

# Annex A

Confidential *Ex parte*  
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Registry

IN THE MATTER OF THE INTERNATIONAL CRIMINAL COURT  
IN THE MATTER OF PROPRIO MOTU INVESTIGATIONS BY THE PROSECUTOR OF  
THE ICC ON THE SITUATION IN KENYA UNDER ARTICLE 15 AND 54 OF THE ROME  
STATUTE ON THE ESTABLISHMENT OF THE ICC PURSUANT TO THE PRE-TRIAL  
CHAMBERS LEAVE GRANTED ON 31<sup>ST</sup> MARCH 2010

DATED 1<sup>ST</sup> DECEMBER 2010

*Original: English*

TO THE PRE-TRIAL CHAMBER II

MOST URGENT

*{Under Regulation 24(3) of the Registry}.*

BEFORE: Judge Ekaterina Trendafilova, Presiding Judge  
Judge Hans- Peter Kaul  
Judge Kuno Tarfusser

APPLICATION FOR LEAVE TO SUBMIT OBSERVATIONS PURSUANT TO RULE 103 OF  
THE RULES OF PROCEDURE AND EVIDENCE

Source: *Honourable William Ruto* of the Republic of Kenya,

*APPLICANT*

LEGAL REPRESENTATIVES FOR THE APPLICANT

1. MR. JOSEPH KIPCHUMBA KIGEN-KATWA *INSTRUCTED*
2. PROF. KITHURE A. KINDIKI *ASSISTING*

DOCUMENTS TO BE NOTIFIED IN ACCORDANCE WITH REGULATION 31 OF THE  
REGULATIONS OF THE COURT, TO:

Office of the Prosecutor  
(Mr. Louis Moreno Ocampo)

Legal Representatives of Victims

Unrepresented Victims

Victims Participation and Reparations  
Section

Office of the Public Counsel for Victims

## A) INTRODUCTION:

1. Pursuant to Rule 103 of the Rules of Procedure and Evidence of the International Criminal Court, *Hon William Ruto* through his chosen counsel *Joseph. K. Kigen-Katwa*, {instructed} and *Professor Kithure Kindiki* {assisting} requests to be granted leave to make oral and written observations of a most urgent nature regarding the Situation in Kenya and in particular the Post election Violence investigations
2. The Applicant proposes to demonstrate to the Pre-Trial Chamber (hereinafter *PTC II*) that there has been and continues to be the gross abuse of the mandate of the Prosecutor of the International Criminal Court (hereinafter *ICC*) with regard to investigations surrounding the Situation in Kenya, resulting in grave prejudice and possible infinite irredeemable damage to the Applicant.
3. The Applicant, the *Hon William Ruto* is a Kenyan national who has been mentioned adversely in the reports that were relied on by the Prosecutor to obtain authority to prosecute *suo motu* the Situation in Kenya, an authority granted by this Honourable Pre-Trial Chamber on 31<sup>st</sup> March 2010.
4. Further, the applicant, the *Hon William Ruto* has been the subject of interrogation by the Prosecutor at The Hague on 3<sup>rd</sup> to 7<sup>th</sup> November 2010 regarding the Situation in Kenya, purportedly under **Article 55(2)** of the Rome Statute on the Establishment of the *ICC*.

## B) JUSTIFICATION OF REQUEST FOR LEAVE TO MAKE SUBMISSIONS UNDER RULE 103

5. The Applicant is a suspect in relation to investigations and intended prosecutions in relation to the 2007-2008 Post Election Violence in Kenya for the following reason:-

