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**International
Criminal
Court**

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

Date: **14 April 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
With Public Annexes 1(a) and 1(b)

**Response on behalf of Henry Kiprono Kosgey to the Prosecution's Request for
Conditions of Enforcement**

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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Legal Representatives of the Victims

Legal Representatives of the Applicants

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**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
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REGISTRY

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Counsel Support Section

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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. On 15th December, 2010 the Prosecutor applied for Summonses to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang and requested pursuant to the provisions of Article 58(7) and Rule 119 for conditions for the three suspects to appear as follows:¹

- (1) To provide the Chamber with all residential addresses and telephone numbers. The suspects shall verify the accuracy of this information (to the Registry) on a bi-monthly basis. Any change in the information provided shall be immediately reported to the Registry;
- (2) To have no contact with the other suspects personally, by telephone (including, but not limited to, Skype or sms), in writing or through intermediaries, except through counsel for lawful purposes;
- (3) To have no contact directly or indirectly with any person who is or is believed to be a victim or a witness of the crimes in the Rift Valley;
- (4) To refrain from corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, or tampering with or interfering with the Prosecution's collection of evidence;
- (5) To refrain from committing crime(s) set forth in Kenyan law or the Rome Statute;
- (6) To timely respond to any request by the Chamber;
- (7) To attend all required hearings at the International Criminal Court; and
- (8) To post a bond or provide real or personal security or surety, as the Chamber deems fit.

2. The Prosecution reserved the right to recommend the issuance of a warrant of arrest in the event that current information indicating that bribes, intimidation and threats have occurred is confirmed.²

¹ Pre-Trial Chamber II Prosecutor's Application Public Redacted Version of Document ICC-01/09-30-conf-Exp, para 219

² Pre-Trial Chamber II Prosecutor's Application Public Redacted Version of Document ICC-01/09-30-Conf-Exp para 220

3. On 8th March, 2011 the Chamber by a majority issued summonses without prejudice to the Chamber's competence to revisit its finding either *proprior motu* or in response to a request submitted by the prosecutor *inter alia* for failure to comply with the conditions imposed by the Chamber. The Chamber reserved the right to replace the Summonses to Appear with warrants of arrest under Article 58 of the Statute and Rule 119(4) of the Rules of Procedure and Evidence. The following conditions were imposed on the suspects – that they should:³

- (1) Have no contact directly or indirectly with any person who is or is believed to be a victim or a witness of the crimes for which they have been summoned;
- (2) Refrain from corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, or tampering with or interfering with the Prosecution's collection of evidence;
- (3) Refrain from committing crime(s) set forth in the Statute; and
- (4) Attend all required hearings at the Court.

4. In reaching this Decision the Chamber observed that “at this stage, there is no indication that Ruto, Kosgey and Sang are either perceived as flight risks or likely to evade personal service of the summonses or refrain from cooperating if summoned to appear”.⁴

5. On 6 April 2011, the Prosecutor filed “Prosecution's Request for Conditions of Enforcement”⁵ (the “Prosecution's Request”) in which he argued that “if the suspects remain free pending confirmation, adequate conditions should be imposed to guarantee that they continue to appear voluntarily and that they not obstruct or endanger the investigation or the Court's proceedings”. The Prosecutor requests that the Chamber (the “Chamber”) imposes additional conditions on the suspects. These conditions are:

³ Pre-Trial Chamber II Decision of the Prosecutor's Application for Summons ICC-01/09/11 para 56

⁴ ICC-01/09-01/11-1, p. 21.

⁵ ICC-01/09-01/11-41.

