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

Date: 29 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

**Decision on the “Defence Request for Leave to Appeal the ‘Urgent Decision on the
‘Urgent Defence Application for Postponement of the Confirmation Hearing and
Extension of Time to Disclose and List Evidence’ (ICC-01/09-01/11-260)’”**

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 and
Joshua Arap Sang**

Joseph Kipchumba Kigen-Katwa, David
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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

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
Appeals Chamber**

Judge Ekaterina Trendafilova, acting as Single Judge on behalf of Pre-Trial Chamber II (the “Chamber”) of the International Criminal Court (the “Court”)¹ issues this decision on the “Defence Request for Leave to Appeal the ‘Urgent Decision on the ‘Urgent Defence Application for Postponement of the Confirmation Hearing and Extension of Time to Disclose and List Evidence’” (ICC-01/09-01/11-260)’” (the “Application for Leave to Appeal”).²

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”) (collectively the “Suspects”) to appear before the Court.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

¹ Pre-Trial Chamber II, “Decision Designating a Single Judge”, ICC-01/09-02/11-6.

² ICC-01/09-01/11-280 and ICC-01/09-01/11-280-Conf-Exp-Anx.

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.

admissibility challenge' and Establishing a Calendar for Disclosure Between the Parties"(the "20 April 2011 Calendar Decision"), wherein the Prosecutor was 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 of 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 -week postponement of the confirmation of charges hearing scheduled to take place on 1 September 2011.⁹

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"),¹⁰ in which it sought joining the Defence for Mr. Ruto and Mr. Sang and requested the postponement of the confirmation hearing for six weeks plus a three weeks extension of time to disclose its evidence to the Prosecutor.¹¹ On the same date, the Chamber received the "Prosecution's Request for an Order Directing the Defence to Comply with its Disclosure Obligations",¹² in which the Prosecutor opposed Mr. Ruto and Mr. Sang Joint Application as well as Mr. Kosgey's Application.

⁷ Pre-Trial Chamber II, "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; ICC-01/09-01/11-255-Conf-Exp-AnxA; ICC-01/09-01/11-255-Conf-AnxB; ICC-01/09-01/11-255-Conf-Exp-AnxC; ICC-01/09-01/11-255-Conf-Exp-AnxD and ICC-01/09-01/11-255-Conf-AnxE.

⁹ ICC-01/09-01/11-255, para. 2.

¹⁰ ICC-01/09-01/11-256.

¹¹ ICC-01/09-01/11-256, pp. 3, 9.

¹² ICC-01/09-01/11-258.

7. On 12 August 2011, the Single Judge issued the “Decision on the ‘Urgent Defence Application for Postponement of the Confirmation Hearing and Extension of Time to Disclose and List Evidence’” (the “12 August 2011 Decision”), wherein she rejected Mr. Ruto and Mr. Sang Joint Application as well as Mr. Kosgey’s Application and decided that the confirmation of charges hearing shall take place, as scheduled, on 1 September 2011.¹³

8. On 22 August 2011, the Chamber received the Application for Leave to Appeal, in which the Defence of Mr. Ruto and Mr. Sang sought leave to appeal the 12 August 2011 Decision on the following points:

a) whether the Defence should be rushed into filing a list of evidence and disclosing evidence for the purposes of the confirmation hearing, which it is not prepared to do for documented legal and logistical reasons [the “First Issue”]; and

b) whether the Single Judge should have denied the Defence’s request for postponement of the confirmation of charges hearing, partially on the basis of erroneous information obtained from other sources at the Court, upon which the Defence did not have the opportunity to comment [the “Second Issue”].¹⁴

9. In addition, the Defence “requests [...] a suspension of the proceedings, while this request for leave to appeal is pending” (the “Request for Suspension”).¹⁵

10. On 23 August 2011, the Prosecutor filed the “Prosecution’s Request that the ‘Defence Request for Leave to Appeal the ‘Urgent Decision on the ‘Urgent Defence Application for Postponement of the Confirmation Hearing and Extension of Time to Disclose and List Evidence’ be Dismissed as Filed out of Time’”, wherein the Prosecutor requested that the Application for Leave to Appeal be dismissed *in limine* as it was filed out of the applicable time-limit.¹⁶

¹³ Pre-Trial Chamber II, “Decision on the ‘Urgent Defence Application for Postponement of the Confirmation Hearing and Extension of Time to Disclose and List Evidence’”, ICC-01/09-02/11-260, p. 10.

