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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
with Confidential Annex

Ruto and Sang Defence response to Second transmission to the parties and the legal representatives of redacted applications to participate in the proceedings

Source: Defence

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

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I. Introduction & Procedural History

1. On 30 March 2011, the Single Judge issued the *First Decision on Victims' Participation in the Case*,¹ 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. On 24 June 2011, the Registry transmitted 105 applications to the Defence for Mr. Ruto and Mr. Sang ('the Defence').²
3. The Defence incorporates by reference the legal submissions set out in its *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*³ while noting the Single Judge's *Decision on Defence Requests in Relation to the Victims' Applications for Participation in the Present Case*.⁴
4. Furthermore, and in light of recent ICC jurisprudence in the *Bemba* and *Banda and Jerbo* cases, the Defence submits additional observations concerning firstly, the extent to which certain redactions in the present applications can be considered as either necessary and proportionate, and secondly, the modalities of victim participation at Confirmation.
5. 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,⁵ the Defence has attached its factual analysis in a separate confidential annex.

II. Submissions

Disclosure of Unredacted Versions of Applications to the Prosecutor

6. The full unredacted versions of the 105 victims applications submitted through the Second Transmission should be disclosed to the Prosecutor. The Defence notes that in relation to the First Transmission⁶ of applicants, the Single Judge recently determined that the Prosecutor should be provided unredacted copies of the victims' applications, on the

¹ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-17, First Decision on Victims' Participation in the Case, 30 March 2011.

² *Prosecutor v. Ruto et al*, ICC-01/09-01/11-142, Second transmission to the parties and legal representatives of redacted applications to participate in the proceedings, 24 June 2011 ("**Second Transmission**").

³ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-102, 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, 3 June 2011.

⁴ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-169, Decision on the Defence Requests in Relation to the Victims' Applications for Participation in the Present Case, 8 July 2011 ("**Decision in Relation to Victims' Applications**").

⁵ *Prosecutor v. Bemba*, ICC-01/05-01/08-320, Fourth Decision on Victims' Participation, 12 December 2008.

⁶ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-92, First transmission to the parties and legal representatives of redacted applications to participate in the proceedings, 18 May 2011 ("**First Transmission**").

grounds that non-disclosure was not necessary in light of the Prosecutor's duty to protect victims.⁷ The Single Judge emphasized that "full disclosure is the principle while redaction of information only constitutes the exception" and that such disclosure would enable the Prosecutor to properly discharge his statutory obligations with regard to investigating whether information in the possession of the applicants could be considered exculpatory in nature and should thus be disclosed to the Defence.⁸ Consequently, and in the event that such is not already ordered by the Decision in Relation to Victims' Applications at paragraph 16,⁹ the Defence requests that Single Judge issue the same order for unredacted disclosure to the Prosecutor in relation to the Second Transmission of applicants.

Disclosure of the Identity of the Applicants to the Defence

7. The Defence submits that disclosure to the Defence of the identity of the 105 applicants from the Second Transmission is also warranted. The Defence strongly disputes the necessity of withholding from the Defence the identities of applicants who have either explicitly indicated that their identity could be provided to the Defence (or expressed no preference), or who have failed to provide any justification for the measures.
8. The Defence notes that twenty-one applicants expressed a preference that their identities be conveyed to the parties,¹⁰ and five expressed no preference.¹¹ At a minimum, the Registry should be ordered to disclose unredacted versions of these twenty-six applications to the Defence.
9. Additionally, the Registry should be ordered to disclose to the Defence the identity of applicants who failed to provide adequate justification for the request for non-disclosure to the Defence. The Appeals Chamber has held that general security concerns are insufficient to justify withholding such information from the Defence.¹² Vague and unspecific requests do not warrant the extreme protective measure of anonymity, yet the majority of applicants either provided no justification for the request, or cited only general

⁷ Decision in Relation to Victims' Applications, para. 15.

⁸ Decision in Relation to Victims' Applications, paras 13 and 15.

⁹ The Defence submits that the Single Judge's order for disclosure relates to all victims' applications in the First and Second Transmissions, as well as any future transmissions, on the basis that the Single Judge stated, "The Registry is therefore hereby ordered to transmit to the Prosecutor the unredacted versions of all the victims' applications for participation received in the present case".

