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

Date: 15 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

Defence Response to “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:

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1. Introduction

1. The Defence requests the Honourable Single Judge to reject the additional conditions requested by the Prosecution on the grounds that:
 - i. the Prosecution failed to appeal the Pre-Trial Chamber's earlier decision not to impose identical or similar conditions, and the Prosecution has failed to avert to any new circumstances which would warrant the imposition of new conditions;
 - ii. the terms of the requested conditions violate the Defendants' right of silence and privilege against self-incrimination;
 - iii. the conditions requested violate the rights of the Defendants in a manner which is unnecessary and disproportionate.

2. Procedural History

2. On 15 December 2010, the Prosecution filed an 'Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang'.¹
3. In this application, the Prosecution submitted that the issuance of a summons would be sufficient to ensure the persons appearance before the ICC because "[n]one of the three suspects are perceived to be a flight risk. All three suspects have prominent leadership status in Kenyan society. At the present time, there is no indication that they would evade personal service of the summonses."²
4. The Prosecution nonetheless requested the Pre-Trial Chamber to impose the following conditions on the persons, pursuant ant to article 58(7) and rule 119:
 - To provide the Chamber with all residential addresses and telephone numbers. The suspects shall verify the accuracy of this information (to the

¹ ICC-01/09-30-RED2.

² At para 218.

Registry) on a bi-monthly basis. Any change in the information provided shall be immediately reported to the Registry;

- 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;
- 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;
- 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;
- To refrain from committing crime(s) set forth in Kenyan law or the Rome Statute;
- To timely respond to any request by the Chamber;
- To attend all required hearings at the International Criminal Court; and
- To post a bond or provide real or personal security or surety, as the Chamber deems fit.³

5. On 8 March 2011, the Honourable Pre-Trial Chamber issued its 'Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang' (the Summons Decision).⁴
6. In the Summons Decision, the majority of Pre-Trial Chamber II 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 Defendants' appearance at the initial appearance.
7. Without prejudice to further orders on this subject, the Pre-Trial Chamber ordered that the Defendants were:
 - i. 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 for which William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang have been summoned;

³ At para 219.

⁴ ICC-01/09-01/11-01.

- ii. 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;
- iii. to refrain from committing crime(s) set forth in the Statute; and
- iv. to attend all required hearings at the International Criminal Court.

8. On 6 April 2011, the Prosecution filed the 'Prosecution's Request for Conditions of Enforcement' (the Prosecution's Request),⁵ in which the Prosecution requested:

(i) An order requiring William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang to provide the following information to the Court to allow for the enforcement of the original conditions imposed by the Chamber:

- i. To provide the Chamber with all residential and home addresses, email addresses, and telephone numbers, inside and outside Kenya. The suspects shall verify the accuracy of this information in signed statements made under oath and filed with the Registry the first day of every month. Any change in the information provided shall be reported to the Registry within 48 hours of the change.
- ii. To provide the Chamber with official records for all telephone numbers from the date the summonses were issued until further order of the Chamber; and
- iii. To provide the Chamber with their email account addresses that are directly or indirectly used;

(ii) An order requiring William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang to provide complete information about their finances, including assets and liabilities and the identities of all to whom money or property is owed;

(iii) An order requiring William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang to post bond in a sum to be determined by the Chamber, for the purpose of guaranteeing their appearances at the International Criminal Court;

(iv) An order requiring William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang to appear in person at the seat of the Court at least once

⁵ ICC-01/09-01/11-41

every six month period and certify before the Chamber, under oath, that he has complied in full with all the conditions imposed by the Chamber; and

(v) An order restraining William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang from making public statements or comments about the case, the charges, the investigation, or the evidence.⁶

9. The Honourable Single Judge ordered the Defence to file any response by Friday 15 April 2011 at 4pm.⁷

3. The Prosecution failed to appeal the Pre-Trial Chamber's earlier decision not to impose identical or similar conditions, and the Prosecution has failed to establish any new circumstances which would warrant the imposition of new conditions.

