

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 23 May 2011

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. WILLIAM SAMOEI RUTO, HENRY
KIPRONO KOSGEY AND JOSHUA ARAP SANG**

Public redacted version of

**Prosecution's First Application Pursuant to Rule 81(2) and Rule 81(4) for Redactions
to Statements of Witnesses and Related Materials to Be Relied Upon at the
Confirmation Hearing**

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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**Unrepresented Applicants for
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**Victims Participation and Reparations
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Other

1. The Prosecution hereby submits its first application for redactions, pertaining to evidence on which the Prosecution intends to rely for the purposes of the confirmation hearing and which was collected prior to 15 December 2010.

I. Procedural History

2. On 7 April 2011, the Single Judge rendered the “Decision Setting the Regime for Evidence Disclosure and Other Related Matters” (the “First Decision”), establishing the modalities by which the parties would execute disclosure.¹
3. 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 Decision”).² In the Second Decision, the Single Judge ordered that, *inter alia*, the Prosecution shall, by 13 May 2011: (i) disclose to the Defence any evidence collected prior to 15 December 2010 on which he intends to rely for the purposes of the confirmation hearing and for which no redaction is needed; and (ii) submit to the Chamber properly justified proposals for redactions with respect to the evidence collected prior to 15 December 2010.³
4. On 2 May 2011, the Prosecution filed an “Application for Extension of Time Limit for Disclosure”,⁴ and the Chamber consequently granted the Prosecution until 23 May 2011 to make this first submission of evidence and request for redactions.⁵

¹ ICC-01/09-01/11-44.

² ICC-01/09-01/11-62.

³ ICC-01/09-01/11-62 para. 17.

⁴ ICC-01/09-01/11-77.

⁵ “Decision on the ‘Prosecution’s Application for Extension of Time Limit for Disclosure’” (“the Third Decision”), ICC-01/09-01/11-82.

5. In compliance with the Second and Third Decisions, the Prosecution disclosed to the Defence on Monday, 9 May 2011, 58 documents for which no redactions were required.⁶ On 23 May 2011, the Prosecution disclosed to the Defence an additional 7 documents on which the Prosecution intends to rely for the purposes of the confirmation hearing, and 34 documents which, pursuant to Rule 77, constitute books, documents, photographs and other tangible objects in the possession or control of the Prosecutor which are intended to be used as evidence for the confirmation hearing. The Prosecution has attached to this Application the documents related to this second disclosure, specifically: (i) a list of evidence that identifies recipients for each evidentiary item and reflects the access and level of confidentiality of each item, and (ii) as to the 7 documents on which the Prosecution intends to rely for the confirmation hearing, an analysis of each piece of evidence reflecting its relevance.
6. By this Application, the Prosecution proposes redactions to material that it intends to rely upon at the confirmation hearing, and which was collected prior to 15 December 2010.
7. As required by the First Decision, this Application for redactions includes a list of evidence identifying the document number, disclosure classification, intended recipients, and proposed access and level of confidentiality of each document. Additionally, this Application is accompanied by illustrative charts identifying the legal and factual bases supporting the proposed redactions.
8. The Prosecution's proposes redactions pursuant to Rules 81(1), 81(2) and 81(4) of the Rules of Procedure and Evidence ("the Rules"). Following previous practice of the Court, yellow highlights identify redactions requested pursuant to Rule 81(1), blue

⁶ ICC-01/09-01/11-80, with public Annexes A and B. The OPCD received the disclosure on behalf of all three suspects.

highlights identify redactions requested pursuant to Rule 81(2), and red highlights identify redactions requested pursuant to Rule 81(4).

9. In addition, the Decisions require that, by 23 May 2011, the Prosecution permit the Defence to inspect, pursuant to Rule 77 of the Rules, any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor which are intended to be used as evidence for the purposes of the confirmation hearing or were obtained from or belonged to the suspects, and which were also collected prior to 15 December 2010. The Prosecution also proposes redactions to these materials. The Prosecution notes that it has no materials which were obtained from or belonged to the suspects.
10. The Prosecution seeks redactions both to the face of documents being disclosed, and to the metadata accompanying the documents. The Prosecution is providing the Chamber with separate charts justifying proposed redactions on the face of documents, and separate charts justifying redactions to the metadata of incriminating materials and Rule 77 materials.

