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Date: 13 June 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 Document

**Observations on behalf of Henry Kiprono Kosgey to the 'Decision Requesting
Observations on the Place of the Proceedings for the Purposes of the Confirmation
of Charges Hearing'**

Source: Defence

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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**Unrepresented Applicants
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INTRODUCTION

1. On 3rd June 2011, the Pre-Trial Chamber issued its decision “*Requesting Observations on the Place of the Proceedings for the Purposes of Confirmation of Charges Hearing*’ [the said ‘Request’].¹
2. Consequently, the Chamber, ordered that any Observations by the Defence pursuant to the said Request be filed by no later than Monday, 13 June, 2011 at 16:00 hours.
3. The Defence of Henry Kiprono Kosgey welcomes the opportunity to make its observations on the fascinating prospect of the Court finding it desirable to conduct its proceedings away from the Seat of the Court.
4. For the reasons set out herein, it is submitted that there are manifest advantages both to the Court as a whole and to the Defence if the proceedings are conducted in the Territory of the Republic of Kenya. In sum, the Defence position is as follows:
 - i. The Court in exercise of its discretion bestowed by Article 3(3) as read together with Rule 100 of the Rules of Procedure and Evidence, can and ought to move the Confirmation of Charges hearing to the Territory of the Republic Kenya, a state party to the Rome Statute, being the country where the alleged crimes occurred so as to afford the greatest level of local participation in the Court’s work²;
 - ii. The proximity of witnesses, evidence, Defence Counsel and family as well as attendant low costs of procuring attendance will tremendously contribute to the fairness and expeditiousness of the proceedings.

¹ ICC-01/09; 3 June 2011.

² Under Article 4(2) the Court may exercise its functions and powers in the territory of any state party.

DEFENCE OBSERVATIONS

5. The Defence appreciates the text of Article 3(3) of the Statute as read with Rule 100(1) of the Rules vesting the Court with discretion to sit elsewhere (other than the seat of the Court) whenever it considers it *desirable* and *in the interest of justice*³.
6. On the reasoned observations set out herebelow, the Defence of Henry Kiprono Kosgey humbly submits that it is desirable and in the interest of justice to conduct Confirmation of Charges hearing on the territory of the Republic of Kenya.

Cost and Time Efficiency

7. The subject of the current proceedings are crimes allegedly committed within the territory of the Republic of Kenya. It therefore follows that all potential witnesses as well as evidence and exhibits are domiciled within the said Republic.
8. During the Confirmation of Charges hearing, Henry Kiprono Kosgey will have to make adequate arrangements necessary to present his defence. A particular hardship for him is the daunting prospect of the high cost of travel of Defence Counsel and Support Staff, various Consultants, family members and witnesses to The Hague as well as hotel accommodation and maintenance for the entire period of the Confirmation of Charges hearing.
9. Even if the hardship of costs was to be overcome through financial assistance, there is still the lingering possibility of witnesses declining such a long absence from their local personal engagements in pursuit of a court appearance at The Hague. This can impede his ability to mount a credible defence.
10. The proceedings at the seat of Court would therefore mean that Henry Kiprono Kosgey (or the Court in case he seeks legal aid) shall incur colossal costs in travelling, accommodation and subsistence. To this end, it is in the interests of justice that the

³ It is significant to note that a sitting of the court in the Territory of the Republic of Kenya will not compromise any of the procedural safeguards that guarantee a fair trial. The intrinsic safeguards aimed at fairness of proceedings shall be maintained because both the Rome Statute and the Rules of Evidence and Procedure shall apply in the same way as if the proceedings were conducted at The Hague.

Confirmation of Charges hearing be conducted on the territory of the Republic of Kenya to enable him mount an affordable, proportionate and efficient defense.