10. The first four conditions sought by the Prosecution are virtually identical to the conditions requested by the Prosecution in its initial application for a summons. In particular, the Defence refers to the Prosecution's request for an order to provide the Chamber with all residential and home addresses, email addresses, and telephone numbers, inside and outside Kenya. This differs only to the extent that the Prosecution is now also requesting email addresses. Essentially, the first condition has already been proposed and considered by the Pre-Trial Chamber which did not include it when rendering its Summons Decision.
11. As concerns the second condition sought, the Prosecution submits that this information is required in order to set an appropriate bond (the third condition). Although the Prosecution did not explicitly request this information in its Application for the Summons, the Prosecution did request the Chamber to set a bond, which was rejected. The Chamber has therefore already adjudicated upon the third condition, and the objective of the second condition.
12. As concerns the fourth condition, the Prosecution had previously requested that the Defendants attend 'all required hearings' at the ICC. The 6 April 2011 request only differs to the extent that the Prosecution specifies that the Defendants should be required to attend at least every six months.

⁶ At para. 8.

⁷ 'Order under Regulation 24(1) of the Regulations of the Court', ICC-01/09-01/11-46, 8 April 2011.

13. The Prosecution did not file a request for leave to appeal the Pre-Trial Chamber's decision not to grant all of the conditions requested by the Prosecution. The Prosecution is therefore precluded for resurrecting its request before the Chamber, unless it can prove that its request falls within the terms of article 60(3) of the Statute. Article 60(3) of the Statute provides that "the Pre-Trial Chamber shall periodically review its ruling on the release or detention of a person, any may do so at any time on the request of the Prosecutor or the person. Upon such review, it may modify its ruling as to detention, release or conditions of release, if it is satisfied that changed circumstances so require".
14. Although Rule 119(2) of the Rules of Procedure and Evidence permits the Prosecution to request the Pre-Trial Chamber to amend the conditions set pursuant to rule 119(1), this rule is ultimately subject to the provisions of the Statute, in particular, the requirement under article 60(3) that the Chamber may only modify the conditions of release if it is satisfied that changed circumstances so require. The Appeals Chamber has recently confirmed that the burden of demonstrating a change in circumstances falls on the Prosecutor.⁸
15. The Prosecutor's Request contains no explanation as to why the requested conditions are necessary, nor the change in circumstances which would warrant their imposition at this point in time.
16. The Defence submits that there are no new circumstances that justify any new conditions to be imposed. There is no evidence that the suspects have failed to comply with the conditions imposed by the Pre-Trial Chamber. Nor is there any suggestion that the Defendants are unwilling to appear voluntarily to The Hague for their trial or any other required hearing. The Defendants appeared voluntarily in The Hague for their initial appearance and have, therefore, respected the summons. In the absence of any reasoning by the Prosecution to the contrary, this would appear to negate any necessity for the proposed additional conditions.

⁸ Prosecutor v. Bemba, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled "Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence", 19 November 2010, ICC-01/05-01/08-1019 at para 51.

17. The Prosecution has a duty to act with diligence and good faith. Filing a dilatory request to modify the conditions, without referring to any new circumstances, after the Defendants have fully complied with the previous conditions and appeared before the Court, constitutes an abuse of the processes of the Court.

4. The terms of the requested conditions violate the Defendants' right to remain silent and the privilege against self-incrimination

