

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 25 July 2011

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single 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 Document

**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**

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

The Office of the Prosecutor
Luis Moreno-Ocampo, Prosecutor
Fatou Bensouda, Deputy Prosecutor

Counsel for William Samoei Ruto
Joseph Kipchumba Kigen-Katwa, David
Hooper and Kioko Kilukumi Musau

Counsel for Henry Kiprono Kosgey
George Odinga Oraro

Counsel for Joshua Arap Sang
Joseph Kipchumba Kigen-Katwa

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States Representatives

Amicus Curiae

Other

REGISTRY

Registrar & Deputy Registrar
Silvana Arbia, Registrar
Didier Preira, Deputy Registrar

Defence Support Section

Victims and Witnesses Unit
Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Ekaterina Trendafilova, acting as Single Judge on behalf of Pre-Trial Chamber II (the “Chamber”) of the International Criminal Court (the “Court”),¹ hereby renders this order to the Defence teams to reduce the number of witnesses they intend to call to testify at the confirmation of charges hearing.

I. Procedural History

1. On 8 March 2011, the Chamber, by majority, decided to summon William Samoei Ruto (“Mr. Ruto”), Henry Kiprono Kosgey (“Mr. Kosgey”) and Joshua Arap Sang (“Mr. Sang”) to appear before it.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 the date for the commencement of the confirmation of charges hearing for 1 September 2011.³
2. 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” (the “Calendar for Disclosure”), whereby she, *inter alia*, ordered the Defence teams to “disclose to the Prosecutor the evidence they intend to present at the confirmation hearing, if any, and to file the list of such evidence, no later than Tuesday 16 August 2011”.⁴
3. On 29 June 2011, the Single Judge ordered the parties to indicate whether they intended 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 (the “29 June 2011 Decision”).⁵

¹ Pre-Trial Chamber II, “Decision Designating a Single Judge”, ICC-01/09-01/11-6.

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

³ ICC-01/09-01/11-T-1-ENG page 17, lines 12 to 25.

⁴ Pre-Trial Chamber II, Calendar for Disclosure, ICC-01/09-01/11-62, operative part, letter (c)(i).

⁵ Pre-Trial Chamber II, “Decision Requesting the Parties to Submit Information for the Preparation of the Confirmation of Charges Hearing”, ICC-01/09-01/11-153, para. 8.

4. In compliance with the 29 June 2011 Decision, the Prosecutor indicated his intention not to call any live witness at the confirmation of charges hearing,⁶ while the Defence teams of the three suspects submitted their respective lists of *viva voce* witnesses, specifying, as requested, the subject-matter and the scope of the proposed testimony of each of those witnesses.⁷ In particular, the Defence for Mr. Kosgey indicates its intention to call a maximum of 3 witnesses;⁸ the Defence for Mr. Ruto a maximum of 25 witnesses;⁹ and the Defence of Mr. Sang a maximum of 15 witnesses.¹⁰ In their submissions, the Defence teams of Mr. Ruto and Mr. Sang provide the following arguments in support of calling all of the *viva voce* witnesses indicated: (i) evidence given by live witnesses has a higher probative value;¹¹ (ii) one witness for Mr. Ruto and three witnesses for Mr. Sang suggested their preference for their testimonies to be provided live before the Court;¹² and (iii) the desire for an expeditious conduct of the confirmation of charges hearing should not prevail over the rights of the defence.¹³

5. On 21 July 2011, the Prosecutor filed the "Prosecution's Response to the Defence submissions in preparation of the Confirmation of Charges Hearing and Request for Re-classification", whereby he, *inter alia*, requested the Single Judge to reclassify as "confidential" the annexes – currently classified as "confidential *ex parte* Pre-Trial Chamber only" – which contain the list of the witnesses proposed by the Defence of Mr. Ruto and Mr. Sang (the "Prosecutor's Request for Reclassification").¹⁴

⁶ ICC-01/09-01/11-187.