11. It is likely that the Prosecutor's and other Defendants' witnesses and evidence are also largely based in the territory of the Republic of Kenya. There is therefore no discernible prejudice that will be visited on them should the Court decide that it is desirable and in the interests of justice to conduct the Confirmation of Charges hearing in Kenya.
12. It is generally accepted that conducting proceedings as close as possible to the location of the crimes provides maximum access to the trial process for the public and the victims. In the *Bemba case*⁴ for instance, OTP made a specific request to the Trial Chamber to consider moving parts of the hearing to the Central African Republic. A decision of this nature is therefore in the interests of justice.

Expedient Administration of Justice

13. As observed above, the focal point of this case is the Republic of Kenya. Conducting the Confirmation of Charges hearing within the said territory will not prejudice the speed at which the confirmation hearing shall proceed⁵. In the contrary, it shall assist the court and the affected parties to efficiently manage the case thereby saving the precious judicial time and resources.
14. At a broader level, there is also manifest efficiency in the work of the court if flexibility in the sitting of the court is encouraged. At the moment, a number of trials are ongoing at The Hague. New situations such as Libya, Egypt, Tunisia, Syria, Yemen and Ivory Coast could develop into additional cases thereby stretching the facilities at The Hague beyond capacity. Thus, a decision to conduct the Confirmation of Charges hearing proceedings within the Territory of the Republic of Kenya will help free up some much needed facilities at the Hague to be used to try those cases which, owing to the volatility or other political instability in the country of origin it is not in the interests of justice to conduct the trials there.

⁴ See *Prosecutor v. Jean-Pierre Bemba Gombo, Prosecution's Submission to Conduct Part of Trial In Situ*, ICC-01/05-01/08-555, dated 12 October 2009.

⁵ It is reasonably expected that logistical and administrative procedures can be undertaken within the time-table already set for Confirmation of Charges hearings.

15. It is also our humble submission that a sitting within the territory of the Republic of Kenya will afford the Court and its Staff the rare opportunity of living within and interacting with communities that bore the brunt of Post-Election Violence *in situ*. By itself, such proximity and interaction will provide the Court with invaluable understanding of the circumstances that gave rise to the tragic events of the 2008 Post-Election Violence in Kenya⁶.

Kenyan Public Participation

16. The 2008 Post-Election Violence (PEV) is a dark event in Kenyan history. It is therefore inevitable that the Kenyan public desires to be part of the consequent justice process.
17. Conducting Confirmation of Charges hearing in Kenya shall bring the Court and therefore justice to the affected persons, the Defence, those claiming to be victims and the Kenyan public as opposed to relying solely on media reports on the proceedings at The Hague.
18. Cognizant of the Court's responsibility to the security of those who claim to be victims and witnesses, there is yet no indication that conducting proceedings in the territory of the Republic of Kenya could in any way endanger the lives of the alleged victims and witnesses. The Court has, in any event, developed effective measures to ensure the safety of witnesses and these can be complimented by the local Witness Protection Programmes in Kenya⁷.

Government Cooperation and Infrastructure

19. Whereas the Court is independent under Article 40 (1) of the Statute, the receiving State governments' cooperation is paramount. There is hitherto no indication that the Government of the Republic of Kenya is hostile to or uncooperative with the Court⁸.

⁶ Although it is not a practice for the Court to conduct site visits during Confirmation of Charges hearings, nothing in the Statute precludes the Court from doing so if it opts to.

⁷ See *Witness Protection Act ACT NO. 16 of 2006* of the Laws of Kenya.

⁸ In any event, the Government of Kenya is under constitutional obligation to observe its Treaty obligations. See *Article 2 (6) of the Constitution of Kenya 2010*.

