

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 12 August 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

Urgent

**Decision on the "Urgent Defence Application for Postponement of the
Confirmation Hearing and Extension of Time to Disclose and List of Evidence"**

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
Defence 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

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 renders this decision on two applications concerning the postponement of the confirmation hearing submitted by the Defence teams of William Samoei Ruto (“Mr. Ruto”), Henry Kiprono Kosgey (“Mr. Kosgey”) and Joshua Arap Sang (“Mr. Sang”).²

1. On 8 March 2011, the Chamber, by majority, decided to summon Mr. Ruto, Mr. Kosgey and Mr. Sang to appear before it (collectively the “Suspects”).³ 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 2011.⁴

2. On 6 April 2011, the Single Judge issued the “Decision Setting the Regime for Evidence Disclosure and Other Related Matters” (the “6 April 2011 Disclosure Decision”).⁵

3. On 18 April 2011, the Chamber convened a status conference in the presence of the Prosecutor, the Defence teams of the Suspects and the Registrar with a view to discussing matters relevant for the purposes of establishing an adequate calendar of the disclosure proceedings (the “18 April 2011 Status Conference”).⁶

4. 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” (the “20 April 2011 Calendar Decision”), wherein the Prosecutor was

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

² ICC-01/09-01/11-255 and its annexes; ICC-01/09-01/11-256.

³ 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.

⁴ ICC-01/09-01/11-T-1-ENG.

⁵ Pre-Trial Chamber II, “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”, ICC-01/09-01/11-44.

⁶ ICC-01/09-01/11-T-2-ENG.

ordered, *inter alia*, “to file in the record of the case as soon as possible and no later than Monday, 1 August 2011 the Document Containing the Charges and the List of Evidence as required by rule 121(3) of the Rules”. The Defence was also ordered 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 2011.⁷

5. On 11 August 2011, the Defence for Mr. Ruto and Mr. Sang submitted the “Urgent Defence Application for Postponement of the Confirmation Hearing and Extension of Time to Disclose and List of Evidence”, together with a number of annexes (“Mr. Ruto and Mr. Sang Joint Application”),⁸ in which, it requested a six weeks postponement of the confirmation of charges hearing scheduled to take place on 1 September 2011.⁹ In turn, the Defence also requested the postponement of the related deadlines for disclosure of evidence in particular, the filing of its list of evidence in accordance with rule 121(6) of the Rules of Procedure and Evidence (the “Rules”).¹⁰ According to the Defence, it is “endeavoring to be in a position to disclose some materials and file a partial list of evidence by 23 August 2011”.¹¹ In developing its reasoning to justify granting the Application, the Defence for Mr. Ruto and Mr. Sang furnished the Chamber with a number of points that can be summarized as follows: a) the Single Judge has limited the number of live witnesses to two per each team, and accordingly, the Defence had to spend unexpected time to take statements from persons that were supposed to testify before the Court;¹² b) the Defence has to wait for a number of formal and informal relevant requests addressed to the Government of Kenya;¹³ c) the Defence has to wait for responses from various Kenyan institutions and authorities within the next “5 to 40 days”;¹⁴ d) the

⁷ “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.

⁸ ICC-01/09-01/11-255 and its annexes.

⁹ ICC-01/09-01/11-255, para. 2.

¹⁰ ICC-01/09-01/11-255, para. 2.

¹¹ ICC-01/09-01/11-255, para. 2.

¹² ICC-01/09-01/11-255, paras. 3, 8.

¹³ ICC-01/09-01/11-255, paras 3, 10.

¹⁴ ICC-01/09-01/11-255, para. 3, 10.

statements and evidence which the Defence intends to disclose remain in Kenya, and due to security as well as logistical concerns such as poor internet access, they cannot be transmitted by email or sent by way of regular or fast mail carrier;¹⁵ e) there remains a difficulty in obtaining a travel visa for a team member to travel to the Netherlands with the said evidence;¹⁶ f) the failure of the Registry to provide an office for the Defence as well as training related to importing the metadata into the E-Court system and the use of ringtail, which affects its ability to comply with the required deadline for disclosure;¹⁷ g) the amount of work pending to be done by the Defence, such as the analysis of a big volume of disclosed evidence that amounts to “almost 9000 pages”, reviewing victims’ applications, preparing filing related to the admissibility of the case and other pre-trial issues including preparation, investigations and interviewing several identified witnesses for the purposes of the confirmation hearing;¹⁸ and h) the Defence’s right to meaningfully prepare for its case in order to be able to challenge the evidence presented in a “manner that is effective and not illusory” as well as not to be prompted to “hastily submit evidence” that might turn out to be detrimental to its case.¹⁹

6. On 12 August 2011, the Defence for Mr. Kosgey filed the “Kosgey’s Joinder to Ruto and Sang’s Urgent Defence Application for Postponement of Confirmation and Extension of time to Disclose and List Evidence” (“Mr. Kosgey’s Application”),²⁰ in which it sought joining the Defence for Mr. Ruto and Mr. Sang and requested the postponement of the confirmation hearing for six weeks and a three weeks extension of time to disclose its evidence to the Prosecutor.²¹ In justifying its Application, the Defence for Mr. Kosgey made the following points: a) challenges and delays outside the Defence’s control prevented the production of key written witness statements and the securing of key pieces of evidence from the Kenyan Government and other

¹⁵ ICC-01/09-01/11-255, paras 3, 14.

