



Original: English

No.: ICC-01/09-02/11

Date: 13 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. FRANCIS KIRIMI MUTHAURA, UHURU MUIGAI***  
***KENYATTA AND MOHAMMED HUSSEIN ALI***

**PUBLIC WITH CONFIDENTIAL ANNEX**

**Response on Behalf of Uhuru Muigai Kenyatta 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**

Mr. Luis Moreno-Ocampo, Prosecutor  
Ms. Fatou Bensouda, Deputy Prosecutor

**Counsel for Francis Kirimi Muthaura**

Karim A. Khan QC and Kennedy Ogetto

**Counsel for Uhuru Muigai Kenyatta**

Steven Kay QC and Gillian Higgins

**Counsel for Mohammed Hussein Ali**

Evans Monari and Gershom Otachi

**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

**Deputy Registrar**

Mr. Didier Daniel Pereira, Deputy  
Registrar

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. PROCEDURAL HISTORY

1. On 30 March 2011, the Single Judge issued the “First Decision on Victims’ Participation in the Case”<sup>1</sup> (the “30 March Decision”), in which the Single Judge ordered the Victims Participation and Reparation Section (the “VPRS”) to submit complete applications “as soon as practicable and no later than Friday, 8 July 2011”.<sup>2</sup>
2. In the 30 March Decision, the Single Judge also ordered that the VPRS, when submitting victims’ applications to Pre-Trial Chamber II (the “Chamber”), simultaneously transmit redacted victims’ applications to the parties, and that the parties “shall provide their observations thereto, if they so desire, within a time limit of two weeks upon notification of the redacted victims’ applications”.<sup>3</sup>
3. On 31 May 2011, the Defence was notified of four redacted applications for participation in the present case (the “applications”).<sup>4</sup>
4. On 3 June 2011, in the case of *The Prosecutor v William Samoei Ruto et al*, the Defence for Mr Ruto and Mr Sang filed its “Response to the First transmission to the parties and legal representatives of redacted applications to participate in the proceedings, with Confidential Annex” (the “Ruto-Sang Response”).<sup>5</sup>

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<sup>1</sup> See also Pre-Trial Chamber II, *Prosecutor v Muthaura et al.*, “First Decision on Victims’ Participation in the Case”, 30 March 2011, ICC-01/09-02/11-23.

<sup>2</sup> See also Pre-Trial Chamber II, *Prosecutor v Muthaura et al.*, “First Decision on Victims’ Participation in the Case”, 30 March 2011, ICC-01/09-02/11-23, p.13.

<sup>3</sup> See also Pre-Trial Chamber II, *Prosecutor v Muthaura et al.*, “First Decision on Victims’ Participation in the Case”, 30 March 2011, ICC-01/09-02/11-23, p.13.

<sup>4</sup> Pre-Trial Chamber II, *Prosecutor v Muthaura et al.*, “First transmission to the parties and legal representatives of redacted applications to participate in the proceedings”, 30 May 2011, ICC-01/09-02/11-98.

<sup>5</sup> Pre-Trial Chamber II, *The Prosecutor v. William Samoei Ruto et al*, “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”, 3 June 2011, ICC-01/09-01/11-102.

5. In accordance with the practice of the Single Judge in the case of *The Prosecutor v. Jean-Pierre Bemba Gombo*,<sup>6</sup> and in addition to the legal submissions outlined in this request, the Defence provides its factual assessment of each individual application in a separate confidential annex.

## II. SUBMISSIONS

### (A) Redactions and the Non-disclosure of the Identity of the Applicants

6. The Defence adopts paragraph 4 of the Ruto-Sang Response, and accordingly submits that it 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.<sup>7</sup>

### (B) Dismissal of the Applications due to Inability to Satisfy the Test under Rule 85 of the Rules of Evidence and Procedure

7. The Defence submits, for reasons set out in the confidential annex, that the applications are intrinsically incoherent and fail to prove to a satisfactory level, as viewed by an objective observer, that the criteria for victim participation are satisfied, namely that (1) the applicant is a natural person as set forth in rule 85(a) of the Rules of Procedure and Evidence, (2) a crime within the jurisdiction of the Court appears to have been committed, (3) the victim applicant has suffered harm, and (4) such harm arose “as a result” of the alleged crime within

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<sup>6</sup> Pre-Trial Chamber III, *The Prosecutor v. Jean Pierre Bemba Gombo*, "Fourth Decision on Victims' Participation", 15 December 2008, ICC-01/05-01/08-320, para.28.

