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No.: ICC-01/09-01/11  
Date: 25 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**

**Defence Request for Reconsideration of the Single Judge's "Decision on the  
"Defence Request for Leave to Appeal 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:

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**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 Pereira

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. Introduction

1. The Defence hereby requests the Single Judge to reconsider her *Decision on 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)’* (“Decision”)<sup>1</sup> on the grounds stated herein.

## II. Procedural Background

2. On 22 August 2011 at 4:00pm, the Defence filed a *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)’* (“Defence Request”).<sup>2</sup>
3. Having then discovered that the cover page of the Defence Request failed to indicate that the public filing contained a confidential and *ex parte* annex, the Defence sent a corrected version of the cover page to Court Management at 4:23pm. The cover page was changed from stating “PUBLIC” to stating “PUBLIC With *Ex Parte* & Confidential Annex, Pre-Trial Chamber only”. Court Management then recorded the time as having received the whole filing as 4:24pm on 22 August 2011.
4. On 23 August, the Prosecution filed a *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* (“Prosecution Request”).<sup>3</sup> By this Request, the Prosecution requested the Single Judge to dismiss the Defence Request *in limine* on the basis that it was filed 24 minutes late.
5. On 24 August 2011 at 12:53, the Defence filed a Response to this Prosecution’s Request explaining that the Defence Request was in fact filed in time, namely at 4:00pm exact.<sup>4</sup>

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<sup>1</sup> ICC-01/09-01/11-286

<sup>2</sup> ICC-01/09-01/11-280

<sup>3</sup> ICC-01/09-01/11-284

<sup>4</sup> ICC-01/09-01/11-287, 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’, 24 August 2011 (“Defence Response”) and Annex A showing the time of the Defence filing.

6. Meanwhile, at 12:38, prior to the receipt of the Defence Response, the Single Judge issued her Decision. By this Decision, the Single Judge dismissed the Defence Request for Leave to Appeal *in limine* on the ground that it was filed out of time. This Decision was only notified to the Defence at 1:56pm, approximately an hour after it had filed its Response to the Prosecution's Request to dismiss the Defence Request for Leave to Appeal on that same basis.<sup>5</sup>
7. This Decision was rendered without offering an opportunity to the Defence to be heard and thus the Defence respectfully requests that the Single Judge reconsider the merits of her decision in light of the Defence submissions.

### III. Applicable Legal Principles

8. The Defence acknowledges the Single Judge's stated position that:
 

“... as consistently held by the established jurisprudence of the Pre-Trial Chambers of the Court, the statutory framework of the Statute and the Rules do not provide for a motion for reconsideration as a procedural remedy against any decision taken by the Chamber or the Single Judge.”<sup>6</sup>
9. However, in the instant circumstances, the Defence respectfully urges the Single Judge to follow the approach to reconsideration adopted by Trial Chamber I in the *Lubanga* case. Therein, the majority noted that the idea that decisions can only be varied if permitted by an express provision of the Rome Statute framework “does not entirely reflect the true position of the law”.<sup>7</sup> Furthermore, that it is necessary for the Chamber to be able to reconsider administrative matters, including control over the submissions of the parties. The majority held that in such circumstances, it would cause “injustice – indeed it may well lead to absurdity – if the Chamber was unable to alter” decisions or orders of this kind.<sup>8</sup> The majority concluded that this practice of the *ad hoc* tribunals follows the position established in many common law systems which allows for a Court to depart from earlier decisions that would usually be binding if they are “manifestly unsound and

<sup>5</sup> See Annex B noting the time the Defence was notified of the Decision.

<sup>6</sup> ICC-01/09-01/11-82, Decision on the “Prosecution's Application for Extension of Time Limit for Disclosure”, 10 May 2011, para. 11 (citing several Pre-Trial Chamber I and II decisions to this effect).

<sup>7</sup> ICC-01/04-01/06, Decision on the defence request to reconsider the “Order on numbering of evidence” of 12 May 2010, 30 March 2011, para. 12 (“**Lubanga Reconsideration Decision**”).

<sup>8</sup> Lubanga Reconsideration Decision, para. 13.

their consequences are manifestly unsatisfactory, because for instance, *a decision was made in ignorance of relevant information*".<sup>9</sup>

10. Additionally, pursuant to the *audi alteram partem* principle, parties have a right to be heard on any issue prior to a decision being issued. The Single Judge, supported by human rights and international criminal tribunal jurisprudence, has recognized that the right to be heard is a "fundamental right" and an "absolute guarantee" at the national and international level.<sup>10</sup> It follows that while this right may be circumscribed, the restriction must be in service of a "sufficiently important objective that must impair the right no more than is necessary to accomplish the objective".<sup>11</sup>

#### IV. Submissions

##### Decision Should be Reconsidered in light of Available Information

11. The Single Judge's failure to provide an opportunity to the Defence to be heard on the issue has resulted in the Decision being made in ignorance of relevant information. This justifies reconsideration on the Decision. In reaching her Decision that the Defence Request for Leave to Appeal was filed out of time, the Single Judge was unaware that in fact the Defence had filed its application not at 4:24pm but by 4:00pm, in accordance with Regulation 33(2). In light of this information, the Single Judge's Decision is manifestly unsound and the consequent *in limine* dismissal of the Defence's Request for leave to appeal is manifestly unsatisfactory.

