

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/11
Date: 16 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 Defence Requests for Extension of Time Limit for Disclosure in
Compliance with the E-Court Protocol**

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
Sureta Chana

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 requests for extension of time limit for disclosure in compliance with the E-Court Protocol.

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 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 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”).⁴
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”).⁵
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 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

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.

⁴ Pre-Trial Chamber II, “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”, ICC-01/09-01/11-44.

⁵ ICC-01/09-01/11-T-2-ENG.

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 2011.⁶

5. On 15 August 2011, the Chamber received "Henry Kosgey's Contingent Request for Extension of Time Limit for Disclosure in Compliance with the E-Court Protocol" ("Mr. Kosgey's Request"),⁷ wherein the Defence for Mr. Kosgey "[...] requests that the Pre Trial Chamber extend the 16 August 2011 Defence deadline for disclosure in compliance with the E-Court protocol by **one day**—if and only if the Registry cannot otherwise facilitate the timely processing of the disclosure".⁸ On the same date, the Chamber received "Ruto and Sang's Joinder to Kosgey's Contingent Request for Extension of Time Limit for Disclosure in Compliance with the E-Court Protocol" (Mr. Ruto and Mr. Sang's Joint Requests"),⁹ in which the Defence team for Mr. Ruto and Mr. Sang joins Mr. Kosgey's Request.¹⁰

6. On 16 August 2011, the Prosecutor filed his response to Mr. Kosgey's Request and to Mr. Ruto and Mr. Sang's Joint Requests.¹¹ In his submissions, the Prosecutor opposes the Defence teams' requests and "[...] asks that the Chamber require the Defence teams to proceed with their disclosures on 16 August 2011, in a format that complies with the E-Court protocol, as ordered in the [6 April 2011 Disclosure Decision and in the 20 April 2011 Calendar Decision]".¹²

7. Considering the common subject matter of the Defence teams' requests, the Single Judge will address them jointly.

⁶ "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.

⁷ ICC-01/09-01/11-262; ICC-01/09-01/11-262-Conf-Anx1; ICC-01/09-01/11-262-Conf-Anx2; ICC-01/09-01/11-262-Conf-Anx3.

⁸ ICC-01/09-01/11-262, para. 13.

⁹ ICC-01/09-01/11-264.

¹⁰ ICC-01/09-01/11-264, para. 1.

¹¹ ICC-01/09-01/11-265.

¹² ICC-01/09-01/11-265, para. 5.

8. The Single Judge notes article 21(1)(a) and 52(1) of the Rome Statute (the “Statute”), rule 121(6) of the Rules of Procedure and Evidence (the “Rules”) and regulation 35(2) of the Regulations of the Court (the “Regulations”).

9. The Defence assert that, in the course of a training held on 12 August 2011, “[...] the case managers for Kosgey, Ruto and Sang were informed that no disclosures could be uploaded onto the Defence Ringtail database if they did not have access to the shared drives and network drives for their respective teams”, a detail of which the Defence of the Suspects claim to have been unaware of up until that moment.¹³ The Defence teams contend that immediately after being informed of the necessity to access the relevant drives in order to upload disclosure material “[...] the Kosgey case manager made an urgent, renewed request to the [Information Technology] department for access to the drives”.¹⁴ The Defence avert that no measures have been taken in respect of such request and that at 11:40 hours on Monday 15 August 2011, the two Defence teams of the Suspects did not yet have access to the necessary drives to upload material to be disclosed to the Prosecutor.¹⁵

10. The Defence also claim that, while it is in principle possible to resort to the Office for Public Counsel for the defence (the “OPCD”) to upload disclosure material “[...] the OPCD simply cannot support a task this large and in the short period of time scheduled as [...] [it] has one case manager and one computer with the relevant software”.¹⁶ Furthermore, the OPCD is “busy assisting numerous defence teams in both pre-trial and trial preparations”.¹⁷

11. The Single Judge recalls rule 121(6) of the Rules which stipulates that if the Suspects intend to present evidence at the confirmation of charges hearing, they “shall provide a list of that evidence to the Pre-Trial Chamber no later than 15 days before the date of the hearing”. Pursuant to regulation 35(2) of the Regulations “[t]he

¹³ ICC-01/09-01/11-262, para. 7.