¹⁶ ICC-01/09-01/11-255, para. 14.

¹⁷ ICC-01/09-01/11-255, paras 3, 16.

¹⁸ ICC-01/09-01/11-255, paras 3, 18-19.

¹⁹ ICC-01/09-01/11-255, paras 6-7.

²⁰ ICC-01/09-01/11-256.

²¹ ICC-01/09-01/11-256, pp. 3,9.

actors;²² b) the large volume of disclosure, victims applications and other pending filings together with the shortage of staff;²³ c) the logistical constraints including the lack of office space and access to the Court's systems;²⁴ and d) the issues raised in Mr. Ruto and Mr. Sang Joint Application as set out in paragraphs 16-20 of their filing.

7. On 12 August 2011, the Chamber received the "Prosecution's Request for an Order Directing the Defence to Comply with its Disclosure Obligations",²⁵ in which he opposes Mr. Ruto and Mr. Sang Joint Application as well as Mr. Kosgey's Application.

8. The Single Judge has carefully reviewed Mr. Ruto and Mr. Sang Joint Application together with the annexes as well as Mr. Kosgey's Application, and based on her examination she wishes to express her dissatisfaction with the manner in which the Defence teams of the Suspects approach the upcoming confirmation hearing.

Knowing that the Suspects have chosen their lawyers among those highly qualified in the field, it was her expectations that the Defence teams perform their tasks with full professionalism and without any attempt to delay the Chamber in performing its mandate at the critical moments before the start of the confirmation hearing.

9. Turning to the merits of the two Applications, the Single Judge recalls the initial appearance hearing held on 7 April 2011, in which the Single Judge on more than one occasion referred to the 1 September 2011 as the strict date for the start of the confirmation hearing. In particular, during the hearing the Presiding Judge made clear that from that date of the initial appearance hearing until the commencement of the confirmation hearing, "there is sufficient time for highly professional lawyers on both sides to prepare for the confirmation of charges hearing".²⁶ Moreover, responding to the Defence of Mr. Ruto, the Presiding Judge reiterated the same date

²² ICC-01/09-01/11-256, paras 6, 9-10.

²³ ICC-01/09-01/11-256, paras 6, 18-20.

²⁴ ICC-01/09-01/11-256, paras 6, 8.

²⁵ ICC-01/09-01/11-258.

²⁶ ICC-01/09-01/11-T-1-ENG, p. 17 lines 22-23.

and said that the Judges “consider this to be enough time, almost five months, for the proper conduct of the disclosure. If need be, of course, we always have the opportunity to postpone [...]”.²⁷ Thus, the Defence was well aware and put on sufficient notice for almost five months that the confirmation hearing will take place on 1 September 2011, unless there is an urgent need to decide otherwise.

10. In the context of this case, the Single Judge does not believe that the reasons furnished by the Defence teams in their Applications reveal the urgency for taking this type of action few days before the start of the confirmation hearing. The bulk of the Defences’ arguments go to the heart of its organization strategy. For example, the fact that the Defence allegedly encounters logistical problems to transfer the evidence via email or mail, including DHL carrier, is supposed to be known in advance to the Defence and the latter should have acted diligently earlier to find alternative means to solve the alleged problem, if any. The same holds true in relation to arranging for a visa to a team member. The Defence could have arranged for that long time ago. Moreover, the Defence teams could have availed themselves of the services provided by the Registry to help transferring the documents needed. There is a field officer based in Nairobi and the Court could have offered its assistance, if it had been requested in accordance with rule 20(1)(b) of the Rules. But at no point in time did the Defence request this sort of assistance.

11. In addition, the Defence teams for the Suspects raise the issue of the large volume of disclosed evidence, victims’ applications as well as filings related to the admissibility of cases and pre-confirmation issues. The Single Judge wishes to remind the Defence teams that the information regarding the large volume of evidence is neither novel nor unexpected. In this regard, the Single Judge recalls the 18 April 2011 Status Conference, in which the Office of the Prosecutor made an explicit statement that the documents to be disclosed to the Defence might amount to 11,000 pages.²⁸ Further, the Single Judge wishes to remind the Defence that the

²⁷ ICC-01/09-01/11-T-1-ENG, p. 19 lines 18-20.

