



Original: **English**

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

Date: **3 June 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**

**Response on behalf of Mr. William Samoei Ruto and Mr. Joshua Arap Sang to the  
First transmission to the parties and legal representatives of redacted applications  
to participate in the proceedings, with Confidential Annex**

**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  
Victims**

**The Office of Public Counsel for the  
Defence**

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms. Silvana Arbia, Registrar

**Counsel Support Section**

**Deputy Registrar**

Mr. Didier Daniel Preira, Deputy  
Registrar

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## 1. Procedural history

1. On 30 March 2011, the Honourable Single Judge issued the 'First Decision on Victims' Participation in the Case',<sup>1</sup> in which the Single Judge ordered the Registry to transmit all redacted versions of the applications to the parties by no later than 8 July 2011, and invited the parties to submit their response within two weeks of receipt of the applications.
2. The Registry transmitted fifty nine applications to the Defence for Mr. Ruto and Mr. Sang on 18 May 2011.<sup>2</sup>
3. The Defence of Mr. Ruto and Mr. Sang hereby presents its observations concerning redactions and non-disclosure of the identities of the applicants, and the modalities of participation. In keeping with the practice of the Single Judge in the Bemba case of addressing legal issues in a public filing and factual issues in a confidential annex,<sup>3</sup> the Defence has attached its factual analysis in a separate confidential annex.

## 2. Submissions

### *2.1 Redactions and the Non-disclosure of the Identity of the Applicants*

4. As a preliminary matter, the Defence notes that the requests below concerning redactions cannot be considered to be requests for reconsideration of the Single Judge's decision, and dismissed on that basis. The Appeals Chamber has explicitly tasked the Chambers with the obligation to continuously review the necessity and propriety for maintaining redactions.<sup>4</sup> The Defence therefore has the right throughout the proceedings to seize the Chamber of requests to lift or vary redactions, which might not be justified by article 68(1) of the Statute.

*2.1.1 The Chamber should either base its decision on the information made available to the parties, or order the Registry to lift redactions to information, which may be pertinent to the Chamber's decision*

5. Rule 89(1) of the Rules of Procedure and Evidence stipulates that the Prosecution and the Defence shall be entitled to respond to applications to participate in the proceedings. Although receipt of the applications is subject to the provisions of the Statute, in particular, article 68(1) of the Statute, which permits the Court to take

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<sup>1</sup> ICC-01/09-01/11-17

<sup>2</sup> First transmission to the parties and legal representatives of redacted applications to participate in the proceedings, ICC-01/09-01/11-92.

<sup>3</sup> Prosecutor v. Bemba, Fourth Decision on Victims' Participation, ICC-01/05-01/08-320, 12 December 2008.

<sup>4</sup> 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", 13 May 2008, ICC-01/04-01/07-476, at para 64.

appropriate protective measures, article 68(1) also clearly stipulates that such measures “shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”.

6. For this reason, the Appeals Chamber has held that in authorising the non-disclosure of information, “adequate procedural safeguards should be in place to ensure that the interests of the Defence are protected so as to comply, as far as possible, with the requirements of adversarial proceedings and equality of arms”.<sup>5</sup> Moreover, whenever the Statute permits the Chamber to authorise the non-disclosure of information to the Defence, it is always subject to the clear caveat that the non-disclosed information cannot be used as a basis for any factual findings by the Chamber.<sup>6</sup>
7. The right of the Defence under rule 89(1) to be heard, in connection with the principle of adversarial proceedings, which is a fundamental component of a fair trial, require the Chamber to base its decision on the evidence available the Prosecution and Defence.<sup>7</sup> Indeed, it is arguable that if the Chamber renders a *prima facie* factual determination concerning a particular applicant on the basis of evidence which has not

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<sup>5</sup> 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", 13 May 2008, ICC-01/04-01/07-476, at para 63.

