

**Cour
Pénale
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**International
Criminal
Court**

Original: English

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

Date: 3 June 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 Second 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:

The Office of the Prosecutor
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Counsel for the Defence

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
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Amicus Curiae

REGISTRY

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Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

1. The Prosecution hereby submits its second application for redactions, pertaining to evidence on which the Prosecution intends to rely for the purposes of the confirmation hearing and which was collected between 15 December 2010 and 31 March 2011.

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 3 June 2011: (i) disclose to the Defence any evidence collected between 15 December 2010 and 31 March 2011, 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 between 15 December 2010 and 31 March 2011.³
4. In compliance with the Second Decision, the Prosecution disclosed to the Defence on 3 June 2011, six documents on which the Prosecution intends to rely for the purposes

¹ ICC-01/09-01/11-44.

² ICC-01/09-01/11-62.

³ ICC-01/09-01/11-62, para. 18.

of the confirmation hearing, and for which no redactions were required. The Prosecution has attached to this Application the documents related to this 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) an analysis of each piece of evidence reflecting its relevance.

5. By this Application, the Prosecution proposes redactions to materials that it intends to rely upon at the confirmation hearing, and which were collected between 15 December 2010 and 31 March 2011. This Application is accompanied by illustrative charts identifying the legal and factual bases supporting the proposed redactions.
6. The Prosecution also notes that it may use as evidence at the confirmation hearing [REDACTED] ■ As these documents are already in the record of the case, the Prosecution does not see the need to disclose the documents back to the Defense.
7. The Prosecution 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 highlights identify redactions requested pursuant to Rule 81(2), and red highlights identify redactions requested pursuant to Rule 81(4).
8. In addition, both the First and Second Decision require that, by 3 June 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

■ [REDACTED]

which were also collected between 15 December 2010 and 31 March 2011.⁵ The Prosecution also proposes redactions to these materials.

9. 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

10. 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.

11. The Prosecution also requests that majority of these documents disclosed to the Defence on 3 June 2011 be treated as confidential, because they contain sensitive information [REDACTED]

[REDACTED] The Prosecution proposes to treat a small number of these documents as public, because they are already in the public domain (e.g. media articles, videos).

III. Submissions

A. Legal foundation for the requested redactions

⁵ ICC-01/09-01/11-62, para. 20.

12. According to Article 61(5) of the Statute, at the confirmation hearing, the Prosecution shall support each charge with sufficient evidence to establish substantial grounds to believe that the person(s) committed the crimes charged.
13. The Prosecution must select the evidence on which it relies, and the conditions under which it proposes this evidence be disclosed, with a view to its obligations pursuant to Articles 54(1)(b) and 68 to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. As the Single Judge noted, “the Prosecutor has the obligation to protect victims and witnesses and, to that effect, he may request that certain information be redacted or rely on summary evidence for the purposes of the confirmation hearing.”⁶ To that end, where necessary to protect the safety of witnesses and victims and members of their families, Rule 81(4) permits the Prosecutor to seek the non-disclosure of their identities prior to the commencement of trial.
14. The Prosecution may also request redactions to material being disclosed to: (i) protect further and/or ongoing investigations, pursuant to Rule 81(2); or (ii) portions 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).
15. 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)

⁶ ICC-01/09-10/11-85, para. 18 (footnotes omitted).

16. In its “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” (“First Application”), the Prosecution set forth the legal and factual bases for seeking redactions pursuant to Rule 81(4) and incorporates them by reference.⁷ The Prosecution requests that the Chamber apply the same rules to this Application. A few proposed redactions require limited further explanation, as set forth below.

Proposed redactions to evidence from Prosecution witnesses

[illegible]

[REDACTED]

⁷ ICC-01/09-01/11-96-Conf-Exp, paras. 17-25.

[REDACTED]

[REDACTED]

Summaries of statements

19. Pursuant to Article 68(5), at the confirmation hearing the Prosecution may rely on summaries of evidence it has collected to protect witnesses, members of witnesses' families and others at risk on account of the activities of the Court. The Appeals Chamber has held that it is in principle permissible that "that the Prosecutor would present the summaries at the confirmation hearing as evidence and that the Prosecutor would not disclose to the defence prior to the confirmation hearing the underlying witness statements or documents but only the summaries thereof, which would not divulge the identities of the witnesses".⁹

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁹ *Prosecutor v. Lubanga*, Judgment on Appeal against First Redaction Decision, ICC-01/04-01/06-773 OA5, 14. December 2006, paras. 44-45; see also paras. 46.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

25. 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)

26. 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 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.”¹¹

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

[REDACTED]

[REDACTED]

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

¹¹ *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.

28.

D. Redactions highlighted in purple

29. The Prosecution has also proposed redactions to the transcript of [REDACTED] [REDACTED] 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 at this time to also prepare the redactions to the Swahili text, and does not want to inadvertently disclose dialogue which should be redacted. Once the Prosecution has completed this task, it will propose redactions for the Swahili text.¹⁴ The Prosecution submits that, at this time, no other measures can be taken to avoid the risks attendant with disclosure of the Swahili text.

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

¹⁴ 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.

E. Redactions as to each suspect

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

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

IV. Relief

32. In light of the foregoing, the Prosecution requests that the Chamber approve the proposed redactions, and give the Prosecution 10 days in which to apply approved redactions and disclose the documents to the Defence.



Luis Moreno-Ocampo
Prosecutor

Dated this 3 day of June 2011
At The Hague, The Netherlands

[REDACTED]