¹⁰ See, a/8400/11, a/8407/11, a/8422/11, a/8425/11, a/8042/11, a/8435/11, a/8438/11, a/8440/11, a/0590/10, a/8332/11, a/8333/11, a/8333/11, a/8336/11, a/8339/11, a/8343/11, a/8347/11, a/8347/11, a/8348/11, a/8351/11, a/8358/11, and a/8370/11.

¹¹ See, a/8434/11, a/0356/10, a/0578/10, a/8329/11, and a/8335/11.

¹² *Prosecutor v. Lubanga*, ICC-01/04-01/06-773, 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, 14 December 2006, para. 21.

security concerns, which bear no relation to the scenario in which their identity may be disclosed on a confidential basis to the Defence.¹³ Their identities should consequently be disclosed.

10. When assessing any potential security risk to the victims, due regard must also be given to the difference between disclosure of the identities of victims to the general public and disclosure of the identity of victims to the Defence. The Defence recalls that the Appeals Chamber has repeatedly supported this proposition, holding that in determining the necessity for protective measures, the Chamber must base its assessment on the risk which would result if the information were disclosed to the Defence, as opposed to the general public.¹⁴ Unfortunately, this distinction is not made clear on the victims' application forms. For instance, Explanation Note #4 (which provides an explanation of protective measures for victims) is extremely misleading. It does not differentiate between possible risks to the victims associated with having their identity disclosed to the public, as opposed to possible risks that would result if the identity was disclosed to the Prosecution and Defence, whom are bound by the Code of Conduct and the Court's orders on protective measures. This misleading explanation appears to have significantly influenced the responses of the applicants. For example, many applicants initially ticked "no" to protective measures, and then subsequently (presumably upon reading the explanation) changed it to "yes". The Defence submits that the Registry should be ordered to contact those individuals in order to clarify the difference between disclosure of their identity to the public and disclosure of their identity to the Defence and to see if that has a bearing on the individual's preference. This in turn would allow the Single Judge to make a more informed decision as to whether or not their identities should be disclosed to the Defence.
11. In any event, the Single Judge will no doubt bear in mind the Appeals Chamber's ruling that the Chamber should also "consider, *inter alia*, whether the danger could be overcome by ruling that the information should be kept confidential between the parties. In making

¹³ For example, a/8392/11 (none), a/8393/11 (so that peace can continue), a/8394/11 (none), a/8395/11 (for fear or security threats), a/8396/11 (because of fear of security), a/8397/11 (ditto), a/8399/11 (for fear of being threatened and trauma), a/8019/11 (none), a/8403/11 (disclosure would put family at risk), a/8408/11 (fear of security), a/8409/11 (fear of security threats), a/8420/11 (fear of security and again being attacked), a/8423/11 (none), a/8424/11 (none), a/8428/11 (fear of security threats), a/8430/11 (none), a/8431/11 (none), a/8432/11 (because of fear of security threat), a/8433/11 (none), a/8436/11 (none), a/8442/11 (none), a/2080/10 (my security reasons), a/8337/11 (so that I don't have any security), a/8338/11 (none), a/8349/11 (for his personal security), a/8352/11 (for her personal security), a/8355/11 (so that I cannot back again to the same pain), a/8356/11 (none), a/8365/11 (fear of security risk), a/8372/11 (so they cannot be enemies again), a/8373/11 (fear of security), a/8374/11 (because of security), a/8379/11 (none), a/8380/11 (none), a/8381/11 (none), a/8382/11 (none), a/8383/11 (none), a/8386/11 (because of fear of threats), and a/8387/11 (fear of security).

¹⁴ *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-475, Appeals Chamber: 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', 13 May 2008 ("**Katanga Appeals Decision on Redactions**"), paras 60 and 71.

this assessment, the circumstances of the individual suspect should be considered, including, *inter alia*, whether there are factors indicating that he or she may pass on the information to others or otherwise put an individual at risk by his or her actions”.¹⁵ In the present case, by virtue of the fact that the Pre-Trial Chamber issued summonses rather than arrest warrants, the Chamber has already made a determination that Mr. Ruto and Mr. Sang are not a risk to victims or witnesses, and that there is no danger that they might obstruct the investigations or court proceedings.¹⁶ Consequently, the victims are not objectively at any risk from the suspects and their identities should not be withheld.