<sup>6</sup> For example, Rule 81(2) and Rule 81(5) provide that where information is withheld from the Defence, such information cannot be subsequently introduced into evidence without adequate prior disclosure to the Defence.

<sup>7</sup> The right to adversarial proceedings “means in principle the opportunity for the parties to a criminal or civil trial to have knowledge of and comment on all evidence adduced or observations filed, even by an independent member of the national legal service, with a view to influencing the court's decision.” Vermeulen v. Belgium, Application no. 19075/91, Judgment of 22 Jan. 1996, para. 33. That Court noted that despite the fact of the independent avocet général's objectivity, the potential for bias and appearance of impropriety were sufficient to constitute violations of Article 6.1. These principles have been endorsed by the ICC: “In keeping with the right to adversarial proceedings, the parties to a trial are afforded the opportunity to have knowledge of all evidence adduced or observations filed.” Situation in the Democratic Republic of the Congo ICC 01/04-135 Decision on the Prosecutor's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6 (31 March 2006), footnote 68.

In line with this principle, the ICTY has held that the adversarial process demands that the Chamber should not base its decisions on information which is only available to one of the parties, and that it would thus be unfair to permit the Prosecution to use the confidential decisions from other Chambers of the Tribunal as the basis for the arguments it puts forward in its submissions, since the Defence teams have no access to them”. The Chamber would therefore “not take into account any arguments based on confidential decisions for which the Prosecution has failed to obtain a public redacted version” Prosecutor v. Prlić, et al., Case No. IT-04-74-T, Decision on a Stojić Defence Request Regarding References to Confidential Decisions Rendered by other Chambers, p. 3 (23 Mar. 2009).

The principle of adversarial proceedings also requires that the parties are aware of the factual basis for a decision so that they can appeal if necessary. As the Appeals Chamber has noted, the Court “must identify which facts it found to be relevant ... [and] ‘indicate with sufficient clarity the grounds on which they based their decision ... [i]t is this, inter alia, which makes it possible for the accused to exercise usefully the rights of appeal available to him.’” See Prosecutor v. Lubanga, ICC-01/04-01/06-772, 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” para. 20 (14 December. 2006), citing to Hadjianastassiou v. Greece, Application no. 12945/87, Judgment of 16 December 1992, para. 33.

been disclosed to the parties and which might never be disclosed to the parties, the impartiality of the Chamber could be contaminated.<sup>8</sup>

8. In the present case, the Single Judge only authorised redactions, which were consistent with the principles of necessity and proportionality, and which were “not “prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial””.<sup>9</sup> The Defence respectfully disputes whether redactions can be considered to be proportionate and non-prejudicial if they prevent the Defence from being able to assess whether a key element of the criteria to be admitted as a participating victim is fulfilled.<sup>10</sup>
9. For example, as concerns a/8067/11, the precise location of the event has been redacted, and the remaining information (the Rift valley) is too vague to enable the Defence to ascertain whether the events fall within the geographic scope of the case. Similarly, applicant a/0045/10 alleges that “I lost my [redacted] in the fire.” It is impossible to ascertain from this sentence whether the applicant suffered property damage or the loss of a relative. Moreover, since the Defence have not been provided the identity of the applicants, it is not in a position to verify whether the identity cards correspond to the application if the applicant has not provide his or her birth-date on the application form.<sup>11</sup>
10. In order to counterbalance this prejudice to the Defence, the Defence respectfully requests the Single Judge to either restrict her analysis to the versions of the applications which have been provided to the parties, or order the Registry to transmit sufficient information concerning the redacted components to enable the Defence to ascertain whether the criteria for participation has been fulfilled.<sup>12</sup>

*2.1.2 In the event that the applicants are granted the right to participate, the Chamber should order the Registry firstly, to disclose to the defence the unredacted version of the applications, in which the applicant has not requested the application to be withheld from the Defence, and secondly, to re-examine whether the criteria for continued non-disclosure is met in connection with the other applications.*

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<sup>8</sup> See Prosecutor v. Krnolejac, Case No. IT-97-25-PT, Decision on Prosecutor’s Response to Decision of 24 February 1999, (20 May 1999), paras. 11-12, describing how a Judge who rendered factual findings on an *ex parte* basis could be contaminated from participating in later stages of the case. The ICTY later recognised that this contamination would not arise if the defence was subsequently disclosed the materials which had been provided to the confirming judge, and was provided with an opportunity to contest the factual findings at trial.