- (1) To provide the Chamber with all residential and office addresses, email addresses and telephone numbers.
 - (2) To submit complete financial information.
 - (3) Not to make any public statements that contain or can be construed as containing an open or veiled threat to actual or prospective witnesses or victims.
 - (4) To appear in person before the Chamber at least once every six months and certify before the Chamber, under oath, that they have complied in full with all the conditions.
6. On 8 April 2011, Judge Ekaterina Trendafilova, acting as Single Judge on behalf of the Chamber, ordered that any Defence responses to the Prosecution's Request be filed by no later than Friday 15 April 2011 at 16:00 hours.⁶
7. The Defence for Henry Kiprono Kosgey (the "Defence") files this Response in accordance with that order.
8. The Defence position is summarised as follows:
- (1) The Chamber, having heard from the Prosecutor, in issuing its 'Decision on the Prosecutor's Application for Summons to Appear ...' gave careful consideration to the necessary conditions to both secure attendance and safeguard the integrity of proceedings.
 - (2) In accordance with the Summons, and pursuant to the existing conditions, Mr Kosgey duly complied with all the conditions and appeared as requested at the ICC on 7 April 2011.
 - (3) There has been no material change in circumstance since the Chamber's issuance of the Summons with attached conditions. The Prosecution has, in his Request, failed to set out or articulate any reason as to why the additional measures sought should be imposed.
 - (4) The current Order should remain in place and the Prosecution's Request dismissed.

⁶ ICC-01/09-01/11-46, page 4.

II. PROCEDURAL BACKGROUND

9. It will be recalled that in the Prosecution's original application for a summons for Messrs. Ruto, Kosgey and Sang, the Prosecution specifically noted that:
 - (1) "it believes that summonses to appear are sufficient to ensure [their] appearance";
 - (2) "none of the three suspects are perceived to be a flight risk";
 - (3) "all three suspects have prominent leadership status in Kenyan society ... there is no indication that they would evade personal service of the summonses";
 - (4) "there is no indication that they would not cooperate if summoned to appear".⁷

10. In response to a Submission requesting relief from the condition regarding witnesses filed in the related proceedings in Muthaura, Kenyatta and Ali, on 5 April 2011,⁸ Judge Tendaifilova issued a "Decision establishing modalities to be observed when complying with summons conditions"⁹ which clarified that the Defence for Ruto, Kosgey and Sang are nevertheless entitled to approach "any person willing to give his or her account of the events in relation to this case" as part of its "minimum guarantees" as stipulated in Article 67 of the Statute. The Decision also made clear that before such contact takes place the Defence is obliged to seek prior advice on security issues pertaining to potential witnesses by the Victims and Witnesses Unit.

11. Mr. Kosgey has strictly complied with and adhered to the conditions set out by the Chamber and by a letter dated 30th March 2011 required the Prosecutor to provide an assurance that an Application shall not be made for variation of the terms as he had complied with all the conditions in the summons. The Prosecutor confirmed that they would not seek a variation of the conditions of the summons in their letter dated 31st March 2011. See Annexure 1 (a) and 1(b) hereto.

⁷ Pre-Trial Chamber II Prosecutor's Application Public Redacted Version of Document ICC-01/09-30-Conf-Exp, para 218

⁸ Submission : ICC-01/09-02/11-13; see also Decision: ICC-01/09-02/11-38.

⁹ ICC-01/09-01/11-38.

III. THE PROSECUTION'S REQUEST

12. The additional conditions now sought in the Prosecution Request are that Messrs. Ruto, Kosgey and Sang:

- (1) Address, email and telephone information - Provide the Chamber with all residential and office addresses, email addresses (directly or indirectly used) and telephone numbers (including providing official records for all telephone numbers from the date the summonses were issued until further order of the Chamber), both inside and outside Kenya. Each suspect shall verify in a signed statement, under oath, the accuracy of this information (to the Registry) on a monthly basis. He shall also immediately report to the Registry any change in the information. Any misstatement in a report, or any failure to provide timely, accurate and complete information shall result in the issuance of a warrant and revocation of the conditions of the suspect's release.
- (2) Financial Information - Submit complete financial information (including assets and liabilities and the identities of all to whom money or property is owed), under oath, to enable the Chamber to determine the appropriate bond and to ensure its enforceability; and that he then post bond or provide real or personal security or surety in an amount sufficient to guarantee his future appearance at all required hearings of the Court.
- (3) Press statements - Forbear from making any public statements or comments about the case, the charges, the investigation, or the evidence against them. Due to their senior positions of authority in Kenya, any statements that the suspects may make concerning the violence or their cooperation with the Court could, intentionally or unintentionally, be regarded by actual or potential witnesses as pressure to cease cooperation with the Court, or impact future witnesses' willingness or desire to cooperate.
- (4) Appearance in Court - Appear in person before the Chamber at least once every six months and certify before the Chamber, under oath, that they have complied in full with all the conditions imposed by the

Chamber. If the Chamber discovers that a suspect did not comply in full within a timeframe set by the Chamber and / or made a false statement of compliance either in person or in a written statement, the Chamber shall issue a warrant and revoke the conditions of his release.

