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

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
Defence 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:

The Office of the Prosecutor

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Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

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Counsel for Henry Kiprono Kosgey:
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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

Sir Geoffrey Nice
Rodney Dixon

Amicus Curiae

REGISTRY

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

Procedural History

1. On 8 March 2011, the Honourable Pre-Trial Chamber issued its ‘Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang’.¹
2. During the initial appearance on 7 April 2011, the Pre-Trial Chamber announced that the confirmation hearing was scheduled for 1 September 2011.
3. On 3 June 2011, the Pre-Trial Chamber issued its ‘Decision Requesting Observations on the Place of the Proceedings for the Purposes of the Confirmation of Charges Hearing’, in which the Chamber requested the views of the parties in relation to the “desirability and feasibility of conducting the confirmation of charges hearing on the territory of the Republic of Kenya”.²
4. The Defence of Mr. Ruto and Mr. Sang hereby files its observations.

Observations

5. The Defence submits firstly that it is not possible to give meaningful observations concerning the convocation of the confirmation hearing in Kenya in the absence of any information from either the Court or the Kenyan authorities in relation to the views of the Kenyan government, and the facilities which will be made available to the Defence if the hearing were to be relocated.
6. The Defence have been disabled, and cannot therefore endorse the option for confirmation hearings in Kenya owing to the fact that the Pre-Trial Chamber has not manifested either expressly or impliedly the reasons that warranted the need to consider and entertain the option to host the confirmation hearings in Kenya.

¹ ICC-01/09-01/11-01.

² ICC-01/09-01/11-106.

7. The Defence has so far had no difficulty with having the Pre-Trial proceedings, including the scheduled confirmation hearings done in The Hague, and do not envisage any challenge thereto. The Defence is therefore unable to fathom any circumstances that have made conducting the proceedings at The Hague comparatively undesirable
8. The Defence is confident in the ability of the Kenyan authorities to provide adequate security and protection for court hearings. Nonetheless, Kenya is a sovereign State, with its own domestic legal system. In the absence of any provision in the Statute which expressly requires a State party to acquiesce to *in situ* hearings,³ it may be necessary for the Kenyan authorities to determine under article 93(1)(l) of the Statute whether the hosting of a non-Kenyan court, enforcing non-Kenyan laws on Kenyan territory is compatible with domestic law. Since this is the first time that Kenya has been required to address this issue, and in the absence of any clear legal precedents from the Court, the Defence is concerned that the time involved in such a deliberation will unnecessarily delay the confirmation hearing, and affect the defendants' right to an expeditious confirmation process.
9. Moreover, in the absence of any clear indication as to how the Kenyan court or other Kenyan premises could have its facilities adapted to the unique requirements of the ICC e-court system, the Defence is concerned that the temporary relocation of the case for isolated components of the case will cause disruption in Defence preparation, and impede the ability of the Defence to effectively participate in the confirmation hearing.
10. In this connection, the Defence has discovered that several ringtail functionalities can only be utilised at the Court's premises in The Hague. For example, evidence can only be uploaded into ringtail on an ICC computer, and documents can only be converted to *pdf* documents and saved on a desktop on an ICC computer. The latter aspect is of particular importance in light of the fact that internet connection in Kenya tends to be sporadic, which renders it impossible to analyse lengthy documents *via* citrix online.
11. The Defence in consideration of all the above had therefore adopted its team composition and working processes in order to address the specificities of court

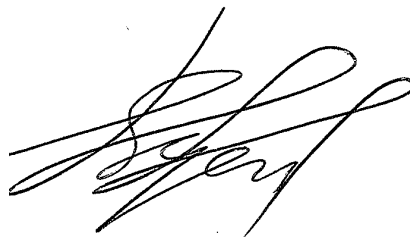
³ To the contrary, rule 100(3) of the Rules of Procedure and Evidence clearly suggests that the State must first consent to host hearings before the Judges, in plenary session, can make a ruling to that effect.

hearings in The Hague, before the ICC. It had therefore recruited a counsel, and legal assistant based in The Hague, and adopted a system of the review of disclosure of evidence which is predicated on the legal assistant utilising the computer facilities in the ICC premises. Recruitment of other necessary staff, and search for suitable accommodation provisions were already initiated. The Defence team will need to continue these operations in The Hague until just before the confirmation hearing, in order to give effect to its duty to upload Defence evidence before the confirmation hearing. It will therefore have very little time to relocate to Kenya and properly test the functionalities of its analysis systems and any visual aids, which the Defence may wish to use, within the set up of Kenyan courtrooms or other premises that may be contemplated prior to the confirmation hearing.

12. Of further concern to the Defence is the fact that the confirmation hearing can be a very emotive event, which, could possibly be taken out of context and could present a distorted and unbalanced perspective of facts and events. The Defence has already drawn the attention of the Chamber to the fact that the Prosecution has used the court processes to repeat scurrilous and unsubstantiated allegations concerning the integrity of the Defendants. Given the profile of these cases in Kenya and the fact that the local population do not necessarily understand the limited role and purpose of the confirmation hearing, and generally, the dynamics of the ICC court, if the Prosecution were to use the confirmation hearing as a vehicle for making similar allegations, some segments of the local press, activists, and community could be highly influenced by such statements.
13. At the same time, whereas the Defence would normally have the right to clear their name before the general public through the adjudication process, since the remainder of the ICC court process is likely to be held remotely in The Hague (the confirmation decision, and any potential appellate activity concerning the confirmation decision), the public standing of the defendants in Kenya could be damaged in the interim.
14. Relocating ICC proceedings to Kenya could also create an erroneous perception of the Kenyan Government, which is a State Party, and create the appearance that certain pending issues have been predetermined. The practical effect of the Pre-Trial Chamber's decision to confirm the admissibility of the case is that the cases cannot be prosecuted by Kenyan authorities in the geographic area of Kenya. However, as the

Honourable Pre-Trial Chamber is aware, the Kenyan Government has also lodged an appeal concerning the admissibility of the case, which is pending before the Appeals Chamber. The Government has also sought the assistance and cooperation of the ICC in relation to Kenya's investigations, more particularly by way of access to the Prosecutor's investigative materials. A decision relocating the hearing to Kenya presupposes that the challenges and requests filed by the Kenyan government will be unsuccessful. Moreover, if the Government is required to mobilize its resources in order to give effect to the specific requirements of the ICC in convening the confirmation hearing in Kenya, this will divert resources and funds from the ability of the Kenyan authorities to focus on its own investigations and national proceedings, which would thus defeat the purpose of complementarity.

15. Finally, the Defence emphasizes that the above observations are specific to the issue as to whether it is feasible to temporarily relocate a discrete component of ICC court proceedings in Kenya for the purposes of the confirmation hearing. The above observations would not be applicable to the scenario in which Kenyan authorities are investigating and prosecuting the Defendants within the framework of Kenyan court procedures and the domestic disclosure system.



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

Dated this Monday, 13 June 2011

At Nairobi, Kenya