- i) He was adversely mentioned in the reports of Commission of Inquiry into Post Election Violence (*C.I.P.E.V*) and in Kenya National Commission of Human Rights (*KNCHR*) which reports formed the basis of the Pre-Trial Chamber to authorize investigation on the situation in Kenya, and which reports the Prosecutor continues to rely heavily on and to defend.  
[Prosecutor's Application for authority to investigate Kenya, [ICC-01/09 dated 26<sup>th</sup> November 2009 ]
  - ii) With effect from 29<sup>th</sup> April 2010, the Prosecutor initiated correspondence with the Applicant culminating in a particular letter dated 1<sup>st</sup> November 2010 disclosing that the Applicant's scheduled appointment of 2<sup>nd</sup> November 2010 would proceed under **Article 55(2)**, which Article applies to interview of a suspect [See enclosure Page 98 to 147]
  - iii) On 4<sup>th</sup> November 2010, the Prosecutor informed the applicant, albeit unprocedurally at an interview at *The Hague* that he is a suspect [See enclosure Page 11 to 14]
6. That the *PTC II* having granted the Office of the Trial Prosecutor (hereinafter referred to as the *OTP*) leave on 31<sup>st</sup> March 2010 to investigate the Situation in Kenya, particularly on the Post Election Violence 2007/2008 has an interest in ensuring that these investigations are conducted properly, fairly, impartially and in accordance with the applicable law.
7. That the *ICC* and in this case the *PTC II* as the custodian and guarantor of the rights of all parties (witnesses, victims and suspects) has the duty to ensure that the investigative powers granted to the *OTP* are done lawfully and are not abused, or used for ulterior motives.

8. In the past, the courts have granted leave under Rule 103 inter-alia on the basis that an applicant can demonstrate that he intends to provide the court with an alternative view { *Prosecutor -vs- Omar H.A.A. Bashir( ICC-02/05-01/09-51)*}

The Applicant herein proposes to provide the court with alternative views of great value for the court considering that the Prosecutor's conduct on the situation in Kenya has in effect failed to investigate exonerating evidence in relation to the Applicant and also failed to afford the Applicant an opportunity to present such exonerating evidence as he has.

9. The Prosecutor has acted and continues to act unprofessionally, unprocedurally and unlawfully in disregarding of his mandate towards the Applicant in respect of the situation in Kenya on the 2007-2008 Post Election Violence.
10. The Prosecutor has publicly stated that he intends to seek indictments by 17<sup>th</sup> December 2010 against suspects on the Kenyan situation {*See enclosed verbatim quotations of his reports, Page 61 to 67 being summary of available Newspaper quotes and Page 68-97 being newspaper cuttings on available statements made by the Prosecutor*}. The Prosecutor stated on 3<sup>rd</sup> December 2010 at Nairobi Kenya that: "*... Before December 17, we will file before pre-Trial Chamber III of the International Criminal Court (ICC) two written application of around 80 pages each, summarizing the facts and analyzing the evidence collected...*"
11. This Honourable court is obliged to safeguard and uphold the integrity and credibility of ICC process
12. That notwithstanding repeated statements that the OTP has concluded investigations on the Situation in Kenya and particularly on the Post Elections

Violence of 2007-2008, the investigations in Kenya are so far manifestly ineffective, limited in scope, poorly directed, display lack of commitment to gather relevant information and evidence relating to the Situation in Kenya

### C) A SUMMARY OF ISSUES

Upon the grant of leave, the applicant through his chosen counsel intends to make detailed oral and written observations on the following issues:

13. This court has jurisdiction to entertain and determine this application for the reasons set out in the foregoing Paragraph "5" to "11" namely that the applicant is a suspect whose rights have been violated, the court is the guarantor and custodian of the rights of all parties {victims, witnesses and suspects} and that the court has a duty to protect and enforce the integrity and credibility of the *ICC* processes at all stages, and in this case as contemplated by **Articles 54, 55, and 58** of the **Rome Statute**.
14. That the Key Reports on post election violence particularly *CIPEV*) and the *KNCHR* relied on by the *OTP* to request for authority to investigate *suo motu* the situation in Kenya and particularly the 2007-2008 Post Election Violence are fatally flawed, having in respect to the Applicant breached fundamental substantive and procedural legal guarantees provided for under the **Rome Statute** and **Rules of Procedure and Evidence** made there under as follows:-
  - I. Having been adversely mentioned, none of the investigations leading to the prejudicial reports gave the Applicant an opportunity to be heard contrary to the principles of natural justice.
  - II. The two most relied on commissions reports namely the *CIPEV* and the *KNCHR* reports, denied the Applicant his statutory right to be heard in light of adverse allegations against him.