Disclosure of Key Elements of Victims’ Applications to the Defence

12. In the Second Transmission of victims’ applications, the Defence has been precluded from being able to assess whether the criteria for participation were fulfilled due to the fact that in some instances, the location of the events was completely redacted,¹⁷ and in others, all information from the identity cards were redacted¹⁸ or unreadable¹⁹.
13. The Defence is fully cognizant of the Single Judge’s Decision in Relation to Victims’ Applications of 8 July 2011, in which the Single Judge rejected the Defence arguments concerning the prejudicial nature of the redactions in the application forms on the grounds that firstly, the redactions had not restricted the ability of the Defence to submit meaningful observations as to whether the criteria were fulfilled, and secondly, the redactions were the only available means to secure the protection of the applicants.²⁰
14. The Defence nonetheless respectfully submits that these findings can be distinguished from the current motion insofar as the redactions to the locations prevent the Defence from being able to ascertain whether the events occurred in the relevant geographic area, or whether the applicant was actually displaced from that area, and the redaction of the entire identity card precludes the Defence from being able to verify whether the applicant has submitted reliable supporting documents, and indeed, whether the events in the application relate to the applicant or a family member. As concerns the necessity of such redactions, in situations in which the provisions of the specific locality of the events would identify the applicants, the prejudice to the Defence could be remedied by

¹⁵ Katanga Appeals Decision on Redactions, para. 71.

¹⁶ *Prosecutor v. Ruto et al*, ICC-01/09-01/11-01, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 8 March 2011.

¹⁷ See, a/0275/10, a/0590/10, a/8329/11, a/8332/11, a/8337/11, a/8342/11, a/8351/11, a/8353/11, a/8355/11, a/8363/11, a/8369/11, a/8370/11, a/8374/11, a/8375/11, a/8376/11, a/8399/11, a/8400/11, a/8402/11, a/8419/11, a/8420/11, a/8423/11, and a/8437/11.

¹⁸ See, a/8394/11 and a/8405/11.

¹⁹ See, a/8331/11, a/8347/11, a/8356/11, a/8361/11, a/8365/11, a/8428/11, and a/8438/11.

²⁰ Decision in Relation to Victims’ Applications, para 23.

substituting this information with details concerning the larger geographic area. This measure would be consistent with the Chamber's duty to implement counter-balancing measures to ameliorate any prejudice which ensues from redactions.²¹

15. As regards redactions to the entire identity card, the Trial Chamber in the *Prosecutor v. Bemba* has recently instructed the Registry "to avoid redacting the entire document, when the redaction of specific information appearing on this document would be sufficient".²² The Trial Chamber further held that:

where the Chamber finds that an application is redacted to such an extent that the redactions prevent the parties from making any meaningful observations, it will defer the application concerned and order that unnecessary redactions be removed.²³

16. The Defence therefore requests the Single Judge to order the Registry to replace the redaction of entire locations with information concerning the general locality, and to reduce the level of redactions to the aforementioned applicants' identity cards.

Modalities of Participation

17. In its response of 3 June 2011 to the First Transmission, the Defence submitted that anonymous victims should be prohibited from tendering evidence or eliciting testimony, and makes the same submission herein. In a recent decision in the *Banda and Jerbo* case, the Trial Chamber confirmed that in line with the jurisprudence of the ICC prohibiting 'anonymous accusers', it would be inappropriate to allow anonymous victims to comment on evidential positions filed by the parties.²⁴
18. Consistent with this case law, it would also be inappropriate to allow any anonymous victims participating at the confirmation hearing to present submissions concerning the evidential foundation of the Prosecution case, or any Defence counter-evidence. If the Chamber is unwilling to make any distinction between anonymous and non-anonymous victims, then the injunction in article 68(3) that participation must not be prejudicial to the rights of the Defence requires the Chamber to prohibit *all* participating victims from presenting submissions concerning the evidential foundation of the Prosecution case, or any Defence counter-evidence.

