

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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 pursuant to Rule 124(1) for Mr. William Ruto to Waive his Right to be Present for part of the Confirmation of charges Hearing"

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

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

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 the “Defence Request pursuant to Rule 124(1) for Mr. William Ruto to Waive his Right to be Present for part of the Confirmation of charges Hearing” (the “Application”).²

1. On 8 March 2011, the Chamber, by majority, decided to summon William Samoei Ruto (“Mr. Ruto”), Henry Kiprono Kosgey and Joshua Arap Sang to appear before it.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”.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.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

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

² ICC-01/09-01/11-299 and its annex.

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.

Kenya's admissibility challenge' and Establishing a Calendar for Disclosure Between the Parties".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

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"),¹¹ 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.¹²

7. On 12 August 2011, the Chamber received the "Prosecution's Request for an Order Directing the Defence to Comply with its Disclosure Obligations",¹³ in which he opposes Mr. Ruto and Mr. Sang Joint Application as well as Mr. Kosgey's Application.

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-01/09-01/11-256.

¹² ICC-01/09-01/11-256, pp. 3,9.

¹³ ICC-01/09-01/11-258.

8. 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’”, wherein she rejected Mr. Ruto and Mr. Sang Joint Applicant as well as Mr. Kosgey’s Application and decided that the confirmation of charges hearing shall take place, as scheduled, on 1 September 2011.¹⁴

9. On 17 August 2011, the Single Judge issued the “Decision Requesting Observations on the Schedule for the Confirmation of Charges Hearing”,¹⁵ in which the parties and participants were requested to submit observations for the purposes of establishing the final schedule of the Hearing, by no later than 22 August 2011. On 25 August 2011, the Single Judge based on the observations received, issued the “Decision on the Schedule for the Confirmation of Charges Hearing”.¹⁶

10. On 26 August 2011, the Defence for Mr. Ruto submitted the Application and an annex appended thereto, in which, it request that:

[T]he Pre-Trial Chamber find, pursuant to Article 61(2)(a) and Rule 125(1), that there is cause to hold part of the hearing on confirmation of charges in the absence of Mr. Ruto, given that he has knowingly waived his right to be present and understands the consequences thereof.¹⁷

In particular, Mr. Ruto argues that he “understands the consequences of waiving his right to be present [...] [and] request to be absent from part of the proceedings [...] to continue his legislative duties and fulfil [sic] his obligations as an elected official to members of his constituency”.¹⁸ According to Mr. Ruto, his absence is required because he “also has an important personal matter for which he needs to be in attendance”.¹⁹

11. The Single Judge notes articles 21(1)(a),(2) and (3), 61(2)(a) of the Rome Statute (the “Statute”) and rules 124 and 125 of the Rules of Procedure and Evidence (the “Rules”).

¹⁴ 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.

¹⁵ Pre-Trial Chamber II, ICC-01/09-01/11-272.

¹⁶ Pre-Trial Chamber II, ICC-01/09-01/11-294.

¹⁷ ICC-01/09-01/11-299, para. 10 and its annex.

¹⁸ ICC-01/09-01/11-299, paras 1-2, 8-9.

¹⁹ ICC-01/09-01/11-299, para. 9.

12. The Single Judge further notes that, while article 61(2)(a) of the Statute together with rules 124 and 125 of the Rules entitle Mr. Ruto, in principle, to waive his right to be present at the confirmation of charges hearing scheduled to take place on 1 September 2011, they do not support an interpretation that the suspect may pick and choose the days he wishes to attend. On the contrary, rule 124(1) of the Rules speaks of “the person [who] wishes to waive the right to be present at the *hearing on confirmation of charges* [...]”, which in the Single Judge’s view entails, the entire hearing and not part of it. This is equally true if one reads the plain wording of rule 125(1) of the Rules, which makes clear that once a decision is taken to hold a hearing in the absence of the person concerned, this will be for the entirety of the confirmation proceeding. Thus, nowhere in the text of these provisions is it stated that the person could skip parts of the hearing and attend the other. It follows that the midway solution Mr. Ruto has put forward in his Application has no legal basis in the Court’s statutory documents, and therefore, he must either decide to be present during the whole proceeding or he may waive his right to be present throughout the entirety of the hearing.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

- a) rejects** the Application;
- b) decides** that, should Mr. Ruto decide to waive his right to be present during the entirety of the hearing, he must submit a new written request to that effect.

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