- III. None of the investigations leading to the reports afforded the Applicant the opportunity to meet his accusers and cross-examine them contrary to both statutory and natural justice principles.
- IV. In spite of the *CIPEV* inquiry being public and notwithstanding the public interest in it, the Commission conducted most of its proceedings *in-camera*, yet the *CIPEV* conclusions relied heavily on the *in-camera* proceedings, undermining the spirit of public and open inquiries.
- V. The *CIPEV* report maliciously and without cause, dishonestly alleged that the Applicant testified to the Commission, an allegation that is unbelievably and ridiculously false.
- VI. The *KNCHR* wholly assembled their evidence clandestinely and in secrecy defeating any credibility that would otherwise be attached to the report.
- VII. Both *CIPEV* and *KNCHR* reports cannot be the basis of any Criminal action or decision since the reports themselves acknowledge that the investigations in question were preliminary and inconclusive. See *CIPEV* report at page 17. *Enclosed herein and marked page 268, which states "... the evidence the Commission has gathered so far is not, in our assessment, sufficient to meet the threshold of proof required for criminal matters in this country: that it be "beyond reasonable doubt. It may even fall short of the proof required for international crimes against humanity..."*
- VIII. The *CIPEV* and the *KNCHR* reports acknowledged that their investigations were preliminary, inconclusive and were bedeviled by the lack of time and resources, and therefore recommended further and proper investigations to be carried out. These reports cannot, therefore, be a basis of any reasonable action or decision.

- IX. The **KNCHR** report is based on statements that were not made under oath or affirmation, and which were not subjected to cross-examination.
- X. The **KNCHR** chair is on record to have acknowledged that the Applicant and the other adversely mentioned parties were not given an opportunity prior to the adverse findings (*See enclosure, page 242 to 267, CIPEV report in-camera proceedings of 20<sup>th</sup> August 2008 at KICC.*

15. The credibility of the reports has subsequently been eroded upon damning revelations emerging that witnesses were compromised, induced and coached to implicate the Applicant especially **KNCHR**.
16. Despite the questionable integrity of the reports the prosecutor continues to defend and rely on the same. *{ See enclosure, Page 11 to 14 } in which the Prosecutor uses the said report to deem the Applicant a suspect.*
17. Contrary to the provisions of the **Rome Statute** requiring the Prosecutor to conduct his own independent, fair and impartial investigations, and in breach of the mandate given to the Prosecutor by this Chamber on 31<sup>st</sup> March 2010 as well as the **OTP's** own undertaking in the letter dated 7<sup>th</sup> September 2010, the investigations by the Prosecutor on the Situation in Kenya relating to the Post Election Violence of 2007-2008 are not independent as they are influenced by the aforesaid questionable reports( *See enclosures, Page 108*) for letter dated 7<sup>th</sup> September 2010, and Prosecutor's notice to Applicant that he is a suspect, *{ Page 11 to 14 of the enclosures }*
18. That the purported investigations by the Prosecutor are selective, presumptuous and calculated to lead to indictment of particular pre-determined persons, the Applicant

included. (See *inter-alia* enclosure Page 97A being the Prosecutor's verbatim speech made at Nairobi- Kenya, on 3<sup>rd</sup> December 2010, expressly stating that the Prosecutor had excluded some people and some circumstances from investigations.

19. That the investigations by the prosecutor on the Situation in Kenya and particularly the Post Election Violence of 2007-2008 are fundamentally flawed and constitute a great travesty of justice, particularly with regard to how the Prosecutor has treated the Applicant in particular:-