¹⁴ ICC-01/09-01/11-262, para. 10; ICC-01/09-01/11-262-Conf-Anx1, pp. 2-3; ICC-01/09-01/11-262-Conf-Anx2, p. 2

¹⁵ ICC-01/09-01/11-262, para. 10.

¹⁶ ICC-01/09-01/11-262, para. 9.

¹⁷ ICC-01/09-01/11-262, para. 9.

Chamber may extend or reduce a time limit if good cause is shown and, where appropriate, after having given the participants an opportunity to be heard”.

12. The Single Judge is cognizant that regulation 35(1) of the Regulations applies exclusively to time limits “[...] as prescribed in these Regulations or as ordered by the Chamber [...]”. According to article 21(1)(a) of the Statute, “the Court shall apply in the first place, [the] Statute, [...] and its Rules of Procedure and Evidence”. Thus, regulations of the Court, which are established “in accordance with [the] Statute and the Rules of Procedure and Evidence”, and for the sole purpose of its “routine functioning”, can neither override the Statute nor its Rules. It follows that the deadline established by rule 121(6) of the Rules may not be derogated from and that the Suspects are bound by the Rules to provide the Chamber, should they wish to do so, with a list of the evidence they intend to rely on at the confirmation of charges hearing no later than 15 days before the date of the hearing.

13. The Single Judge considers, however, that it is of particular significance that the Suspects fully enjoy their rights and, in particular, that they are put in a position to present evidence, if they so wish, to object the charges against them and to challenge the evidence presented by the Prosecutor, pursuant to articles 61(6)(c) and 67(1)(e) of the Statute.

14. In the particular circumstance of the current case and given the time constraints, the Single Judge will not delve into the problem as presented by the Defence. She takes note of the facts as portrayed, in that the technical obstacles experienced by the Defence unexpectedly arose a few days before the expiration of the deadline for disclosure and were not resolved until 15 August 2011 until 14.30 hours, *i.e.* one day before the lapse of the established time limit.

15. In light of the foregoing and in respect of the deadline enshrined in rule 121(6) of the Rules, the Single Judge is of the view that it is appropriate to authorize the Defence to submit, in compliance with the E-Court Protocol, the evidence they intend to rely on at the confirmation of charges hearing up until 23:59 hours on 16

August 2011. This ensures, on the one hand, that the deadline dictated by rule 121(6) of the Rules is complied with, while on the other hand, the Defence is not prejudiced.

16. The Single Judge is confident that, pursuant to rule 20 of the Rules, the Defence teams of the Suspects will receive the continuing support and assistance by the Registry in the preparation of the confirmation of charges hearing and during the hearing itself.

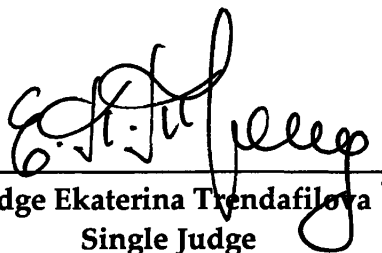
FOR THESE REASONS, THE SINGLE JUDGE HEREBY

rejects Mr. Kosgey's Request;

rejects Mr. Ruto and Mr. Sang's Joint Requests;

authorizes the Defence team of Mr. Kosgey, the Defence team of Mr. Ruto and the Defence team of Mr. Sang to submit, in compliance with the E-Court Protocol, the evidence they intend to rely on at the confirmation of charges hearing up until 23:59 hours on 16 August 2011

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Tuesday, 16 August 2011

At The Hague, The Netherlands