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**International
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Court**



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PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF THE PROSECUTOR v. FRANCIS KIRIMI MUTHAURA,
UHURU MUIGAI KENYATTA AND MOHAMMED HUSSEIN ALI**

PUBLIC

Prosecution's Application for Extension of Time Limit for Disclosure

Source: Office of the Prosecutor

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

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Other

1. The Prosecution informs the Chamber that it is working to comply with the “Second Disclosure Decision” adopted on 20 April 2011. However, the Prosecution proposes some adjustments, which are consistent with the time frame adopted by the “First Disclosure Decision” on 7 April 2011. These proposals will better respect the Prosecution’s right to a fair trial, including the right to most efficiently and effectively present its case.
2. In the Second Disclosure Decision, the Single Judge ordered the Prosecution *inter alia* to disclose and submit proposals for redaction no later than Friday, 3 June 2011 of the evidence that has been collected prior to 15 December 2010.
3. The Second Disclosure Decision requires the Prosecution to disclose 88% of its evidence 77 days in advance of the deadline originally established by the first disclosure decision. The Second Disclosure Decision was based in a distinction of the information collected during three periods of the investigation. The Single Judge did not realize that almost the totality of the information was collected during the first period, until 15 of December 2010. Until such day the Prosecution collected 88% of the total of the information collected, a negligible amount or 0.002% was collected between 15 December 2010 and 31 March 2011 and 12% has been collected since 31 March 2011.¹
4. Additionally, because the current security situation in Kenya, the decision imposes the need to heavily redact the evidence to be disclosed, excluding a substantial proportion of its incriminating value. It is unfair and unnecessary to impose to the Prosecution that time and resource-intensive work on redactions if it is possible that lesser remedies would soon be available. In agreement with the Kenyan national authorities the Prosecution is planning a mission to Kenya to reevaluate that

¹These numbers are mere estimates which may change due to a number of factors, including the ongoing review of evidence collected in the case.

country's national protection program. Based on information it receives during the mission, the Prosecution could reconsider the need to redact information.

5. As a consequence, the Prosecution requests to disclose the witnesses statements collected that require redactions after a proper reevaluation of the security in Kenya. It will do it within the original deadline established by the Chamber and in accordance with the Statute. Permitting disclosure within the Chamber's original deadline in the First Disclosure Decision will protect the Prosecution's right to a fair trial, it will reduce an extremely intensive work for the Chamber and the Prosecution that could be unnecessary and will allow the Prosecutor to present the evidence required for the confirmation of the charges without exposing other witnesses whose evidence could be unnecessary to meet the standard at this stage.

Background

6. On 8 March 2011, Pre-Trial Chamber II (the "Chamber"), by majority, decided to summon Francis Kirimi Muthaura ("Muthaura"), Uhuru Muigai Kenyatta ("Kenyatta") and Mohammed Hussein Ali ("Ali") (collectively, the "suspects") to appear before it.² Pursuant to this decision, the suspects voluntarily appeared before the Court at the initial appearance hearing held on 8 April 2011.³
7. On 7 April 2011, the Single Judge rendered the "Decision Setting the Regime for Evidence Disclosure and Other Related Matters" (the "First Disclosure Decision") in which she ordered the parties "to submit the evidence [for disclosure] in due time",⁴ while encouraging them "to fulfil their disclosure obligations as soon as practicable

²Pre-Trial Chamber II, "Decision on the Prosecutor's Application for Summons to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali ", ICC-01/09-02/11-1.

³ ICC-01/09-02/11-T-1-ENG.

⁴ ICC-01/09-02/11-48, p. 11.

and not only on the date when the deadline as provided by the statutory documents expires”.⁵

8. At a status conference held at the request of the Single Judge on 18 April 2011, the Prosecution *inter alia* provided the Chamber with estimates of the following: (i) the number of witnesses it intends to call at the confirmation hearing, including the number of prior statements by these witnesses; (ii) the number of documents which contain information falling within the meaning of Rule 77 of the Rules; (iii) the number of documents for which redactions will be requested; and (iv) the number of documents obtained pursuant to Articles 54(3)(e), 72 and 93(8) of the Rome Statute that contain exculpatory information under Article 67(2).⁶
9. During the status conference, the Prosecution also informed the Chamber that it intends to request that protective measures for victims, witnesses and other persons at risk be put in place prior to disclosure, and has been taking steps to minimize risk in this regard.⁷

The Second Disclosure Decision

10. On 20 April 2011, the Single Judge issued the “Decision on the ‘Prosecution’s application requesting disclosure after a final resolution of the Government of Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure Between the Parties” (the “Second Disclosure Decision”) in which she prescribed various time limits, the earliest being 3 June 2011, for the disclosure of evidence to the Defence *based on the date the evidence that was collected*.⁸

⁵ *Ibid.*, para. 11.

