Supplemental Defence Filing of Disclosure Analysis for Evidence Intended for Use at the Confirmation of Charges Hearing”,¹⁰ in which it submitted a wholly new IDAC

⁴ ICC-01/09-01/11-266. Court records indicated that this was received at 15:52.

⁵ ICC-01/09-01/11-266-AnxB-Corr-Anx.

⁶ ICC-01/09-01/11-266.

⁷ ICC-01/09-01/11-268.

⁸ Email from the Defence Case Manager, attached as Confidential Annex A.

⁹ ICC-01/09-01/11-269. Its cover filing for the submission of its chart stated (para. 3) that the Defence “has attempted in good faith to comply with the Court’s orders”.

¹⁰ ICC-01/09-01/11-273.

("the Second IDAC"). Subsequent to that filing, and after their disclosure deadline had passed, the Defence has apparently attempted to rectify its earlier deficiencies by submitting materials and metadata to the Registry without leave of the Court.¹¹

II. Request for Confidentiality

8. The Prosecution requests that this document and its annexes be received by the Single Judge as "Confidential" because they contain information of a sensitive nature not currently available to the public and/or which was obtained from confidential sources. The Prosecution will shortly file a public version of the document only.

III. Submissions

9. The Prosecution is attempting to work with the documents submitted, despite their inadequacies and blatant non-compliance with the Single Judge's order. However, they are incomplete and in some respects so incapable of assisting in a meaningful way that they fail to serve the purposes for which they were ordered, handicapping the Prosecution's ability to prepare for the hearing. However, in the interest of keeping the proceedings on track, the Prosecution will not object wholesale at this time to the evidence of the Defence on the basis of the repeated disclosure failures, but will instead reserve the right to object at the Confirmation Hearing to any particular argument or evidence not properly noticed and that therefore results in prejudice to the Prosecution.

The Chamber should exclude items contained in the List of Evidence or IDAC but not disclosed to the Prosecution

10. However, certain disclosure failures warrant exclusion of evidence at this time. The Prosecution has reviewed the materials disclosed by the Defence for Ruto and Sang, and has found that the following items are identified in the Defence's Lists

¹¹ See Confidential Annex B.

of Evidence but are not among the materials that the Prosecution received: [REDACTED].

11. A number of these documents are listed in the Second IDAC produced by the Defence for Ruto and Sang. However, the Prosecution has still not received them.

12. As to the Defence for Kosgey, the Prosecution has found that the following evidence registration numbers, listed in the List of Evidence, contain no image: [REDACTED].

13. The Prosecution has also found that the following items are listed in the First IDAC produced by the Defence for Ruto and Sang, but do not appear to be among the materials that the Prosecution received.¹² This list is based on the Prosecution's preliminary review of the evidence disclosed by the Defence teams. The Prosecution notes that the Defence may have disclosed some of the items but cannot say for certain, since the IDACs and Lists of Evidence are so imprecisely drafted that it is impossible to correlate all the items received with the entries on the IDAC:

- [REDACTED]
- Item #7 does not appear to be among the materials disclosed, and is not mentioned in the List of Evidence
- Item #9 does not appear to be among the materials disclosed; [REDACTED] is described in the List of Evidence as [REDACTED], the Prosecution received only [REDACTED]
- Item #11 – all of the items specifically listed appear to have been included in batch D11-0006 as listed in the List of Evidence, none of which the Prosecution actually received

¹² Note: it is difficult to be absolutely certain what documents are and are not discussed in the Defence's IDAC, because the IDAC does not always refer to documents by the same title as they are referred to in the List of Evidence, nor does it contain the document identification numbers of any of the documents.

- Item #12 – this does not appear to be in the List of Evidence or among the items that the Prosecution received
- Item #17 – the only related item that the Prosecution can find in the List of Evidence is [REDACTED], which the Prosecution did not receive
- Item #18 – the Prosecution does not appear to have received the statements of witnesses [REDACTED]
- Item #19 – likely to be [REDACTED], which the Prosecution did not receive
- Items #20, 21 – it appears the Prosecution did not receive these items, and they are not in the List of Evidence

14. Despite their inclusion in the Defence teams' Lists of Evidence and/or IDACs, these documents were not disclosed by the 16 August 2011 deadline for Defence disclosure. Thus, the Chamber should preclude the Defence teams from relying on them at the confirmation hearing. The 16 August 2011 deadline was established by the Single Judge in her Second Disclosure Decision nearly four months in advance,¹³ in order for the Defence to disclose its materials to the Prosecution 15 days prior to the start of the confirmation hearing as mandated by Rule 121(6) of the Rules. As the Single Judge recently clarified, the deadline is mandatory and not something that can be shortened by order of the Court.¹⁴ Thus, pursuant to the Decision and the Rules, the Chamber should exclude all items not disclosed by that deadline.

15. Moreover, given the volume of material that the Defence teams have disclosed, the short time frame in which the Prosecution must review and investigate the Defence's evidence, and the meager IDAC that the Defence for Ruto and Sang has provided to guide the Chamber and the Prosecution through its evidence, both the

¹³ ICC-01/09-01/11-62, p. 13.