20. Further, the Government of the Republic of Kenya has acknowledged the need to deal with the offences arising out of the 2008 post election violence⁹. Thus, there is no indication that the co-operation of the Government of Kenya will not be extended to the Court if sought.
21. The present case is therefore distinguishable from the circumstances that faced the Court in the *Lubanga case*¹⁰ where the consent of the DRC Government was withheld on the grounds that it '*could lead to ethnic tensions in an area that had been recently pacified and is potentially unstable*'.
22. Unlike the DRC situation, Kenya is a stable country with relative peace and security. There is no indication that conducting the Confirmation of Charges hearing on the territory of the Republic of Kenya shall in any way jeopardize peace and security. The security of the Judges, Court Staff, the Prosecutors, Witnesses and those who claim to be Victims will therefore be assured¹¹.
23. A major consideration for the court in deciding whether or not to conduct its proceedings in the Territory of the Republic of Kenya will be the availability of infrastructural facilities such as courtrooms or halls that can suitably be converted into courtrooms, reliable electricity and water supply, modern Tele-communications infrastructure, secure accommodation for Court Staff and adequate security¹². Kenya enjoys relatively well-developed infrastructure facilities. As the host country to the UN's Headquarters¹³, it has adequate facilities that can serve the needs of the Court if appropriate arrangements are made for the use of such facilities.
24. Outside the UN offices in Nairobi Kenya, there are also numerous conference facilities that can be used as courtrooms with adequate public gallery spaces such as the Government owned Kenyatta International Conference Centre, County Hall, or Bomas

⁹ See ICC-01/09; 21 April 2011 "*Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194*".

¹⁰ See *Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters, ICC-01/04-01/06-1311, Annex 2, dated April 24, 2008.

¹¹ Despite the tragic events characterized by the 2008 post-election violence in Kenya, Kenya remains one of the most stable countries in the Sub-Saharan Africa. It is still widely acknowledged that despite its perennial challenges, the Government of Kenya is still relatively capable of providing a minimum level of security that will enable the Court, its staff, the witnesses and victims to conduct the said proceedings within the territory of the Republic of Kenya.

¹² Cassese et al., *The Rome Statute of the International Criminal Court: A Commentary*, at pg 190.

¹³ UNON – United Nations Office at Nairobi.

of Kenya. In addition, Jomo Kenyatta International Airport at Nairobi is a major transport hub with major international airlines plying it. There are also excellent accommodation facilities ranging from private residences to hotels and hotel apartments that can cater for varying needs of the Court's staff.

25. In the particular circumstances of the current case, all the Defendants have been bonded and as such the necessity for detention facilities such as those at The Hague are not an immediate concern. There is so far no indication that this situation will change and as such the usual consideration of the risk of transportation of the Defendants between the Detention centre and the Court premises will not arise.

Public Policy Consideration

26. While maintaining his innocence and remaining confident that in the fullness of time will ultimately vindicate his innocence, Henry Kiprono Kosgey envisages that should the proceedings be conducted in the territory of the Republic of Kenya, the visibility of such proceedings to the greater majority of the members of the public as well as those who claim to be victims of the 2008 post election violence will play a significant role in engendering a sense of accountability should similar circumstances occur. This is especially critical given that these are cyclic nature of the disturbances occurring around every General Election calendar in Kenya. Proceedings in the local territory will thus engender the certainty of redress and in so doing help bring to an end any such recurrence.
27. Ultimately the success of the Court in bringing justice to those who claim to be victims of post-election violence in Kenya will largely depend on their acceptance that justice has not only been done but it has also been seen to be done. There is probably no better way of ensuring accountability on the part of the Court towards such public expectations other than a facilitation of a greater public scrutiny of its proceedings which is only possible if the said proceedings are conducted as close as possible to the location of the alleged crimes. The notion that the Court represents foreign justice to local situations¹⁴ does not augur well for the Court.

¹⁴ See *The Economist*, 17th February 2011, *Dim Prospects: The International Criminal Court loses Credibility and Co-operation in Africa*. See also Christopher M. Gosnell, "A Court Too Far" *Int'l Herald Tribune*, March 29, 2008.

