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Date: **22 August 2011**

**PRE-TRIAL CHAMBER II**

**Before: Judge Ekaterina Trendafilova, Presiding 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**

**Prosecution's Observations on the Schedule of the 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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**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**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms Silvana Arbia

**Deputy Registrar**

**Defence Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. Introduction

1. In the “Decision Requesting Observations on the Schedule for the Confirmation of Charges Hearing”<sup>1</sup> dated 17 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 time for the presentation of the arguments and evidence.
2. The Prosecution will not challenge jurisdiction or admissibility. It anticipates that its presentation of argument on the charges against three suspects and its cross-examination of five defence witnesses can reasonably be completed within 15 hours. Assuming that the entire hearing takes 40 hours, this will allow the Defence to have substantially more time than the Prosecution. The Prosecution would, of course, endeavor to use less than the 15 hours, if it turns out that cross-examination of the Defence witnesses will not be necessary. Without any information as to what four of the five Defence witnesses will testify to or how long any their anticipated direct testimony will take, it is impossible to assume that it will need less time than that.
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

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<sup>1</sup> ICC-01/09-01/11-272.

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.
5. The Prosecution also opposes the apparent effort by the Defence to offer alibi evidence.<sup>2</sup> Alibi or other types of affirmative defences are not appropriate at confirmation; they too are issues to be resolved on a full record at the trial. Moreover, the failure of the Defence to provide adequate advance notice also disables them from attempting to prove alibi at the confirmation hearing.

## II. Observations

### *Questions or challenges concerning jurisdiction or admissibility*

6. The Prosecution requests that, in the event that the Defence intends to raise any questions regarding jurisdiction or admissibility 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.
7. The Prosecution argues that, if raised, the issue of admissibility should not be litigated during the confirmation hearing, as it is currently pending before the

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<sup>2</sup> See ICC-01/09-01/11-266 and ICC-01/09-01/11-268 and related annexes.

Appeals Chamber (assuming that the issue has not been ruled upon by 1 September 2011). In *Mbarushimana*, Pre-trial Chamber I held that “the Defence has challenged the jurisdiction of the Court and [...] the Chamber’s decision on the matter is pending, and that, therefore, no submissions on this issue shall be made at the confirmation hearing”.<sup>3</sup> Pursuant to Rule 58(2) of the Rules, the Chamber has the discretion to decide on the proper conduct of the proceedings when considering such challenges. On that basis, the Prosecution submits that the Chamber should order that litigation regarding admissibility challenges be deferred until after the confirmation hearing.

### *Conduct of the Proceedings*

8. The Prosecution suggests that the Chamber follow the confirmation model adopted in the cases of *Prosecutor v. Mbarushimana*<sup>4</sup> and *Prosecutor v. Abu Garda*,<sup>5</sup> where 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.
9. Additionally, this presentation format will allow for the most fluid presentation of the five 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.
10. 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

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<sup>3</sup> ICC-01/04-01/10-356 p. 5.

<sup>4</sup> ICC-01/04-01/10-356-Anx1.

<sup>5</sup> ICC-02/05-02/09-162-Anx1

related to calling witnesses. The VWU will need time and notice to prepare logistically for each witness's testimony.

11. In the Prosecution's view, the format of the confirmation hearing in the case *Prosecutor v. Bemba* would not be suited to the current multi-defendant case. The Chamber in that case divided the Prosecution and Defence presentations into short sections by issue or crime.<sup>6</sup> If applied to the present case, it would lead to unnecessary repetitions in the parties' submissions.

***Time allotted to the Prosecution***

12. When deciding on how to divide the time between the parties, two factors must be considered by the Chamber. First, the schedule indicates that the confirmation hearing will last 8 days, from 1-12 September. According to adjournment practice at the ICC, the duration of the entire hearing amounts to just under 40 hours.<sup>7</sup> 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 five Defence witnesses.<sup>8</sup> For these reasons the Prosecution submits that it should be granted 15 hours in total to present its case and cross-examine the five Defence witnesses.

13. To conduct its cross examination of the witnesses, the Prosecution requests that, as was granted in the *Abu Garda* case, it be granted the same amount of time given to the Defence to lead its witnesses during the direct examination.<sup>9</sup> Alternatively and because of the limited scope of the confirmation hearing, the

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<sup>6</sup> ICC-01/05-01/08-336 and annex.

<sup>7</sup> 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 3.5 hours. Thus, with eight days of hearings at 4.5 hours per day, plus the additional 3.5 hour morning session, the Prosecution estimates that the confirmation hearing will last just under 40 hours.

<sup>8</sup> See Article 61(5) of the Statute ; see also ICC-01/09-01/11-221, para. 21.

<sup>9</sup> ICC-02/05-02/09-162-Anx1.

Prosecution suggests that each party be given an hour per witness for questioning.

### *Protection of witnesses' identities*

14. Because of the security concerns its witnesses face in Kenya, the Prosecution requests from 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*

15. The Prosecution intends to use visual aids such as power point slides 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.<sup>10</sup>

#### *Method of citation of evidence*

16. As a method of simplifying the referencing process of exhibits, the Prosecution proposes to submit written and sourced copies of the oral presentations containing citations to the List of Evidence to the Chamber and the parties, at the conclusion of each presentation. At that point, the Prosecution will request that the written copies be admitted into the record of the case. Such

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

process is intended to avoid the distracting and time-consuming referencing method of calling out each EVD number cited during the oral presentations.

### *Oral Objections*

17. In order to ensure that the schedule of the confirmation hearing is respected when parties wish 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 that for the party making the objection or other statement.

### *Nature of the confirmation hearing*

18. 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.<sup>11</sup> 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<sup>12</sup> and during which the evidentiary debate is circumscribed.<sup>13</sup> Parties are encouraged to select their best pieces of evidence to support their cases.<sup>14</sup> However, as noted by this Chamber, the onus is on the Prosecution to satisfy the threshold to commit the suspects to trial<sup>15</sup> and for that reason is the

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<sup>11</sup> 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 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".

<sup>12</sup> ICC-01/09-01/11-221, para. 8.

<sup>13</sup> ICC-01/09-01/11-153, para. 8.

<sup>14</sup> See for instance ICC-01/09-01/11-221, para. 8

<sup>15</sup> ICC-01/09-01/11-221, para. 21.



“triggering force” of these confirmation proceedings.<sup>16</sup> The role of the Defence in these proceedings is *ipso facto* a limited one.<sup>17</sup>

19. As noted by the Single Judge, the Defence’s intent to call a high number of witnesses is *per se* manifestly excessive and disproportionate for the purposes of the confirmation of charges hearing<sup>18</sup>. Likewise, the recent Defence’s submission of a vast number of documents constitutes an attempt to convert this stage of the proceedings as an anticipation of the trial stage of the case<sup>19</sup>. The Prosecution will address this issue, in more details, during its presentation at the confirmation hearing.

### *Written submissions*

20. The Prosecution suggests that parties be given, as in other cases before this Court the possibility to file written submissions after the hearing.<sup>20</sup> Substantive argument regarding objections made during presentations could be developed therein.




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Luis Moreno-Ocampo,  
Prosecutor

Dated this 22<sup>nd</sup> day of August 2011

At The Hague, The Netherlands

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<sup>16</sup> See for instance ICC-01/09-01/11-153, para.13.

<sup>17</sup> 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.

<sup>18</sup> ICC-01/09-01/11-221, para. 9.

<sup>19</sup> See for instance ICC-01/09-01/11-221, para. 9.

<sup>20</sup> 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.