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**International
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Court**



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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. FRANCIS KIRIMI MUTHAURA,
UHURU MUIGAI KENYATTA AND MOHAMMED HUSSEIN ALI**

Public Document

Prosecution's Observations on the Schedule of Confirmation of Charges Hearing

Source: Office of the Prosecutor

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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I. Introduction

1. In the “Decision Requesting Observations on the Schedule for the Confirmation of Charges Hearing”¹ dated 30 August 2011, the Single Judge requested from the parties their observations regarding: 1) whether they intend to raise questions or challenges concerning jurisdiction or admissibility, pursuant to Rule 122(2) of the Rules of Procedure and Evidence (“the Rules”), and/or raise objections or make observations concerning issues related to the proper conduct of the proceedings prior to the confirmation hearing pursuant to Rule 122(3) of the Rules; and 2) the estimate of the time required for the presentation of the arguments and evidence.

2. The Prosecution will not challenge jurisdiction or admissibility but will request time to file written submissions in response to any challenge filed by the Defence.² It anticipates that its presentation of argument on the ten charges against three suspects and its cross-examination of six defence witnesses³ can reasonably be completed within 18 hours. Assuming that the entire hearing takes 58 hours, this will allow the Defence to have some more time than the Prosecution. The Prosecution would, of course, endeavor to use less than the 18 hours, if it turns out that cross-examination of the Defence witnesses will not be necessary. Without any information as to what the Defence witnesses will testify to or how long their anticipated direct testimony will take, it is impossible to assume that it will need less time than that.

¹ ICC-01/09-02/11-272.

² This will be consistent with the practise followed by the Pre Trial Chamber in the hearings in the case of *Prosecutor V William Ruto et al*, ICC-01/09-01/11-T-5-ENG ET WT 01-09-2011 1/116.

³ Although the filing by the defence of Kenyatta was confidential *ex parte* - ICC-01/09-02/11-238-Conf-Exp – Prosecution assumes it was in compliance with the Chamber’s order.

3. The Prosecution observes that the Defence's intent to convert this confirmation hearing into a full-blown trial on the merits is an abuse of the confirmation process. Confirmation is not intended to be a mini-trial, an evidentiary hearing at which both sides are to be heard and assessed and guilt determined. The purpose of confirmation is to consider whether the evidence proffered by the Prosecution is sufficient, at its highest value, to establish substantial grounds to believe the suspects committed the alleged crimes. There is a limited role for the presentation of Defence evidence.

4. The Prosecution submits that the Defence at confirmation may attempt to challenge the legal basis for the charges, and it may offer evidence that might explain the Prosecution's evidence. But the Chamber should reject attempts by the Defence to offer conflicting or contradictory evidence; conflicts and contradictions instead should be presented to, and resolved by, the trier of fact, at trial, since it is both excessive and impractical for the Pre-Trial Chamber to rule on conflicting versions at this preliminary stage in the process.

II. Observations

Questions or challenges concerning jurisdiction or admissibility

5. In view of the recent Appeals Chamber decision on Admissibility, the Prosecution requests that, in the event that the Defence intends to raise any questions regarding jurisdiction at the confirmation hearing, they should do so in writing, as prescribed in Rule 58 of the Rules. The Prosecution further requests that it be granted sufficient time to respond to such claims, if raised, and in writing.

Conduct of the Proceedings

6. The Prosecution suggests that the Chamber follow the confirmation model adopted in the cases of *Prosecutor v. Mbarushimana*,⁴ *Prosecutor v. Abu Garda*,⁵ and *Prosecutor V William Ruto et al*⁶ wherein each party received a separate block of time in which to present its case or arguments as it saw fit. The suggested format will allow the most efficient and synthesized presentation of evidence from all parties, in particular because this case concerns multiple suspects and common facts/arguments. It will allow each suspect to respond to specific elements relevant to him all at once, rather than piecemeal.

7. Additionally, this presentation format will allow for the most fluid presentation of the six Defence witnesses, as it is unlikely that each of their testimonies will focus exclusively on a single crime, mode of liability, or other component of the case.

8. Furthermore, for organizational purposes and to avoid delays, the Prosecution requests from the Chamber that the Defence witnesses be called, for instance, at the close of the Defence submissions, so as to facilitate the logistical needs related to calling witnesses. The VWU will need time and notice to prepare logistically for each witness's testimony.

Time allotted to the Prosecution

9. When deciding how to divide the time between the parties, two factors must be considered by the Chamber. First, the schedule indicates that the confirmation hearing

⁴ ICC-01/04-01/10-356-Anx1.

⁵ ICC-02/05-02/09-162-Anx1.

⁶ ICC-01/09-01/11-T-5-ENG ET WT 01-09-2011 1/116

will last 13 days, from 21 September – 4 October. According to adjournment practice at the ICC, the duration of the entire hearing amounts to about 58 hours.⁷ Second, the Prosecution bears the burden of proof. The Prosecution must present its legal and evidentiary elements to satisfy the threshold set in Article 61 of the Statute, in relation to three suspects, and anticipates that it will also cross-examine six Defence witnesses.⁸ For these reasons the Prosecution submits that it should be granted 18 hours in total to present its case and cross-examine the six Defence witnesses.