18. The information requested by the Prosecution in conditions 1 and 2 is excessive and on its face, violates the Defendants' privilege against self-incrimination, as enshrined in article 67(1)(g) of the Statute. For example, if the Defence confirms certain email addresses or telephone numbers, this could, if ever the information were to be disclosed to the Prosecution, be used by the Prosecution to establish the authenticity of certain communications. Similarly, the provision of financial information could be used by the Prosecution to prove that the Defendant/s provided financial assistance or received financial assistance in respect of persons allegedly involved in the relevant events.⁹ Requiring the Defendants to submit signed undertakings could also violate the Defendants' right not to provide the Prosecution with a handwriting/signature sample, which can subsequently be used by the Prosecution to establish the authenticity of certain communications.¹⁰
19. The Statute also clearly sets out the right of a defendant to remain silent, without adverse inference being drawn from their silence.¹¹ The right to silence is broader than the privilege against self-incrimination.
20. In line with these statutory rights, the various Trial Chambers of the ICC have confirmed that the Defence's disclosure obligations to the Prosecution are limited,¹² and in principle there is no defence disclosure obligation to the Chamber other than

⁹ See *Funke v. France*, European Court of Human Rights, Series A No. 256A para. 44, in which the European Court of Human Rights held that requiring a defendant to provide custom authorities with financial statements (on pain of sanctions), which could potentially be used in criminal proceedings to establish that the defendant had committed fraud, violated the privilege against self-incrimination.

¹⁰ See *Prosecutor v. Mucic*, 'Decision on the Prosecution's Oral Requests for the Admission of Exhibit 155 into Evidence and for an Order To Compel The Accused, Zdravko Mucic, To Provide A Handwriting Sample', 19 January 1998, at paras. 58-61.

¹¹ Articles 55(2)(b) and 67(1)(g) of the Statute.

¹² See *Prosecutor v. Lubanga*, Annex I "Decision on disclosure by the defence"; 20 March 2008; ICC-01/04-01/06-1235-Corr-AnxI; *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.

those set out in regulation 54 of the Regulations of the court. Although the Defence may be requested to provide the Prosecution and Chamber 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 is thus not obliged to allow the Prosecution or Chamber to inspect the Defence files or have any other form of access to Defence information.

21. In the Lubanga case, Trial Chamber 1 recently¹³ emphasised firstly, the limited nature of the Defence's disclosure obligations under the Statute and Rules, secondly, that the Defence's right of silence extended to any Defence related information (which the Defence did not intend to rely upon as evidence) irrespective of whether it was incriminating, and thirdly, the fact that the Prosecution and the Defence cannot be placed on the same footing as the Prosecution has the burden of proof whereas the Defence has the right to invoke the right of silence and privilege against self-incrimination.¹⁴

22. Although a defendant may waive his right to silence or his privilege against self-incrimination, such a waiver must be informed and voluntary. The voluntariness of the waiver may be rendered nugatory if it was procured through inducements or threats. In this regard, Article 55(1)(b) stipulates that during the course of the Prosecutor's investigation, the persons "shall not be subjected to any form of coercion, duress or threat [...]". Although this Pre-Trial Chamber has rightly emphasised that the decision whether to impose conditions resides solely with the Chamber and not the Prosecution, the Chamber must base its decision on the observations of the Prosecution.¹⁵ The Prosecution may also move the Chamber to vary or modify the conditions. Given the considerable sway of the Prosecution as concerns the freedom of the Defendants, a veiled threat to request that the Chamber issue an arrest warrant could have the effect of impelling the Defendants to volunteer privileged information in order to stave off this threat.

¹³ Prosecutor v. Lubanga, Transcript of 29 June 2010, pages 7-8 ICC-01/04-01/06-T-307-Red-ENG WT 29-06-2010.

¹⁴ Prosecutor v. Lubanga, Transcript of 29 June 2010, pages 7-8 ICC-01/04-01/06-T-307-Red-ENG WT 29-06-2010

¹⁵ Prosecutor v. Bemba, Prosecutor v. Bemba, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 28 July 2010 entitled "Decision on the review of the detention of Mr Jean-Pierre Bemba Gombo pursuant to Rule 118(2) of the Rules of Procedure and Evidence", 19 November 2010, ICC-01/05-01/08-1019.

23. The ECHR has confirmed that it would be improper to detain a person due to their non-compliance with an order, which would have required them to incriminate themselves.¹⁶

5. The conditions requested by the Prosecution violates the rights of the Defendants, in a manner which is unnecessary and disproportionate.

