



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 Disclosure of Article 67(2) and Rule 77 Materials**

**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**

## Procedural History

1. On 8 April 2011, the Defence team for Mr. Ruto and Mr. Sang wrote to the Prosecution to inquire as to when the disclosure of evidence would commence.<sup>1</sup> The Defence received no response.
2. On 3 May 2011, the Defence sent two letters to the Prosecution.<sup>2</sup> In the first letter, the Defence requested the Prosecution to disclose several categories of items, which fall under either Article 67(2) of the Statute or Rule 77 of the Rules of Procedure and Evidence. In the second letter, the Defence specifically requested the Prosecution to disclose:
  - the names (to the extent known to the Prosecution)/pseudonyms and position of all co-perpetrators and physical perpetrators;
  - whether such persons are Prosecution witnesses or have provided statements to the Prosecution; and
  - whether such persons are referred to in Prosecution statements or evidence, and if so, the relevant statement/document in question
3. The Defence received no response to these letters. Nonetheless, in a filing dated 9 May 2011 concerning the transmission of the first batch of disclosure documents, the Prosecution noted that it had
 

“received two letters from defence counsel for Mr. Ruto and Mr. Sang, requesting disclosure of a variety of items. The Prosecution submits that the disclosure of all relevant materials will be subject to the disclosure calendar set by the Chamber and subject to any further modifications that the Chamber may make. Such disclosure will continue to be effected through the Registry.”<sup>3</sup>
4. This oblique acknowledgement of the correspondence does not in any way constitute a response since the Prosecution has failed to confirm whether it considers the requested categories of documents and information to be ‘relevant’.
5. The Defence will therefore be unable to verify whether the Prosecution has indeed disclosed the requested materials until after the Prosecution has all pre-confirmation disclosure, and the Defence has had sufficient time to review the materials. By this stage, in the event that the Prosecution had failed to disclose any of the categories

---

<sup>1</sup> Annex 1.

<sup>2</sup> Annex 2 and 3.

<sup>3</sup> Prosecution’s First Communication of Disclosure of Incriminating Evidence for Disclosure to the Defence, ICC-01/09-01/11-80, at para 7.

requested, it would be too late for the Defence to seek and obtain timely relief before the confirmation hearing.

6. The Defence therefore requests the Honourable Pre-Trial Chamber to order the Prosecution to disclose the requested categories of material, in accordance with the terms of the Disclosure Calendar.

### **Submissions**

#### ***Preliminary observations concerning the scope of article 67(2) and rule 77***

7. The Defence firstly observes that the ICC Appeals Chamber has confirmed that the Prosecution's duty to disclose exculpatory and relevant materials is an essential component of the fairness of the proceedings,<sup>4</sup> and is one of the mechanisms by which the Court aims to promote equality of arms.<sup>5</sup> In terms of the latter aspect, the drafters of the Rome Statute envisaged that the Prosecution would often be in a better position than the Defence to obtain cooperation and access key information.<sup>6</sup> Their decision to vest the Prosecution with broad investigative powers was thus explicitly linked to their concern that the defence should be able to ultimately benefit from these powers through the disclosure regime.<sup>7</sup>
8. The ICC Appeals Chamber has also held that the Prosecution's obligation to make available to the defence any material which might be relevant to defence preparation must be construed broadly to include any items which may be relevant to defence

---

<sup>4</sup> "[A]rticle 54 (1) (c) of the Statute expressly provides that the Prosecutor shall "[f]ully respect the rights of persons arising under this Statute." A fundamental right of the accused person in proceedings before the Court is the right to disclosure of "evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence" (article 67 (2), first sentence, of the Statute) and the right "to inspect any book, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence" (rule 77 of the Rules of Procedure and Evidence). *Prosecutor v. Lubanga*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", ICC-01/04-01/06-1486, 21 October 2008 at para 42.

<sup>5</sup> *Prosecutor v. Katanga and Ngudjolo*, 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", ICC-01/04-01/07-2288, 16 July 2010, at footnote 125, citing the United Nations General Assembly, "Draft Report of the Preparatory Committee", 23 August 1996, A/AC.249/L.15, p. 14: "Given the fact that the Prosecutor would have earlier access to evidence and other information, it was recommended that a mechanism be found that would neutralize any potential advantage to the Prosecutor over the defence"

<sup>6</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. Triffterer (ed.), 2<sup>nd</sup> ed., 2008) p1078.

