

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 15 Aug 2011

**PRE-TRIAL CHAMBER II**

**Before:** Judge Ekaterina Trendafilova, Presiding Judge  
Judge Hans-Peter Kaul, Judge  
Judge Cuno Tarfusser, 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  
Henry Kosgey's Contingent Request for Extension of Time Limit for Disclosure in  
Compliance with the E-Court Protocol  
with Confidential Annexes 1-3**

**Source:** Defence for Mr. Henry Kiprono Kosgey

Document 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 the Defence**

Counsel for William Samoei Ruto:  
Kioko Kilukumi Musau, Joseph  
Kipchumba Kigen-Katwa and Kithure  
Kindiki, David Hooper QC  
Counsel for Henry Kiprono Kosgey:  
George Odinga Oraro, Julius Kemboy  
and Allan Kosgey  
Counsel for Joshua Arap Sang:  
Joseph Kipchumba Kigen-Katwa, Joel  
Kimutai Bosek and Philemon K.B. Koech

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**

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

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms. Silvana Arbia, Registrar

**Counsel Support Section**

**Deputy Registrar**

Mr. Didier Daniel Preira, Deputy  
Registrar

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. Introduction

1. Pursuant to regulation 35 of the Regulations of the Court (“Regulations”), the Defence for Henry Kiprono Kosgey (“Defence”) respectfully requests a one-day extension of the 16 August 2011 deadline to submit Defence disclosure to the Prosecution in compliance with the E-Court protocol. The Defence submits that technical difficulties, not within the Defence’s control, substantially limit the timely uploading of Defence disclosure and constitute “good cause” within the meaning of regulation 35(2) of the Regulations to vary the time limit and militate in favour of granting this Request. The Defence files this Request out of an abundance of caution—in the event that the Registry is not able to facilitate the uploading and processing of the disclosure in compliance with the E-Court protocol within the time remaining before the 16 August deadline.

## II. Procedural Background

2. Following the majority’s Decision to issue three summons’ against the Suspects,<sup>1</sup> the Single Judge’s *Decision on the “Prosecution’s application requesting disclosure after a final determination of Kenya’s admissibility challenge” and Establishing a Calendar for Disclosure Between the Parties* (“20 April 2011 Calendar Decision”) ordered the Defence 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.”<sup>2</sup>
3. On 12 August 2011, the Defence filed *Kosgey’s Joinder to Ruto and Sang’s Urgent Defence Application for Postponement of Confirmation and Extension of Time to Disclose and List Evidence* (“Joinder”) to join Ruto and Sang’s *Urgent Defence Application for Postponement of Confirmation and Extension of Time to Disclose and List Evidence* (“Ruto and Sang Application”), filed 11 August 2011.

<sup>1</sup> 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.

<sup>2</sup> *Prosecutor v. Ruto et al*, ICC-01/09-01/11-62, Decision on the “Prosecution’s application requesting disclosure after a final determination of Kenya’s admissibility challenge” and Establishing a Calendar for Disclosure Between the Parties, 20 April 2011 (“**20 April 2011 Calendar Decision**”).

4. On 12 August 2011, the Single Judge issued her *Decision on the “Urgent Defence Application for Postponement of the Confirmation Hearing and Extension of Time to Disclose and List Evidence”*, denying the Defence requests for postponement and deadline extensions in their entirety.

### **III. Applicable Law**

5. This Pre-Trial Chamber has previously held that regulation 35 of the Regulations—governing variation of time limits—provides a legal basis for varying time limits set out in past decisions if “good cause” is shown.<sup>3</sup>

### **IV. Submissions**

6. On 12 August, the Kosgey case manager attended an IT training on how to prepare and upload disclosure documents, in an effort to meet the 16 August deadline. While the Kosgey case manager (as well as other *Ruto et al* defence team members) had attended a previous E-Court training session on 28 June, that earlier session only provided an introduction to ICC systems and software and did not give instruction on the process of uploading disclosures.<sup>4</sup> When the Kosgey case manager and other *Ruto et al* defence team members asked when they would receive training on the all-important process of uploading disclosure, they were informed that such training could not take place until the defence actually had copies of the disclosure they sought to upload. Therefore, leading up to the 12 August training on uploading disclosures, the *Ruto et al* defence team members had not yet been instructed by the Registry on any part of that process.
7. In the course of the training on 12 August, the case managers for Kosgey, Ruto and Sang were informed that no disclosures could be uploaded onto the Defence Ringtail

<sup>3</sup> *Prosecutor v. Ruto et al*, ICC-01/09-01/11-82, Decision on the “Prosecution’s Application for Extension of Time Limit for Disclosure”, 10 May 2011 at para 18.