¹⁴ ICC-01/09-01/11-280, paras 11-12.

¹⁵ ICC-01/09-01/11-280, para. 3.

¹⁶ ICC-01/09-01/11-284.

11. On 24 August 2011, the Single Judge issued the “Decision on the ‘Defence Request for Leave to Appeal the ‘Urgent Decision on the ‘Urgent Defence Application for Postponement of the Confirmation Hearing and Extension of Time to Disclose and List Evidence’ (ICC-01/09-01/11-260)” (the “24 August 2011 Decision”), in which the Application for Leave to Appeal was dismissed *in limine* on the basis that it was filed out of time.¹⁷

12. On 24 August 2011, the Defence of Mr. Ruto and Mr. Sang filed the “Response to the “Prosecution’s Request that the ‘Defence Request for Leave to Appeal the ‘Urgent Decision on the ‘Urgent Defence Application for Postponement of the Confirmation Hearing and Extension of Time to Disclose and List Evidence’ (ICC-01/09-01/11-260)’ be Dismissed as Filed out of Time”” (the “Defence’s Response”),¹⁸ in which the Defence submitted that it filed their substantive Application for Leave to Appeal at 16:00 hours on 22 August 2011, within the prescribed time limits.¹⁹ However, a corrected version of the cover page of the filing – stating that the Application for Leave to Appeal comprised a confidential *ex parte* annex – was transmitted to the Court Management Section (the “CMS”) at 16:23 hours on the same day.²⁰ Accordingly, the Defence contends that the CMS recorded the time of receipt of the whole filing as 16:24 hours, which was deemed out of time limit.²¹

13. On 25 August 2011, the Chamber received the “Defence Request for Reconsideration of the Single Judge’s ‘Decision on the ‘Defence Request for Leave to Appeal the ‘Urgent Decision on the ‘Urgent Defence Application for Postponement of the Confirmation Hearing and Extension of Time to Disclose and List Evidence (ICC-01/09-01/11-260)’” (the “Request for Reconsideration”),²² wherein the Defence of Mr. Ruto and Mr. Sang requested the Single Judge to “[...] reconsider her decision to

¹⁷ Pre-Trial Chamber II, “Decision on the ‘Defence Request for Leave to Appeal the ‘Urgent Decision on the ‘Urgent Defence Application for Postponement of the Confirmation Hearing and Extension of Time to Disclose and List Evidence’ (ICC-01/09-01/11-260)”, p. 4.

¹⁸ ICC-01/09-01/11-287; ICC-01/09-01/11-287-Conf-AnxA; ICC-01/09-01/11-287-Conf-AnxB.

¹⁹ ICC-01/09-01/11-287, para. 1; ICC-01/09-01/11-287-Conf-AnxA.

²⁰ ICC-01/09-01/11-287-Conf-AnxB.

²¹ ICC-01/09-01/11-287, paras 2-3.

²² ICC-01/09-01/11-288; ICC-01/09-01/11-288-Conf-AnxA; ICC-01/09-01/11-288-Conf-AnxB.

dismiss the Defence's [Application for Leave to Appeal] [...]" and to consider it as filed within the prescribed time limit.²³

14. On 26 August 2011, the Chamber received the "Registry's Report on the Registration of Document ICC-01/09-01/11-280 and its annex" (the "Registry's Report"), in which it is stated that "the Defence [Application for Leave to Appeal] [...] consisting of a main document and an annex was submitted for registration in the case record on 22 August 2011 and received at 16h01, beyond the official filing hours".²⁴ The Registry added that "the Defence submitted a corrected version of its request stating that the cover page of the initially submitted document [...] [did] not reflect the confidential and *ex parte* annex".²⁵ The Registry points out that "the reception time of a document submitted for registration is the time when the final and complete version of that document is received".²⁶

II. Applicable Law

15. The Single Judge notes articles 21(1)(a), (2), (3) and 82(1)(d), (3) of the Rome Statute (the "Statute"), rules 121(6) and 156(5) of the Rules of Procedure and Evidence (the "Rules") and regulation 33(1) and (2) of the Regulations of the Court (the "Regulations").