<sup>7</sup> "[T]he drafting history of the Statute supports the notion that the Prosecutor's disclosure obligations to the accused are linked to the Prosecutor's role in conducting the investigation, and stem from the Prosecutor's obligation to investigate incriminating and exonerating circumstances equally under article 54 (1) (a) of the Statute". *Prosecutor v. Katanga and Ngudjolo*, 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", ICC-01/04-01/07-2288, 16 July 2010 at para 75.

preparation, irrespective of whether they are directly linked to incriminating or exonerating material.<sup>8</sup> For example, information might be material to defence preparation if it assists the Defence to understand the context of the events, to understand certain phenomena during the conflict, or to prepare potential submissions on sentencing issues.<sup>9</sup>

9. Finally, the fact that the case is currently in the pre-confirmation stage has no bearing on the scope of the Prosecutor's duty to disclose exculpatory evidence or information which is material to the Defence's preparation for the confirmation hearing (although it may be relevant to the extent of the protective measures). As recognised by the Honourable Single Judge in this case, there is no legal or practical reason as to why the Prosecution would be unable to comply with its duty to disclose all exculpatory and relevant materials in its possession prior to the confirmation hearing.<sup>10</sup> The Prosecution also cannot construe its duty to disclose exculpatory materials on an overly narrow basis in order to evade such obligations.<sup>11</sup>

### **Specific categories of information/documents requested by the Defence**

#### ***Information concerning co-perpetrators and physical perpetrators***

10. In its Application for a Summons, the Prosecution refers to a vague network of perpetrators, coordinators, and commanders (see paras. 3, 4, 19, 21, 24, and 25), in support of its argument that there were reasonable grounds to believe that Mr. Ruto was an indirect co-perpetrator of the alleged crimes set out in the Application, and that Mr. Sang contributed to the commission of a crime by a group of persons acting with a common purpose.<sup>12</sup>
11. In a letter to the Prosecution, the Defence informed the Prosecution that "in order for the Defence to analyse and respond to the allegation that Mr. Ruto (and other co-perpetrators) made an essential contribution to this network, and exercised

<sup>8</sup> Prosecutor v. Lubanga, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, ICC-01-04-01-06-1433, 11 July 2008, at para 77.

<sup>9</sup> Prosecutor v. Lubanga, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, ICC-01-04-01-06-1433, 11 July 2008 at para 82.

<sup>10</sup> Prosecutor v. Ruto et al, Decision on the "Prosecution's Application for leave to Appeal the 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters' (ICC-01/09-01/11-44)", ICC-01/09-01/11-74, 2 May 2011, at paras 24-28.

<sup>11</sup> Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing ICC-01/04-01/07-621, 20 June 2008, at paras 24-27.

<sup>12</sup> Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ICC-01/09-01/11-26, 15 December 2010.

hierarchical authority over the physical perpetrators (such that he was allegedly able to secure their absolute compliance with any orders), it is necessary for the Defence to have more clarity and information concerning the identity and position of these co-perpetrators and physical perpetrators – namely, the persons referred to in the Application as perpetrators, coordinators and commanders/divisional commanders.”<sup>13</sup>

The Defence therefore requested the Prosecution to disclose:

- the names (to the extent known to the Prosecution)/pseudonyms and position of all co-perpetrators and physical perpetrators;
- whether such persons are Prosecution witnesses or have provided statements to the Prosecution; and
- whether such persons are referred to in Prosecution statements or evidence, and if so, the relevant statement/document in question.

12. The Defence submits that the requested information is clearly relevant and/or exculpatory for the following reasons.

13. In its decision on the issuance of the summonses, the Pre-Trial Chamber held that in order to satisfy the elements of indirect co-perpetration, the Prosecution must establish *inter alia*, that the suspect had control over an organization, which consists of an organized and hierarchal apparatus of power, and that the suspect is aware of the circumstances allowing him to exercise joint control over the commission of the crime through another person.<sup>14</sup> It follows that it is necessary to know the identity of the physical perpetrators in order to identify whether they were part of the organization allegedly controlled by the Defendants, and that the Defendants were aware that the circumstances which enabled them to exercise control over these persons. Such persons could also be potential defence witnesses, as they may be able to provide the defence with information concerning the hierarchy and chain of command of the organisation, which could contradict the prosecution case theory.

14. Although the Prosecutor might not be aware of the precise identity of each and every physical perpetrator, it should be able to at the very least, identify the group to which these persons belonged, and the role that they played in the execution of the plan.