24. Article 58(7) enables the Chamber to impose “conditions restricting liberty (other than detention) if provided for by national law”. In the absence of any information on this point, the Prosecution has completely failed to discharge its burden to demonstrate that the particular conditions that he is seeking are consistent with Kenyan law. It is submitted by the Defence that Kenyan law does not provide for such restrictions.

25. Even if such restrictions did exist under domestic Kenyan Law, “such measures, however, should be consistent with the Rome Statute and other international law and standards”.¹⁷ This is consistent with article 21(3) of the Statute, which provides that the Court must apply and interpret its law in a manner which is consistent with internationally recognised human rights.

26. The first two conditions requested by the Prosecution constitute an unjustified interference in the private life and correspondence of the Defendants.¹⁸ The third condition (posting bail) infringes the Defendants’ right to property,¹⁹ the fourth condition affects the Defendants’ entitlement to waive their right to be present at hearings, and the fifth condition infringes the Defendants’ right of freedom of expression.²⁰

27. The Appeals Chambers of the ICC has confirmed that any restrictions of the rights of the Defence must accord with the principles of necessity and proportionality.²¹ The

¹⁶ Funke v. France, European Court of Human Rights, Series A No. 256A para. 44. See also S. Trechsel, Human Rights in Criminal Proceedings (Oxford University Press 2005) at p. 443.

¹⁷ C Hall, ‘Article 58’ in o. Triffterer (ed.) Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article (2nd ed, 2008) at p. 1144.

¹⁸ Article 17 of the International Covenant on Civil and Political Rights, Article 8 of the European Convention on Human Rights

¹⁹ Article 17(1) of the Universal Declaration of Human Rights, Article 1, Protocol 1 of the European Convention on Human Rights, Article 21 of the American Convention on Human Rights.

²⁰ Article 10(1) of the European Convention on Human Rights, article 19(2) of the International Covenant on Civil and Political Rights.

²¹ Prosecutor v. Lubanga, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81, ICC-01/04-01/06-773, 14 December 2006, at para 33, See also Trial Chamber decisions:

Defence therefore disputes the application of the requested conditions on the grounds that they are neither necessary nor proportionate and are of a punitive nature.

The request that the Defendants provide their residential addresses and telephone and email addresses, financial information, and post bail

28. The Defence submits that the request for financial information and that the Defendants post bail is highly inappropriate in the case of persons who have never been declared to be flight risks, were stated by the Prosecution not to be flight risks,²² and who travelled to The Hague for their initial appearance.

29. The Prosecution has failed to provide an explanation as to why providing this information, or the providing a bond, is necessary. The European Court of Human Rights has held that in imposing security measures other than detention, such as the restriction of movement, “[a]s the fundamental right to liberty is at stake, the authorities must take as much care in fixing appropriate bail [conditions] as in deciding whether the accused’s detention is indispensable”.²³ An unexplained and unsubstantiated request for residential addresses, email and telephone details, and the posting of bail does not in any way satisfy this burden.

30. The European Court of Human Rights has confirmed that the purpose of requesting a person to submit bail is to eliminate the risk that the person may flee from the jurisdiction;²⁴ it has no application in relation to issues concerning witness intimidation or obstruction of justice.²⁵ It should only be employed in the context of a person who would otherwise need to be detained due to the risk that the person may abscond.²⁶

31. In the context of the ICC, the posting of a bond would be appropriate in the case of a person who might be considered a flight risk, and who may have less incentive to flee

Prosecutor v. Lubanga Decision inviting the parties' observations on applications for participation of a/0001/06 to a/0004/06, a/0047/06 to a/0052/06, a/0077/06, a/0078/06, a/0105/06, a/0221/06, a/0224/06 to a/0233/06, a/0236/06, a/0237/06 to a/0250/06, a/0001/07 to a/0005/07, a/0054/07 to a/0062/07, a/0064/07, a/0065/07, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0168/07 to a/0185/07, a/0187/07 to a/0191/07, a/0251/07 to a/0253/07, a/0255/07 to a/0257/07, a/0270/07 to a/0285/07, and a/0007/08, Doc. ICC-01/04-01/06-1308, 6 May 2008 at page 8.