⁷ ICC-01/0-01/11-202-Conf-Exp; ICC-01/09-01/11-203 and confidential *ex parte* annex attached thereto; ICC-01/09-01/11-204 and confidential *ex parte* annex attached thereto.

⁸ ICC-01/0-01/11-202-Conf-Exp, para. 17.

⁹ ICC-01/09-01/11-203-Conf-Exp-Anx.

¹⁰ ICC-01/09-01/11-204-Conf-Exp-Anx.

¹¹ ICC-01/09-01/11-203 paras 7 and 8; ICC-01/09-01/11-204, paras 7 and 8.

¹² ICC-01/09-01/11-203, para. 9; ICC-01/09-01/11-204, para. 9.

¹³ ICC-01/09-01/11-203, paras 10 and 11; ICC-01/09-01/11-204, para. 10 and 11.

¹⁴ ICC-01/09-01/11-213.

II. The Applicable Law

6. The Single Judge notes articles 21(1)(a) and (3), 61(5) and (6), 67(1), 68(5) and 69(4) of the Rome Statute (the “Statute”), rules 63(2), 81(6), 121(5) and 122(1) of the Rules of Procedure and Evidence (the “Rules”) and regulation 23 *bis* of the Regulations of the Court (the “Regulations”).

7. The present order is classified as “public” although it refers to the existence of documents and, as the case may be, to a limited extent to their content, which have been submitted and are currently treated as confidential *ex parte*, Defence only. The Single Judge considers that the references made in the present order are required by the principle of publicity and judicial reasoning. Moreover, those references are not inconsistent with the nature of the documents referred to and have been kept to a minimum.

III. The Order to the Defence to Reduce Its List of *Viva Voce* Witnesses

8. The Single Judge recalls the 29 June 2011 Decision, in which she explained that the confirmation of charges hearing has a limited scope and purpose and that her expectations are that the parties, being cognizant of the nature of the present proceedings, select their best pieces of evidence in order to support their respective cases.¹⁵ As also considered in the said decision, a series of provisions make clear that, for the purposes of the confirmation of charges hearing, the parties may rely on documentary evidence and written witnesses’ statements – including in the form of summaries. Reference in this respect is made to the provisions of articles 61(5) and 68(5) of the Statute and rule 81(6) of the Rules. In light of the above, in the 29 June 2011 Decision, the Single Judge concluded that:

[C]onsidering the nature and purpose of the confirmation of charges hearing as well as the limited evidentiary debate to take place therein, the Single Judge anticipates that when the parties intend to rely on witnesses for the purposes of the confirmation hearing, they would normally do so through the use of their statements or transcripts of their recorded interviews. Consequently, the Single

¹⁵ Pre-Trial Chamber II, 29 June 2011 Decision, para. 8.

Judge expects the parties 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.¹⁶

9. The Single Judge notes that the suspects indicate their intention to call a number of *viva voce* witnesses, the total amount of which reaches a maximum of forty-three (43). However, this number of live witnesses is *per se* manifestly excessive and disproportionate for the purposes of the confirmation of charges hearing. If all the witnesses indicated by the parties were permitted to testify orally, the confirmation of charges hearing would, ultimately, constitute a mere anticipation of the trial stage of the case, only distinguishable from the latter for the different standard of proof established by articles 61(7) and 66(3) of the Statute, respectively. Therefore, if the pre-trial stage is to be accorded any meaning within the procedural system as established by the drafters of the Statute, the number of witnesses indicated by the Defence should be significantly reduced.

10. In this respect, the Single Judge wishes to make clear that the issue *sub judice* is not whether the Defence teams should be authorized to rely on the testimonies of the witnesses that they have identified, upon review of the Prosecutor's evidence and upon conducting their own investigation, to be relevant for their respective procedural strategies. Rather, the matter under consideration is whether, and to what extent, such testimonies must be elicited through the *oral* questioning of such witnesses at the confirmation of charges hearing and could not, more appropriately, given the nature and purposes of the confirmation of charges hearing, be presented in the form of written statements.