⁶ ICC-01/09-02/11-T-2-ENG.

⁷ ICC-01/09-02/11-T-2-ENG, pages 16-17.

⁸ ICC-01/09-02/11-64.

11. In the Second Disclosure Decision, the Single Judge also ordered the Prosecution *inter alia* “to submit properly justified proposals for redactions, if any, with respect to the evidence that has been collected prior to 15 December 2010, no later than Friday, 3 June 2011.”⁹ According to the Single Judge, the material collected prior to 15 December 2010 “has been in [the Prosecution’s] domain for sufficient time for him to be able to disclose to the Defence or to request redactions, if need be, within a short period of time.”¹⁰

Unfair Burden Placed on Prosecution

12. The new disclosure calendar affect the Prosecution’s right to a fair trial in its preparation for the confirmation of charges hearing:

- a. It requires the Prosecution to review the bulk of its evidence for redaction purposes in a relatively short period of time and months before the legal deadline.
- b. It also forces the Prosecution to decide on the evidence it intends to rely on at the hearing during a period when it cannot conduct new investigations.
- c. Additionally the Prosecution has to decide on redactions before the protection concerns of its witnesses and others at risk on account of their testimony have been adequately addressed in accordance with the Statute.

Factual basis

13. The Prosecution draws the attention of the Chamber to the number of documents relevant to the case against the suspects that were collected in the three periods identified in the Second Disclosure Decision.

⁹ICC-01/09-02/11-64, p. 11.

¹⁰*Id.*, para. 17.

14. The Prosecution has collected a rough total of 1,026 documents (constituting 17,697 pages) relevant to the case against the suspects to date. Of these:
- a. 981 documents (constituting 15,512 pages), representing 88 per cent of the total, were collected prior to 15 December 2010
 - b. 6 documents (constituting 40 pages) were collected between 15 December 2010 and 31 March 2011
 - c. 39 documents (constituting approximately 2,145 pages) have been collected since 31 March 2011.¹¹
15. At the status conference of 18 April 2011, the Prosecution informed the Chamber that it estimates that it will disclose approximately 542 documents in redacted form, constituting approximately 9,400 pages.¹² Of these, only approximately 40 documents, constituting 2,167 pages, were collected after 15 December 2010.
16. Accordingly, by the Second Disclosure Decision, the Prosecution is required to review, by 3 June 2011, 502 documents, constituting 7,230 pages or nearly 77 per cent of the total number of documents to be disclosed in redacted form.
17. The Prosecution observes that in order for it to submit properly justified proposals for redactions, it must base such proposals not on circumstances prevailing at the time the material in question was collected, but on currently prevailing circumstances vis-à-vis the protection of victims and witnesses. Hence, while the Prosecution can be expected to have reviewed the evidence relied on in its application for summonses to appear for the suspects, it cannot reasonably be expected to have prepared in advance the redactions to be sought for disclosure

¹¹These numbers are mere estimates which may change due to a number of factors, including the ongoing review of evidence collected in the case.

¹²ICC-01/09-02/11-T-2-ENG, page 16.

purposes given the volatile security climate. Such redactions can only properly be sought after a thorough assessment of the security situation that currently exists, and in particular relation to victims and witnesses (with regard to who they are, where they live, and the predominant political or other influences within their communities) and the availability of other protective measures.

18. These determinations are themselves moderately labour and time intensive. Having made them, if it is determined that any disclosure of identity will create a foreseeable risk that cannot be managed in time by protective measures, the Prosecution must determine whether and what redactions can be made that will enable disclosure without jeopardy to witnesses. This highly labour and time intensive exercise is undertaken to eliminate not just immediate identifying information, such as names and addresses, but also other bits of information that could enable a knowledgeable reader to identify the witness or misidentify another person as the witness.