28. Conducting the proceedings in Kenya will present the Court with an opportunity to demystify its processes. Let Kenyans own the whole process for after all, the courts efforts are in pursuit of justice for them. When the process is “*touched*” and “*felt*”, it would undoubtedly satisfy expectations of transparency of the process thereby lending credence to the Court’s role¹⁵.

Emerging Trends of International Tribunals

29. There is ample learning and consensus that bringing an international court to where the crimes occurred and away from the designated Seat is not only in the interests of justice, but it also helps to minimize perceptions of illegitimacy.¹⁶
30. Other than the plain objective of bringing perpetrators to justice, conducting proceedings in the same place the atrocities occurred also serves a moral as well as educational value. Allowing much greater participation by victims and members of the public as well as easier local media coverage of the proceedings fosters a strong outreach on the role of the Court thereby encouraging a greater sense of respect for and the enforcement of international justice. Consequently, the court’s outreach and educational responsibilities play a critical role in the attainment of the court’s objectives to put an end to impunity and to promote lasting “*peace, security and well-being of the world*”¹⁷.
31. More fundamentally, there is a growing perception among political leaders in Africa that the Court is a vestige of the colonial order¹⁸. Its sittings at The Hague have not helped things especially when most of the cases currently under consideration are those from Africa. For instance, Paul Kagame, the President of the Republic of Rwanda was quoted saying “*Rwanda cannot be party to ICC for one simple reason.....with ICC all the injustices of the past including colonization, imperialism,*

¹⁵ It has been argued that the success of the International Military Tribunal (IMT) at Nuremberg was its establishment at the site of the violations. See Andrew Clapham, *Issues of Complexity, Complicity and Complimentarity: From the Nuremberg Trials to the Dawn of the New International Court*, in *From Nuremberg to the Hague: The Future of International Criminal Justice* 32-33 (Philippe Sands ed., Cambridge University Press 2003).

¹⁶ See William W. Burke-White, “*Regionalisation of International Criminal Law Enforcement: A Preliminary Exploration*” 38 TEX. INT’L L.J 729 (750-52)

¹⁷ Preamble to the Rome Statute.

¹⁸ This may well be a challenge faced by every other international court. For instance, similar perceptions abound on the work of ICTY where Croats are said to be unsupportive of the court primarily because of its location at The Hague. See Janine Natalya Clark, *International War Crimes Tribunals and the Challenge of Outreach*, 9 INT’L CRIMINAL LAW REV. 99, 104 (2009).

*keep coming back in different forms. They control you. As long as you are poor, weak there is always some rope to hang you. ICC is made for Africans and poor countries.”*¹⁹

32. It is our humble submission that a decision to conduct the proceedings in the territory of the Republic of Kenya will therefore herald one in many steps that the Court must undertake in order to debunk the myth that it is a relic of post-colonial reconstruction of world affairs operating from a European capital and issuing edicts to a wretched and benighted Africa.
33. The Special Court for Sierra Leone (SCSL) is one of the International Tribunals (though *ad hoc*) that has exercised the power to move its sitting from its Seat. Article 10 of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone is largely in similar force with Article 3(3) of the Rome Statute. SCSL invoked this power in ordering the change of venue of proceedings against Charles Taylor from Sierra Leone to The Hague.²⁰
34. The Defence humbly urges the Court to be persuaded by the precedent in the *Taylor Case* to exercise its powers under Article 3 (3) of the Statute and Rule 100 of the Court’s Rules. This will go a long way in bridging “*the growing emotional distance between the court*”²¹ and those who claim to be victims of the alleged crimes as well as the greater majority of the members of the public in Kenya.

Other Considerations

35. It will be remiss of the Defence if we did not recognise the possibility that conducting the proceedings so close to the locus of the alleged offences could elicit varied reaction from affected communities. There may well be public outbursts of emotions and counter-accusations. Tensions could rise. Yet the converse is also true. There is no

¹⁹ See D.Kezio-Musoke, ‘Kagame tells why he is against ICC charging Bashir,’ *Daily Nation*, 3 August 2008, online at: <http://allafrica.com/stories/200808120157.html> (visited 10 June 2011).