13. The Prosecution Request does not substantiate the request with any reasons for such measures or explain whether and/or how circumstances have changed so as to justify such additional measures.

IV. THE LAW

14. The applicable law relating to the imposition of summons conditions is contained in Article 58(7) of the Statute and Rule 119(4) of the Rules of Procedure and Evidence.

V. SUBMISSIONS

15. The Chamber has already heard from the Prosecution, and carefully considered the necessity of appropriate conditions for this case. It ruled accordingly and did not impose the conditions now sought.
16. The Defence opposes the Prosecution's Request on the following grounds:
 - (1) The Prosecution has provided no reasons to justify its requested for modification of the summons conditions;
 - (2) The particular conditions requested by the Prosecution are both unnecessary and inappropriate.
17. The Chamber may, pursuant to the Provisions of Rule 119(4) of the Rules of Procedure and Evidence (the Rules), if convinced that the person concerned has failed to comply with one or more obligations imposed, on such basis at the request of the Prosecutor or on its own initiative, issue a warrant of arrest in respect of the person.¹⁰

¹⁰ Rule 119(4) Rules of Procedure and Evidence. Also Decision on the Prosecutor's Application ICC-01/09-01/11 para 56

18. Article 60(3) grants the Chamber the power to review or modify its Ruling on release or detention of a person at any time or upon the request of the Prosecutor and may modify its Ruling as to detention, release or conditions of release but only if satisfied that changed circumstance so require. The Prosecutor has a duty to act with diligence and good faith. Filing a dilatory request to modify conditions without referring to any new circumstances after Mr. Kosgey has fully complied with previous conditions duly confirmed by the Prosecutor and appeared voluntarily before the Chamber constitutes an abuse of the process of the Chamber.
19. Since that date, there has been no violation of any of the summons conditions by Mr. Kosgey. Furthermore, the Prosecutor and the Chamber now have the added assurance that the existing conditions are suitable, as provided by Mr. Kosgey's voluntary attendance at the initial appearance hearing on 7 April 2011. Mr. Kosgey intends to comply fully with the Chamber's order and has demonstrated his willingness to do so. Accordingly, there is no justification for the imposition of the additional summons conditions as requested by the Prosecution.

The particular conditions requested by the Prosecution are both unnecessary and inappropriate

20. Each of the four new summons conditions now sought (the provision of address, email and telephone information; the provision of financial information; the prohibition on press statements; and the requirement to appear in court) are both unnecessary and inappropriate.

i. The provision of information

21. With respect to the two conditions requesting the provision of information (that is: address, email and telephone information; and financial information) it is notable that similar conditions were requested by the Prosecution in its

original summons application and have thus already been considered and implicitly rejected by the Chamber in its 8 March 2011 Decision.

22. It is plain that the Chamber gave careful consideration to the necessary conditions to ensure both the appearance of Mr. Kosgey, and the integrity of the proceedings. There are no grounds set out by the Prosecution for seeking his address, email and other information. Similarly there is no basis for seeking financial information. The Court has held that no bond is required in order to secure attendance, and therefore financial information to determine Mr Kosgey's ability or otherwise to satisfy such a bond is both unnecessary and inappropriate. If the Prosecution requires such information for other purposes, this should be expressly set out and justified.

