

**Cour
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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
Corrigendum of the
Defence Request for Variation of Decision on Summons or in the Alternative
Request for Leave to Appeal

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

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
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States' Representatives

Amicus Curiae

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

1. Introduction

1. The Defence hereby requests the Pre-Trial Chamber to review and vary the modalities set out in paragraph 15 of the ‘Decision on Variation of Summons’ (the Impugned Decision) so as to enable the Defence to contact potential defence witnesses without contacting the Victims and Witnesses Unit in advance, where it is not feasible to do so.
2. The Defence indicates it is not opposed to a condition restricting liberty, at this stage of the proceedings, that forbids Mr Ruto himself from contacting potential defence witnesses (other than close friends or family members). The Defence is concerned that the replacement of the word ‘person’ in Rule 119 (c) with the word ‘Defence’ prevents Mr Ruto’s counsel, assistants or investigators from contacting potential defence witnesses, and thereby creates immense obstacles to the proper preparation of the case.
3. In the alternative, the Defence respectfully requests leave to appeal the Impugned Decision in relation to the issues as to:
 - a. whether the modalities set out in paragraph 14 of the Impugned Decision are necessary and proportionate; and
 - b. whether the imposition of these modalities on the Defence and not the Prosecution or any other participants in the case, violates equality of arms.

2. Procedural History

4. By its ‘Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang’¹ the Pre-Trial Chamber found that there were reasonable grounds to believe that the defendants had committed a crime falling under the Rome Statute, and that the issuance of a summons was sufficient to secure the defendant’s appearance at the initial appearance.
5. Without prejudice to further orders on this subject, the Pre-Trial Chamber ordered that the defendants were, inter alia, “(i) to have no contact directly or indirectly with any

¹ ICC-01/09-01/11-01.

person who is or is believed to be a victim or a witness of the crimes for which William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang have been summoned”².

6. On 5 April 2011, the Single Judge of Pre-Trial Chamber II issued a ‘Decision Establishing Modalities to be Observed When Complying with Summons Conditions’, in which the Single Judge ordered that the Defence should comply with the following modalities: ³

“...the Defence may approach, in principle, any person willing to give his or her account of the events in relation to this case. This consent by the potential witness approached must be given voluntarily and knowingly and any party is prohibited from trying to influence his or her decision as to whether or not to agree to be contacted by the Defence. However, before such contact takes place, the Defence is ordered to communicate the name and necessary contact details to the VWU which, in turn, will advise the Defence on whether this contact may put the person at risk and/or which security arrangements the Defence should obey, if necessary. In case security arrangements need to be set up, the VWU shall be responsible for making the necessary arrangements, in consultation with the Defence. Such advice to the Defence shall be rendered as early as possible, and no later than two weeks as of the day the Defence communicated its intention to contact a particular potential witness to the VWU. In principle, such communication takes place between the Defence and the VWU only, unless the VWU, based on its assessment, is of the view that such contact could lead to a security risk for the person concerned, thus requiring the Single Judge's intervention. In this case, the VWU is instructed to submit immediately a report to the Single Judge, which will, in turn, address this issue in a separate decision.”

7. The Defence notes that the Decision was reached without this Defence being able to make submissions on the matter.

² ICC-01/09-01/11-01 concluding orders.

³ ICC-01/09-01/11-38 at para 14.

8. The Single Judge further ordered that “any difficulties in the implementation of this decision shall be brought immediately to her attention”.⁴

