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No.: ICC-01/09-01/11  
Date: 22 August 2011

**PRE-TRIAL CHAMBER II**

**Before:** Judge Ekaterina Trendafilova, Presiding Judge  
Judge Hans-Peter Kaul  
Judge Cuno Tarfusser

**SITUATION IN THE REPUBLIC OF KENYA**

**IN THE CASE OF  
THE PROSECUTOR *v.* WILLIAM SAMOEI RUTO,  
HENRY KIPRONO KOSGEY AND JOSHUA ARAP SANG**

**PUBLIC**

**With *Ex Parte* & Confidential Annex, Pre-Trial Chamber only**

**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)**

**Source:** Defence for Mr. William Samoei Ruto and Mr. Joshua Arap Sang

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 William Ruto**

Joseph Kipchumba Kigen-Katwa,  
David Hooper QC, Kioko Kilukumi  
Musau and Kithure Kindiki

**Counsel for Henry Kosgey**

George Odinga Oraro, Julius Kemboy  
and Allan Kosgey

**Counsel for Joshua Sang**

Joseph Kipchumba Kigen-Katwa, Joel  
Kimutai Bosek and Philemon K.B. Koech

**Legal Representatives of the Victims**

Sureta Chana

**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

**Counsel Support Section**

**Deputy Registrar**

Mr. Didier Daniel Preira

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. Introduction & Procedural History

1. On 12 August 2011, the Single Judge issued an *Urgent Decision on the 'Urgent Defence Application for Postponement of the Confirmation Hearing and Extension of Time to Disclose and List Evidence'*.<sup>1</sup> Therein she dismissed the Defence's request on behalf of Mr. Ruto and Mr. Sang to postpone the confirmation of charges hearing for six weeks. The Defence had expressed several reasons of a logistical and legal nature which necessitated a postponement.<sup>2</sup> The Request had been supported by Mr. Kosgey.<sup>3</sup> The Single Judge denied the Request on the basis that the Defence were simply unprofessional and unorganized, and that the Defence were attempting to delay the Chamber in performing its mandate at a critical moment prior to the start of the confirmation hearing.<sup>4</sup> Ultimately, the Single Judge characterized the Defence complaints as "unfounded allegations" and accused the Defence of abusing the exercise of the rights referred to in Article 67(1) of the Rome Statute.<sup>5</sup>
2. The Defence subsequently submitted a second urgent request for an extension of the related disclosure and filing deadlines, due to continuing logistical problems exacerbated by an inability to access the requisite network drives needed to upload and disclose the material.<sup>6</sup> This Second Request was partially granted; the Defence were given an extension from 16:00 to 23:59 on 16 August 2011.<sup>7</sup> Under extreme pressure and in an unsatisfactory fashion, the Defence managed to file a list of evidence and to disclose to the Prosecution and the Registry the materials upon which the Defence intends to rely at the confirmation hearing.
3. Pursuant to Article 82(1)(d), the Defence seeks leave to appeal the Single Judge's dismissal of its initial Request for postponement. Furthermore, the Defence requests a suspension of the proceedings while this request for leave to appeal is pending.

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<sup>1</sup> *Prosecutor v. Ruto et al*, ICC-01/09-01/11-260, Urgent Decision on the 'Urgent Defence Application for Postponement of the Confirmation Hearing and Extension of Time to Disclose and List Evidence', 12 August 2011 ("**Decision**").

<sup>2</sup> *Prosecutor v. Ruto et al*, ICC-01/09-01/11-255, Urgent Defence Application for Postponement of the Confirmation Hearing and Extension of Time to Disclose and List Evidence', 11 August 2011 ("**Request**").

<sup>3</sup> *Prosecutor v. Ruto et al*, ICC-01/09-01/11-256, Kosgey's Joinder to Ruto and Sang's Urgent Defence Application for Postponement of Confirmation and Extension of Time to Disclose and List Evidence, 12 August 2011.

<sup>4</sup> Decision, paras 9-10.

<sup>5</sup> Decision, para. 16.

<sup>6</sup> *Prosecutor v. Ruto et al*, ICC-01/09-01/11-262 and *Prosecutor v. Ruto et al*, ICC-01/09-01/11-264.

<sup>7</sup> *Prosecutor v. Ruto et al*, ICC-01/09-01/11-267.

