



Original: English

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

Date: 24 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 Confidential Annexes A & B

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

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

Registrar

Ms. Silvana Arbia

Counsel Support Section

Deputy Registrar

Mr. Didier Daniel Preira

Victims and Witnesses Unit

Detention Section

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'*.¹ The Defence filed a timely request for leave to appeal that Decision at exactly 4:00pm on 22 August 2011.² Attached as Confidential Annex A is the Defence's email to the Court Management officers containing the Application for Leave to Appeal and the related confidential *ex parte* annex.
2. The Defence subsequently realized that the cover page of the Application for Leave to Appeal simply stated that the document was "public" and did not state that it also contained a confidential and *ex parte* annex. Thus, at 4:23pm on 22 August 2011, the Defence sent a corrected version of the cover page to Court Management.³ Court Management then recorded the time as having received the whole filing as 4:24pm.
3. The Prosecution now seeks to have the Defence's substantive Application for Leave to Appeal dismissed *in limine* on the basis of this technicality.⁴ Ironically, in so doing, the Prosecution first errantly filed its request in the *Prosecutor v. Muthuara et al* case file.⁵
4. The Defence submits that as it filed its substantive Application for Leave to Appeal within the prescribed time limits, there is no reason for it to be dismissed *in limine*. The corrected cover page was sent to ensure that the annex would be properly recognized as confidential and *ex parte* and not distributed to unintended recipients.
5. As the Application for Leave to Appeal was only notified to the Prosecution on 23 August 2011, the Defence does not object to their substantive response time running from this date, or until any date as the Single Judge so determines.

¹ *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**").

² *Prosecutor v. Ruto et al*, ICC-01/09-01/11-280, 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), 22 August 2011 ("**Application for Leave to Appeal**").

³ Confidential Annex B.

⁴ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-284, 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, 23 August 2011 ("**Request**").

⁵ *Prosecutor v. Muthaura et al*, ICC-01/09-02/11-261, Prosecution's Request that the "Defence Request for Leave to Appeal the 'Urgent Decision on the 'Urgent Defence Application for Postponement of the Confirmation of Hearing and Extension of Time to Disclose and List Evidence'" be Dismissed as Filed Out of Time, 23 August 2011.



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

Dated this 24th day of August 2011

In Nairobi, Kenya