3. Request for reconsideration and variation

9. In accordance with the Single Judge’s direction that any difficulties concerning the implementation of the decision should be brought to her attention, the Defence draws the attention of the Single Judge to the following practical issues concerning the feasibility of implementing these modalities in connection with all potential witnesses:
- i. firstly, it is unclear as to how the Defence can ascertain whether potential witnesses consent to meeting with the Defence, if they are unable to have any contact with potential witnesses prior to their consultation with the VWU;
 - ii. secondly, the requirement that the Defence must receive the advice of VWU before it can commence its interview with a particular witness will significantly impede and delay defence investigations;
 - iii. thirdly, potential witnesses may be reluctant in any event to be put in contact with the VWU (identifying the VWU with the ICC) and thereby the defence will be prevented from any contact with that potential witness.
 - iv. fourthly, the scheme is essentially unworkable within any reasonable time parameter, given the functional limitations of the Witness and Victim unit imposed by their limited capacity.
 - v. fifthly, the imposition of these modalities on the Defence and not the Prosecution, procedurally disadvantages the Defence vis-à-vis the Prosecution in terms of its ability to conduct effective and expeditious investigations, and thus violates article 67(1)(e) of the Statute.
10. The Defence submits that the wording of paragraph 16 of the Single Judge’s decision clearly implies that the Single Judge may vary these modalities to take into consideration practical difficulties with its implementation. Rule 119(2) of the Rules of Procedure and Evidence further provides that “at the request of the person concerned [...], the Pre-Trial Chamber may at any time decide to amend the conditions set pursuant to sub-rule 1”. Trial Chamber I has also recently recognised in

⁴ At para 16.

the Lubanga case that the Chambers possess an inherent power to vary previous decisions if “they are manifestly unsound and their consequences are manifestly unsatisfactory”.⁵

Obtaining the witness's consent prior to consultation with the VWU

11. At paragraph 14, the Single Judge held that “the Defence may approach, in principle, any person willing to his or her account of the events in relation to this case. This consent by the potential witness approached must be given voluntarily and knowingly [...]. However, before such contact takes place, the Defence is ordered to communicate the name and necessary contact details to the VWU [...]”.
12. It is difficult to ascertain how this is to work in practice. For example, an investigation may take place at a village where an incident concerning the charges took place. All the persons found in the village could be viewed as ‘potential witnesses’. Is the Defence to inform VWU of its general wish to make inquiries of the persons there?
13. It is unclear from this formulation as to whether the Defence should obtain the consent of the potential witness prior to the referral to the VWU or afterwards. If it is prior to referral, then it is equally unclear as to how the Defence can ascertain whether the person consent if the Defence is unable to contact the person in question.
14. If the Defence were only required to obtain the consent of the person after it had first obtained the advice of the VWU, this could overburden the VWU with a multitude of unnecessary requests concerning persons, who subsequently indicate that they do not wish to be contacted by the Defence. Since the Defence would not be able to assess whether the person would be willing to be interviewed or contacted by the Defence until after they had received the advice of the VWU, the Defence investigations would also be stalled in the interim.

⁵ Prosecutor v. Lubanga, “Decision on the defence request to reconsider the “Order on numbering of evidence” of 12 May 2010”, 30 May 2011, ICC-01/04-01/06-2705 at para 18.

15. Many potential defence witnesses will also be persons who are well known to either Counsel or the Defendant. For example, the Defence may wish to call direct family members of the Defendant to testify in connection with the character of the Defendant or in connection with an alibi defence. It is difficult to see why the intervention of the VWU would be necessary in such circumstances.
16. The Defence therefore respectfully requests that the modalities be varied to enable the Defence to make preliminary contacts, in the course of its investigations or otherwise, with the potential witness, for the purpose of ascertaining whether the person consents to be interviewed by the Defence.

The requirement that the Defence must receive the advice of VWU before it commences its interview with a particular witness will significantly impede and delay defence investigation;

17. The ICC Appeals Chamber has affirmed in the Katanga and Ngudjolo case that “in principle, the Defence is entitled to contact persons who the Prosecutor either has interviewed or is about to interview prior to their becoming prosecution witnesses and recognises that such persons may have information which is potentially relevant to the Defence.”⁶ The Appeals Chamber further held that any incursions upon this right related to protective measures must accord with the principles of necessity and proportionality, and “comply, as far as possible, with the requirements of adversarial proceedings and equality of arms”.⁷
18. In terms of the necessity for such an order, the Defence fully understands the concern of the Single Judge to ensure that potential witnesses are not unnecessarily exposed to threats or risks. However, there is currently no reason to believe that the suspects or their counsel will behave in a manner exposing potential witnesses to threats or risks. Moreover, as noted by the Single Judge at paragraph 11 of the Impugned Decision, Counsel are already subject to specific obligations under articles 28 and 29 of the Code of Professional Conduct for Counsel, which enjoin counsel to take due

⁶ Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements" 13 May 2008 ICC-01/04-01/07-476 at para 62.