Submissions

19. The Prosecution assures the Chamber that it is making every effort to comply with the First and Second Disclosure Decisions. Accordingly the Prosecution will disclose to the suspects all materials collected before 15 December 2011 for which no redaction is needed. However it will be impossible to disclose before the original deadline items of evidence for which redactions will be requested.
20. The Prosecution seeks to maintain the deadline established in the First Disclosure Decision, and review the time limits prescribed in the Second Disclosure Decision pursuant to Regulation 35 of the Regulations of the Court. Keeping the original deadline will allow the Prosecution to fully comply with all statutorily imposed deadlines for disclosure.

21. Maintaining the deadlines established by the First Disclosure decision is being sought on two main grounds: (i) the new and unexpected prescribed disclosure calendar affect the Prosecution right to a fair trial; and (ii) given the protection concerns of victims and witnesses in this case, the disclosure calendar places undue reliance on redactions over and above other possible measures to address the concerns.
22. The new time limits for the submission of the redaction proposals do not take into account other steps that are being taken by the Prosecution to ensure the safety and protection of victims and witnesses. While the Prosecution agrees that these steps can be taken in parallel with the redaction of documents, it submits the following: (i) the redaction of vast amounts of documents is highly labour intensive and time consuming; (ii) the utility of heavily redacted documents to the Defence is doubtful;¹³ (iii) the disclosure of inadequately redacted documents may unduly expose unprotected witnesses; and (iv) the steps being taken by the Prosecution for the protection of victims and witnesses may render certain redactions unnecessary.
23. The Prosecution submits that the request to maintain the original deadline is not prejudicial to the Defence as it will disclose all evidence the Defence is entitled to receive as soon as practicable and within the statutorily imposed deadline.

Legal Basis

24. The Prosecution submits that in accordance with the Statute it has a right to a fair trial. "Fairness" within the terms of Article 82(1)(d) incorporates fairness towards the accused, the victims and the Prosecution, and include pre trial proceedings.¹⁴ It

¹³This much was acknowledged by several of the Defence teams at the two status conferences held on 18 April 2011. See ICC-01/09-01/11-T-2-ENG, pages 17-20; ICC-01/09-02/11-T-2-ENG, pages 20-21 and 23.

¹⁴ICC-01/04-141, para. 48; ICC-02/04-01/05-212, paras. 10-11; ICC-01/04-135-tEN, para. 38. Fairness has also been held to include respect for the principles of equality and adversarial proceedings.

requires that the procedural and substantive rights and obligations of all participants be respected.¹⁵ Fairness has also been linked to the ability of a party to present its case.¹⁶ In particular, that “means that the Prosecutor must be able to exercise the powers and fulfill the duties listed in Article 54”.¹⁷

25. In *Lubanga*, Trial Chamber I granted a request for extension of the time limit for disclosure prior to the commencement of trial in accordance with Regulation 35.¹⁸ In that case, the Prosecution had sought an extension on the basis that the security situation in the region affected its ability to comply with the deadline for the disclosure of some categories of evidence.¹⁹ In an oral decision, the Trial Chamber granted a six-week extension for the disclosure of items of evidence concerning witnesses who had been referred to the Victims and Witnesses Unit (“VWU”).

26. Prior to the implementation of adequate protective measures, the Prosecution will have to seek heavy redactions to the evidence to be disclosed. The Defence has already expressed concerns as to the utility of heavily redacted materials.²⁰ In practice, moreover, such material seems to be accorded lesser probative value than unredacted materials affecting the right of the Prosecution to present its case affectively.

¹⁵ *Ibid.*

¹⁶ ICC-02/04-01/05-90-US-Exp (reclassified pursuant to ICC-02/04-01/05-135), para. 24.

¹⁷ ICC-01/04-135-tEN, paras. 38-39. In *Prosecutor v. Zigiranyirazo*, the Trial Chamber of the International Criminal Tribunal for Rwanda (“ICTR”) noted, “[w]hile the Chamber must be diligent in ensuring that the accused is not deprived of his rights, the Prosecution must also not be unduly hampered in the presentation of its case.” See *Prosecutor v. Zigiranyirazo*, Decision on the Prosecution Joint Motion for Re-Opening its Case and for Reconsideration of the 31 January 2006 Decision on the Hearing of Witness Michel Bagaragaza via Video-Link, Case No. ICTR-2001-73-T, T. Ch. III, 16 November 2006, para. 18. See also *Prosecutor v. Karemera et al.*, Decision on Severance of Andre Rwamakuba and Amendments of the Indictment, Case No. ICTR-98-44-PT, T. Ch. III, 7 December 2004, para. 26.