²² ICC-01/09-30-RED2 at para 218.

²³ S Trechsel Human Rights in Criminal Proceedings(Oxford University Press, 2005) at page 532, citing Schertenleib v. Switzerland Application 8339/78 and Iwawanczuk v Poland, no. 25196/94, para 66.

²⁴ Smirnova v. Russia, ECHR Judgement of 24 July 2003.

²⁵ S Trechsel Human Rights in Criminal Proceedings(Oxford University Press, 2005) at page 532.

²⁶ S Trechsel Human Rights in Criminal Proceedings(Oxford University Press, 2005) at page 532.

if he or she is required to provide a bond as security. It may be more appropriate in the case of person brought before the chamber through arrest, and who subsequently requests provisional release, and where posting of a bond or security mitigates their flight risk. It is inappropriate to request summonsed Defendants, who have not been identified as flight risks, to post a bond.

32. Finally, even if the Chamber decides that it is necessary to request the Defendants to post a bond (which the Defence vigorously disputes), it is unnecessary to compel the Defendants to submit financial details to the Court: the Court may assess the bond on the basis of hypothetical assets.²⁷

33. In addition, the proposed requirement to submit complete financial information to the Chamber amounts to a breach of privacy that should not be imposed without clearly demonstrating a necessity for it. In light of the absence of any demonstrated need for the Defendants to submit their financial details to the Court, this proposed condition appears to be wholly unnecessary as it has no bearing on the Defendants' continued voluntary appearance.

The request that the Defendants be required to attend a hearing at least once every six months

34. It is respectfully submitted that it is unnecessary to require the Defendants to attend a hearing for the sole purpose of certifying that they have complied with the conditions in question. The Chamber has ordered the Defendants to comply with the conditions set out in the Decision on the Summons, and the Defendants are fully aware that failure to comply with one or more of the conditions could result in the Chamber issuing a warrant of arrest.²⁸ Requiring the Defendants to travel to The Hague for the sole purpose of certifying this issue would not advance the proceedings in any way. Given the distance from Nairobi to the Court, it would also constitute an excessive financial burden.

35. The condition requested by the Prosecution would contravene the Defendants' entitlement to waive the right to attend hearings (including the confirmation hearing).

²⁷ Bonnechaux v Switzerland Application 8244/78 at para 74.

²⁸ The Presiding Judge underscored this point at the Initial Appearance. Transcript of 7 April 2011 at page 8.

The Presiding Judge also emphasised during the initial appearance that the Defendants are represented by highly qualified counsel, and as such, the presence of the Defendants at status conferences is not necessary.²⁹

36. Rule 124(1) of the ICC 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 the Katanga case the Pre Trial 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 trial.³⁰ The Pre-Trial 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 waive their right to be present (on an informed basis).³¹

37. Finally, the Defence respectfully submits that it is inappropriate to oblige the Defendants to certify under oath their compliance or non-compliance with the conditions. The Rome Statute sets out the principle that deprivation of liberty is the exception, liberty, the rule. The burden of demonstrating that the Defendants should be arrested due to non-compliance with a condition falls on the Prosecution. The Defendants are thus not required to demonstrate to the Court that they should be entitled to exercise their right to liberty (although they may choose to do so). Moreover, in line with the Defendants' absolute right to silence (article 67(1)(g), the Defendants cannot be compelled to provide information to the Court under oath.

The request that the Defendants be prohibited from making public statements or comments about the case, the charges, the investigation, or the evidence

38. The Prosecution's request is extremely broad, and in its present formulation, does not appear to be directly linked to any of the criteria under article 58(1)(b): i.e. the need to ensure the person's appearance at trial, to ensure that the person does not obstruct or endanger investigations or court proceedings, or to ensure that the person does not continue with the commission of a crime or related crime within the jurisdiction of the Court.