II. Request for Confidentiality

11. The Prosecution requests that the unredacted version of this Application and its annexes be received by the Single Judge as “Confidential, *ex parte*, Prosecutor only” as these documents relate to material that is currently confidential and *ex parte* or contain information for which redactions are sought, the disclosure of which would defeat the purpose for which the redactions are requested. The Prosecution will provide a public redacted version of this filing shortly.
12. The Prosecution also requests that majority of these documents disclosed to the Defence on 23 May 2011 be treated as confidential, because they contain [REDACTED]

The

A. Legal foundation for the requested redactions

⁷ ICC-01/09-10/11-85, para. 18 (footnotes omitted).

of documents which constitute reports, memoranda or other internal documents prepared by the Prosecution in connection with the investigation or preparation of the case, pursuant to Rule 81(1).

16. The proposed redactions and their factual and legal basis justifications are set forth in the annexes to this Application. Justifications which require further explanation are discussed below.

B. Request for redactions pursuant to Rule 81(4)

Legal basis for redactions pursuant to Rule 81(4)

17. The non-disclosure of information for the protection of persons at risk is permissible pursuant to Rule 81(4) and applies to witnesses, members of witnesses' families and others at risk on account of the activities of the Court.⁸ The aim is to secure protection of individuals at risk.⁹ Any such non-disclosure should be authorized on the facts of an individual case and will require a careful assessment by the Pre-Trial Chamber on a case-by-case basis, balancing the various interests at stake.¹⁰
18. The Appeals Chamber has held that three of the most important considerations for authorising non-disclosure of the identity of a witness pursuant to Rule 81(4) are: the endangerment of the witness or of members of his or her family that the disclosure of the identity of the witness may cause; the necessity of the protective measure; and

⁸ *Prosecutor v. Lubanga*, Judgment on Appeal against First Redaction Decision, ICC-01/04-01/06-773 OA 5, 14 December 2006, para. 21

⁹ *Prosecutor v. Katanga*, Judgment on Prosecution's Appeal against the First Redaction Decision, ICC-01/04-01/07-475 OA, 13 May 2008, para 56

¹⁰ *Prosecutor v. Katanga*, Judgment on Prosecution's Appeal against the First Redaction Decision, ICC-01/04-01/07-475 OA, 13 May 2008, para. 66.

why the Pre-Trial Chamber considered that the measure would not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.¹¹

19. When evaluating requests for non-disclosure, the Pre-Trial Chamber should consider the following factors in relation to the alleged risk of danger:

- a) The alleged danger must involve an objectively justifiable risk to the safety of the person concerned.
- b) The risk must arise from disclosing the particular information to the Defence, as opposed to disclosing the information to the public at large. The Chamber should consider, *inter alia*, whether the danger could be overcome by ruling that the information should be kept confidential between the parties. In making this assessment, the circumstances of the individual suspect should be considered, including whether there are factors indicating that he or she may pass the information to others or otherwise put an individual at risk by his or her own actions.¹²
- c) If the Pre-Trial Chamber concludes that it has been demonstrated that the risk addressed above in fact exists, it should assess whether the proposed redactions could overcome or reduce the risk.¹³

¹¹ *Prosecutor v. Lubanga*, Judgment on Appeal against First Redaction Decision, ICC-01/04-01/06-773 OA5, 14. December 2006, para. 21; see also *Prosecutor v. Katanga*, Judgment on Prosecution's Appeal against the First Redaction Decision, ICC-01/04-01/07-475 OA, 13 May 2008, para. 67.

¹² Given that this "specific guidance" was provided "in absence of any specific factual application before it, what is said below is only by way of guidance which must be understood to be capable of being interpreted flexibly depending upon the specific circumstances of the particular application. *Prosecutor v. Katanga*, "Judgment on Prosecution's Appeal against the First Redaction Decision", ICC-01/04-01/07-475 OA, 13 May 2008, para 68.

¹³ *Prosecutor v. Katanga*, Judgment on Prosecution's Appeal Against the First Redaction Decision, ICC-01/04-01/07-475 OA, 13 May 2008, paras. 71-72.

20. A variety of factors necessitate the use of redactions to evidence that the Prosecution collected prior to 15 December 2010 pursuant to Rule 81(4). These are set out below.