⁷ At para 63.

consideration of the security and protection of witnesses and to respect the voluntary nature of their cooperation with the Defence. In this regard, the ICTY Appeals Chamber underscored in the Prlic case that the Chamber should generally presume, absent evidence to the contrary, that defence counsel will act in an appropriate manner.⁸ This finding was also upheld by the Special Court for Sierra Leone in the Charles Taylor case.⁹

19. Furthermore, the Pre Trial Chamber in its summons decision, ordered the summoned parties to (ii) ‘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; (iii) to refrain from committing crime(s) set forth in the Statute....¹⁰
20. The Defence also acknowledges that the VWU can play a useful role in advising the Defence as to the best practices for approaching vulnerable or sensitive witnesses, who may subsequently require the protection of the Court if they decide to testify. To that end, it may be consistent with Counsel’s obligation under article 29 of the Code of Conduct to seek the advice of the VWU in connection with such persons.
21. The Defence nonetheless respectfully contests whether it is proportionate to require the Defence to seek the prior advice of the VWU with respect to each and every potential witness, irrespective of the circumstances of that potential witness.
22. The Defence submits that in a situation in which the Defence has made a good faith determination under article 29 of the Code of Professional Conduct that contact with a particular person will not result in any security risk or harm to the person in question it is unnecessary to compel the defence to seek the advice of VWU. To oblige the Defence to consult with the VWU in such a case would unnecessarily and unfairly delay the proceedings. It would also gravely hamper the Defence ability to conduct effective investigations.

⁸ Prosecutor v. Prlic et al, ‘Decision On Prosecution’s Appeal Against Trial Chamber’s Order On Contact Between The Accused And Counsel During An Accused’s Testimony Pursuant To Rule 85(C)’, 5 September 2008, at para 18.

⁹ Prosecutor v. Taylor, Decision on Prosecution Motion for an Order Restricting Contact Between the Accused and Defence Counsel During Cross-Examination’, 20 November 2009, at page 3.

¹⁰ ICC-01/09-01/11-01.

23. The Defence has a duty to act expeditiously and with diligence, in order to ensure that the defendant's right to an expeditious trial is fully respected. The Defence will not be aware of the full range of persons to contact prior to their investigations as it is often the case that the Defence will be referred to potential witnesses through their discussions with other potential witnesses. For example, in going to a village to meet one potential witness, that person may advise the Defence that they should also speak to several other potential witnesses, with whom the first person can put them in contact.
24. If the Defence are required to wait for the response of the VWU each and every time they get a new investigative lead, this could significantly prolong their investigative missions, which can adversely impact on the security of the Defence,¹¹ and waste defence resources. It could also result in potential witnesses becoming unavailable. This would be the case if the Defence is informed that a potential witness will only be present in a particular village for a limited time period.
25. At the same time, the Defence may also be required to conduct discrete investigations within a very short time period: for example, if the Prosecution discloses the names of key Prosecution witnesses on or near the final 30 day cut-off period prior to the confirmation hearing, the Defence will only have approximately 15 days within which to finalise any witnesses or exhibits which the Defence wish to rely upon in response to the newly disclosed Prosecution witnesses. Since the VWU is only obliged to respond to Defence inquiries no later than two weeks after they have first received the Defence's communication that they intend to contact a particular witness, full compliance with the modalities set out in the Impugned Decision would mean that the Defence would only have three days within which to conduct its investigations. This is a wholly inadequate time period to conduct investigations effectively. In situations where the VWU is of the view that contact between a person and the Defence could lead to a security risk to that person, it would then have to produce a report to the

¹¹ The prolonged presence of Defence investigators in a particular village would draw attention to the Defence, and could rightly or wrongly create the perception that there are many persons in that village who are cooperating with the Defence, and who may be Defence witnesses.

Single Judge. The Single Judge would then issue a decision in respect of the person concerned. This would even further delay the process.