## II. Legal Principles

4. Article 82(1)(d) of the Statute states that “either 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”.
5. Thus, in requesting leave to appeal, the Defence must demonstrate: a) a decision which involves an “issue” which would significantly affect *both* (i) the “fair” and “expeditious conduct of the proceedings, or (ii) 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.<sup>8</sup>
6. The Defence must articulate an “appealable issue”, which has been defined by the Appeals Chamber as:

[A]n identifiable subject or topic requiring a decision, 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.<sup>9</sup>

7. The Appeals Chamber has determined that the object of the remedy of an interlocutory appeal provided by Article 82(1)(d) is to “pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial”.<sup>10</sup> Furthermore, when determining an application for leave to appeal, the Pre-Trial Chamber should be guided by three main principles: a) the restrictive nature of the remedy provided, b) the need for the applicant to satisfy the Chamber as to the fulfilment of the requirements

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<sup>8</sup> *Prosecutor v. Muthaura et al*, ICC-01/09-01/11-253, Decision on the Prosecution’s Application for Leave to Appeal the ‘Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence (ICC-01/09-02/11-185)’, 18 August 2011.

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

<sup>10</sup> *Id.*, para. 19.

embodied in this provision, and c) the irrelevance of addressing arguments concerning the merits of the appeal.<sup>11</sup>

8. The Appeals Chamber has held that it is appropriate to grant suspensive effect if the “implementation of the Impugned Decision would create an irreversible situation that could not be corrected, even if the Appeals Chamber eventually were to find in favour of the appellant.”<sup>12</sup>
9. Notwithstanding the fact that the power to grant suspensive effect in connection with an interlocutory appeal is vested with the Appeals Chamber, the Trial Chambers have granted temporary suspensive effect to their decisions, in order to enable the parties to effectively exercise their right to file a request for interlocutory appeal under article 82(1)(d) and to subsequently seek an order for suspensive effect from the Appeals Chamber, in the event that the party’s request for leave to appeal is granted.<sup>13</sup>
10. Trial Chamber I has also granted suspensive effect to the proceedings pending the Appeals Chamber’s determination of the merits of the appeal.<sup>14</sup> The Chamber thus recognized that it had an independent power and duty to take such measures as are necessary (including, a

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<sup>11</sup> Pre-Trial Chamber II, ICC-02/04-05-20-US-Exp, 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, para. 15.

<sup>12</sup> Prosecutor v. Lubanga, Decision on the request of Mr. Thomas Lubanga Dyilo for suspensive effect of his appeal against the oral decision of Trial Chamber I of 18 January 2008, 22 April 2008, ICC-01/04-01/06-1290, at para 8.

<sup>13</sup> In the Lubanga case, in its oral decision releasing the defendant, the Trial Chamber stipulated that “This order shall not be enforced until the five day time limit for an appeal has expired. If an appeal is filed within the five day time limit against this order granting release, and if a request is made to suspend its effect, the accused shall not leave detention until the Appeals Chamber has resolved whether this order granting release is to be suspended.” Transcript of 15 July 2010, ICC-01/04-01/06-T-314.ENG p. 21, line 25 to p. 22, line 5. Similarly, in the Prosecutor v. Bemba, the Trial Chamber suspended the commencement of the trial, pending the Appeals Chamber’s decision on the defence request for suspensive effect in connection with its appeal against admissibility. The Trial Chamber held that “The consequence of the application to the Appeals Chamber for suspensive effect is that the trial, as a matter of principle, should not commence, at least until the application for suspension has been resolved. It would be inappropriate for the Chamber to commence a trial when there is an outstanding issue for determination by the Appeals Chamber as to whether the proceedings (seemingly in their entirety) should be suspended, pending the outcome of the substantive appeal. In addition, as set out during a status conference on 8 March 2010, it is in the interests of justice for this challenge to be resolved prior to the commencement of the trial”. Order postponing the commencement of the trial ICC-01/05-01/08-811, 7 July 2010, at para 5.

<sup>14</sup> Prosecutor v. Lubanga, Decision adjourning the evidence in the case and consideration of Regulation 55, ICC-01/04-01/06-2143, 2 October 2009. The Chamber emphasized at para 22 that a decision from the Appeals Chamber granting suspensive effect was not a precondition for the Trial Chamber to independently grant suspensive effect: “Given those conclusions, the inevitable result is that further evidence in this case, along with a more detailed consideration of Regulation 55, cannot occur until the Appeals Chamber has resolved this appeal. The disposal of the applications for suspensive effect will not alter the inability of the Chamber to proceed further until the merits of the joint appeals have been decided.”

suspension of the proceedings) in order to prevent the rights of the defence from being prejudiced pending the outcome of the appellate proceedings.