15. A further element of indirect co-perpetration is that “suspect and the other coperpetrator(s) must carry out essential contributions in a coordinated manner which

---

<sup>13</sup> Annex 2.

<sup>14</sup> Prosecutor v. Ruto et al, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 8 March 2011, ICC-01/09-01/11-01, at para 40.

result in the fulfilment of the material elements of the crime”.<sup>15</sup> An essential contribution has been described by ICC jurisprudence as a contribution, which if the co-perpetrator withheld, would be “capable of frustrating its implementation and accordingly the commission of the crime.”<sup>16</sup>

16. In order for the Defence to gauge whether the alleged contribution of the defendant could be described as ‘essential’, it is necessary for the Defence to be aware of the number and identity of other co-perpetrators, so that the Defendant can compare the alleged role of the defendant in the implementation of the commission of crimes with these persons.
17. The Defence notes that when these arguments were raised in the Katanga and Ngudjolo case, the Single Judge implicitly recognised that the Defence must be able to ascertain from either the charging document or the evidence, the identity of the co-perpetrators and their contributions, and the role played by other members in the common plan (i.e. physical perpetrators) and their respective contributions.<sup>17</sup>
18. Moreover, although indirect co-perpetration is distinct in several aspects from the joint criminal enterprise theory employed at the ad hoc Tribunals, the latter corpus of jurisprudence is still relevant to the ICC insofar as it sheds light on the minimum type of information which must be disclosed to the Defence in order to comply with the defendant’s right to be informed of the nature and details of the charges, taking into consideration that the obligation to disclose the identity of co-perpetrators is more heightened at the ICC. This is due to the fact that the contribution of each co-perpetrator is considered to be the sine qua non of the commission of the plan; it would therefore be impossible for the Prosecution to identify the common plan without being aware of the identity and contribution of each co-perpetrator.
19. It is thus notable that the ad hoc Tribunals have held that the defendant must be informed of the identity of all co-perpetrators, who have participated in the formulation of the common plan, at the very least, by reference to their position or specific group.<sup>18</sup> A reference to “local politicians, military and police commanders,

---

<sup>15</sup> Prosecutor v. Ruto et al, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 8 March 2011, ICC-01/09-01/11-01, at para 40.

<sup>16</sup> Prosecutor v. Bemba, Decision on the Confirmation of Charges, ICC-01/05-01/08-424, 15 June 2009, at para 371, citing pre-Trial Chamber I, Lubanga decision, ICC-01/04-01/06-803-tEN, paras 366-367; Pre-Trial Chamber I, Katanga decision, ICC-01/04-01/07-717, paras 538-539.

<sup>17</sup> Prosecutor v. Katanga and Ngudjolo, Decision on the Defences’ Motions Regarding the Document Containing the Charges, ICC-01/04-01/07-648, 25 June 2008, at paras 23 to 26.

<sup>18</sup> Prosecutor v. Karemera et al, ICTR-98-44-PT, Decision on Defects in the Form of the Indictment, 5 August 2005, para. 19; Prosecutor v. Ntagerura et al, No. ICTR-99-46-T, Judgment, 25 February 2004, para. 34. See also Prosecutor v. Gatete, No. ICTR-00-61-I, Decision on Defence Preliminary Motion, 29 March 2004, paras. 12-13, where it was held that the Defence must be informed of the identities of at least those perpetrators the

paramilitary leaders, and others” will, however, be insufficient.<sup>19</sup> Moreover, if the co-perpetrator is considered to be in a ‘key position’ in the group, then the Prosecution must identify them by name.<sup>20</sup> The defence must also be informed - to the extent possible – of the identity of the physical perpetrators who executed the plan, and their link to the co-perpetrators.<sup>21</sup>

20. The ICC has held that the defendant’s right to be informed of the nature and detail of the charges can be satisfied either through the information included in the charging document, or the accompanying evidence.<sup>22</sup> In light of the clear relevance of this information to Defence preparation, the Defence requests the Honourable Pre-Trial Chamber to order the Prosecutor to either disclose these particulars to the Defence as an annex or table, or include the details in the charging document.