26. The suggestion of the Pre-Trial Chamber to consult with the VWU prior to any contact with any potential witness is also manifestly impractical. It will overburden the VWU with work. In order to give proper advice on whether contact by the Defence with a particular person may put this person at risk or whether security arrangements are to be put in place, the VWU would need to conduct its own investigations. They would need a sufficient number of people on the terrain who are in a position to assess adequately the security situation. The extra costs involved in such an operation are enormous. Given the already full agenda of the VWU, more people would have to be employed. Their travel and investigative expenses would have to be paid as well as many unforeseen costs.
27. In addition, the Defence is better placed to assess the security situation of their potential witnesses than is the VWU. The Defence is better informed about internal Kenyan politics affecting the security situation of any potential witness. The Defence also has more awareness of the various relationships between the potential witnesses, the suspect and others and about any potential security threat to them as a result of their cooperation with the Defence. It is clearly not in the interests of the Defence for any of its potential witnesses to be subjected to threats of any sorts. Such would have an impact on the entire defence investigations as other potential defence witnesses may subsequently refuse to cooperate. The Defence will, therefore, do all within its capacity to prevent such security threat to take shape.
28. The most practical way of finding out whether a person would face any risk by speaking to the Defence is to ask the person him or herself about his or her security situation. However, pursuant to the Impugned Decision, the Defence is not allowed to make any contact with anyone without informing the VWU. Thus, it cannot assess their security situation. Were the VWU to contact these potential witnesses to inquire about their security, they may refuse to meet with the Defence whereas they may not have refused to do so had the Defence been in a position to contact them informally first. This would also compromise the neutrality position of the VWU. It may raise question marks about the advice of the VWU to any potential defence witness. Thus,

the Defence would strongly oppose any contact between the VWU and any potential witness before it has had an opportunity to be in contact with the person in question. However, without speaking to the person concerned, the VWU will not be in a position to assess adequately his security. Accordingly, the conditions set out in the Impugned Decision are completely unworkable.

29. The Defence therefore respectfully requests the Honourable Single Judge to vary the modalities to provide that:

- based on the particular circumstances of the person, the Defence must make a good faith assessment as to whether the advice of the VWU is necessary to ensure the psychological well-being and safety of the person, whom the Defence intends to interview;
- to that end, when making a preliminary contact with the potential witness, for the purpose of ascertaining whether the person consents to be interviewed by the Defence, the Defence shall inquire with the person whether there are any personal well-being or safety issues, which have been referred to the VWU in the past, or which should be referred to the VWU at that juncture;
- if the Defence has made a good faith assessment that the advice of the VWU is not necessary with respect to a particular person, and that person has not brought any issues to the attention of the Defence, then the Defence may proceed to interview that person, without first seeking the advice of the VWU;
- the Defence is obliged continuously to evaluate the security and safety of the person throughout the course of the interview, and to stop the interview and seek the advice of the VWU where necessary, should new information concerning the well-being and safety of the person come to the attention of the Defence.

30. The Defence submits that this proposed variation is consistent with the practice of Trial Chamber II, which has only required the parties to seek the assistance of the VWU in connection with the facilitation of interviews with persons who are

particularly vulnerable or whose safety is at risk, or who are already within the witness protection programme.¹²

The imposition of these modalities on the Defence and not the Prosecution, procedurally disadvantages the Defence vis-à-vis the Prosecution

31. Article 67(1)(e) of the Statute sets out the right of the Defence to obtain the attendance and examination of witnesses under the same conditions as witnesses called by the Prosecution against the Defence. Moreover, as noted at paragraph 17 above, the Appeals Chamber has held that any restrictions of the right of the defence to contact potential witnesses must be consistent with the requirements of adversarial proceedings and equality of arms.¹³

32. As set out at paragraphs 22 to 24, the modalities imposed by the Single Judge will hamper the expeditious execution of defence investigations, and may prevent the defence from interviewing potential witnesses. In contrast, the Prosecution is under no such disadvantage. Whilst the Prosecution is obliged under article 54(3)(f) to take necessary measures to ensure the protection of any person, the Prosecution is not obliged to seek the advice of the VWU with respect to all potential witnesses, irrespective of whether the witness requires the protection of the VWU. The Prosecution has a degree of latitude to balance the operational requirements of effective investigations with the security and well-being of its witnesses and sources, and to that end, to use its judgment as to whether the prior advice of the VWU is necessary and appropriate.