- a) The Prosecutor has deliberately failed to carry out any investigations on the circumstances with regard to the Applicant. This is in contravention of **Article 54(1)** of the **Rome Statute** which requires the prosecutor to investigate and consider both incriminating and exonerating evidence "*equally*". This failure is demonstrated by the Prosecutor's:-
  - i) Disregard, disinterest, and dismissal of information emanating from potential witnesses who admitted to having been coached induced and compromised to implicate the Applicant. {See *enclosures, page 13 to 29*}
  - ii) Further the Prosecutor has not only ignored the claims stated above but he has also neglected, or otherwise refused to investigate the veracity of these damning allegations and the extent and scope of the alleged coaching, inducement and compromise of witnesses to fabricate and generate false evidence in respect to the Applicant.
  - iii) The claims of coaching, inducement and compromise of witness ought to have been investigated. They are not unfounded as there is all possibility that a person whose sum total monthly income is **US £ 20.00** on average would be overwhelmed by offers including **US £ 2000.00** rent per month and a monthly stipend of *over* **US £ 1000.00** together with offer for relocation to

a developed country and free education for children. All these can be inducements enough to make such person to fabricate and generate false evidence.

b) The Prosecutor has denied the Applicant the opportunity to offer exonerating evidence by:-

- i) Not giving the Applicant prior notice before questioning as required by **Article 55(2) (a)**. The Prosecutor failed to issue a notice informing the Applicant that he is a suspect and affording him reasonable time to respond and with adequate particulars of the grounds to deem the Applicant a suspect
- ii) By generalizing the allegations against the Applicant and failing to particularize the same.
- iii) Failing to inform the Applicant that he was being treated as a suspect prior to being questioned and unfairly, unlawfully and unprocedurally ambushing the Applicant with this information during the interview on 4<sup>th</sup> November 2010. *{See enclosures Page 127, and page 11 to 14}*

c) The Prosecutor kept changing the Agenda of what he was expecting from the Applicant from April to November 2010 as evidenced by his contradictory and conflicting correspondence, to the Applicant. *{See enclosures, page 98 to 147 where the Prosecutor stated that he required of the Applicant to generally state what he knew of post election violence, then that he should explain his public comments, commissions, then that he needed not bother with any commission reports, state generally what he knows of post election violence, then that he is a suspect based on other commission reports }*

d) The Prosecutor stated in writing on 7<sup>th</sup> September 2010 that the Applicant did not need to respond to investigations conducted by various commissions, but reneged on this undertaking during the meeting of 4<sup>th</sup>

**November 2010** where he required the Applicant to respond to allegations against him contained in the reports of the same Commissions that were the subject of the letter dated **7<sup>th</sup> September 2010**. *{See Prosecutor's letter dated 7<sup>th</sup> September 2010 at page 108 of the enclosures and quotation of verbatim of verbatim interview of the Applicant, by the Prosecutor Page 11 to 14}*

- e) The Prosecutor pre-determined and or otherwise prematurely decided that the Applicant was amongst the persons to be held responsible for the Post Election Violence. This is demonstrated by:-
- i) Letters written by the Prosecutor to the Applicant as far back as **29<sup>th</sup> April 2010** before the Prosecutor effectively commenced or otherwise conducted independent investigations. *{See enclosures, Page 98, together with enclosures, page 99 to 147}*
  - ii) Concluding that he will prosecute two (2) to six (6) persons in respect of the situation in Kenya. *{See enclosures, page 61 to 62, and pages 68-97}*
  - iii) The manner in which the Applicant has been treated by the prosecutor amounts to a gross violation of **Article 66** of the **Rome Statute** which guarantees the rights to be presumed innocent until proven guilty.
- f) The Prosecutor is ostensibly influenced by extraneous and other ulterior motives in his decision to prosecute the Applicant on the Kenyan situation. This is evident from the Prosecutor public pronouncements to the effect that:-
- i) The **ICC** prosecutions are meant to ensure that the next general elections in Kenya in 2012 lead to "credible leader" being elected. *{See enclosures, page 63 and page 65, and pages 98 to 147}*