***Any information which suggests that prosecution evidence was collected by the ICC Prosecution, persons working on behalf of the ICC Prosecution, or by national authorities, in a manner which does not conform with the Rome Statute and Rules and/or the relevant domestic requirements for the collection of evidence/search and seizure operations.***

21. Information concerning the manner in which evidence was collected and the methods used by the Prosecution is directly relevant to defence preparation and potentially exculpatory insofar as it assists the Defence to contest the reliability of Prosecution evidence, and to challenge admissibility under article 69(7) of the Statute. Pre-Trial Chamber I has also confirmed in both the Lubanga case and Mbarushimana case that the Prosecution is obliged to disclose to the Defence information concerning the legality of the collection of any evidence, which the Prosecution intends to rely upon at the confirmation hearing.<sup>23</sup>

---

Prosecution is aware of. See also the ICTY cases of Prosecutor v. Pavkovic et al, IT-03-70-PT, Decision on Vladimir Lazarevic’s Preliminary Motion on the Form of the Indictment, 8 July 2005, para. 25; Prosecutor v. Prlic et al, IT-04-74-PT, Decision on Defence Preliminary Motions Alleging Defects in the Form of the Indictment, 22 July 2005, para. 11.

<sup>19</sup> Prosecutor v. Krajisnik, Appeals Judgment, 17 March 2009, at paras 156 and 157.

<sup>20</sup> Prosecutor v. Gotovina, ‘Decision on Ante Gotovina’s Preliminary Motions Alleging Defects in the Form of the Joinder Indictment’, 19 March 2007, at para 14.

<sup>21</sup> Prosecutor v. Krajisnik, Appeals Judgment, 17 March 2009, at para 237.

<sup>22</sup> Pre-Trial Chamber I, Prosecutor v. Lubanga, Decision on the confirmation of charges, ICC-01/04-01/06-803, 29 January 2007, para. 150.

<sup>23</sup> Prosecutor v. Mbarushimana, Decision on issues relating to disclosure ICC-01/04-01/10-87, 30 March 2011, at para 15; Prosecutor v. Lubanga, Decision on the Defence Request for Order to Disclose Exculpatory Materials (Public redacted version), ICC-01/04-01/06-649, 2 November 2006, at p. 6.



***Information concerning contacts between prosecution witnesses and sources, and intermediaries, the credibility and reliability of intermediaries, and the existence of accountability mechanisms***<sup>24</sup>

22. Information concerning the methods by which evidence was collected and witnesses were interviewed is relevant to both the reliability and credibility of Prosecution evidence and witness statements, and possible Defence arguments concerning the fairness and impartiality of the proceedings.
23. The Prosecution has been ordered in various ICC cases to disclose information to the Chamber and parties concerning the methods, which it has used to collect evidence. For example, in the Katanga and Ngudjolo case, the Prosecution was ordered to file submissions concerning the methods which it utilised to collect exculpatory material,<sup>25</sup> and was further ordered to call the Chief of Investigations as the first prosecution witness to respond to questions concerning the investigative methods of the Prosecution.<sup>26</sup> The Defence in the Abu Garda case was also authorised to question the Prosecution investigator in relation to any issues that could affect whether the standard to confirm the charges was met.<sup>27</sup>
24. In terms of the Prosecution's use of intermediaries to conduct its investigations, Trial Chamber I has requested the Prosecution to provide the Defence with information concerning the identity, qualifications and payment of intermediaries, the persons contacted by these intermediaries, and the Prosecution's methods of recruiting and

---

<sup>24</sup> The Defence requested "confirmation as to whether any Prosecution witnesses or sources were contacted by intermediaries, and if so:

- (i) the names or pseudonyms of these witnesses/sources;
- (ii) whether the intermediaries were employed by the ICC or remunerated in any form;
- (iii) whether the Prosecution vetted the background of the intermediaries, and if so, whether they are affiliated/have received funding from any NGOs/IGOs/political parties which may have contrary interests from the Defendants, or which do not have an impartial position as concerns the Defendants;
- (iv) what accountability mechanisms the Prosecution put in place to ensure that the intermediaries acted in a manner which is consistent with the Prosecutor's powers and duties under article 54, and which fully respects the rights of the Defendants; and
- (v) whether the Prosecution instructed these intermediaries to identify or search for information which could demonstrate the innocence of the Defendants, or mitigate their alleged guilt, or which may affect the credibility of Prosecution evidence."

<sup>25</sup> Trial Chamber II requested the Prosecutor to file a document, in which he "must explain how he understands his obligation under article 54(1)(a) of the Statute, pursuant to which "in order to establish the truth, [the Prosecutor shall] extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under th[e] Statute, and, in doing so, investigate incriminating and exonerating circumstances equally", and state which investigation methods he favours to this end". Prosecutor v. Katanga and Ngudjolo, Order Instructing the Participants and the Registry to File Additional Documents, ICC-01/04-01/07-788, 10 December 2008, at para 8.