<sup>7</sup> “Even if non-disclosure is authorised, this determination must be kept under review and altered should changed circumstances make that appropriate”, *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.

the jurisdiction of the Court.<sup>8</sup> Accordingly and notwithstanding the redacted nature of the information, the Defence submits that the Single Judge should dismiss each and every application for the reasons set out in the confidential annex.

8. In the alternative, in the event the Single Judge rejects the Defence submissions to dismiss any or all four applications, the Defence requests the Learned Judge to order the Registry to disclose to the Defence sufficient information concerning the redacted components to enable the Defence to make further submissions. In this regard, the Defence adopts paragraphs 5-10 of the Ruto-Sang Response.<sup>9</sup>

(C) Transmission of the Unredacted Versions of the Applications to the Prosecutor

9. Irrespective of the decision of the Single Judge concerning the substantive merit of the applications, the Defence submits that the unredacted version of the applications should be transmitted to the Prosecution so that it can fulfill its obligations under article 54 and article 67(2) of the Rome Statute. The Defence adopts paragraphs 15-21 of the Ruto-Sang response in support of this submission.<sup>10</sup>

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<sup>8</sup> Victims' means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court", rule 85(a) of the Rules of Procedure and Evidence; Pre-Trial Chamber III, The Prosecutor v. Jean Pierre Bemba Gombo, "Fourth Decision on Victims' Participation", 15 December 2008, ICC-01/05-01/08-320, paras 30 and 31.

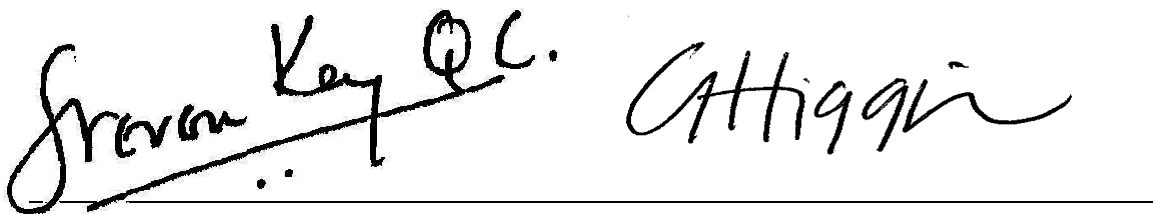
<sup>9</sup> See the references in paragraph 9 to victims' applications a/0045/10, a/8015/11, a/8028/11, a/8025/11, a/8036/11, a/0772/10 and a/8049/11.

<sup>10</sup> The following applicants have not requested that their identity be withheld from the Defence: a/8278/11, a/8280/11, a/8285/11.

### III. RELIEF SOUGHT

10. For the reasons stated above, and as set out in the confidential annex, the Defence requests that the Single Judge:

- (a) Dismiss all four applications;
- (b) In the event of non-dismissal of any or all applications, order the Registry to disclose to the Defence sufficient information concerning the redacted components to enable the Defence to make further submissions; and
- (c) Order the Registry to transmit to the Prosecution the unredacted applications so that the Prosecution can fulfill its obligations under article 54 and article 67(2) of the Rome Statute.

The image shows two handwritten signatures in black ink. The signature on the left is 'Steven Kay QC.' and the signature on the right is 'Gilligan'. Both signatures are written in a cursive, flowing style. Below the signatures is a horizontal line.

Steven Kay QC and Gillian Higgins

On behalf of Uhuru Kenyatta

Dated this Monday 13 June 2011

At London, England