12. If the Court Management's policy is to state, as the time of receipt, the time of any correction, then this should have been explained to the Defence. The Defence would then have filed a corrigendum instead of a corrected version. Ironically, the Defence Request would have been deemed filed in time had the Defence later filed a corrigendum or waited for the CMS to ask for the cover page to be corrected.

##### Even if Deemed Out of Time, the Filing Should be Accepted in the Interests of Justice

<sup>9</sup> Lubanga Reconsideration Decision, para. 29 (emphasis added).

<sup>10</sup> ICC-04/01-01/07-2297 OA 10, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings", Dissenting Opinion of Judge Erkki Kourula and Judge Ekaterina Trendafilova, 28 July 2010, para. 56.

<sup>11</sup> *Ibid.*, para. 57.

13. Even if the Defence Request filed at 4:00pm is deemed for some reason, technical or otherwise, to have been filed out of time, the issue of seeking leave to appeal the Single Judge's dismissal of the Defence's Request for an adjournment of Confirmation is too important to be rejected on a technical error.
14. On previous occasions, the Single Judge has exercised her power to accept submissions that were not filed properly, including non-compliance with the page limit<sup>12</sup> and formatting specifications.<sup>13</sup> The ICC Appeals Chamber accepted a late filing that was 26 minutes past the deadline, accepting it in part because of the "negligible extent of the delay".<sup>14</sup>
15. The Defence submits that the Single Judge's discretion to accept late filings is especially warranted in circumstances such as these where there is a critical issue (ie, the postponement of the confirmation of charges hearing) at stake *vis-a-vis* a negligible non-compliance. Consequently the Defence requests that on an exceptional basis and by virtue of its inherent powers, the Single Judge accept the Defence Request, even if she deems it out of time, in order to preserve the interests of justice and protect the interests of Mr. Ruto and Mr. Sang.
16. Such an approach is in line with jurisprudence from the other *ad hoc* tribunals, where late filings by both parties have been accepted in the interests of justice.<sup>15</sup>

## V. Conclusion

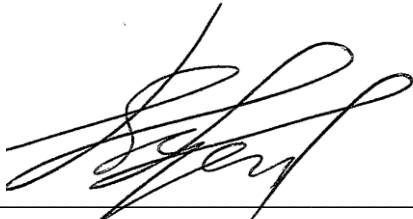
<sup>12</sup> ICC-01/09-02/11-182, "Order on the Resubmission of the 'Defence Request for Leave to Appeal the Redacted First Decision on the Prosecutor's Requests for Redactions and Other Related Requests'", 20 July 2011, p. 4.

<sup>13</sup> ICC-01/09-01/11-51, Decision on the Re-filing of the "Defence Request for Variation of Decision on Summons or in the Alternative Request for Leave to Appeal", 13 April 2011.

<sup>14</sup> ICC-01/04-01/07-522 OA3, Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled "Decision on the Defence Request Concerning Languages", 27 May 2008, paras. 11 and 12.

<sup>15</sup> *Prosecutor v. Slobodan Milosevic*, IT-02-54-AR77.4, Decision on Prosecution Application to Strike Out Appellant's Brief in the Appeal of the Decision on Contempt of the Tribunal Kosta Bulatovic, 23 June 2004, paras. 5-8 (the Appeals Chamber accepted a late filing by the Defence without justifiable explanation for the breach of a court order where the appeal touched on "the fundamental due process rights of an Accused... charged with particularly serious offences"); *Prosecutor v. Brima, Kamara, Kanu*, SCSL-04-16-T-456, Decision on Urgent Defence Request under Rule 54 with Respect to Filing of Motion for Acquittal, 19 January 2006 (accepting the late filing of the Defence motion for judgement of acquittal); *Prosecutor v. Bizimungu et al*, ICTR-99-50-T, Decision on Casimir Bizimungu's Motion for Permission to Convey Protected Information to Defence Experts, 11 September 2006, paras. 1-6 (accepting a Prosecution response inadvertently filed three months out of time on the issue of witness protection); *Ngirumpatse v. the Prosecutor*, ICTR-98-44-AR73.3, Decision on the Prosecutor's Urgent Motion for Extension of Time Limit, 10 June 2004, paras. 17-20 (accepting a Prosecution response three weeks out of time, despite the Prosecution not being able to show good cause, specifically because the Appeals Chamber did not want to hear only from one side).

17. Given the foregoing, the Defence respectfully requests that the Single Judge reconsider her decision to dismiss the Defence's application for leave to appeal the dismissal of its request to postpone the confirmation of charges hearing. When making her Decision, the Single Judge was not in possession of information that might otherwise have changed her opinion. The Defence requests that even if upon reconsideration of the merits, the Single Judge determines that the Defence Request was filed late, the Defence requests that it be accepted nonetheless in the interests of justice.



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

Dated this 25<sup>th</sup> day of August 2011

In Nairobi, Kenya