<sup>9</sup> At para 22.

<sup>10</sup> See for example a/0045/10, a/8015/11, a/8028/11, a/8025/11, a/8036/11.

<sup>11</sup> See for example, a/0772/10, and a/8049/11.

<sup>12</sup> For example, if provision of the specific location of the events would identify the applicant, then the Registry could provide the parties with the name of the general location, so that the parties can verify whether it falls within the geographic areas approved by the Single Judge.

11. Rule 89 of the Rules of Procedure and Evidence does not create a separate protective regime for victim-applicants: in order to attract the protection of article 68(1) and other provisions in the Statute, the applicants must satisfy the same criteria, which applies to witnesses and persons at risk on account of the activities of the Court.<sup>13</sup>
12. In terms of an objective risk of harm, some of the present applicants have not requested that their identity be withheld from the Defence.<sup>14</sup> In addressing a similar situation in the Katanga and Ngudjolo case, the Trial Chamber ordered the Legal Representatives to liaise with their clients to confirm that the applications could be disclosed to the Defence, and thereafter, authorised their disclosure to the Defence.<sup>15</sup> The Defence therefore requests the Single Judge to order the Registry to confirm with the applicants whether the unredacted applications can be immediately transmitted to the Defence, and if so, to transmit them forthwith to the Defence.
13. As concerns the applicants, who have requested that their identity be withheld from the Defence, the Defence submits that these applicants have failed to provide any concrete or objective concerns which would justify the drastic measure of withholding their identities from the Defence. In the event that these applicants are granted a right to participate, the Defence requests the Single Judge to order the Victims and Witnesses Unit to conduct a thorough assessment as to firstly, whether there is an objective basis to consider that protective measures are required for the individual applicants in question, and secondly, whether there any other protective measures which could achieve the same objective. In the event that the Chamber eventually decides to retain any of the redactions, then the Chamber is also obliged to implement appropriate counter-balancing measures. In this case, the Defence submits that the only appropriate remedy would be to modify the applicant's participatory rights in order to protect the integrity and fairness of the proceedings.
14. Finally, as concerns applicants, who are also Prosecution witnesses, the Defence requests the Single Judge to adopt the finding from the 'Fourth Decision on Victim Participation', in the Prosecutor v. Bemba, to the effect that the application forms should be re-disclosed with any information concerning the identity of the applicants.<sup>16</sup> In the event that the Defence has not been disclosed the name of the

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<sup>13</sup> Prosecutor v. Bemba, Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties' observations on applications for participation by 86 applicants, ICC-01/05-01/08-699, 22 February 2010 at para 26.

<sup>14</sup> a/0056/10, a/0064/10, a/8067/11, a/8069/11, a/8091/11.

<sup>15</sup> Prosecutor v. Katanga and Ngudjolo, Deuxième décision relative à la divulgation de l'identité des victimes aux parties ICC-01/04-01/07-1650, 18 November 2009 at para 4-5.

<sup>16</sup> "[F]or reasons of fairness of the proceedings the names of victims who are also witnesses and whose identity and Statements have been disclosed by the Prosecutor to the Defence, should be shared with the parties but not

Prosecution witness in question, then the Defence requests the Single Judge to order the Prosecution to disclose to the Defence a list, which cross-references the pseudonym of the Prosecution witness with the application number of the applicant. This exercise should not be limited to applicants, who are also witnesses, but should also extend to applicants, who are related to Prosecution witnesses.

