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

Date: 30 May 2011

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

**Urgent Defence Request for Additional Information Concerning the
'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', and for Immediate Disclosure of Redacted Materials**

Source: Defence

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

The Office of the Prosecutor

Luis Moreno-Ocampo, Prosecutor
Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Counsel for William Samoei Ruto:
Kioko Kilukumi Musau, Joseph
Kipchumba Kigen-Katwa, David Hooper
QC and Kithure Kindiki
Counsel for Henry Kiprono Kosgey:
George Odinga Oraro, Julius Kemboy
and Allan Kosgey
Counsel for Joshua Arap Sang:
Joseph Kipchumba Kigen-Katwa, Joel
Kimutai Bosek and Philemon K.B. Koech

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia, Registrar

Counsel Support Section

Deputy Registrar

Mr. Didier Daniel Pereira, Deputy
Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Procedural History

1. On 20 April 2011, the Honourable Single Judge issued her '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',¹ in which the Single Judge ordered the Prosecution to file any requests for redactions to incriminating and exculpatory material collected before 15 December 2010, by 15 May 2011.
2. At the request of the Prosecutor, the Single Judge subsequently extended the deadline until 23 May 2011.²
3. On 26 May 2011, the Prosecutor filed a public redacted version of the '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' (the Prosecution Request).³ The Prosecution did not file a confidential, parties only annex.
4. The Prosecution Request is extensively redacted, and only provides information in the most general terms possible, for example, that the Prosecution is requesting redactions under rule 81(1), 81(2) and 81(4). It is not possible to discern from the filing the rationale for the redactions (the objective risk of harm), what type of information is being redacted (i.e. is the Prosecution seeking redactions to the names of witnesses, locations of interviews, names of family members, screening notes of investigators et cetera), what type of evidence is being redacted (i.e. witness statements,

¹ ICC-01/09-01/11-62

² Decision on the "Prosecution's Application for Extension of Time Limit for Disclosure", ICC-01/09-01/11-82.

³ ICC-01/09-01/11-96-Red

reports, intercepts), and the extent to which the Prosecutor has attempted to identify measures, which are less intrusive to the rights of the Defence.

5. Whilst article 68(5) and the attendant jurisprudence concerning summaries is cited at paragraph 32 of the Prosecution Request, it is entirely opaque as to whether the Prosecution is actually requesting to utilise summaries at the confirmation hearing.
6. The filing of such a document renders illusory the right of the Defence to respond to the Prosecution Request. Moreover, in seeking to delay the disclosure of the redacted material until ten days after the Chamber renders its decision (which is after the rule 155 deadline for filing a request for leave to appeal will have expired), the Prosecution is also completely frustrating the ability of the Defence to file an informed request for leave to appeal of any subsequent redactions decision.
7. The Prosecution's request to defer the implementation of disclosure will also have the inevitable consequence of either unduly pressuring the Chamber to render a speedy decision on redactions (which may be incompatible with the duty of the Chamber to scrutinise the redactions rigorously) or shortening the amount of time that the Defence will have to review the material, develop its strategy, and conduct its investigations prior to the confirmation hearing.
8. In order to counterbalance these prejudicial aspects of the Prosecution Request, the Defence of Mr. Ruto and Mr. Sang respectfully request the Honourable Pre-Trial Chamber to order the Prosecution to:
 - i. file a confidential annex to the Prosecution Request (and all future redactions requests), which to the extent possible, sets out the legal and factual justification for each redaction; and

- ii. disclose the redacted materials immediately to the Defence, subject to the caveat that the Prosecution will lift any redactions, which the Chamber decides not to authorise in its decision.

Submissions

9. The current version of the Prosecution Request does not permit the Defence to file any meaningful observations concerning the categories of redactions, the type of evidence to which it is being applied, and the potential impact on the rights of the Defence and pre-confirmation preparation. Without viewing the extent of the redactions and the type of material redacted, it is also impossible for the Defence to submit any concrete proposals or views to the Chamber.