33. The Impugned Decision also imposes no reciprocal obligations on the Prosecution as concerns their contacts and interview with persons, who are either potential or actual witnesses for the Defence. In this connection, both Trial Chamber I and II have held that any obligations, which apply to the Defence in connection with their interactions

¹² Prosecutor v. Katanga and Ngudjolo, 'Décision relative aux modalités de contact entre des victimes représentées et les parties', ICC-01/04-01/07-2571, 23 November 2010 at para 31. Prosecutor v. Katanga and Ngudjolo, Prosecutor v. Katanga, 'Decision on a Number of Procedural Issues Raised by the Registry', 14 May 2009, ICC-01/04-01/07-1134, at paras 26 and 27.

¹³ Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements" 13 May 2008 ICC-01/04-01/07-476

with victims and Prosecution witnesses, apply equally to the Prosecution in equivalent circumstances.¹⁴ The imposition of such judicial directions is particularly warranted in the case of the Prosecution due to the fact that the Prosecutor has not enacted a Code of Conduct, containing provisions such as articles 28 and 29 of the Code of Professional Conduct for Counsel.

34. The Defence therefore respectfully requests the Honourable Single Judge to order that any modalities established by the Chamber should apply to the Defence and the Prosecution and other parties.

4. Alternative Request for Leave to Appeal

35. Should the Single Judge reject the Defence request for variation of the modalities set out in the Impugned Decision, the Defence respectfully requests leave to appeal in accordance with article 82(1)(d) of the Statute in connection with the issue as to
- a. whether the modalities set out in paragraph 14 of the Impugned Decision are necessary and proportionate; and
 - b. whether the imposition of these modalities on the Defence and not the Prosecution or any other participants in the case, violates equality of arms.

¹⁴ In the Prosecutor v. Lubanga, Trial Chamber I set out conditions, which were equally applicable to the Prosecution, the Defence and the Legal Representatives of Victims, in terms of the modalities, which they should follow when contacting witnesses, who were being called by the other party (See Prosecutor v. Lubanga, Decision on the prosecution's application for an order governing disclosure of non-public information to members of the public and an order regulating contact with witnesses, 3 June 2008, ICC-01/04-01/06-1372, at para 14).

In Prosecutor v. Katanga and Ngudjolo, both the Prosecution and the Defence were ordered to comply with the modalities, which should be followed if one party wishes to contact a witness, who is being called by the other party. (See Prosecutor v. Katanga, 'Decision on a Number of Procedural Issues Raised by the Registry', 14 May 2009, ICC-01/04-01/07-1134, at paras 27 and 28). In a subsequent decision concerning the relationship between investigations and protective measures, the Chamber underscored that such protocols should be equally applicable to the Prosecution (and the Legal Representatives of Victims).

"14. As regards the Protocol's field of application, the Chamber notes that the Prosecutor considers that he does not have to apply the Protocol during his own investigations since he was not involved in drafting it.²⁷ However, the Chamber would recall that the purpose of the Protocol is to lay down a set of general guidelines which are to be applied on a case-by-case basis. Moreover, the Legal Representatives of the Victims have undertaken to comply with these good practices. The Chamber considers that the Protocol constitutes a set of minimum rules designed to safeguard the security of all protected witnesses, whether called by the Prosecutor or by the other participants. It is the Chamber's view that, although the Prosecutor is free to adopt practices which offer greater protection during his investigations, he cannot, however, disregard those minimum rules."

(See Prosecutor v. Katanga and Ngudjolo, Decision on the "Protocol on investigations in relation to witnesses benefiting from protective measures" ICC-01/04-01/07-2047 26 April 2010)

Both Issues Arise from the Impugned Decision

36. The Impugned Decision does not distinguish between the different types of potential witnesses: the Defence is obliged to obtain the prior advice of the VWU with respect to every person who may be a potential witness, irrespective as to whether the person's circumstances warrant such an approach. The Defence also refers to the arguments it set out at paragraphs 17 to 28 *supra*. The issue as to whether such an all encompassing order is both necessary and proportionate thus directly arises from the Impugned Decision.
37. Although the Chamber cites article 54(1)(b) and 68(1) of the Statute in relation to the Prosecution, the dispositive section of the Impugned Decision is directed solely to the Defence. At the same time, there is no explanation in the Impugned Decision as to why the need for additional safeguards is not equally applicable to the Prosecution's interaction with potential witnesses (who may also be potential Defence witnesses). As argued in paragraphs 32 and 33 *supra*, the imposition of these modalities upon the Defence and not the Prosecution will disadvantage the Defence in terms of its ability to conduct efficient and expeditious investigations. The issue as to whether the imposition of these modalities on the Defence and not the Prosecution or any other participants in the case, violates equality of arms, directly arises from the Impugned Decision.