*2.1.3 The unredacted version of the applications should be transmitted to the Prosecution, so that it can fulfil its obligations under article 54 and article 67(2)*

15. Many of the applications contain information, which is potentially exculpatory. For example, the applicants attribute the events to spontaneous reactions by local community members or unidentified persons, who do not appear to have any link to the Defendants. It is also possible that specific information in the applications concerning the identity of persons involved, and the location and timing of events, may contradict information provided by Prosecution witnesses. Some applicants might also be related to Prosecution witnesses, in which case, the existence of such a relationship would be relevant to the Defence cross-examination of the witness. The information would therefore fall under rule 77 of the Rules of Procedure and Evidence. However, since the Defence is not in possession of either the unredacted version of the applications or the unredacted version of Prosecution evidence, it is not in a position to cross-reference the two in order to check for inconsistencies, contradictions, and relationships.
16. The Defence is therefore concerned that as a result of the transmission of redacted versions of the applications to the Prosecution, the Prosecution will be unable firstly, to make an informed decision as to whether to proceed with the charges, and secondly, to fulfil its disclosure obligations to the Defence, which is a key element in the equality of the parties.
17. In terms of the equality of the parties, during the drafting process of the Statute, the State parties decided to vest the Prosecution with a strong obligation to search for and disclose exculpatory materials in order to lessen the structural inequality of arms between the Prosecution and the Defence could be lessened.<sup>17</sup> As confirmed by the

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with the public. To this end, the Defence and the Prosecutor should be provided anew with the application forms of those witnesses disclosing information pertaining to their identity. This, however, does not affect other redactions contained in those applications which are "strictly necessary" pursuant to rule 87 of the Rules." Fourth Decision on Victims' Participation, ICC-01/05-01/08-320, 12 December 2008.

<sup>17</sup> M. Bergsmo and P. Kruger, "Article 54 Duties and powers of the Prosecutor with respect to investigations", in *Commentary on the Rome Statute of the International Criminal Court*, (O. Triffeterer (ed.), 2<sup>nd</sup> ed., 2008) p1078. See also United Nations General Assembly, "Draft Report of the Preparatory Committee", 23 August 1996, A/AC.249/L.15, p. 14, cited by the Appeals Chamber in its 'Judgment on the Appeal of Mr Katanga Against the

Appeals Chamber, this prosecutorial obligation to disclose exculpatory information extends to any information contained within victim applications.<sup>18</sup> It is, however, necessary for the Prosecution to be provided with the unredacted versions of the applications in order to for them to fulfil this obligation.

18. Whilst it is possible that the parties might eventually be provided with more detailed versions of the application forms corresponding to victims who have been granted a right to participate, it is also possible that many of the applicants, who have been denied the right to participate, may have provided highly exculpatory details in the information redacted from their forms. Indeed, the very fact that their applications contradict the Prosecution theory of the case could be the cause for their rejection as a participating victim.
19. The Prosecution therefore has a direct interest in receiving the unredacted versions of all applications, irrespective of whether the applicant is granted a right to participate, so that it can make an informed and impartial decision whether to proceed with the charges. If it does choose to do so, then it would also have an obligation to alert the Defence to the specific Prosecution evidence, which is contradicted by the information in the applications.
20. Finally, several of the applicants have not requested that their identity be withheld from the Prosecution,<sup>19</sup> and those that have, have not provided any justification for this measure.
21. The Defence therefore respectfully requests the Honourable Single Judge to order that the unredacted versions of the applications should be disclosed forthwith to the Prosecutor.