### III. Submissions

#### The Two Appealable Issues

11. The Defence submits that the First Appealable Issue arising from the Single Judge's Decision is 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<sup>15</sup>; this issue is more poignant in light of the safeguard against self-incrimination enjoyed by the Suspects.
12. The Second Appealable Issue arising from the Single Judge's decision is 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 Two Issues Significantly Affect the Fairness of the Proceedings

13. The First Appealable Issue directly affects the rights of Mr. Ruto and Mr. Sang to challenge and present evidence at the confirmation of charges hearing as enshrined in Article 61(6). The Single Judge has previously acknowledged that this right must be exercised in a manner which is real and not illusory, and that the Defence must be given adequate time to prepare meaningfully for the confirmation hearing. The ability of the Defence to prepare and to present evidence on behalf of its client, coupled with the right against self-incrimination per Article 67, are the essence of fair trial rights. Any derogation from these rights threatens the overall fairness of the proceedings.
14. The rushed manner in which the Single Judge required the Defence to list and disclose its evidence, despite having been notified about the logistical problems the Defence was facing, has resulted in disclosure that is incomplete and which has not been reviewed by all counsel. It also resulted in the Defence having to take statements from witnesses

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<sup>15</sup> See detailed reasons in Request, paras 3 and 8-20 (highlighting, *inter alia*, outstanding requests for investigative materials, the time that it takes to write statements rather than call viva voce witnesses, the difficulties in securely transporting confidential evidence, the volume of filings and disclosure, the lack of office space, the inability to undertake timely and complete IT training, and the lack of networked computers for disclosure purposes).

without adequate time for preparation and substantive review of its contents. The Defence is including as an *ex parte and confidential annex* a more detailed description of outstanding investigative materials and statements upon which the Defence had intended to rely at the confirmation hearing, but will be unable to given the denied postponement.

15. The Second Appealable Issue relates to the Single Judge's conclusion that the Defence complaints were merely "unfounded allegations" and therefore the request for postponement should be rejected. Rather than treating the Defence as a *bona fides* party before the Court, the Single Judge consulted other organs of the Court including the Registry, CSS, WVU, etc, and obtained information which was either incorrect or irrelevant to the individualized circumstances of the Defence. The Single Judge's decision not to postpone the hearing not only unfairly chastises the Defence for being unorganized and unprofessional, but also deprives the suspects of the opportunity to fully and properly put forth their cases at the confirmation of charges hearing.

*The Two Appealable Issues Significantly Affect the Expeditiousness of the Proceedings*

16. The Single Judge's rejection of the requested postponement has resulted in key Defence documents not being able to be listed or disclosed for the purposes of the confirmation hearing. This means that the Defence now has to reconsider aspects of its confirmation strategy in order to compensate for this loss. This may mean requiring the *viva voce* witnesses to testify longer than anticipated. It may also mean that the entire proceedings are invalidated on an appeal after the confirmation hearing is completed and the confirmation decision is issued. This would mean that the entire period from confirmation through the issuance of the decision is might have to be replicated a second time.

*An Immediate Resolution of the Two Issues Materially Advances the Proceedings*

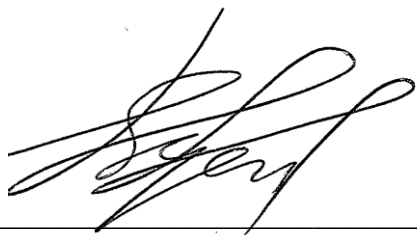
17. If these issues are not resolved immediately through an interlocutory appeal, and if the Defence is not given the time it needs to adequately prepare for confirmation, then doubts about fairness of the proceedings could cloud the entire confirmation hearing, and any eventual decision committing the cases to trial. These issues should be resolved now in order to "remove doubts about the correctness of [the] decision or map [...] a course of action along the correct lines".<sup>16</sup>

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<sup>16</sup> Appeals Chamber, ICC-01/04-168, Judgement on the Prosecutor's Application for Extraordinary Review of the Pre-Trial Chamber's 31 March 2006 Decision Denying Leave to Appeal, paras 14-15.

#### IV. Conclusion & Request for Relief

18. The Defence has illustrated two distinct appealable issues stemming from the Single Judge's Decision not to postpone the confirmation of charges hearing by six weeks. These issues affect the fairness of the and affect the expeditiousness of the proceedings. Therefore an immediate resolution of them would materially advance the proceedings. Furthermore, because the issues raised must be resolved prior to the confirmation of charges hearing, it is in the interests of justice and will mitigate prejudice to the Defence if the proceedings are suspended until this request for leave to appeal has been adjudicated.



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Joseph Kipchumba Kigen-Katwa  
On behalf of Mr. Joshua Arap Sang and Mr. William Samoei Ruto

Dated this 22<sup>nd</sup> day of August 2011

In Nairobi, Kenya