<sup>4</sup> Specifically, the 28 June training session instructed on log-in to CITRIX (programme covering remote database access), access to transcripts, E-Court navigation and other introductory topics. The session did not include instruction on the process of how to upload disclosure.

database if they did not have access to the shared drives and network drives for their respective teams. The case managers were told that disclosure cannot be downloaded from an external hard drive—as a security measure, the system is designed to only upload disclosure from the shared drive. The *Ruto et al* defence team members had previously been unaware of such a requirement—they had no notice from the Counsel Support Section about this precondition in an already highly technical process of uploading disclosure.

8. Regrettably, despite several oral and written requests from the *Ruto et al* defence teams, access to the shared drives and network drives has yet to be granted to the case managers.<sup>5</sup> When the case managers were initially appointed on their respective cases, the Counsel Support Section informed them that their access to these drives would be granted upon the Registry's issuance of an office and computer. However, the Registry has yet to issue any such resources.
9. Indeed, all processing of the Prosecution's disclosures with the requisite software and access to drives over the past two months has been executed from the Office of Public Counsel for the Defence (OPCD) as a temporary measure until such resources could be allocated. But now that it is the turn of the Defence to upload its own disclosures, the resources allotted the OPCD simply cannot support a task this large and in the short period of time scheduled as the office only has one case manager and one computer with the relevant software. Additionally, the OPCD is not only supporting the *Ruto et al* defence teams—it is busy assisting numerous defence teams in both pre-trial and trial preparations.<sup>6</sup>
10. Immediately after being informed of the necessity of access to the shared drives and network drives in the process of uploading disclosure, and despite the continuing lack of the requisite office and computer, the Kosgey case manager made an urgent, renewed request to the IT department for access to the drives.<sup>7</sup> However, on the IT side, no measures have yet been taken to rectify the problem aside from opening an IT

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<sup>5</sup> See Annex 1 to this Application for the relevant written correspondence between the Defence and the Registry regarding access to the shared and network drives.

<sup>6</sup> Presently the OPCD is busy assisting the defence team for Callixte Mbarushimana in preparation for their confirmation hearing this week, as well as providing support to the three defence teams in *Muthaura et al*; four defence teams in trial (including assisting the defence team for Jean-Pierre Bemba in the review of hundreds of victims applications); and two defence teams in pre-trial preparations.

<sup>7</sup> See Annex 2 for 12 August 2011 email from CSS containing IT ticket request.

ticket request for the Kosgey team to get secure access to the shared, but not the network, drive.<sup>8</sup> As of 11:40 AM on Monday, 15 August—just one day before the disclosure deadline for the *Ruto et al* defence teams—the Defence still does not have access to the shared and network drives.<sup>9</sup>

11. Due to this “perfect storm” of factors, the Defence has, as of yet, been unable to make any headway on the uploading and processing of disclosures in accordance with E-Court Protocol—for reasons completely outside of its control.
12. The Defence notes that the Request for extension is in respect to filing the disclosure in compliance with the E-Court protocol only—the Defence is prepared to submit the disclosure in a non-E-Court protocol format, i.e. hard copies, in the interim to the Prosecution so as not to inhibit the Prosecution’s preparations for the Confirmation Hearing.

## V. Conclusion and Request for Relief

13. For the reasons enumerated above, pursuant to regulation 35 of the Regulations and for “good cause”, the Defence respectfully 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.



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George Odinga Oraro  
On behalf of Henry Kiprono Kosgey

Dated this 15<sup>th</sup> August 2011

At The Hague, Netherlands

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<sup>8</sup> See Annex 2 for 12 August 2011 email from CSS containing IT ticket request.

<sup>9</sup> See Annex 3 for screenshot of Kosgey case manager computer showing no access to shared or network drive as of 11:40 AM on Monday, 15 August 2011.