¹⁸ ICC-01/04-01/06-T-65-ENG, pages 10-11.

¹⁹ ICC-01/04-01/06-1073, paras. 6-7.

²⁰ ICC-01/09-02/11-T-2-ENG, pages 20-21 and 23.

Redactions are labour intense and are not the only measure to resolve the security concerns

27. The Prosecution notes that while the redaction of information for the protection of persons at risk is permissible under Rule 81(4), whether particular proposed redactions should be requested requires careful and knowledgeable assessment by the Prosecution of every word in a document. In the redaction process, close reading is essential. Redaction is not simply the blacking out of names and addresses. It may also be excluding seemingly innocuous facts that would enable an informed reader to identify a prospective witness. For example, an assertion in a statement that the witness attended a meeting with a suspect may or may not need to be redacted depending on the number of persons present at the meeting; if there were but a handful, reference to the meeting is dangerous, while the presence of 100 other persons makes disclosure of the statement less risky. A statement that the witness observed an event from his kitchen window would have to be redacted. Similarly, it may be necessary to redact the name of the hospital where the witness received treatment for a particular type of injury, since knowing which hospital treated the witness might enable the reader to investigate the witness's identity.

28. Whether requested redactions should be authorised then requires a second careful assessment by the Pre-Trial Chamber on a redaction-by-redaction basis, balancing the various interests at stake.²¹ One of the factors to be considered by the Chamber in determining whether to accept redaction proposals is whether an alternative protective measure short of redaction is available and feasible in the circumstances.²² The Prosecution is considering whether such less restrictive protective measures are available and feasible for its witnesses and then to seek redactions only where there are no alternative measures short of redaction.

²¹ICC-01/04-01/07-475, OA, para. 66.

²²*Id.*, para. 72.

29. Pursuant to Articles 54(3)(f) and 68(1), the Prosecution has taken steps to address protection concerns, including by minimizing contact with persons within Kenya and referring witnesses for protection to the VWU. The VWU accepted some for inclusion in the ICC Protection Program ("ICCPP"). Some witnesses and their immediate family members were relocated to more secure locations outside of Kenya. The Prosecution is also currently assessing other measures that can be put in place to protect other persons at risk, including the possibility to rely in the Kenya government. Because of the disruption of the life of the witnesses and their family and the cost of protective measures the Prosecution is reluctant to recommend a full protection program for all its future witnesses, and thus must make and continually review individualized assessments to determine if lesser measures can provide sufficient protection.
30. The Prosecution submits that in view of the steps it is currently taking to ensure that measures are put in place for the protection of witnesses, it is premature to decide immediately on what redactions are strictly necessary for the purpose of the confirmation hearing. The jurisprudence of the Appeals Chamber favours a phased approach to the seeking of redactions such as is proposed in this Application.
31. Therefore, the Prosecution does not want to expend the considerable effort and time to review the huge bulk of its materials, determine what snippets must be redacted to ensure that knowledgeable persons may identify (correctly or incorrectly) Prosecution witnesses, and redact with sufficient explanation that the Chamber will accept the proposals. Such an exercise would be a waste of that time and effort if the Prosecution will have concluded that there is no foreseeable risk that cannot be managed. The extension sought will give the Prosecution adequate time to ensure that it seeks only redactions which are appropriate and necessary.

Relief Sought

32. In light of the foregoing, the Prosecution requests the Chamber to authorize the disclosure of the witnesses statements collected that require redactions after a proper reevaluation of the security in Kenya within the time frame adopted in the First Disclosure Decision.

33. The Prosecution will disclose other evidence in accordance with the Second Disclosure Decision. The Prosecution undertakes to submit proposals for redactions in two stages, the first group on 24 June and the second group on 29 July 2011.



Luis Moreno-Ocampo
Prosecutor

Dated this 2nd day of May 2011
At The Hague, The Netherlands