11. It is also to be clarified that it is not the Single Judge's intent to interfere with the strategy of the Defence. However, the Single Judge recalls her duty to organize the proceedings, taking due account of their nature and scope. Indeed, her duty entails making a delicate balance of interests between, on the one hand, the rights of the suspects to conduct their defence for the purposes of the confirmation of charges

¹⁶ *Ibid.*, para. 9.

hearing, including by way of calling witnesses to testify in open court, and, on the other hand, the proper organization of the entire proceedings, with a view to ensuring, *inter alia*, their expeditiousness. This requires the endorsement of an approach towards handling these proceedings in a manner that does not compromise one element in favor of the other. In this regard, the Single Judge is not persuaded by the argument put forward by the Defence of Mr. Ruto and Mr. Sang that all the witnesses indicated should be allowed to orally testify at the confirmation of charges hearing since the principle of expeditiousness should not prevail over the rights of the defence.¹⁷ Several reasons make such an argument unconvincing.

12. First of all, the principle of expeditiousness is not different from, let alone incompatible with, the rights of the defence. To the contrary, the principle of expeditiousness is one of the core components of the fairness of the proceedings and one of the main rights enjoyed by the suspects themselves. In this respect, the Single Judge refers to the right of the suspects “to be tried without undue delay” as enshrined in article 67(1)(c) of the Statute and recognized as one of the paramount rights of the suspects according to well-established international human rights standards.¹⁸ Thus, in resolving the matter *sub judice*, the Single Judge does not consider the principle of expeditiousness of the proceedings to be in conflict with the “rights of the defence”, as alleged by Mr. Ruto and Mr. Sang.

13. Secondly, the Single Judge notes that the right to be tried without undue delay is enjoyed by the three suspects in the present case equally. They cannot thus be mutually and unduly prejudiced by the procedural strategy of one another, resulting in a burden on the hearing on the confirmation of the charges brought against the three suspects concomitantly.

14. Thirdly, the Single Judge notes that the rights of the defence at the confirmation of charges hearing that are of particular relevance for the matter under consideration

¹⁷ ICC-01/09-01/11-203, paras 10 and 11; ICC-01/09-01/11-204, paras 10 and 11.

¹⁸ See article 6(1) of the European Convention on Human Rights, article 8(1) of the American Convention on Human Rights and article 7(1)(d) of the African Charter on Human and Peoples' Rights.

are provided for by article 61(6) of the Statute. The said provision clarifies that, at the confirmation hearing, the Defence may: (i) object to the charges; (ii) challenge the evidence presented by the Prosecutor; and (iii) present evidence. Such rights cannot be denied to the suspects and the Single Judge has the responsibility to put the Defence in a position to meaningfully exercise them. However, it is nowhere provided that the Defence shall exercise the said right *exclusively* by way of calling live witnesses at the hearing. To the contrary, as already clarified above, the legal instruments of the Court permit that, at the stage of the confirmation of charges hearing, witnesses' testimonies be introduced in writing into the record of the case. Therefore, given the suspects' opportunity to rely on other types of evidence – which, contrary to Mr. Ruto and Mr. Sang's assertion, are not *a priori* accorded a lesser probative value – the proper employment of the rights of the Defence is not preconditioned on the possibility to call an unlimited number of *viva voce* witnesses or to rely on as many live witnesses as would correspond to each and every of the legal elements for both the crimes and the form of the individual responsibility with which the suspects are charged.

15. In conclusion, the Single Judge considers that, whilst it falls within the realm of the Defence teams to decide their best strategy in order to serve the interests of the suspects, this does not mean that all the evidence to be presented needs to be obtained through *viva voce* witnesses. This is, in particular, because live testimony has a significant impact on the organization of the confirmation of charges hearing and, more generally, on the expeditiousness of the proceedings.