<sup>26</sup> Prosecutor v. Katanga and Ngudjolo, Decision on the Application by the Defence for Mathieu Ngudjolo for Postponement of the Commencement Date for the Hearings on the Merits (Rule 132(1) of the Rules of Procedure and Evidence), ICC-01/04-01/07-1603-tENG, 5 November 2009, at para 17.

<sup>27</sup> Prosecutor v. Abu Garda, Decision on witness to be called by the Defence at the confirmation hearing, ICC-02/05-02/09-186, 19 October 2009 at p. 6.

supervising the intermediaries.<sup>28</sup> The Trial Chamber later clarified that information concerning the background of the intermediary not included their professional background, but also their work if any with the authorities (in this case Congolese), NGOs and children who were associated with armed groups.<sup>29</sup>

25. Trial Chamber II has also ordered the disclosure of similar information,<sup>30</sup> and the *ad hoc* Tribunals and the Special Court for Sierra Leona have also recognised that the identity of persons who contacted Prosecution witnesses on behalf of the Prosecution, or acted as evidential sources, could be exculpatory.<sup>31</sup>

26. Issue of security and witness protection would not prevent the prosecution from complying with the Defence request since it would be possible to substitute the names of intermediaries and witnesses with pseudonyms.

***Information concerning the credibility of the witnesses whose summaries or statements the OTP seeks to rely on for the purposes of the confirmation hearing***

27. The jurisprudence of the ICC and *ad hoc* Tribunals provides ample support for the Defence request for disclosure of the following information, on the grounds that it is potentially exculpatory or relevant to Defence preparation:

- (i) that the witness may have committed criminal acts;<sup>32</sup>
- (ii) that the witnesses can be considered a suspect for the purposes of article 55;<sup>33</sup>

<sup>28</sup> Prosecutor v. Lubanga, Redacted Decision on Intermediaries ICC-01/04-01/06-2434-Red2, 31 May 2010; See also Prosecutor v. Lubanga, Redacted Decision on the defence request for the admission of 422 documents, ICC-01/04-01/06-2595-RED, 7 March 2011, at paras 59-65.

<sup>29</sup> Prosecutor v. Lubanga, Oral decision, Transcript of 2 June 2010; ICC-01/04-01/06-T-297-Red-ENG WT; pages 28-31.

<sup>30</sup> Prosecutor v. Katanga and Ngudjolo, Order on the Disclosure of the Identity of P143, ICC-01/04-01/07-1817, 1 February 2010; Prosecutor v. Katanga and Ngudjolo, Transcript of 16 February 2010; ICC-01/04-01/07-T-103-Red-ENG WT, pages 2-7.

<sup>31</sup> Prosecutor v. Taylor, Decision on Defence Motion for Disclosure of Exculpatory Materials Pursuant to Rule 68 of the Rules of Procedure and Evidence, 22 May 2008; Prosecutor v. Bagasora, Prosecutor v. Bagasora, 'Decision on Disclosure of Identity of Prosecution Informant', 24 May 2006.

<sup>32</sup> Prosecutor v. Lubanga, Decision on the Defence Request for Order to Disclose Exculpatory Materials (Public redacted version), ICC-01/04-01/06-649, 2 November 2006.

See the Trial Judgement in Prosecutor v. Kordic and Cerkez, in which the Chamber observed that in common law jurisdictions "the evidence of witness AT would be treated as that of an accomplice and would be treated with great caution" (26 February 2001 at para 628); and Prosecutor v. Halilovic, 'Decision on Addendum to Further Defence Report *re* Access to *Foss* Material and Additional Motions *re* Criminal Record of Prosecution Witnesses filed on 5 January 2005 and 11 February 2005, Decision of 18 March 2005'. The Chamber referred to the "general principle of law that judgements of domestic courts are public, wherefore the right to privacy of a witness is not violated in any way by allowing access to the Defence to these judgements", and that "a file containing the supporting material of a criminal case ("criminal file") which has led to a conviction, whether or not the witness was later pardoned or whether amnesty was granted to that witness, may contain information which could affect the credibility of a witness, or information as to the "criminal character" of those witnesses who allegedly were involved [...], wherefore the Trial Chamber considers that access to those criminal files may be necessary or relevant for a fair determination of a matter in issue before the Trial Chamber".