III. The Request for Reconsideration

16. In the Request for Reconsideration, the Defence of Mr. Ruto and Mr. Sang reiterated their submission made in the Defence's Response, according to which after filing the Application for Leave to Appeal at 16:00 hours on 22 August 2011, upon discovering that the cover page of the filing failed to indicate the existence of the confidential *ex parte* annex attached thereto, the Defence sent a corrected version of the

²³ ICC-01/09-01/11-288, para. 17.

²⁴ ICC-01/09-01/11-295, p. 4.

²⁵ ICC-01/09-01/11-295, p. 4.

²⁶ ICC-01/09-01/11-295, p. 4.

said cover page to the CMS at 16:23 hours. The latter then recorded the time as having received the whole filing at 16:24 hours.²⁷

17. The Defence team of Mr. Ruto and Mr. Sang avers that, by issuing the 24 August 2011 Decision before receiving the Defence's Response, the Single Judge deprived the Defence of an opportunity to be heard on the issue as to whether and eventually why the Application for Leave to Appeal was effectively filed out of time. As a consequence, the Defence contends that the 24 August 2011 Decision was taken "[...] in ignorance of relevant information",²⁸ since the Single Judge "[...] was unaware that in fact the Defence had filed its [A]pplication for Leave to Appeal not at 4:24 pm but by 4:00 pm, in accordance with Regulation 33(2)".²⁹ The Defence team of Mr. Ruto and Mr. Sang refers to the jurisprudence of Trial Chamber I of the Court and requests the Single Judge to reconsider the 24 August 2011 Decision, thereby accepting the Application for Leave to Appeal as duly filed on time and entertaining it on the merits.

18. At the outset, the Single Judge notes that, with the exception of Trial Chamber I, the jurisprudence of the Court has refused the approach to reconsider its previous rulings. This proves to be a coherent approach especially in instances where a Chamber has ruled on the issue *sub judice* in good faith and considering the information available to it as correct and reliable. In this respect, and contrary to the Defence's assertions, the Single has taken the 24 August 2011 Decision not "in ignorance of relevant information" but being guided by the information relevant to her ruling provided by the Registry as the relevant neutral body at the Court. Thus, the time the CMS received the Application for Leave to Appeal was trustful. In light of this consideration, the Single Judge is of the view that taking the 24 August 2011 Decision without waiting for Defence's Response was neither an infringement on the rights of the Suspects nor it constituted *a conditio sine qua non* for ruling on the subject-matter. Therefore, the Request for Reconsideration must be rejected.

²⁷ ICC-01/09-01/11-288, para. 3.

²⁸ ICC-01/09-01/11-288, para. 11.

²⁹ ICC-01/09-01/11-288, para. 11.

19. However, the Single Judge considers that in the specific circumstances of the case, the CMS, unlike other times,³⁰ negligently omitted to specify the reception time of the main document, on the one hand, and the reception time of any annexes attached thereto or corrected versions of the main document, on the other hand. As submitted in the Registry's Report, "the reception time of a document submitted for registration is the time when the final and complete version of that document is received".³¹ While this may be acknowledged to be the practice, the omission of relevant information, namely the time of receipt of the main document and the subsequent submission of a corrected cover page of the filing, led the Single Judge to take a decision which could have been different, had such information been available at the time of ruling on the issue *sub judice*.

