



Original: **English**

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

Date: **10 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

Defence Request for Access to VWU Observations

Source: Defence

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Luis Moreno-Ocampo, Prosecutor
Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Counsel for William Samoei Ruto:
Kioko Kilukumi Musau, Joseph
Kipchumba Kigen-Katwa and Kithure
Kindiki
Counsel for Henry Kiprono Kosgey:
George Odinga Oraro, Julius Kemboy
and Allan Kosgey
Counsel for Joshua Arap Sang:
Joseph Kipchumba Kigen-Katwa, Joel
Kimutai Bosek and Philemon K.B. Koech

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

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. On 3 May 2011, the Honourable Single Judge requested “that the VWU provide its observations on the security risk assessment submitted by the Prosecutor with respect to each witness and attached to the First Application for Redactions as well as to propose any additional or alternative protective measures that might be necessary or appropriate in order to ensure the proper protection of a given witness and/or his family members.”¹
2. These observations were to be submitted no later than 13 June 2011 in relation to the Prosecution’s first request for redactions, and no later than one week subsequent to any future requests for redactions.
3. The decision of the Single Judge does not specify whether the observations must be filed on a confidential or confidential *ex parte* basis.
4. The jurisprudence of the ICC clearly indicates that *ex parte* procedures should only be resorted to exceptionally, in a manner which is consistent with the principles of proportionality and necessity.² Regulation 23 *bis* of the Regulations of the Court also stipulates that any document filed by the Registry on an *ex parte* basis must specify the factual and legal basis for the classification. The Registry therefore does not enjoy a privileged position vis-a-vis the parties in terms of its ability to resort to *ex parte* procedures.
5. In terms of the applicability of regulation 23*bis* (2), which provides that any response to an *ex parte* document should be filed on an *ex parte* basis, although the initial Prosecution request for redactions was filed on an *ex parte* basis, the Prosecution subsequently filed a public redacted version.³ The observations of the VWU can also not be considered to be a response to the Prosecution request, as the Single Judge has requested the VWU to conduct an independent assessment and propose measures, which are not contingent on the specific information contained in the Prosecution request.
6. It is therefore possible and indeed probable, that the VWU observations will contain information containing general security issues in Kenya or general protective

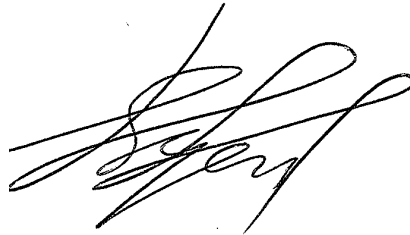
¹ Decision Requesting the Victims and Witnesses Unit to Submit Observations, ICC-01/09-01/11-103, 3 May 2011, at para 7.

² 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 22. See also Prosecutor v. Lubanga, Decision on the Procedure to be Adopted for Ex Parte Procedures’, ICC-01/04-01/06-1058, 6 December 2007, at para 12.

³ Prosecution’s First Application Pursuant to Rule 81(2) and Rule 81(4) for Redactions to Statements of Witnesses and Related Materials to Be Relied Upon at the Confirmation Hearing, ICC-01/09-01/11-96-RED, 26 May 2011.

mechanisms, which do not reveal the *ex parte* information contained within the initial Prosecution filing or the identity of the protected witnesses.

7. In other ICC cases, the Defence have also been granted access to redacted version of VWU observations concerning protective measures, and accorded an opportunity to comment on these observations.⁴
8. The ICC Appeals Chamber has also underscored that the principle of adversarial proceedings requires that to the extent possible (taking into consideration security considerations), the parties should be granted access to any information which could influence the outcome of the Chamber's decision.⁵
9. The Defence therefore requests the Honourable Single Judge to:
 - I. order the VWU to prepare a confidential redacted version of its observations, which can be provided to the Defence; and
 - II. grant the Defence the right to respond to any observations which might impact on the rights of the Defence and a fair and impartial confirmation process.



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

Dated this Friday, 10 June 2011

At Nairobi, Kenya

⁴See for example, Prosecutor v. Lubanga, Trial Chamber, "Redacted Decision on the "Prosecution's Request for Lifting of Redactions to the Identity of One Individual providing Rule 77 Information and Request for Redactions further to Article 54(3)(f) and Rules 81(2) and 81(4)" and "Prosecution's application for variation in the protective measures concerning witness 44 and witness 101" of 24 July 2009"; ICC-01/04-01/06-2196-Red2; 15 December 2009, para. 20-23; Prosecutor v. Lubanga, Oral decision 24 November 2010, Transcript ICC-01/04-01/06-T-336-Red-ENG pp2-3 ; Prosecutor v. Katanga and Ngudjolo, "Decision on the Defences' Urgent Request for the reclassification of document" ICC-04-01/07-482-Conf-Exp ICC-01/04-01/07-532, 30 May 2008.

⁵ Prosecutor v. Katanga and Ngudjolo, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", ICC-01/04-01/07-475, 13 May 2008, at paras 57-59.