<sup>33</sup> Prosecutor v. Halilovic, Decision on defence motion for identification of suspects, and other categories among its proposed witnesses, 14 November 2003; Prosecutor v. Lubanga, Decision on the Defence Request for Order to Disclose Exculpatory Materials (Public redacted version), ICC-01/04-01/06-649, 2 November 2006.

- (iii) that the OTP has informed the witness on any occasion that they would not be prosecuted before the ICC;<sup>34</sup>
- (iv) whether the witness has been preventatively relocated by either the Prosecution or the Registry, and the quantum of any payments or benefits made to the witness and their family in connection with their testimony and/or relocation;<sup>35</sup>
- (v) any prior statements or information concerning the events set out in the charges, the defendant, or the command structure of the ODM, and emanating from the witness, which has been published in NGO or UN reports, together with any statements concerning these topics given by the witness to the media;<sup>36</sup>
- (vi) any prior testimony or statements given in national proceedings in relation to the events at the various places referred to in the charges, or the alleged position of the defendant in the ODM party;<sup>37</sup>
- (vii) whether the witness is participating as either a witness/applicant/ or victim in other proceedings before the ICC (for example, the Kenya situation phase or the Kenyatta et al. case);<sup>38</sup>
- (viii) whether the witness has ever been in the employ of the ICC Prosecution as a staff member, contractor, consultant, expert, visiting professional, or intern, or has worked for national investigating authorities in connection with inquires against any of the three defendants;<sup>39</sup>

<sup>34</sup> Prosecutor v. Halilovic, Decision on defence motion for identification of suspects, and other categories among its proposed witnesses, 14 November 2003; Prosecutor v. Taylor, Decision on Public Motion with Confidential Annexes 1-D Defence Motion for Disclosure of Exculpatory Information Related to DCT-032, 20 October 2010.

<sup>35</sup> See Prosecutor v. Lubanga, Oral decision 25 May 2010, Transcript ICC-01/04-01/06-T-294-ENG CT p 25-27. See also Prosecutor v. Brima et al, Decision on Kanu Motion to Disclose Prosecution Material and/or Supporting material and/or other information pertaining to rewards to Prosecution trial witnesses, 16 March 2005; Prosecutor v. Zigranyirazo, Decision on defence and prosecution motions related to witness ADE, 31 January 2006; Prosecutor v. Karemara, Decision on Nzirorera's Motion for request for Governmental Cooperation, 19 April 2005; Prosecutor v. Taylor, Decision on Defence Motion for Disclosure of Statements of Prosecution Payments to DCT-097, 23 September 2010.

<sup>36</sup> Prosecutor v. Lubanga, Decision on the Defence Request for Order to Disclose Exculpatory Materials (Public redacted version), ICC-01/04-01/06-649, 2 November 2006; Prosecutor v. Lubanga, Decision on Defense Requests for Disclosure of Materials ICC-01/04-01/06-718, 17 November 2006. See also Prosecutor v. Milutinovic, 'Decision on Ojdanic Motion for Disclosure of Witness Statements and for Finding of Violation of Rule 66(A)(ii)', 29 September 2006.

<sup>37</sup> Prosecutor v. Karemara, Decision on Motions to Compel Inspection and Disclosure and to Direct Witnesses to Bring Judicial and Immigration Records, 14 September 2005; Prosecutor v. Haradinaj, Chamber's Request to the Prosecution to Obtain a Document Related to Witness Avni Krasniqi, 5 December 2007.

<sup>38</sup> The statements provided by the witness concerning the other cases would fall within the Prosecution's rule 76 disclosure obligations. Trial Chamber I has held in the Lubanga case that the Prosecution would be obliged to inform the Defence that a witness has also participated as a victim/applicant, and disclose the application form in accordance with its obligation under rule 77 to disclose material which is relevant to the preparation of the Defence. 'Decision on the Defence Application for Disclosure of Victims' Applications', ICC-01/04-01/06-1637, 21 January 2009.

<sup>39</sup> The ICTY has held that the fact that a witness has been in the employ of the Prosecution could affect the witness's ability to testify in an independent and impartial manner. Prosecutor v. Milosevic, Oral decision 13 June 2006, cited in Decision On Prosecution Request For Certification Of Interlocutory Appeal Of Decision On Admission Of Witness Philip Coo's Expert Report, 30 August 2006. See also Prosecutor v. Lubanga, Oral

- (ix) whether the witness is related to other witnesses, victim applicants, participating victims or persons who could be considered to be suspects under article 55 of the Statute;<sup>40</sup>
- (x) information reflecting the witness' bias or prejudice against the defendant, and any evidence of personal animosity towards the defendant;<sup>41</sup> and
- (xi) all statements by third parties that may cast doubt on the witness's testimony, or other information which would impact on their credibility.