- ii) The purpose of the intended prosecution is to use the situation in Kenya as an example to other African countries and the rest of the world to end impunity. *{See enclosures Page 64 to 65 and page 98-147}*
  - iii) The indictments will set an example on how to manage election disputes in the electoral processes due in fifteen (15) electoral countries in Africa in the "next" two(2) years *{See page 61 to 67, and pages 98 to 147}*
- g) The Prosecutor has failed to conduct thorough impartial independent investigations on the situation in Kenya relating to 2007-2008 Post Election Violence in Kenya, and has instead chosen to rely on questionable reports particularly the report of KNCHR and CIPEV. This contravenes **Article 54 Rome Statute**. *(See enclosure page 11 to 14 at which the prosecutor informed that the Applicant he is a suspect on account of KNCHR and CIPEV reports)*
- h) The investigations by *OTP* on the situation in Kenya have not been nor are they likely to be conducted fairly, independently, meticulously and impartially and unless the court intervenes they will not lead to culpable parties being presented to the *ICC* court (unless by reason of chance coincidence)
- i) The prosecutor has adopted the methodology used by *CIPEV,KNCHR* and other reports, that is assuming that certain people are excluded from investigations contrary to:-
  - i. **Article 27** of the **Rome Statute** which provides that a person's official capacity is irrelevant with regard to the applicability of the jurisdiction of the Court including investigations for crimes.
  - ii. **Article 28** of the **Rome Statute** providing that commanders and superiors attract specific and higher responsibility.

*See inter-alia page 97A of the enclosures, being the Prosecutor's verbatim speech made at Nairobi Kenya on 3<sup>rd</sup> December 2010 whereby some persons and circumstances were excluded from the Prosecutor's investigative preview from the scope of his investigations.*

- j) In the meeting of 4<sup>th</sup> November 2010 which turned out to be an interview under **Article 55(2)** the Prosecutor made general allegations that he had reasons to believe that the Applicant has committed crimes in respect to the situation in Kenya {*See enclosures, Page 11 to 14*} but failed to ask any relevant question relating to the allegations against the Applicant, and instead dwelt entirely on asking on irrelevancies and trivializations.
- k) The prosecution kept shifting and altering his requirements from the Applicant, either out of lack of clarity on his [Prosecutor's] part or otherwise owing to a design to confuse and mislead the Applicant so gravely as not to be able to respond to the prosecutor's intended ultimate application for indictment as contemplated by **Article 54, 55, and 58** of the **Rome Statute**. {*See enclosures page 98 to 147*}
- l) The Prosecutor was not forthright when he indicated in his letter dated 7<sup>th</sup> September 2010 that the Applicant needed provide specific responses to the allegations in the investigative reports conducted by various commissions. This is despite the a fact that it is clear that the Prosecutor all along intended to rely on the Commissions reports, in particular **CIPEV** and **KNCHR** reports as evidenced in the interview of 3<sup>rd</sup> to 7<sup>th</sup> November 2010 . {*See enclosure page 108, letter dated 7<sup>th</sup> September 2010 and information that Applicant is a suspect, Page 11 to 14*}

- m) The prosecutor was not candid when he informed the Applicant that he was a suspect culpable for incitement and supporting persons attacking PNU supporters on the basis of *CIPEV* and *KNCHR* reports in the interview of 3<sup>rd</sup> to 7<sup>th</sup> November, {See page 11 to 14 of the enclosures} and thereafter informing Applicant that he is a suspect {page 108} being a letter dated 7<sup>th</sup> September 2010 and thereafter electing not to pose any question in the course of the interview to the Applicant on any one single allegation of incitement and for supporting persons attacking PNU supporters, yet the Prosecutor's office had that information.
- n) The Prosecution used mischief in confirming to the Applicant through letters dated 7<sup>th</sup> September 2010 and 8<sup>th</sup> October 2010 that they (Prosecutor and Applicant) could meet on 3<sup>rd</sup> to 7<sup>th</sup> November 2010 at *The Hague* so as to provide to the Applicant an opportunity to speak to the prosecutor and more particularly so that the Prosecutor could get information regarding post election violence and any other matter the Applicant could deem necessary.
- Upon the Applicant arriving at *The Hague* the Prosecutor changed the agenda so that the Applicant was confronted with the task of participating in an interview he had not been given Notice of, and having to labour under the disadvantage of being deemed a suspect without adequate notice as to time, and reasonable particulars as to afford him a chance to respond and possibly dispel the Prosecutors view that he (Applicant) was a suspect. {See pages 108, 114 and page 11 to 14 of the enclosures}
- o) That the **Rome Statute** under **Article 54(1) (a)** on the establishment of the ICC demands that the *OTP* shall investigate both incriminating and exonerating evidence equally. However, the Prosecutor herein has deliberately failed to carry out any investigations on the exonerating evidence and circumstances in regard to the Applicant. Further he has

denied the Applicant an opportunity to offer exonerating evidence by not giving him prior notice by:-