## ***2.2 Modalities of Participation***

22. The Defence respectfully requests the Single Judge to adopt the same modalities of participation as were adopted in the ‘Fourth Decision on Victim Participation’ in the Prosecutor v. Bemba. As the parties did not call any witnesses during the Bemba confirmation hearing, the Pre-Trial Chamber was not required to rule on this issue as to whether the participating victims should be permitted to question witnesses. The Pre-Trial Chamber also did not explicitly address whether participating victims could

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Decision of Trial Chamber II of 22 January 2010 Entitled “Decision on the Modalities of Victim Participation at Trial”, ICC-01/04-01/07-2288, 16 July 2010, at footnote 125.

<sup>18</sup> Prosecutor v. Katanga and Ngudjolo, ICC-01/04-01/07-2288, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled “Decision on the Modalities of Victim Participation at Trial”, 16 July 2010, para. 81

<sup>19</sup> a/0041/10, a/0042/10, a/0045/10, a/0051/10, a/0056/10, a/0064/10, a/8067/11, a/8069/11, a/8091/11.



tender evidence. The Defence therefore submits the following observations on these issues.

23. The confirmation hearing has a limited purpose; the Chamber's sole task is to determine whether the Prosecution has met its burden of adducing sufficient evidence to establish substantial grounds to believe that the person committed the crime charged. It is not a mini-trial, and, unlike the Trial Chamber, the Pre-Trial Chamber is not vested with the duty to ascertain the truth.
24. This has the notable consequence that whilst the Trial Chamber has the power under article 64(6)(d) to order the production of evidence not tendered by the parties, the Pre-Trial Chamber has no such power. To the contrary, article 61(5) of the Statute clearly refers to the responsibility of the Prosecution to support each charge with sufficient evidence to establish substantial grounds to believe. Article 61(7) also provides that if the Pre-Trial Chamber considers that the threshold is not met, it must either decline to confirm the charges, or adjourn the hearing and request the Prosecution to consider providing further evidence.
25. The Pre-Trial Chamber therefore does not have the power to supplement any evidentiary lacunae in the Prosecution's case by utilising evidence, which has either been tendered by participating applicants, or elicited by participating applicants through their examination of Prosecution and Defence witnesses.
26. The Defence also observes in that in the Bemba Fourth Decision on Victim Participation, the Single Judge held that it would be inappropriate to distinguish between the participatory rights granted to non-anonymous and anonymous victims.<sup>20</sup> At the same time, the jurisprudence of the ICC has consistently held that it would violate the rights of the Defence and the prohibition against anonymous accusers to permit anonymous victims to question witnesses.<sup>21</sup> The need to avoid discrimination between anonymous and non-anonymous witness, and the prohibition on anonymous accusers can only be reconciled if all participating applicants are prohibited from eliciting factual evidence from witnesses by posing questions to them.

### **3. Relief Sought**

27. For the reasons set out above, and in the confidential annex A, the Defence for Mr. Ruto and Mr. Sang request the Honourable Single Judge to:

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<sup>20</sup> At para 99.

<sup>21</sup> Prosecutor v. Abu Garda, Decision on victims' modalities of participation at the Pre-Trial Stage of the Case, ICC-02/05-02/09-136, 6 October 2009, at para 22, citing ICC-01/04-01/06-462-tEN, pp. 8 and 9 and ICC-01/04-01/07-474, paras. 180-182.

- i. dismiss the request of the applicants to participate in the proceedings;
- ii. either restrict her analysis to the information contained within the redacted version of the applications, or order the Registry to disclose to the parties any information, which may be pertinent to the Chamber's decision;
- iii. order the Registry to disclose to the parties the unredacted version of the applications of dual victim-witnesses, and those in which the applicants have not requested to withhold their identity from the parties, and verify whether the redactions are objectively justified for the remaining applications;
- iv. order the Prosecution to provide the Defence with a list, which cross-references the pseudonyms of anonymous Prosecution witnesses with the application number of related applicants; and
- v. adopt the same modalities of participation set out in the Bemba Fourth Decision on Victim Participation, with the additional caveat that participating victims will not be permitted to tender evidence or question witnesses.



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

Dated this 3rd day, June 2011

At Nairobi, Kenya.