***Disclosure of relevant information, statements and evidence from the Kenyatta et al case***

28. In its letter, the Defence referred to the Prosecution's statement in its application for summons that "the two applications [Kenyatta et al. and Ruto et al.] concern crimes that are interlinked, allegedly committed to prevent government actions or to retaliate against members of the opposition",<sup>42</sup> and the Prosecution's professed intention to join the two cases if the charges are confirmed,<sup>43</sup> and therefore requested the following:

1. Any information, evidence or statements from the Kenyatta et al. case concerning any alleged crimes or atrocities committed by the Mungiki and PNU against civilians and/or members or perceived members of the ODM;
2. Any information, evidence or statements from the Kenyatta et al. case concerning a similar time frame and geographic locations of incidents, which form the basis of the Prosecutor's charges against Ruto et al; and
3. Any information, evidence or statements from the Kenyatta et al. case which impacts on the credibility or reliability of the Prosecution evidence in the Ruto et al. case, or which exculpates the Defendants.

---

decision, Transcript of 2 June 2010; ICC-01/04-01/06-T-297-Red-ENG WT; pages. 28-31, which relates to the context of intermediaries. .

<sup>40</sup> The ad hoc Tribunals, Special Court for Sierra Leone, and ICC have recognised that the fact that a witness is related to other persons involved in the proceedings could potentially influence the witness's testimony, and this is therefore an issue which the Defence is entitled to examine. Prosecutor v. Brima, Decision On Confidential Urgent Joint Defence Motion To Exclude Evidence Given By Witness Tfi-157 And Evidence To Be Given By Witness Tfi-158 Based On Lack Of Authenticity And Violation Of Rule 95, 10 October 2005; Prosecutor v. Furundzija, Order on Defence Motion Requesting Sequestration of Witnesses', 10 June 1998. In the Prosecutor v. Katanga and Ngudjolo, Trial Chamber II granted a Defence request to be informed of the circumstances in which OTP witnesses may have contacted other persons involved in the proceedings. Oral decision of 15 March 2010, pages 2-3, Transcript ICC-01/04-01/07-T-116-Red-ENG.

<sup>41</sup> As noted by the ICTR, a witness's "statement cannot be properly understood without knowing the author's ability to observe the events he describes; his possible biases or point of view; or the consistency of his account with any other statements he may have given", Prosecutor. v. Bagosora, 'Decision on Disclosure of Identity of Prosecution Informant', 24 May 2006, at para 5.

<sup>42</sup> ICC-01/09-30-Red2 at para 11.

<sup>43</sup> ICC-01/09-30-Red2 at para 12.

29. This information falls squarely within the terms of the ICC Appeals Chamber's judgment of 11 July 2008 insofar as it would enable the Defence to understand the context of the events and the phenomena of the electoral violence. It is also possible that the Prosecution may call common or related witnesses in two cases, or that one witness in one case may be exculpatory for the defence in other case. For these reasons, Trial Chamber I and II have ordered the Prosecution to disclose to the Lubanga, Katanga and Ngudjolo defence teams relevant information and evidence from the respective 'flip side' case.<sup>44</sup> This is consistent with the practice of the ad hoc Tribunals to grant the defence access to evidence and statements in cases which have similar geographic and temporal scope.<sup>45</sup>
30. The existence of protective measures in one case is also not in itself a bar to disclosure. In accordance with the system developed by Trial Chambers I and II, "the Chamber which originally issued the non-disclosure order, logically, should first deal with the issue, providing an analysis to assist the second Chamber, and the latter Chamber will undoubtedly take into account any security concerns that are indicated."<sup>46</sup> Since the same Chamber is seized of both the Kenyatta and the Ruto

<sup>44</sup> Prosecutor v. Lubanga, Redacted Decision on the prosecution's applications to vary protective measures under Regulation 42 of 14 July and 17 August 2009, ICC-01/04-01/06-2206-Red, 22 February 2010; Prosecutor v. Lubanga, Redacted Decision on the variation of protective measures under Regulation 42 on referral from Trial Chamber II on 22 July 2009, 16 March 2010, ICC-01/04-01/06-2209-Red; Prosecutor v. Lubanga, Oral decision, Transcript 6 February 2009 pages 2-3.