¹⁴ "Decision on the Defence Requests for Extension of Time Limit for Disclosure in Compliance with the E-Court Protocol", ICC-01/09-01/11-267, para. 12.

Chamber and the Prosecution would be prejudiced if the Defence teams are allowed to submit additional evidence after the 16 August 2011 deadline.

16. Nor would it matter whether, as the Defence teams may assert, the omission was occasioned by the late realization that an IDAC was required and, accordingly, its hurried preparation – i.e., the “dissatisfact[ory] [...] manner in which the Defence teams [...] approach the upcoming confirmation hearing” and its “lack of proper organization” already highlighted by the Single Judge.¹⁵ A failure to appreciate the Chamber’s intention to adhere to the schedule may be a reasonable explanation but it is not sufficient justification for non-compliance.

17. For these reasons, therefore, the Chamber should preclude items contained in the Lists of Evidence and/or IDACs which were not disclosed to the Prosecution.

The Chamber should exclude items disclosed which are, in whole or in part, in a language other than one of the working languages of the Court, but for which no translation is provided

18. Regulation 39(1) of the Regulations of the Court requires that “All documents and materials filed with the Registry shall be in English or French unless otherwise provided in the Statute, Rules, these Regulations or authorized by the Chamber or the Presidency. If the original document or material is not in one of these languages, a participant shall attach a translation thereof.”

19. The Defence for Ruto and Sang and the Defence for Kosgey have disclosed materials containing language that is neither English nor French, apparently without providing translations. This failure on the part of the Defence teams to fulfil their disclosure obligations requires that the material not be admitted as evidence at the confirmation hearing.

¹⁵ ICC-01/09-01/11-260, paras. 8 and 11, see also *passim*.

20. Based on a preliminary review of the materials disclosed, the following 10 ERNs (with only the last provided by the Defence for Kosgey) contain material which is not in a working language of the court:

- [REDACTED].
- [REDACTED].
- [REDACTED].
- [REDACTED].
- [REDACTED].
- [REDACTED].
- [REDACTED].
- [REDACTED].
- [REDACTED].
- [REDACTED].

21. As required by the Single Judge¹⁶, the Defence submitted these materials, on which they intend to rely at the confirmation hearing, to the Registry. Filing into the record of the case documents and materials which are not in a working language of the court (and disclosed as such), with no accompanying translation, violates Regulation 39(1).

¹⁶ ICC-01/09-01/11-44, paras. 5-6, 11, 14-15 and orders (a)-(c), ICC-01/09-01/11-62, order (c)(i), p.13; ICC-01/09-01/11-267, p.7.

22. Pre-Trial Chamber I has held that “a prerequisite for the admissibility of evidence before the Court is translation into one of its working languages.”¹⁷

Significantly:

“[...] under no circumstances may evidence not translated into one of the working languages of the Court at the time of the commencement of the confirmation hearing, be admitted into evidence insofar as the Chamber must be in a position to fully understand the evidence.”¹⁸

23. This was cited approvingly by Trial Chamber II, which stated, in relation to an un-translated video, that “until the transcript and the necessary translations into one of the working languages of the Court have been provided to the Defence, the Prosecution has not complied with its disclosure obligations and its obligations under regulation 39(1) of the of the Regulations”.¹⁹

24. This also applies to partially translated materials.²⁰

25. Moreover, the Prosecution respectfully requests that the Chamber, exercising its discretion under Article 69(4), should rule these materials inadmissible for the purposes of the confirmation hearing. Article 69(4) allows the Chamber to “rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial.” Without a translation, these materials have little if any probative value. Moreover, even if the Defence were able to produce translations at this late stage, allowing the Defence to rely upon them would be prejudicial to the fairness of the proceedings given the particularly short time frame that the Chamber and Prosecution have left in which to understand their significance.

¹⁷ *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, “Decision on the confirmation of charges,” 30 September 2008, ICC-01/04-01/07-717, para 129.

¹⁸ “Decision on the Defence ‘Request to exclude video evidence which has not been disclosed in one of the working languages’”, 7 November 2006, ICC-01/04-01/06-676 at pp. 3-4.

¹⁹ *The Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, 27 July 2009, ICC-01/04-01/07-1336 at paras 10-13 (emphasis added).

²⁰ ICC-01/04-01/07-717 at paras. 129-130. See also ICC-01/04-01/06-676.

26. First, the probative value of these un-translated materials is extremely low. Some of the materials contain no information at all in a working language of the Court. Others materials contain minimal portions in a working language of the Court surrounded by portions that are not in a working language of the Court. As to the latter, even if the Defence intends only to rely on the portions of these materials which are in English or French, the Prosecution submits that a translation of the surrounding portions is required in order for both the Chamber and the Prosecution to understand the context of the portions relied upon by the Defence. The Chamber should not, and the Prosecution will not, rely on Defence representations about the contents of the materials without a translation from a certified and neutral translator. However, the Chamber and the Prosecution have merely 15 days to attempt to translate the material in-house and analyse it, compelling any review to be fairly cursory and incomplete. Thus, any assessment of the material at this juncture would have low probative value.