Dangers inherent in disclosing evidence to the suspects

21. The Prosecution's requests for redactions are justified by [REDACTED]

[REDACTED]

[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

Proposed redactions to evidence from Prosecution witnesses

15 [REDACTED]

16 [REDACTED]

26. To protect the safety of Prosecution witnesses, as well as members of their families and victims, sources and other persons identified in their statements, the Prosecution considers it necessary to [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
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[REDACTED]

33. _____

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[REDACTED]

[REDACTED]

37. The Prosecution notes that it has not provided illustrative charts identifying the legal and factual bases supporting the proposed summaries, as the legal and factual basis for summarizing these documents is contained in this section, and the Prosecution is not requesting paragraph- or page-specific redactions that require individual justification. As such, producing charts would be of no additional value.

C. Requests for redactions pursuant to Rule 81(2)

38. The Prosecution also proposes redactions to protect information related to its ongoing investigations pursuant to Rule 81(2). The Appeals Chamber has held that the same general factors used to analyze proposals for non-disclosure pursuant to Rule 81(4) apply *mutatis mutandis* to proposals pursuant to Rule 81(2), namely: “a

thorough consideration of the danger that the disclosure of the information may cause; the necessity of the non-disclosure, including whether it is the least intrusive measure necessary to avoid prejudice to the investigations of the Prosecutor; and the fact that any measures taken shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”²⁰

39. In this case, the Prosecution to redact in particular the [REDACTED]

[REDACTED] This includes redactions to the face of evidence, and to its metadata. It does not include Prosecution staff whose names have already been revealed to the public (e.g. by their presence at public hearings).

40. [REDACTED]

[REDACTED] ■ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

²⁰ *Prosecutor v. Katanga*, Judgment on Katanga’s Appeal against the First Redaction Decision, ICC-01/04-01/07-476 OA2, 13 May 2008, para. 59.

²¹ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

44. The Prosecution is of the view that there is no less restrictive protective measure that can be taken to avoid the risk. Moreover, these redactions are not prejudicial to or inconsistent with the rights of the Defence and the requirements of a fair and impartial trial because [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

D. Redactions highlighted in purple

45. The Prosecution has also proposed redactions to transcripts of witness interviews, where the witness or interpreter communicates in Swahili. Such redactions are proposed in purple. The Prosecution seeks these redactions because the Prosecution does not have the resources to also prepare the redactions to the Swahili text, and does not want to inadvertently agree to disclosure of dialogue which should be redacted. Once the Prosecution has completed this task, it will propose redactions for the Swahili text.²⁴ The Prosecution submits that, at this time, no other measures can be taken to avoid the risks attendant with disclosure of the Swahili text.

46. Since the Prosecution has proposed redactions to, and will provide to the Defence upon approval of the redactions, English versions of the same transcript, redacting in full the Swahili text is not prejudicial to or inconsistent with the rights of the Defence

■ [REDACTED]

[REDACTED]

²⁴ Should the Chamber decide on the approved redactions to the English text of the transcribed witness interviews before the Prosecution can propose redactions to the Swahili version, the Prosecution will simply implement the approved redactions to the Swahili text, and submit them to the Chamber for final approval.

and the requirements of a fair and impartial trial and will not prejudice the suspects' preparation for the confirmation hearing.

E. Redactions as to each suspect

47. Finally, the Prosecution notes that it proposes the same redactions and summaries with regard to all three suspects in almost all instances. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
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[REDACTED]
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[REDACTED]
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[REDACTED]

■ [REDACTED]

IV. Request for brief extension of time to disclose to Defence upon decision

49. In the Second Decision, the Chamber ordered the Prosecution to disclose to the Defence the evidence for which redactions will be requested no later than five days after the Chamber's decision regarding such redactions.²⁶ Given the volume of evidence for which the Prosecution requests redactions in this first Application, recognized by the Single Judge in the Third Decision,²⁷ the Prosecution fears that five days will be an insufficient amount of time in which to carefully and properly implement the approved redactions. The Prosecution thus requests that it be granted ten days by which to disclose this first set of documents to the Defence.

V. Relief

50. In light of the foregoing, the Prosecution requests that the Chamber approve the proposed redactions, and give the Prosecution ten days in which to apply approved redactions and disclose the documents to the Defence.



Luis Moreno-Ocampo

Prosecutor

Dated this 23rd day of May 2011

At The Hague, The Netherlands

²⁶ ICC-01/09-01/11-62 p. 11.

²⁷ ICC-01/09-01/11-82 para. 17.