Both issues affect the fairness of the proceedings

38. For the reasons set out in paragraphs 23 to 28, and 31 to 33, the Impugned Decision directly affects the right of the Defence under article 67(1)(e) of the Statute to obtain the attendance and examination of witnesses under the same conditions as witnesses called against the Defence; a right which is intrinsically connected to both issues. To the extent that the Impugned Decision also impacts upon the efficiency and expeditiousness of Defence investigations, it also affects the right of the Defence under article 67(1)(c) to be tried without undue delay.

Both issues affect the expeditiousness of the proceedings

39. As set out at paragraphs 21 to 25, the requirement that the Defence consult with the VWU prior to contacting each and every potential witness will fundamentally affect the expedition of defence investigations. This, in turn, will result in the Defence requesting adjournments in the proceedings so that it can process and utilise its investigative findings in an effective manner.
40. At the same time, by burdening the VWU with the obligation to render advice each and every time a defence team contacts a potential witness, the VWU will have less time and resources to process requests for protective measures, which may need to be implemented before the parties can comply with their disclosure obligations. This will clearly affect the ability of the Chamber to maintain the confirmation schedule, and will thus affect the expeditiousness of the proceedings.

An immediate decision of the Appeals Chamber would materially advance the proceedings

41. The modalities set out in the Impugned Decision impose significant logistical challenges for the Defence, which can affect the entire manner in which the Defence conducts its case, and in particular, its investigations.
42. The lack of any directives concerning the conduct of the Prosecution vis-à-vis potential Defence witnesses also creates uncertainty as to whether such persons can be approached by the Prosecution, and if so, the applicable modalities. There are therefore no procedural safeguards with respect to such persons.
43. The Defence therefore submits that in these circumstances, an immediate decision of the Appeals Chamber will rid the judicial process of possible mistakes,¹⁵ “remove[e] doubts concerning the correctness of a decision”,¹⁶ and thereby ensure that the judicial process is not clouded by such doubts and errors.¹⁷

¹⁵ DRC situation, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, at para 14.

¹⁶ At para 15.

¹⁷ At para 16.

5. Relief Sought

44. For the reasons set out above, the Defence respectfully requests the Honourable Single Judge to vary the modalities imposed at paragraph 14 of the Impugned Decision to provide that:

- I. The Defence may make preliminary contacts with all potential witnesses, for the purpose of ascertaining whether the person in question consents to be interviewed by the Defence;
- II. Based on the particular circumstances of the person, the Defence must make a good faith assessment as to whether the advice of the VWU is necessary to ensure the psychological well-being and safety of the person, whom the Defence intends to interview;
- III. To that end, when making a preliminary contact with the potential witness for the purpose of ascertaining whether the person consents to be interviewed by the Defence, the Defence shall inquire with the person whether there are any personal well-being or safety issues, which have been referred to the VWU in the past, or which should be referred to the VWU at that juncture.
- IV. If the Defence has made a good faith assessment that the advice of the VWU is not necessary with respect to a particular person, and that person has not brought any issues to the attention of the Defence, then the Defence may proceed to interview that person, without first seeking the advice of the VWU;
- V. The Defence is obliged continuously to evaluate the security and safety of the person throughout the course of the interview, and to stop the interview and seek the advice of the VWU where necessary, should new information concerning the well-being and safety of the person come to the attention of the Defence;
- VI. These modalities shall apply *mutatis mutandis* to all other parties and participants in the case.

45. In the event that this request for variation of the modalities is rejected, the Defence respectfully requests the Honourable Single Judge to grant the Defence leave to appeal the Impugned Decision in relation to the issues as to:

- a. whether the modalities set out in paragraph 14 of the Impugned Decision are necessary and proportionate; and
- b. whether the imposition of these modalities on the Defence and not the Prosecution or any other participants in the case, violates equality of arms.

Signed



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

Dated this Thursday, 14 April 2011
Nairobi, Kenya.