²⁰ See Changing of Venue Proceedings, *Prosecutor vs. Charles Taylor*, SCSL 03-01-PT. This of course entailed a decision to move the Court away from the location of the alleged crimes following concerns raised by the governments of Liberia and Sierra Leone that trying Charles Taylor in Sierra Leone would destabilize West Africa.

²¹ See C.C. Jalloh, *Regionalizing International Criminal Law?*, *INTERNATIONAL CRIMINAL LAW REVIEW* 9 (2009) 445 – 449 (Electronic copy available at <http://ssrn.com/abstract=1431130>).

guarantee that such transitional challenges will not arise if the proceedings are conducted at The Hague. It is the Defence humble submission that any such possibility should not be an impediment to the decision to conduct the proceedings within the Territory of the Republic of Kenya, but rather an opportunity for the broken spirits of the people of Kenya to confront their past and perchance explore alternative forms of accountability and reconciliation so as to secure their future as a peaceful nation.

36. There are currently on-going public proceedings in Kenya under the *Truth Justice and Reconciliation Commission*²² in which individuals and communities that have endured past historical injustices come face to face. It is painfully emotional. But that is as far as it has gone. Justice, in any event, is not a cloistered virtue. In a matter related to the present proceedings, the *Waki Commission*²³ conducted public hearings across the country at a time when the wounds of the 2008 Post-Election-Violence were fresh. These were largely peaceful. It is our humble submission that the fabric that holds the nation together, though fragile, is strong enough to withstand the shock of a public process such as the Confirmation of Charges hearing within the territory of the Republic of Kenya.

Principle of Complementarity

37. The ICC is not expected to supplant national prosecutions of persons accused of international crimes. As such, investigations and prosecutions under the Rome Statute are premised on the Principle of Complementarity²⁴. This Principle ensures that the ICC operates as a system of international criminal justice that buttresses national justice systems of State Parties. A decision to conduct proceedings within the territory of a State Party is in keeping with this Principle.
38. Additionally, the involvement of local professionals as well as the proximity of the court proceedings to the local Judiciary will go a long way in inspiring and improving the standards of the National justice system²⁵. This is particularly timely in the case of

²² Established pursuant to the Truth, Justice and Reconciliation Act No. 6 of 2008 of the Laws of Kenya.

²³ See The Report of Commission of Inquiry into Post-Election Violence (CIPEV) found at http://www.communication.go.ke/Documents/CIPEV_FINAL_REPORT.pdf

²⁴ See Preamble to the Rome Statute.

²⁵ See Etelle R. Higonnet, Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform, 23 ARIZ. INT'L & COMP.L. 347, 359 (2006).

Kenya, where the Judiciary is currently undergoing unprecedented reform processes to bring it at par with international best practices.

CONCLUSION

- a) For reasons set out above, the Defence of Mr. Henry Kiprono Kosgey respectfully requests that the Honorable Pre-Trial Chamber do find and hold that it is desirable and in the interests of justice to conduct the Confirmation of Charges hearing within the Territory of the Republic of Kenya.
- b) In the alternative, the Honorable Pre-Trial Chamber do find and hold that it is desirable and in the interests of justice to conduct the Confirmation of Charges hearing within the Territory of any Member State of the East African Community²⁶.



George Odinga Oraro
On behalf of Henry Kiprono Kosgey

Dated this Monday, 13 June 2011

At Nairobi, Kenya

²⁶ The United Republic of Tanzania has previously offered to host ICC trials at the ICTR facilities in Arusha. *See Hironde News Agency, Tanzania offers to host ICC trial,* dated June 3, 2009, available at <http://www.hirondellenews.com/content/view/12451/289/>.