10. To conduct its cross-examination of the witnesses, the Prosecution requests that, as was granted in the *Ruto et al* case, it be granted the same amount of time given to the Defence to lead its witnesses during the direct examination.⁹ Alternatively and because of the limited scope of the confirmation hearing, the Prosecution suggests that each party be given an hour per witness for questioning.

11. Based on the information concerning courtroom scheduling, it appears that the courtroom will be available from 14:30-20:00 every day, and on one day it will also be available for an additional morning session from 09:00-13:30. Assuming a 30-minute break every 90 minutes to accommodate the translators, daily hearings should last about 4.5 hours, except for one day when it will last for an additional 4.0 hours. Thus, with thirteen days of hearings at 4.5 hours per day, plus the additional 4.0 hour morning session, the Prosecution estimates that the confirmation hearing will last about 58 hours.

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⁸ See Article 61(5) of the Statute; see also ICC-01/09-02/11-226, para. 26.

⁹ ICC-02/05-02/09-162-Anx1; ICC-01/09-01/11-T-5-ENG ET WT 01-09-2011 1/116

Protection of witnesses' identities

12. Because of the security concerns its witnesses face in Kenya, the Prosecution requests the Chamber to order that any argument or presentation of evidence by the Defence concerning persons believed to be Prosecution witnesses be done in closed session. The Prosecution believes that the mere speculation that a person is cooperating with the office of the Prosecutor could put that person and his or her family in danger.

Presentation of the Prosecution case

Use of visual aids

13. The Prosecution intends to use visual aids such as power point slides, video clips and interactive maps during the presentation of its case. These visual aids are not submitted as evidence, but will be used solely as explanatory support to the Prosecution's oral presentation. They will be based exclusively on evidence included in the Prosecution's List of Evidence. Advance copies of this material will be provided to the Court Officer in accordance with the Regulations.¹⁰

Method of citation of evidence

14. Following the decision of the Chamber in the *Ruto et al* case¹¹, on the Schedule of the Confirmation of Charges, the Prosecution shall "provide the EVD number plus the last 4 digits of the document ID number or, at a minimum, their page and paragraph numbers" when referring to any evidence it seeks to rely upon.

¹⁰ Regulation 52 of the Regulation of the Registry. See also ICC-01/04-01/10-335.

¹¹ ICC-01/09-01/11-294

Oral Objections

15. In order to ensure that the schedule of the confirmation hearing is respected, when a party wishes to make an objection during the opposite side's presentation, it should do so by stating merely the legal basis with a brief explanation. Any discussion related to an objection cannot be included in the time allotted for the presentation. Should a party make a lengthy objection or other statement during the opposite side's designated time, the time should be deducted from the time allotted to the party making the objection or other statement.

Nature of the confirmation hearing

16. In the Prosecution's view, the Defence's attempt to expand the scope of the confirmation hearing and convert it into a trial is contrary to the Statute and the rulings from the Pre-trial Chambers of this Court.¹² The confirmation hearing is intended to filter cases that should go to trial from those that should not. The confirmation of charges hearing has a limited scope and purpose,¹³ during which the evidentiary debate is circumscribed.¹⁴ Parties are encouraged to select their best pieces of evidence to support their cases.¹⁵ However, as noted by this Chamber, the onus is on the Prosecution

¹² The draft text for article 61 was introduced at the 1998 Rome Conference under the section entitled "Further options for articles 58-61" in UN Doc A/CONF.183/2/Add.1. Footnote 25 of the that document observes that the draft for these articles had been achieved as a result of adoption of the framework outlined in A/AC.249/1998/WG.4/DP.36 (27 March 1998), which states, *inter alia*, "At the hearing, the Prosecutor must present the charges on which he seeks trial and has the burden of establishing to the court that there is a prima facie case which respect to each of those charges. The evidence, however, could be presented in summary form; full presentation of witnesses and evidence as at trial is not contemplated".

¹³ ICC-01/09-02/11-226, para. 11.

¹⁴ ICC-01/09-02/11-181, para. 8.

¹⁵ See for instance ICC-01/09-02/11-226, para. 11.

to satisfy the threshold to commit the suspects to trial¹⁶ and for that reason is the “triggering force” of these confirmation proceedings.¹⁷ The role of the Defence in these proceedings is *ipso facto* a limited one.¹⁸

Written submissions

17. The Prosecution suggests that parties be given, as in the *Ruto et al.*¹⁹ case and other cases before this Court, the possibility to file written submissions after the hearing²⁰ Substantive argument regarding objections made during presentations could be developed therein.



Luis Moreno-Ocampo,
Prosecutor

Dated this 2nd day of September 2011

At The Hague, The Netherlands

¹⁶ ICC-01/09-02/11-226, para. 26.

¹⁷ See for instance ICC-01/09-02/11-181, para. 13.

¹⁸ A/AC.249/1998/WG.4/DP.36 (27 March 1998). See also Kuniji Shibahara/William Schabas, ‘Article 61’, Commentary on the Rome Statute of the International Criminal Court, Otto Triffterer ed. (2008, 2nd ed), pp.1178-9.

¹⁹ ICC-01/09-01/11-T-5-ENG ET WT 01-09-2011 1/116

²⁰ E.g. ICC-01/04-01/10-356, p. 7 (“the Single Judge is of the view that the parties and the participants to the present case shall be allowed to submit, after the conclusion of the hearing on the confirmation of the charges, their written submissions in relation to issues discussed during the confirmation hearing”). See also ICC-01/04-01/06-678.