Prosecutor v. Katanga and Ngudjolo, Decision on protective measures for 16 protected witnesses in the *Lubanga* case, 10 January 2011, ICC-01/04-01/07-1915-Red-tENG; Prosecutor v. Katanga and Ngudjolo, Order on the Disclosure of the Identity of P143, ICC-01/04-01/07-1817, 1 February 2010.

<sup>45</sup> Prosecutor v. Hadzihasanovic, Decision on "Application of Dario Kordic for Access to Confidential Submissions filed by Prosecution and defence" in the Case Prosecutor v. Hadzihasanovic and Kubura, 12 June 2003; Prosecutor v. Blaskic, IT-05-14-A, "Decision on Appellants Dario Kordic and Mario Cerkez's Request for Assistance of the Appeals Chamber in Gaining Access to Appellate Briefs and Non-public Post Appeal Pleadings and hearing Transcripts Filed in the Prosecutor v. Blaskic", 16 May 2002, para. 14; Prosecutor v. Kordic and Cerkez, IT-95-14/2-A, "Decision on Motion by Hadzihasanovic, Alagic and Kubura for Access to Confidential Supporting Material, Transcripts and Exhibits in the Kordic and Cerkez Case, 24 January 2003, p. 4; ; Prosecutor v. M. Krajisnik, IT-00-39-A, "Decision on "Motion by Mico Stanisic for Access to All Confidential Materials in the Krajisnik Case", 21 February 2007, p. 4-5; Prosecutor v. Djordjevic, IT-05-87/1-PT, "Decision on Vlastimir Djordjevic's Motion for Access to Transcripts, Exhibits and Documents in Prosecutor v. Slobodan Milosevic, Case No. IT-02-54", 6 February 2008, para. 7.

<sup>46</sup> Prosecutor v. Lubanga, Decision on the application to disclose the identity of intermediary 143, 18 November 2009, ICC-01/04-01/06-2190-Conf-Exp, cited in Prosecutor v. Lubanga, Redacted Decision on the variation of protective measures under Regulation 42 on referral from Trial Chamber II on 22 July 2009, 16 March 2010, ICC-01/04-01/06-2209-Red at para 13.

The ad hoc Tribunals have also emphasized that the existence of protective measures in one case cannot be relied upon by the Prosecution as an excuse for not complying with its disclosure obligations. Prosecutor v. Brdjanin, IT-99-36-A, "Decision on Appellant's Motion for Disclosure Pursuant to Rule 68 and Motion for an Order to the Registrar to Disclose Certain Materials" 7 December 2004, p. 4. See also Prosecutor v. Delic, IT-04-83-PT, "Order on Defence Motions for Access to All Confidential Material in Prosecutor v. Blaskic and Prosecutor v. Kordic and Cerkez", 7 December 2005 : " the redaction of the identities, whereabouts, and other identifying information of witnesses from non-public transcripts prior to disclosure is not necessary—particularly in light of the Trial Chamber's orders in the Disposition, *infra*—given that the existing protective measures in *Kordic and Cerkez* are sufficient to safeguard the security of all protected witnesses, and that the Applicant has affirmed that "all original or new protective measures attached to the material sought will be complied with."; Prosecutor v.

case, this Chamber will have the competence to determine whether protected materials in the Kenyatta et al case may be disclosed to the Ruto and Sang defence teams.

### **Relief Sought**

31. For the reasons set out above, the Defence respectfully requests the Honourable Pre-Trial Chamber to order the Prosecution to disclose the information requested above, and requested in the letters dated 3 May 2011 attached as Annexes 2 and 3, in accordance with the disclosure calendar.
32. In terms of the deadline for the Prosecution response to this request, the Defence further requests the Pre-Trial Chamber to shorten the applicable deadline in order to ensure that the request is resolved in an expeditious manner in advance of the confirmation hearing. In so doing, the Chamber should take into consideration the fact that the Prosecution was first notified of the request on 3 May 2011, and that it deliberately chose not to avail itself of the right to respond to the letter.



---

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

---

Blaskic, IT-95-14-A, "Decision on Prosecution's Preliminary Response and Motion for Clarification Regarding the Appeal Chamber's Decision dated 4 December 2002 on Pasko Ljubicic's Motion for Access to Confidential Material, Transcripts and Exhibits in the Blaskic Case", 8 March 2004, para. 34.