



Original: **English**

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

Date: **22 August 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
With Confidential Annex A

**OBSERVATIONS ON THE SCHEDULE OF THE CONFIRMATION OF
CHARGES HEARING, ON BEHALF OF HENRY KIPRONO KOSGEY**

Source: Defence for Henry Kiprono Kosgey

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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Counsel for Joshua Arap Sang:
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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

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REGISTRY

Registrar

Ms. Silvana Arbia, Registrar

Counsel Support Section

Deputy Registrar

Mr. Didier Daniel Preira, Deputy
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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Confirmation of Charges Hearing (“the Hearing”) is scheduled to commence on 1 September 2011.
2. On 17 August 2011, Judge Ekaterina Trendafilova, acting as Single Judge on behalf of Pre-Trial Chamber II of the International Criminal Court, rendered a decision requesting observations on the schedule of the Hearing (“the Decision”).¹
3. The Decision requesting observations highlighted, *inter alia*, the following points:
 - (1) Pursuant to rule 122(2) and (3) of the Rules of Procedure and Evidence the parties may raise questions or challenges concerning jurisdiction or admissibility as well as raise objections or make observations concerning an issue related to the proper conduct of the proceedings prior to the confirmation hearing. The Single Judge deemed it necessary to receive information as to whether the parties intend to make any such submission, and if so, how much time they anticipate will be necessary to present such issues.
 - (2) In organizing the presentation of their case, the parties shall take into consideration that the Single Judge decided that the Hearing will commence on 1 September 2011 and shall end “by no later than 12 September 2011”.
 - (3) The Single Judge expected the Prosecutor to organize his arguments and presentation of evidence by following the Draft Model Chart appended to a decision by the Single Judge of 6 April 2011 entitled “Decision setting the regime for Evidence Disclosure and Other Related Matters.”

¹ *Prosecutor v. Ruto et al*, Decision Requesting Observations on the Schedule for the Confirmation of Charges Hearing, ICC-01/09-01/11-272.

- (4) The Single Judge considered it appropriate to obtain from the Defence teams of the Suspects information on the time needed to present their respective evidence as well as the time they need for questioning of each witness called to testify.
- (5) The Single Judge recalled the limited purpose of the Hearing and reminded all parties and participants to confine themselves to what is strictly necessary in order that the Pre-Trial Chamber, which has carefully read all the filings, discharge its functions pursuant to Article 61(7) of the Rome Statute.

Defence Observations

- 4. The Defence for Henry Kiprono Kosgey respectfully agrees with the intention behind the Single Judge's order to clarify the issues and assist the parties and the Pre-Trial Chamber in following a recognized schedule for the Hearing.
- 5. The Defence for Henry Kiprono Kosgey also notes the importance of the principle that parties and participants "confine themselves to what is strictly necessary", and make their observations in that context. Accordingly, all observations made by the Defence are with the intention of utilizing the limited time of the Hearing in the most effective way.
- 6. The Defence also requests that the Single Judge adopt a flexible approach to any established time limits, depending on the exigencies of the Confirmation proceedings.

Written submissions

- 7. The Defence will serve written submissions on points of fact and law no later than three days before the date of the hearing, as is the entitlement under Rule 121(9) of the Rules of Procedure and Evidence. The purpose of such submissions is to assist the Pre-Trial Chamber and other parties in understanding the background and foundation of the Defence submissions. This should significantly reduce the time the Defence might otherwise have needed to set out its

arguments. Having served written submissions, the Defence will take care not simply to repeat the points made in the written submissions, but to use the limited time in the oral hearing to develop and answer the key issues between the parties, against the background of those written submissions.

Time Estimates

8. The Defence requires 30 minutes for counsel for Mr Henry Kiprono Kosgey to make opening remarks.
9. The Defence will raise a jurisdictional argument as to the correct interpretation of the term “pursuant to or in furtherance of a State or organizational policy...” contained within Article 7(2)(a) of the Rome Statute.
10. The Defence anticipates that any jurisdictional issue naturally arises prior to submissions on the evidence. The Defence will need approximately 2 hours to address the Court on that jurisdictional issue.
11. The Defence intends to call only one live witness². It anticipates that it will require 2 hours to question that witness at the Hearing.
12. The Defence intends to make oral submissions on the prosecution evidence relating to the alleged liability of Mr Henry Kiprono Kosgey. It anticipates it will require approximately 7 hours to make those submissions.
13. The Defence further intends to make oral submissions on the evidence already presented on behalf of Mr Henry Kiprono Kosgey. It anticipates it will require approximately 1 hour to make those submissions.
14. The Defence will require an additional 30 minutes to make closing arguments.

² The name of the Defence's *viva voce* witness is included in Confidential Annex A to this filing. In a previous filing (ICC-01/09-01/11-266-Conf-AnxA-Corr), the Defence indicated that it would need 4 hours to question the witness. The present document reflects the updated allotment of time for the witness examination.

Detailed timetable of hearing

15. The Defence anticipates that, after considering all parties' observations on the schedule of the Hearing, the Pre-Trial Chamber will provide a detailed timetable according to which all the parties will work.
16. In an effort to assist the Pre-Trial Chamber, the Defence will provide any additional observations, if necessary, on receipt of that detailed timetable.
17. Nevertheless, the Defence humbly suggests that the parties be allocated time to file final written submissions after conclusion of the Confirmation of charges hearing. On behalf of Henry Kiprono Kosgey, the Defence anticipates that it will require 10 days from the date of service of the Prosecutions written Submissions.
18. The Defence requests that Annex A be received by the Single Judge as "Confidential" due to the fact that it contains the identity of the Defence's *viva voce* witness. The Defence is in the process of liaising with the Victims and Witnesses Unit to determine whether protective measures vis-à-vis the public are required, and does not wish to prejudice the security of witnesses and information providers in the interim.



George Odinga Oraro
On behalf of Henry Kiprono Kosgey

Dated this 22nd August 2011

At Nairobi, Kenya