10. Whilst the Chamber exercises overall judicial control over whether the redactions should be granted, the Chamber might not be able to appreciate the importance of certain information for Defence preparation. In this regard, the various ICC Chambers have reversed their positions on redactions on many occasions due to the fact that the Chamber was only in a position to fully evaluate the impact on the rights of the Defence and a fair and impartial trial, after having been apprised of key information concerning Defence strategy and preparation.⁴

11. In the current case, if the Defence is compelled by the paucity of information in the Prosecution Request to reserve its submissions on key aspects of the redactions until after it has received the judicially approved redactions, then this could potentially delay the calendar for the confirmation hearing, and unnecessarily mire the Chamber in multiple reviews of the materials.

⁴ See for example, Prosecutor v. Lubanga, Redacted Decision on Intermediaries, ICC-01/04-01/06-2434-Red2, 31 May 2010; Prosecutor v. Katanga, Oral Decision, Transcript of 14 May 2010, pages 13-18, ICC-01/04-01/07-T-141-Red; Prosecutor v. Katanga, Oral Decision, Transcript of 21 October 2010, pages 2-3, ICC-01/04-01/07-T-208 ; Prosecutor v. Lubanga, Oral decisions, 4-5 March 2009, pages 21-23 (4 March), ICC-01/04-01/06-T-142-ENG, and pages 1-2 (5 March) ICC-01/04-01/06-T-144-ENG.

12. In contrast, if the Prosecution were to provide firstly, more detailed information in a confidential annex concerning the type of redactions, legal basis for the redactions, and type of evidential item being redacted, and secondly, the evidence as redacted by the Prosecution, then the Defence would be in a position to provide practical and informed submissions to the Chamber concerning whether the redactions will be likely to have any impact on Defence preparation, and possible counterbalancing measures, which would mitigate any prejudice to the Defence.
13. Disclosure of the redacted version of the evidence, pending the decision of the Chamber, would also mean that the Defence is able to commence some aspects of its preparation in a more timely manner, which would counterbalance the additional delay accorded to the Prosecution to file its requests for redactions.
14. The Defence further submits that by filing such a heavily redacted request for redactions, the Prosecution has violated the principle that *ex parte* procedures should only be utilised in a manner that is necessary and proportionate, and which does not violate the rights of the Defence.⁵ The Defence also requires access – to the extent possible – to the factual and legal basis for the redactions in order to understand the reasons that will be provided by the Chamber for the redactions, which the Appeals Chamber has recognised is an essential component of the Defence's right to request leave to appeal.⁶

⁵ Prosecutor v. Lubanga, 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, ICC-01/04-01/06-773, 14 December 2006, at para 22. See also Prosecutor v. Lubanga, Decision on the Procedure to be Adopted for Ex Parte Procedures', ICC-01/04-01/06-1058, 6 December 2007, at para 12.

⁶ Prosecutor v. Lubanga, 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, ICC-01/04-01/06-773, 14 December 2006, at para 20.

15. As the jurisprudence and practice of Trial Chambers I and II attest, it is both feasible and an essential component of the fairness of the redaction process for the Prosecution to file more detailed reasons and information in a filing, which is available to the Defence.⁷
16. Moreover, whilst the ICC Appeals Chamber has confirmed that only the Chamber, and not the Prosecution, may authorise the non-disclosure of information,⁸ this finding does not preclude the Prosecution from disclosing to the Defence an advance copy of the redacted materials (with the understanding that the Prosecution would subsequently lift any redactions not authorised by the Chamber), particularly if to do so would further the rights of the Defence and the expeditiousness of the proceedings. This was explicitly recognised by Trial Chamber I in the Lubanga case, and Trial Chamber III in the Bemba case, in which the Chambers ordered the Prosecution to immediately provide the Defence with the redacted materials, pending the Chamber's authorisation.⁹