²⁹ Transcript of 7 April 2011, page 21.

³⁰ 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.

³¹ 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.

39. In this regard, in considering the legitimate grounds upon which the Tribunal can restrict the right of a defendant to speak to the media, the ICTY Vice-President rejected the Registrar's argument that permitting the defendant to speak to a journalist concerning the merits of the case could either affect the political processes in the former Yugoslavia and thereby compromise the mandate of the Tribunal or, in itself, influence or intimidate witnesses.³²
40. In terms of the latter, the Vice-President recognised that the Tribunal had an important obligation to ensure that confidential information concerning witnesses was not disclosed, and that witnesses were not influenced or intimidated. The Vice-President nonetheless concluded that alternative safeguards other than a blanket prohibition on speaking to the media could achieve this objective (for example, monitoring the media communications of the defendant and cautioning journalists of their responsibility not to divulge confidential information).³³
41. The ICC Appeals Chamber has also held that if it is possible to protect the interest and security of witnesses by less restrictive measures, then the Chamber should adopt the measure which is the least intrusive as concerns the rights of the Defence.³⁴ Moreover, the Chamber cannot order measures to protect witnesses on a "completely hypothetical basis";³⁵ there must be an objective factual basis for the measure in question.
42. The Defendants are presently prohibited 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", and from "committing crime(s) set forth in the Statute". It would therefore be superfluous to prohibit the Defendants from making any public statements concerning the case, which would have the affect of either corruptly influencing or intimidating witnesses,

³² Prosecutor v. Karadzic, 'Decision on Radovan Karadzic's Request for Reversal of Denial Of Contact With Journalist', 12 February 2009, at paras 20 and 21.

³³ At para 21.

³⁴ Prosecutor v. Katanga and Ngudjolo, 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" ICC-01/04-01/07-476, 13 May 2008, at para 59,

³⁵ Prosecutor v. Katanga and Ngudjolo 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" ICC-01/04-01/07-476, 13 May 2008, at para 60.

or which would constitute a continuation of the alleged crime, since this prohibition is already encompassed by the present conditions.

43. The Learned Presiding Judge recognised as much during the initial appearance, when she relied upon the conditions imposed in the Summons Decision to caution the Defendants that they should not make any speeches which could retrigger the violence in Kenya.³⁶ The Prosecution has adduced no evidence that the present conditions have proved to be insufficient.
44. Finally, it would also constitute an inequality of arms to prohibit the Defendants from making any statements to the press concerning the case, whilst the Prosecutor enjoys an almost unfettered right to air his views concerning the character and culpability of the defendants. The Defendants should have the right to correct any misconceptions which may arise from the media reportage of the case. This is in line with the fact that the ICTY Registry has recognised the right of detainees to speak to the media in order to request that incorrect information be withdrawn.³⁷
45. The condition requested by the Prosecution is also formulated so broadly that it could encompass public declarations by the Defendants of their innocence, or public statements concerning the Defendants' intention to cooperate with the ICC and attend any required hearings. The Defendants will only have an opportunity to formally assert their innocence within the context of court proceedings if and when the charges are confirmed and a Trial Chamber has been constituted, which is likely to be towards the end of the year at the earliest. It would be extremely deleterious to the Defendants' public and personal life to preclude the Defendants from making any public statements concerning their innocence and good character in the interim.

³⁶ Transcript of 7 April 2011, at page 8.

³⁷ Prosecutor v. Karadzic, 'Decision on Radovan Karadzic's Request for Reversal of Denial Of Contact With Journalist', 12 February 2009 at para 18.

6. Relief Sought

46. For the reasons set above, the Defence respectfully requests the Honourable Pre-Trial Chamber to dismiss the Prosecution's Request for Conditions of Enforcement in its entirety.



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

Dated this Friday, 15 April 2011

At Nairobi, Kenya