16. In light of the above, the Single Judge is of the view that the equal rights of the three suspects in the present case – including the right to the expeditiousness of the proceedings – are properly respected if their Defence teams be ordered to reduce the number of *viva voce* witnesses to be called at the confirmation hearing and rely, as may be deemed necessary, on the written statements of other witnesses without a need to call them to testify live before the Chamber.

17. Moreover, the Single Judge has reviewed the scope and the subject-matter of the proposed questioning of each witness and has identified a substantial duplication of the evidence that each Defence team intends to obtain through the oral testimonies of such witnesses. The Single Judge will hereunder provide some examples of such duplication.

18. First of all, from the list of witnesses provided by the Defence of Mr. Sang, it emerges that Witnesses 1 to 5 would be called to testify on the very same issue. The same holds true for Witnesses 10 to 14. Furthermore, Witnesses 7 and 8 would be questioned on the same matter, which is captured by the evidence to be adduced by Witness 6. As far as the witnesses proposed by the Defence of Mr. Ruto are concerned, the Single Judge notes that Witnesses 6 and 7 would testify on the same subject-matter. In the same vein, Witnesses 17 and 18 would be questioned on one and the same issue. Furthermore the evidence to be elicited from Witness 2 captures that to be obtained through the oral questioning of Witness 1. Finally, with respect to the three witnesses indicated by the Defence of Mr. Kosgey, the Single Judge notes that the evidence to be obtained through the questioning of those witnesses overlap to a very large extent and that the one *sub* letter b) would actually capture the categories of evidence to be introduced through the questioning of the other two.

19. With a view to exercising her power to properly balance the different interests involved and upon careful review of the evidence to be adduced by the proposed witnesses as indicated by the Defence teams, the Single Judge concludes that reducing the number of such witnesses to a maximum of two for each suspect would still permit that the Defence meaningfully exercise its rights provided for by article 61(6) of the Statute, in light of the considerations expressed above.

20. The Single Judge is cognizant that it does not fall within her responsibility and power to identify those witnesses who should be chosen among those previously inserted in the suspects' list of witnesses; rather, the choice lies with the Defence. In light of this, Mr. Ruto and Mr. Sang can, for instance, decide to call those witnesses

who suggested their preference for their testimonies to be given live before the Chamber at the confirmation of charges hearing, as alleged in their respective submissions.¹⁹

21. In any case, the Single Judge expresses her confidence that qualified and experienced counsels, meeting the requirements to appear before the Court, would be able, upon review of the evidence disclosed to them and upon conducting their own investigation, to identify the crucial points of the case and to properly exercise their defence in a focused manner, by way of selecting those live witnesses who are of greatest significance in light of their respective strategy. This could be the case, for example, for those witnesses who are expected to testify in relation to a large number of facts related to several elements of the crimes charged and/or to provide information contesting those pieces of the Prosecutor's evidence deemed to be the weakest. In this respect, needless to say, if even one of the cumulative constituent elements of the crimes charged is not established to the required threshold under article 61(7) of the Statute, this would be sufficient for the Chamber to decide not to confirm the charges. The burden of proof lies indeed with the Prosecutor who is statutorily called, pursuant to article 61(5) of the Statute, to support each charge – and therefore each and every constituent element of the crimes and the mode of liability as charged – with sufficient evidence to convince the Chamber to the requisite threshold.

22. As stated earlier, this is, however, without prejudice to the rights of the Defence teams to rely, for the purposes of the confirmation of charges hearing, upon all written witnesses' statements that are of significance for their respective case, subject to the Chamber's determination as to their relevance or admissibility within the meaning of article 69(4) of the Statute and rule 63(2) of the Rules.

23. In light of the above, the Single Judge deems it necessary that the Defence teams submit an amended list of the witnesses they intend to call to testify live at the

¹⁹ ICC-01/09-01/11-203, para 9; ICC-01/09-01/11-204, para. 9.

confirmation of charges hearing, indicating not more than two *viva voce* witnesses for each suspect and detailing their names and the scope and subject-matter of their proposed questioning.