23. Article 55(2)(b) and Article 67(1)(g)(h) enshrine the right of the Accused to remain silent, without adverse inference being drawn from their silence. The various Trial Chambers of the ICC have also confirmed that in accordance with the Accused's right of silence and privilege against self-incrimination, the Defence's disclosure obligations to the Office of the Prosecutor are limited. Although the Defence may be requested to provide the Prosecutor with the names and details of its witnesses and the evidence it intends to rely upon (including either summaries or statements), it is exempt from any other form of disclosure. The Defence thus has absolutely no duty to allow the Prosecutor to inspect the Defence files or have any other form of access to Defence information.¹¹

ii. The prohibition of press statements

24. The imposition of a prohibition on Mr Kosgey from making public comments about the case, the charges, the investigation or the evidence is unnecessary. There is no suggestion that Mr Kosgey has made any kind of statement to the

¹¹ See Prosecutor v. Lubanga, Annex I "Decision on disclosure by the defence"; 20 March 2008; ICC-01/04-01/06-1235-Corr-Anxl; Prosecutor v. Lubanga, "Redacted Second Decision on disclosure by the defence and Decision on whether the prosecution may contact defence witnesses", 20 January 2010, ICC-01/04-01/06-2192-Red; Prosecutor v. Katanga and Ngudjolo, Decision on the "Prosecution's Application Concerning Disclosure by the Defence Pursuant to Rules 78 and 79(4)", 14 September 2010, ICC-01/04-01/07-2388.

press which could be considered in any way inappropriate. Moreover, the Chamber, at the initial appearance hearing on 7 April 2011, has already made clear to Messrs. Ruto, Kosgey and Sang that their dealings with the press are to be carefully conducted and could lead to the issuance of an arrest warrant in the event of impropriety. Indeed, Judge Trendafilova specifically noted at the 7 April 2011 hearing that:

It came to the knowledge of the Chamber by way of following some articles in the Kenyan newspapers that there are some movements towards re-triggering the violence in the country by way of using some dangerous speeches. I would like to remind the suspects - and I'm not referring to anyone in particular but this is a general point to be made to all the suspects - that such type of action could be perceived as a sort of inducement which may constitute the breach of one of the conditions set out in the summonses to appear, namely, to continue committing crimes within the jurisdiction of the court. Accordingly, this might prompt the Chamber to replace the summonses to appear with warrants of arrest, something that the Chamber wouldn't do with willingness because we would rather that you appear as free persons in this courtroom.¹²

25. The condition imposing restriction on communication with the press at all about the case would not be in keeping with the Court's previous rulings on the subject. Earlier Rulings only caution against inappropriate press reports generated by the parties. For example,

Judge Fulford [addressing the Prosecution]: ... a very considerable time ago ... I gave a very firm indication that the Judges did not expect to see satellite litigation in the press with the issues which we are considering being the subject of some kind of debate, with commentators on one or both sides seeking to litigate the issues in the trial in a different forum. It was expressed to us then that this is an

¹² Transcript page 8.

inappropriate activity, particularly for the Prosecutor to undertake, and you may like to remind this individual of our views on that subject.¹³

None of the provisions of the Rome Statute address the relationship between the parties and the press, and public statements outside the courtroom are in this sense unregulated.¹⁴ ... It is not the role of the Chamber to comment on the arrangements that are, or should be, in place as regards the relationship between the Court (i.e. its various organs and counsel appearing in its cases) and the media. The Chamber's concern is instead focused on the course of the present trial, and the need to ensure that the interests of justice are upheld: by Article 64(2) of the Rome Statute ('Statute'). The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full regard for the rights of the accused and due regard for the protection of victims and witnesses. The presumption is that the trial will be held in public: Article 64(7) of the Statute; and by Article 64(6)(f) of the Statute the Chamber may rule on any relevant matters.¹⁵

26. It is the duty of the Court and the Prosecution to ensure a fair trial. In *Lubanga* the Prosecution accepted that it should *not* comment on issues such as the credibility of witness or the evidence or other matters that are under consideration by the Chamber.¹⁶ It acknowledged that it must respect the other participants and the process.¹⁷ The Chamber held that respecting the Chamber and the other participants includes speaking publicly about the proceedings in a fair and accurate way, and avoiding comment about issues that are for the Chamber to determine.
27. There is therefore no legal basis for the Prosecution's attempt to prevent the Defence from making *appropriate* comments to the press. Inappropriate and impermissible comments to the press would, no doubt, already be restricted by

¹³ ICC-01/04-01/06-T-264-CONF-ENG-ET, pages 5, lines 11-21; see, e.g., ICC-01/04-01/06-T-126-CONF-ENG CT, page 46, line 22 to page 48, line 11. (Referred to in ICC-01/04-01/06-2433, para 15.)