⁷“Furthermore, requests for redactions now made by the Prosecutor include one extremely small number filed as “public” and another filed as “Confidential – Ex Parte – Prosecution only”, which sets out the requested redactions in greater detail. Not only does this not reflect the practice followed by other Chambers, particularly by Trial Chamber I, it does not enable the Defence to respond, if only succinctly, to the Prosecutor's explanations. The Appeals Chamber has in fact directed that prior to ruling on an application for redactions, the Chamber should, as far as possible, give the Defence the opportunity to make submissions on the issues involved, necessarily without revealing to the Defence the information which the Prosecutor alleges should be protected or inviting it to give any form of consent. The Chamber therefore directs the Prosecutor, henceforth, to follow the practice in effect before Trial Chamber I and, barring special circumstances which he will have to justify, to file on the same day two requests for redactions: one “Confidential – Ex Parte – Office of the Prosecutor only” for the Chamber, and another “public redacted version” for the Defence.” Prosecutor v. Katanga and Ngudjolo, ‘Decision on the Redaction Process’, 12 January 2009, ICC-01/04-01/07-819-tENG, at para 10.

See also Prosecutor v. Lubanga, Order on prosecution's application for redactions pursuant to Rule 81(2) filed on 14 February 2008, ICC-01/04-01/06-1172, 15 February 2008 at para 2. For an example of a Prosecution request for redactions, see Prosecutor v. Lubanga, Prosecution's Request for Non-Disclosure of Information in Six Documents, ICC-01/04-01/06-2724-RED, 26 April 2011.

⁸ Prosecutor v. Lubanga, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled “Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU”, ICC-01/04-01/06-2582, 8 October 2010.

⁹ “Given the amount of material which will need to be reviewed with care and the requirement for disclosure of material sufficiently in advance of the commencement of the trial to enable adequate preparation for trial, the Chamber, pursuant to Articles 64(3)(c), 64(6)(c), 64(6)(e) and 68 of the Statute, orders the prosecution to serve the material which is the subject of this request in its current redacted form pending a decision of the Chamber on the prosecution's request of 26 October 2009”. Prosecutor v. Bemba, Order on disclosure of evidence by the Office of the Prosecutor, 4 November 2009, ICC-01/05-01/08-590, at para 6. See also Prosecutor v. Lubanga,

17. Finally, the Defence notes that the Prosecution has requested at paragraph 45 that the Chamber apply blanket redactions to all Swahili text and dialogue, “because the Prosecution does not have the resources to also prepare the redactions to the Swahili text”.
18. The Prosecution has failed to provide any justification as to why it was unable to either prepare the redactions in time, or seek an extension of time before the deadline expired. Under regulation 35(2) of the Regulations of the Court, a party can only obtain an extension of time after the expiration of the deadline if it is able to demonstrate both good cause, and, that due to circumstances outside of its control, it was unable to file the request within the deadline.
19. The Chamber should therefore reject this particular request due to the failure of the Prosecution to either provide individualised justifications for the redactions, which fulfil the criteria established by the Appeals Chamber, or to demonstrate firstly, good cause for an extension of time, and secondly, why it was unable to file a request for an extension of time within the deadline.

Relief Sought

20. For the reasons set out above, the Defence of Mr. Ruto and Mr. Sang respectfully request the Honourable Pre-Trial Chamber to
- a. order the Prosecution to:
 - i. file a confidential annex to the Prosecution Request (and all future redactions requests), which to the extent possible, sets out the legal and factual justification for each redaction; and

Order on the prosecution's applications for the lifting of redactions, nondisclosure of information and disclosure of summary evidence, 18 December 2007, ICC-01/04-01/06-1097, at para 10.

- ii. disclose the redacted materials immediately to the Defence, subject to the caveat that the Prosecution will lift any redactions, which the Chamber decides not to authorise in its decision.
- b.** reject the request of the Prosecution to apply blanket redactions to Swahili text pending the submission of detailed justifications by the Prosecution.



Joseph Kipchumba Kigen-Katwa
On behalf of Mr. Joshua Arap Sang and Mr. William Samoei Ruto

Dated this 30th day, May 2011

At Nairobi, Kenya.