²¹ *Prosecutor v. Lubanga*, ICC-01/04-01/06-108, ICC-01/04-01/06-108-Corr, Pre-Trial Chamber I: Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Statute, 19 May 2006 and, the *Prosecutor v. Lubanga*, Pre-Trial Chamber I: Decision on the final system of disclosure and the establishment of a timetable, ICC-01/04-01/06-102, 15 May 2006.

²² *Prosecutor v. Bemba*, Decision on 401 applications by victims to participate in the proceedings and setting a final deadline for the submission of new victims' applications to the Registry, 8 July 2011, para 33.

²³ *Id.*, para 34.

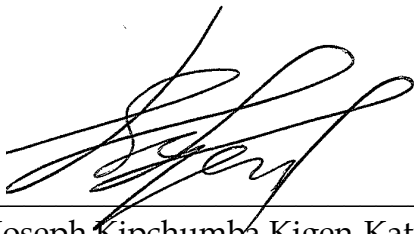
²⁴ *Prosecutor v. Banda and Jerbo*, ICC-02/05-03/09-165, Order requesting observations from the legal representatives on the agreement as to evidence pursuant to Rule 69 of the Rules of Procedure and Evidence, 22 June 2011, paras 4-6.

III. Conclusion & Request for Relief

19. The Defence acknowledges that the Single Judge has deferred making a decision on several requests made by the Defence in its response to the First Transmission of applications.²⁵ The Defence reserves its right to request the same in relation to the applications in the Second Transmission at the appropriate time.
20. For the reasons set out above, and as detailed in the confidential annex A, the Defence for Mr. Ruto and Mr. Sang request the Honourable Single Judge to dismiss the request of all applicants to participate in the proceedings for failing to meet the established criteria.
21. In the alternative, the Defence requests the Single Judge to order the Registry to:
 - i. Disclose unredacted versions all 105 of the applications to the Prosecutor;
 - ii. Disclose to the Defence the unredacted versions of the applications in which the applicants have either not requested to withhold their identity from the parties, or have not provided any objective justification for the non-disclosure of their identity to the Defence on a confidential basis; and
 - iii. Submit less redacted versions of the applications referred to at paras 12 to 16 *infra*.
22. The Defence also requests the Single Judge to:
 - iv. Verify whether the redactions are objectively justified for the remaining applications; and
 - v. Adopt the same modalities of participation set out in the *Fourth Decision on Victim Participation* in the *Bemba* case,²⁶ with the additional caveat that participating victims will not be permitted to tender evidence, question witnesses, or submit observations concerning the evidential foundation of the Prosecution or Defence cases.

²⁵ Decision in Relation to Victims' Applications, para. 7 (deferring a decision on whether the Registry should disclose to the Defence the unredacted version of the applications of victims who are also witnesses in the present case, ... and in the case of victims who are anonymous witnesses, the Prosecutor be ordered to provide the Defence with a list, which cross-references the pseudonyms of anonymous witnesses with the application number of related applicants).

²⁶ *Prosecutor v. Bemba*, ICC-01/05-01/08-320, Fourth Decision on Victims' Participation, 12 December 2008, paras 101-110 (in summary, legal representatives of the victims would have the right to: attend public parts of the confirmation hearing; explain the reasons for their participation in a brief opening and closing statement at the hearing; all public (but not confidential or ex parte) decisions and documents; all public (but not confidential) evidence disclosed by the Prosecutor and the Defence which is contained in the record of the case effective as the date of their recognition to participate in the proceedings; access to public transcripts; notification of all public filings and decisions; timely notification of the date of the confirmation hearing, any postponement thereof, and the date of the delivery of the confirmation decision; make succinct oral submissions on issues of law and fact raised during the confirmation hearing, subject to several criteria; make succinct written submissions to specific issues of law and fact, subject to several criteria. Legal representatives must also have respect for professional secrecy and confidentiality as enshrined in article 8 of the Code of Professional Conduct.).



Joseph Kipchumba Kigen-Katwa

On behalf of Mr. Joshua Arap Sang and Mr. William Samoei Ruto

Dated this 11 July 2011

In Nairobi, Kenya