27. Second, admission of the evidence will cause prejudice to a fair hearing. Having less than 15 days in which to consider the totality of Defence disclosure, the proceedings would be unfairly prejudiced if the Defence could introduce evidence which is un-translated or translated at the last minute. Allowing the Defence to rely on such materials in circumstances where the Chamber and Prosecution are unable to understand the materials themselves and/or have an insufficient amount of time in which to do so, is manifestly unfair. Furthermore, the Prosecution is not in a position to assess the reliability and pertinence of the materials, nor to challenge the conclusions the Defence seeks to draw from the documents. It would therefore give the Defence a tactical advantage detrimental to the search for truth in the matter at hand.

28. Based on the foregoing, the Prosecution requests the Chamber to exclude from the confirmation hearing items disclosed which contain, in whole or in part, a

language other than one of the working languages of the Court, but for which no translation is provided.

C. Request for information about the anticipated testimony of defence witnesses

29. Finally, the Prosecution notes that the Defence teams provided information to the Chamber detailing the subject-matter and the scope of the proposed testimony of each of their *viva voce* witnesses.²¹ However, the Defence for Ruto and Sang does not appear to have included any information in its disclosure to the Prosecution about the substance of the testimony from its four witnesses. Thus, the Prosecution has no information regarding what these witnesses will say during the hearing.

30. The Prosecution respectfully requests the Chamber to order the Defence for Ruto and Sang to provide the Prosecution with a statement or other comparable indication of the anticipated testimony of each of the witnesses it intends to call. The Prosecution submits – in line with the approach taken by the Single Judge in *Prosecutor v Bahar Idriss Abu Garda*²² – that fairness requires that the Prosecution receive some information in advance of the confirmation hearing as to the witnesses' proposed testimony. It is inconceivable that the Defence does not know what its live witnesses will say, and therefore providing no notice as to their testimony so that the Prosecution can properly prepare is nothing more than gamesmanship. Providing sufficient advance notice will enable the Prosecution to use most effectively its

²¹ Following the Single Judge's "Order to the Defence to Reduce the Number of Witnesses to Be Called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of Viva Voce Witnesses" (ICC-01/09-01/11-221), the Defence teams filed amended lists of *viva voce* witnesses, indicating their names and the scope and subject-matter of their proposed questioning in confidential ex parte annexes in accordance with the Single Judge's order; see ICC-01/09-01/11-231 (Ruto) and ICC-01/09-01/11-232 (Sang). The Defence for Kosgey presumably submitted the information in a confidential ex parte filing as the Prosecution has not been notified of any parallel filing on his behalf.

²² "Decision requesting the Defence to provide information on prospective witnesses", ICC-02/05-02/09-146. See also e.g. Trial Chamber II in *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* which decided that disclosure by the Defence of information regarding the identity of defence witnesses, including any relevant information on their personal history and background, and either the statements of the witnesses they intend to call to testify, or a summary of the key elements that each witness will address during his or her testimony, was required for a fair and expeditious trial; ICC-01/04-01/07-2388, paras. 57-60.

limited time to examine the witnesses most effectively, avoid the need to request delay, and enable the Chamber better to ascertain the truth.²³

31. What is more, as is set forth above, the Defence is obliged to provide the Prosecution with an IDAC. As noted by the Single Judge in ordering the parties to produce and present IDACs to the Chamber and each other, a “sufficiently detailed legal analysis relating the alleged facts with the constituent elements corresponding to each crime charged” is necessary for the Chamber and the parties to understand the reasons why a party relies on a particular piece of evidence.²⁴ In the Prosecution’s submission, this reasoning applies not only to evidence in the form of statements, documents, maps, photographs, video and audio recordings and other tangible objects that a party seeks to rely upon, but also testimony from live witnesses.

III. Relief Requested

32. The Prosecution requests that the Chamber:

- (i) preclude the Defence for Ruto and Sang and the Defence for Kosgey from relying at the confirmation hearing on: (i) items which were included in either the Lists of Evidence and/or the IDACs, but were not disclosed and (ii) items which, in whole or in part, are not in a working language of the Court and for which there is no translation; and

²³ *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-T-239-CONF-ENG CT2 (“if there are to be substantive areas of which you [the Prosecution] have not received any warning, then the downside for the Defence may be that the evidence of their witness is going to be constantly peppered with applications by you to adjourn so that you have adequate time to prepare questioning. And, regardless of what the strict position may be in law as regards disclosure, it may be in Mr Lubanga’s own interests to provide you with more information in advance so that you can properly prepare for cross-examination, without having to ask for an adjournment.”).

²⁴ ICC-01/09-01/11-44, paras. 21 (referring to Pre-Trial Chamber III, “Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties”, ICC-01/05-01/08-55, paras 66-70), 22 (confirming that this approach was expected of all parties).

- (ii) order the Defence for Ruto and Sang to produce information about the anticipated testimony of its *viva voce* witnesses.



Luis Moreno-Ocampo,
Prosecutor

Dated this 23rd day of August 2011

At The Hague, The Netherlands