¹⁴ ICC-01/04-01/06-2433, para 34.

¹⁵ ICC-01/04-01/06-2433, para 36.

¹⁶ ICC-01/04-01/06-2433, para 40.

¹⁷ ICC-01/04-01/06-2389, para 15 (cited in ICC-01/04-01/06-2433, para 40.)

the Chamber's careful and detailed conditions set out in the Summons. The additional restrictions are therefore not necessary or appropriate.

iii. The requirement to appear in court

28. The requirement to appear in court at least once every six months is overbroad and not in keeping with the Court's case law.
29. Judge Trendafilova made clear at the 7 April 2011 initial appearance hearing that Messrs. Ruto, Kosgey and Sang are under no obligation to attend the Status Conferences which are to be held in advance of the confirmation of charges hearing.¹⁸
30. Rule 124(1) of the Rules of Procedure and Evidence provides that persons – who are available to the court – may waive their right to be present at the confirmation hearing. In determining whether to grant the request, the Chamber must take into consideration whether a) the persons understands the right to be present at the hearing and b) the consequences of waiving this right.
31. In the Katanga and Ngudjolo case, the Chamber rejected the Prosecution's request to compel the suspect to attend the confirmation hearing. The Chamber was convinced that the suspect had exercised the right to waive his right to be present for the rest of the confirmation hearing. The Chamber was also convinced that in accordance with Rule 124(2), the suspect was fully aware of the consequences of this waiver of his right to be present for the rest of the confirmation hearing. The Chamber was of the view that the absence of the suspect will not cause any prejudice to him, his Defence, or to the right to a fair and expeditious trial¹⁹.
32. The Chamber has also confirmed in the Banda and Jerbo case that persons, who are not detained by the Court but are subject to a summons, may also

¹⁸ Transcript page 21.

¹⁹ Pre-Trial Chamber I, Prosecutor v. Katanga and Ngudjolo, Transcript, ICC-01/04-01/07-T-45-ENG, 9 July 2011, p. 4-5, 7-10, 11, 14; Pre-Trial Chamber I, Prosecutor v. Katanga and Ngudjolo, Transcript, ICC-01/04-01/07-T-46-ENG, 11 July 2008, p. 1-2, 23-24.

waive their right to be present (on an informed basis). In deciding whether to accept the waiver, the Chamber limited its inquiry to a consideration of whether “the suspects are fully aware of (i) the rights to which they are entitled pursuant to Article 67 of the Statute; (ii) their right to be present at the confirmation hearing; (iii) the content of the Joint Submissions; (iv) the consequences of waiving their right to attend the confirmation hearing and the agreement between the Defence and the Prosecution contained in the Joint Submissions”²⁰.

33. The condition requested by the Prosecution could therefore infringe Mr. Kosgey’s right to waive the right to attend the confirmation hearing. Given the distance from Nairobi to the Court, it could also constitute an excessive financial burden.
34. Judge Trendafilova made clear at the 7 April 2011 initial appearance hearing that Messrs. Ruto, Kosgey and Sang are under no obligation to attend the Status Conferences which are to be held in advance of the confirmation of charges hearing.²¹ Messrs. Ruto, Kosgey and Sang are already obliged by the Chamber’s 8 March 2011 Decision to attend all required hearings by the Court and to comply with their other summons conditions. Imposing an additional requirement to appear in person before the Chamber at least once every six months is unnecessary and excessive in light of the Court’s existing order.

²⁰ Pre-Trial Chamber I, Prosecutor v. Banda and Jerbo, Second decision setting a deadline for the submission of the suspects’ written request to waive their right to attend the confirmation hearing, ICC-02/05-03/09-87, 27 October 2010, para. 9.

²¹ Transcript page 21.

VI. RELIEF REQUESTED

35. For the reasons set out above, the Defence requests that the Chamber dismiss the Prosecution's Request.



George Odinga Oraro
On behalf of Henry Kiprono Kosgey

Dated this 14th April 2011

At Nairobi, Kenya