²⁸ ICC-01/09-01/11-T-2-ENG, p. 16, lines 10-11.

Chamber is facing similar difficulties and functions in even more difficult circumstances knowing that it is dealing with two cases simultaneously with very limited legal support staff and being called to examine an enormous amount of evidence related to both cases. This is equally the case with respect to other organs of the Court participating or assisting the Chamber in the proper conduct of the current proceedings. Thus, it comes as a surprise that the Defence invokes this argument which leaves the Single Judge with a sole conclusion namely, that there is a lack of proper organization on the part of the Defence.

12. The Defence also argues that there are pending requests addressed to the Kenyan Government and various Kenyan institutions. In support of that, the Defence for Mr. Ruto and Mr. Sang appended to their Joint Application a number of letters addressed to different bodies. Nonetheless, the Defence has not provided the Chamber with any response from these bodies, which shows that their requests are yet to be granted. In the absence of a prove to that effect, the Single Judge cannot delay the proceedings on the basis of hypothetical potential responses from the entities approached.

13. The Defence has also raised an important issue concerning their deprivation of an office space, which according to them, has a negative impact on their organization. The Single Judge wishes to remind the Defence that being provided with an office space is not mandatory. According to the internal report requested by the Single Judge in response to the Defences' allegations, the Registrar confirmed that "[w]hile the policy of the Registry has been to provide offices to each defence and victims' teams, this is not as of right, and is subject to availability of offices [...] the 'existence of an office is a plus, [but] it is not a *conditio sine qua non* for teams to carry out their work'. Furthermore, according to the said report, the physical presence of the Defence teams in The Hague is required in two instances; the relevant one to this case is due to disclosure purposes. In the event that a Defence team is not provided with an office to perform the process of uploading disclosure materials, assistance should be provided by the Office of Public Counsel for the defence (the "OPCD"),

pursuant to its mandate under regulation 77 of the Regulations of the Court. In this respect, the Kenyan Defence teams “have been assisted by the OPCD for this purpose, and there has been no real prejudice to them in this regard”.

14. A correlated argument has been advanced by the Defence concerning the lack of training “on how to import the metadata into the E-Court system or on how to export documents for disclosure from Ring Tail”.²⁹ The Single Judge notes that according to the information provided by the Registry, the Court Support Section organized E-court training for the Defence teams in April and June 2011. The “eCourt team provided group training sessions on April 19th and June 28th” and only one member of the Defence teams was part of the group. Moreover, “one on one personal training was provided [to that member], when she informed eCourt team that she was acting as a Case Manager for the defense team [...]”.

15. As to the argument that the Defence is unable to access internet due to poor internet connection in Kenya, the Single Judge notes that if this is an issue, it should have been addressed to the Registry in due course. However, there is no record that the Defence teams for the Suspects reported about any failure to that effect. Further, according to the Registry’s report, the “Chief ICT Section was in Kenya for 4 days in early July and the Internet connection [...] was very good” with the ability to connect to the ICC email system.

16. Finally, the Defence argue that by declining the request to postpone the confirmation hearing, the Defence will be deprived of its right to meaningfully prepare for its case in the sense of being able to challenge the evidence presented in a “manner that is effective and not illusory” as well as not to be prompted to “hastily submit evidence” that might turn out to be detrimental to its case. The Single Judge disagrees with the Defences’ arguments especially in view of the fact that all of its complaints turned out to be unfounded allegations. In this respect, the Single Judge wishes to point out that a meaningful or an effective exercise of a right does not

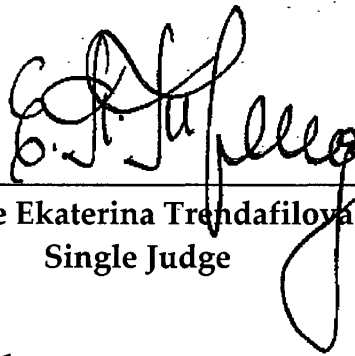
²⁹ ICC-01/09-01/11-255, para. 3.

mean abusing the exercise of such right. The information available before the Chamber makes clear that what the Defence teams are calling for cannot but be described as an abuse of the rights referred to in article 67(1) of the Rome Statute.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

- a) **rejects** Mr. Ruto and Mr. Sang Joint Application;
- b) **rejects** Mr. Kosgey's Application;
- c) **decides** that the confirmation of charges hearing shall take place as scheduled on 1 September 2011;
- d) **orders** the Registry to Provide the necessary assistance to the Defence teams of the Suspects.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Friday, 12 August 2011

At The Hague, The Netherlands