- I. Generalizing the allegations against the Applicant.  
*{See correspondence and information, Page 11 to 14 and page 98 to 147}*
- II. Failing to particularize the allegations upon which he proposes to indict the Applicant. *{See page 11 to 14}*
- III. Failing to inform the Applicant that he was being treated as a suspect prior to being questioned and unfairly, unlawfully and unprocedurally withholding this information and only disclosing the same during the questioning.
- IV. Failing to inform the Applicant prior to being questioned that there are grounds to believe that he has committed a crime within the jurisdiction of the Court, with adequate particulars of the same grounds.

p) That the investigation by the **OTP** on the situation in Kenya and particularly the Post Election Violence of 2007-2008 have not been and are likely not to be conducted independently or impartially and they have been and are being conducted in a manner in which, in the circumstances, is inconsistent with bringing to justice those who bear the greatest responsibility for the possible commissions of crimes against humanities in Kenya.

q) That it is not in the interest of justice that the Prosecutor proceeds with the investigations in the manner stated herein in respect to the Situation in Kenya and particularly the Post Election Violence of 2007-2008.

#### D) THE URGENCY

20. Unless this Honourable Pre-Trial Chamber grants leave and the specific prayers herein below, the applicant stands to suffer irreparable and infinite injustice should the prosecutor decide to present a case involving the applicant. The Prosecutor has stated that he will lodge his application under **Article 58** in the "*next few days*" and more particularly that he intends to apply for summons to appear or warrant of arrest on or before **17<sup>th</sup> December 2010**. *{See enclosures, Page 97A being the Prosecutor's verbatim speech of 3<sup>rd</sup> December 2010 at Nairobi Kenya}*

#### E) REASONS WHEREFORE

It is in the interest of justice:-

21. That the Court determines that no summons or warrants of arrest shall issue in respect to the Applicant before the Applicant has been heard on the issues raised herein.
22. That the Applicant be granted leave and be heard on the above observations before the Prosecutor is heard on an application for summons and warrants of arrest.
23. In the alternative and without Prejudice the Prosecutor be restrained from seeking any orders for summons or warrants before; he [Prosecutor] shall have given the Applicant an adequate and competent notice informing him that he is a suspect and the grounds for belief under **Article 55 (2)**; And before the prosecutor shall have investigated exonerating evidence in regard to the Applicant under **Article 54**. And before he shall have afforded the Applicant an opportunity to be heard on such concise facts constituting a crime contemplated by **Article 58(2)**, the burden of proof being placed on the Prosecutor as an officer of the Honourable Court to proof compliance with these and all relevant provisions designed to balance the rights of all parties including suspects.

**F) LEVEL OF CONFIDENTIALITY**

**Under Regulation 24(2) of the Regulations of the Registry, and regulation 23 (1) of the Regulations of the Court, and**

**Article 55(2) and 58 of the Rome Statute**

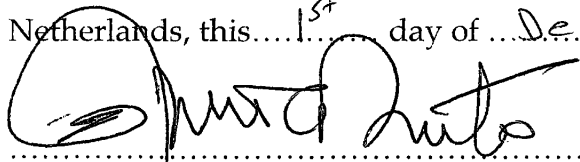
The Applicant does not seek any confidentiality on this Application and the enclosures thereto.

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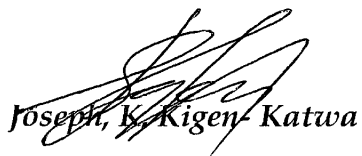
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**DATED AND SIGNED IN NAIROBI THIS..... DAY OF ..... 2010**

Filed at the ICC Registry of the International Criminal Court at The Hague, the  
Netherlands, this....1<sup>st</sup>... day of ...Dec..... 2010



*The Hon William Ruto*



*Joseph K. Kigeny Katwa*

**Counsel for the Applicant**

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