20. The Single Judge took the 24 August 2011 Decision *solely* on the basis of the incomplete information provided by the Registry, which resulted in the dismissal *in limine* of the Application for Leave to Appeal, without entertaining it on the merits. Accordingly, it is the view of the Single Judge that, while it is not a matter of reconsideration of her previous ruling, the Defence however deserves that the Application for Leave to Appeal be assessed on its merits, taking into account that the issues on which the Defence is seeking leave to appeal are of a particular significance. This must be the case notwithstanding that the Application for Leave to Appeal was filed one minute after the lapse of the time limit to seek leave to appeal pursuant to rule 155 of the Rules in conjunction with regulation 33(1)(d) of the Regulations.

21. Lastly, the Single Judge wishes to express her disappointment for the lack of complete information provided by the CMS in registering the Application for Leave to Appeal. The Single Judge reminds that the Registry, and in the particular case under consideration the CMS, shall assist the Chamber to put it in the best conditions to carry out its judicial tasks.

³⁰ See for example the notification of filing ICC-01/09-02/11-203-Conf-Exp.

³¹ ICC-01/09-01/11-295, p. 4.

IV. The Single Judge's Determination of the Application for Leave to Appeal

22. According to article 82(1)(d) of the Statute, "[e]ither party may appeal [...]:

(d) A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial [...] Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

23. In this regard, the Single Judge recalls the first decision on interlocutory appeal dated 19 August 2005, in which this Chamber, albeit in a different composition, held that when addressing an application for leave to appeal under article 82(1)(d) of the Statute, it must be guided by three main principles: a) the restrictive nature of the remedy provided in this provision; b) the need for the applicant to satisfy the Chamber as to the fulfillment of the requirements embodied in this provision; and c) the irrelevance of addressing arguments concerning the merits of the appeal.³² Moreover, the Single Judge recalls the Appeals Chamber's judgment of 13 July 2006 (the "13 July 2006 Judgment"), which states that the object of the remedy provided in article 82(1)(d) of the Statute, is to "pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial".³³ The Single Judge shall therefore examine the Application for Leave to Appeal in light of these principles.

24. The Single Judge turns to the requirements regulating the granting or rejecting an application for leave to appeal, which are as follows:

a) The decision must involve an "issue" that would significantly affect *both* (i) the "fair" and "expeditious" conduct of the proceedings (ii) or the outcome of the trial; and

b) In the view of the Pre-Trial Chamber, an immediate resolution by the Appeals Chamber is warranted as it may materially advance the proceedings.

³² Pre-Trial Chamber II, "Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58", ICC-02/04-01/05-20-US-Exp, unsealed pursuant to Decision ICC-02/04-01/05-52 dated 13 October 2005, para. 15; "Decision on the Prosecution's Application for Leave to Appeal the Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06", ICC-02/04-112, para. 16.

³³ Appeals Chamber, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber's 31 March 2006 Decision Denying Leave to Appeal", ICC-01/04-168, para. 19.

25. It follows that in order to grant the Application for Leave to Appeal, the Defence must demonstrate the existence of an “appealable issue” arising from the 12 August 2011 Decision, which in turn, meets the requirements as specified in paragraphs (a) and (b).³⁴

Determination on the Two Issues

26. In the 13 July 2006 Judgment, the Appeals Chamber defined an appealable issue as:

[A]n identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. There may be disagreement or conflict of views on the law applicable for the resolution of a matter arising for determination in the judicial process. This conflict of opinion does not define an appealable subject. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. The issue may be legal or factual or a mixed one.³⁵

27. The Single Judge observes that the First Issue proposed by the Defence speaks about an alleged rush “into filing a list of evidence and disclosing the evidence for the purpose of the confirmation of charges hearing” and the Defence’s unpreparedness to do so “for legal and logistical reasons”. The Single Judge is compelled to underline that the pace governing the disclosure phase between the initial appearance of the Suspects up until the confirmation of charges hearing has been established in greater advance and detail by the Chamber, most notably in the 6 April 2011 Decision establishing the disclosure system and in the 20 April 2011 Calendar Decision setting the calendar for disclosure to be followed by the parties. The calendar so established was respected by the Prosecutor, who fulfilled his obligations to disclose the evidence to the Defence, which was put in a position to familiarize with the allegations made against the Suspects and the evidence in support thereof.

