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

Date: 16 July 2013

TRIAL CHAMBER V(A)

Before: Judge Chile Eboe-Osuji, Presiding
Judge Olga Herrera Carbuccion
Judge Robert Fremr

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

***THE PROSECUTOR v.
WILLIAM SAMOEI RUTO AND JOSHUA ARAP SANG***

**Public
with Confidential Annex A**

**Sang Defence Response to Prosecution Application to Disclose
Lesser Redacted Versions of Five Victims' Application Forms**

Source: Defence for Mr. Joshua Arap Sang

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

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Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

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1. On 5 July 2013, following an *inter partes* request (initiated on 30 May 2013) for the same, the prosecution sought relief from the Trial Chamber to disclose to the defence lesser redacted versions of victims' application forms relating to five prosecution witnesses: P-378, P-405, P-409, P-410 and P-487.¹ The prosecution has consulted with the Legal Representative for the Victims and they have come to agreement as to the extent that these materials may be disclosed to the defence.²
2. The defence supports the Application and submits that in the circumstances, there should be no bar to disclosure of the victims' application forms, especially as the identities of all five dual victim-witnesses have already been disclosed to the defence. The defence does not object, at this time, to the withholding of the contact information of these dual victim-witnesses.³
3. In its Application, the prosecution notes that the Sang defence has advised the prosecution that the material contained in the victims' application forms is "material to its preparations for trial", under Rule 77 of the Rules of Procedure and Evidence.⁴ While this is true, it sidesteps the fact that the defence also relied on Rule 76 in its *inter partes* requests to the prosecution and that the defence has maintained that the prosecution was obliged to disclose these application forms because they qualified as "prior statements" under Rule 76.⁵
4. In the *Lubanga* case, with respect to dual victim-witnesses, the prosecution averred that it treats this group of witnesses in the same way as all other witnesses in the case, particularly as it has in its possession the non-redacted versions of the application forms. It further indicated that these applications should be considered in the same way as other statements of the witnesses, and that they are covered by Rule 76(1).⁶ The Trial Chamber agreed, and the only

¹ *Prosecutor v. Ruto and Sang*, ICC-01/09-01/11-801, Prosecution application to disclose lesser redacted versions of five victims' application forms, 13 July 2013 ("Application").

² Application, para. 6 and *Ex Parte* Annex A.

³ Noting the Trial Chamber's decision in the case of *Prosecutor v. Kenyatta*, ICC-01/09-02/11-710, Order authorizing disclosure of lesser redacted versions of victims' applications, 2 April 2013, para. 4.

⁴ Application, para. 3.

⁵ See Confidential Annex A, email from Logan Hambrick to Cynthia Tai, dated 24 June 2013.

⁶ *Prosecutor v. Lubanga*, ICC-01-04/01-06-1637, Decision on the defence application for disclosure of victims applications, 21 January 2009, para. 12. This approach was also endorsed in *Prosecutor v. Bemba*, ICC-01/05-

caveat it noted was that the views of the victims' representatives should be sought, and any objection to disclosure brought to the attention of the Chamber.⁷ In the instant circumstances, the prosecution has sought such views from the CLR and there is no disagreement as to disclosure.

5. These victims' applications have been in the possession of the prosecution in an unredacted format for some time.⁸ The victims' application forms should have been disclosed by the prosecution to the defence once their status as dual victim-witnesses was confirmed, and certainly no later than their identities were disclosed to the defence.
6. The Sang defence is thus concerned that the prosecution has not acted in a diligent manner with respect to its Rule 76 disclosure obligations. It is only after several months of *inter partes* communications that the prosecution are seeking authorization from the Chamber to fulfil its long-standing disclosure obligations with respect to five trial witnesses. The defence does not know the degree of prejudice that may result, ie it is not yet in a position to know what discrepancies there may be between the prosecution's statements of the five witnesses as already disclosed, and the information provided by the victim-witnesses in their application forms, which may lead to additional investigation into the accounts of these dual victim-witnesses. This is particularly prejudicial because at least one of the victim-witnesses is slated to testify among the first ten trial witnesses.
7. Therefore, the Sang defence requests that the Trial Chamber, in addition to authorizing the disclosure of the lesser-redacted versions of the victims' application forms, make a finding that the prosecution is in breach of its Rule 76 obligations and that the prosecution desist from any similar future breach.

01/08-807-Corr, Decision on the participation of victims in the trial and on 86 applications by victims to participate in the proceedings, 12 July 2010, p. 25-26.

⁷ Ibid, para. 13.

⁸ However, the exact date and circumstances wherein the prosecution received the unredacted victims' application forms is unclear to the defence. The Pre-Trial Chamber's initial order was that both the prosecution and defence should receive redacted versions of the victims application forms. *Prosecutor v. Ruto, Kosgey and Sang*, ICC-01/09-01/11-17, First Decision on Victims' Participation in the Case, 30 March 2011, para. 16. The relevant victims' applications in redacted format were thus provided in *ex parte* annexes to the parties in ICC-01/09-01/11-142, 24 June 2011 and ICC-01/09-01/11-171, 8 July 2011.



Joseph Kipchumba Kigen-Katwa
On behalf of Joshua arap Sang
Dated this 16th day of July 2013
In Nairobi