IV. The Prosecutor's Request for Reclassification

24. The Single Judge now turns to the request advanced by the Prosecutor that the list of *viva voce* witnesses submitted by Mr. Ruto and Mr. Sang²⁰ be reclassified as "confidential" and, accordingly, be provided to him. The Single Judge notes that the submission of the Defence of Mr. Kosgey is, in the same vein, currently classified as "confidential *ex parte*", only available to the Victims and Witnesses Unit.²¹ As he is unaware of the very same existence of the filing, the Prosecutor was not in a position to request the reclassification of the submission of Mr. Kosgey. However, in light of the same nature of the concerned filings, the Single Judge considers that the reasoning provided in the present section equally applies to Mr. Kosgey's submission. Therefore, should the reclassification of the submissions of Mr. Ruto and Mr. Sang be warranted as requested by the Prosecutor, also Mr. Kosgey's filing would be reclassified *proprio motu* by the Single Judge, despite the absence of any request to this effect.

25. For the purposes of the request under consideration, the Single Judge recalls the provision of regulation 23 *bis* of the Regulations which entrusts the Chamber with the authority to reclassify, *proprio motu* or upon request, any document when there is no factual and legal basis for the chosen classification.

26. The Single Judge considers that the *ex parte* nature of the concerned filings is justified in light of the provision of rule 121(6) of the Rules, which states that the Defence shall present its list of evidence, if any, no later than 15 days before the commencement of the confirmation of charges. The Single Judge, in the Calendar for

²⁰ As clarified above, the documents concerned are the following: ICC-01/09-01/11-203-Conf-Exp-Anx and ICC-01/09-01/11-204-Conf-Exp-Anx.

²¹ ICC-01/09-01/11-202-Conf-Exp.

Disclosure, accordingly ordered the Defence teams to submit their respective list of evidence by no later than Tuesday, 16 August 2011.²²

27. In this respect, it should be clarified that the request of the Chamber to the parties to indicate their intention to call *viva voce* witnesses and, if so, to detail the scope and subject-matter of the proposed questioning was, by no mean, an anticipation of the deadline for the submission of their respective lists of evidence in accordance with rule 121(3) and (6) of the Rules. Conversely, such request was rooted on the necessity for the arrangements regarding the witnesses' testimony to be timely made and "for the Chamber to exercise its powers with a view to ensuring the proper organization of the proceedings".²³

28. In light of the above and considering that the deadline for the Defence disclosure, as established in the Calendar for Disclosure, is Tuesday, 16 August 2011, the Prosecutor cannot expect the Defence teams to disclose the identities of the proposed live witnesses, the list of which, at this point in time and in light of the present order, is only provisional. Such disclosure will happen in due time in accordance with the procedural time frame leading to the confirmation of charges hearing as established by the applicable law and detailed in the Calendar for Disclosure.

29. Accordingly, the Single Judge is of the view that the Prosecutor's Request for Reclassification shall be rejected.

²² Calendar for Disclosure, operative part, letter (c)(i).

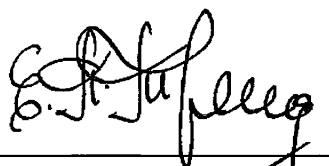
²³ 29 June 2011 Decision, para. 12.

FOR THESE REASONS, THE SINGLE JUDGE

ORDERS the Defence teams to reduce the number of the witnesses they intend to call to testify at the confirmation of charges hearing to a maximum of two witnesses for each suspect and to submit, by no later than **Wednesday, 27 July 2011** an amended list of *viva voce* witnesses, indicating their names and the scope and subject-matter of their proposed questioning;

REJECTS the Prosecutor's Request for Reclassification.

Done in both English and French, the English version being authoritative.



Judge Ekaterina Trendafilova
Single Judge

Dated this Monday, 25 July 2011

At The Hague, The Netherlands