³⁴ Pre-Trial Chamber II, “Decision on the Prosecutor’s Application for Leave to Appeal the ‘Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo’”, ICC-01/05-01/08-532, paras 14-16.

³⁵ Appeals Chamber, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber’s 31 March 2006 Decision Denying Leave to Appeal”, ICC-01/04-168, para. 9.

28. In addition, the Chamber's obligation to ensure that disclosure takes place under satisfactory conditions, as mandated by rule 121(2)(b) of the Rules, is reflected in the assurances given by the Single Judge during the 18 April 2011 Status Conference toward establishing and supervising the calendar for disclosure.³⁶ Such commitment by the Chamber was not objected in that circumstance but actually welcomed by the Defence.

29. On the basis of all steps and measures mentioned above, the Defence has been made aware – since the time referred to in paragraphs 27 and 28 above – of the whole disclosure proceeding, culminating in the 16 August 2011 deadline for disclosure to the Prosecutor of the Defence's list of evidence to be relied upon at the confirmation hearing, namely 15 days before the confirmation hearing itself, as provided for in rule 121(6) of the Rules.

30. Accordingly, the Single Judge is of the view that the alleged pressure under which the Defence was put for the purpose of fulfilling its disclosure obligations and the presumed prejudice to the rights of the Suspects are speculative in nature, as also demonstrated by the timing the Defence chose to come with their requests for postponement, namely only 5 days before the lapse of the 15 days deadline under rule 121(6) of the Rules. Therefore, the First Issue advanced by the Defence amounts to a mere "disagreement or conflict of views on the law applicable for the resolution of a matter arising for determination in the judicial process". Hence, the First Issue does not constitute an appealable issue under article 82(1)(d) of the Statute.

31. As for the Second Issue in respect of which the Defence is seeking leave to appeal, the Single Judge agrees that it amounts to an identifiable subject or topic and not merely a question over which there is disagreement or conflicting opinion, within the meaning of the definition given by the Appeals Chamber in the 13 July 2006 Judgment.

³⁶ ICC-01/09-01/11-T-2-ENG, p. 11 line 6-20.

32. The Second Issue is grounded on the assertion that the Single Judge ruled on the Defence's requests for postponement of the confirmation of charges hearing "[...] on the basis of erroneous information obtained from other sources at the Court, upon which the Defence did not have the opportunity to comment".

33. The Single Judge notes that in taking the 12 August 2011 Decision rejecting Mr. Ruto and Mr. Sang Joint Application and Mr. Kosgey Application, she relied on a report urgently requested to the Registry, which provided clarifications on the issues advanced by the Defence teams in support of their requests.³⁷ In this regard, the Single Judge recalls her argument in paragraph 18 above, according to which any ruling made by a Chamber is based on the presumption that the information available to the Judges for the determination of the subject-matter at stake is in principle correct. The Single Judge notes that, contrary to the Request for Reconsideration, for the purpose of the Second Issue on which leave to appeal is sought, the Defence for Mr. Ruto and Mr. Sang has not argued which among the "[...] information obtained from [...] [the Registry], and upon which the Defence did not have the opportunity to comment, was "erroneous".

34. In the absence of such information, the Single Judge considers that the Second Issue is framed in a general and abstract manner and cannot be said to arise from the impugned decision. Leave to appeal under article 82(1)(d) of the Statute must be therefore rejected with regard to the Second Issue.

35. With regard to the Request for Suspension, the Single Judge considers it becomes moot in light of the rejection of the First Issue and the Second Issue in respect of which the Defence of Mr. Ruto and Mr. Sang sought leave to appeal.

³⁷ ICC-01/09-01/11-283.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

- a) rejects** the Request for Reconsideration;
- b) rejects** the Application for Leave to Appeal.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Monday, 29 August 2011

At The Hague, The Netherlands