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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. FRANCIS KIRIMI MUTHAURA,
UHURU MUIGAI KENYATTA AND MOHAMMED HUSSEIN ALI**

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 Other 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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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. Pursuant to Article 68(5) of the Rome Statute and Rule 81(4) of the Rules, the Prosecution further seeks authorization to use summary evidence for purposes of the confirmation hearing with respect to evidence collected within the same period of time.

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 the Prosecution, by 3 June 2011, to: (i) disclose to the Defence any evidence on which it intends to rely for the purposes of the confirmation of charges hearing, that has been collected prior to 15 December 2010 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. In addition, the Second Decision requires, by 3 June 2011, the Prosecution to permit the Defence to inspect, pursuant to Rule 77 of the Rules of Procedure and Evidence

¹ ICC-01/09-02/11-48.

² ICC-01/09-02/11-64.

³ ICC-01/09-02/11-64, para. 17.

(“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. Further, the Single Judge ordered the Prosecution to disclose to the Defence any piece of evidence which is material to the preparation of the defence within the scope of Rule 77 as soon as practicable.⁴

5. In compliance with the Second Decision, the Prosecution disclosed to the Defence on Friday, 3 June 2011, 154 documents for which no redactions were required.⁵ These comprise 84 materials which are incriminating in nature, and 70 materials which, pursuant to Rule 77, are intended to be used as evidence for the purposes of the confirmation hearing or are material to the preparation of the defence.⁶
6. By this Application, the Prosecution proposes redactions to materials that it intends to rely upon at the confirmation hearing, and which were collected prior to 15 December 2010. This Application is accompanied by illustrative charts identifying the legal and factual bases supporting the proposed redactions.
7. The Prosecution also proposes redactions to materials collected pursuant to Rule 77 prior to 15 December 2010 on which it intends to rely as evidence for the purposes of the confirmation hearing or which are material to the preparation of the defence. The Prosecution notes that it has no materials which were obtained from or belonged to the suspects.

⁴ ICC-01/09-02/11-64, para. 21.

⁵ The Office of the Public Counsel for the Defence (OPCD) received the disclosed documents on behalf of all three suspects.

⁶ Office of the Prosecutor, “Prosecution’s First Communication of the Disclosure of Incriminating Evidence and Rule 77 Materials to the Defence”, filed simultaneously on 3 June 2011.

8. The Prosecution proposes redactions pursuant to Rules 81(1), 81(2) and 81(4) of 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). The Prosecution also proposes the submission of summary evidence pursuant to Article 68(5) of the Statute and Rule 81(4) of the Rules.
9. The Prosecution seeks redactions both to the face of documents being disclosed, and to the metadata accompanying the documents in accordance with the e-Court Protocol. The Prosecution is providing the Chamber with separate charts justifying proposed redactions (1) on the face of the evidence and (2) to the metadata of the evidence.

II. Request for Confidentiality

10. Pursuant to Regulation 23 *bis* of the Regulations of the Court, the Prosecution requests that the unredacted version of this Application and its annexes be received by the Single Judge as “Confidential, *ex parte*, Prosecution and VWU 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 simultaneously file a public redacted version of this filing.

III. Submissions

A. Legal foundation for the requested redactions

11. 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.

12. 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.”⁷ To that end, where necessary to protect the safety of witnesses and victims and members of their families, Rule 81(4) of the Rules permits the Prosecutor to seek the non-disclosure of their identity prior to the commencement of trial.
13. 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).
14. The proposed redactions and their factual basis and legal justifications are set forth in the annexes to this Application.⁸ 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)

⁷ ICC-01/09-02/11-88, para. 20 (footnotes omitted).

⁸ See Annexes A – M. These annexes consist of the following: proposed redactions on the face of the documents to be disclosed and to the metadata of the documents; tables with the factual and legal justifications for proposed redactions; and witness specific security information. They also include proposed summaries of statements of Prosecution and non-Prosecution witnesses. Annex A contains a list of the annexes.

15. 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.⁹ The aim is to secure protection of individuals at risk.¹⁰ 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.¹¹
16. 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: (i) the endangerment of the witness or of members of his or her family that the disclosure of the identity of the witness may cause; (ii) the necessity of the protective measure; and (iii) 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.¹²
17. 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.

⁹ *Prosecutor v. Lubanga*, Judgment on Appeal against First Redaction Decision, ICC-01/04-01/06-773 OA 5, 14 December 2006, para. 21.

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. 56.

¹¹ *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.

¹² *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.

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.¹³

- 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.¹⁴

18. 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

19. The Prosecution's requests for redactions are justified by

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹³ 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.

¹⁴ *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.

■ [REDACTED]

■ [REDACTED]

[REDACTED]

Atmosphere of witness corruption in Kenya

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Proposed redactions to evidence from Prosecution witnesses

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

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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Summaries of statements of Prosecution and non-Prosecution witnesses²⁰

29. 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 "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".²¹ The Appeals Chamber endorsed the approach adopted in that case by Pre-Trial Chamber I which had relied on Rule 81(4) in authorising the submission of summaries in which all identifying information of relevant witnesses would be excluded.²²

30. [REDACTED]

[REDACTED]

[REDACTED]

²⁰ See the summaries in the following annexes – B-2, C-4, E-3, F-3, G-3, K-2 and M.

²¹ *Prosecutor v. Lubanga*, Judgment on Appeal against First Redaction Decision, ICC-01/04-01/06-773 OA5, 14. December 2006, para. 45; see also paras. 44 and 46.

²² *Ibid.*, paras. 36 and 45.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

34. 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.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

36. 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] Therefore, redacting the information will not prejudice the preparation of the suspects for their trial. [REDACTED]

[REDACTED]

[REDACTED]

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

37. 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.”²⁵

²⁵ *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.

38. In this case, the Prosecution proposes to redact in particular the [REDACTED]
[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).

39. [REDACTED]
[REDACTED]
[REDACTED]
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[REDACTED]

D. Redactions as to each suspect

41. Finally, the Prosecution notes that it proposes the same redactions and summaries with regard to all three suspects in all instances. This is because the suspects are known to be familiar and, in some cases, friendly with each other, and their counsel have clearly met and work together. This is evident from the similarity in the filings and occasional joint filings of the three suspects. Thus, there is little point in proposing different redactions for each suspect.

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

42. 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.²⁷ Given the volume of evidence for which the Prosecution requests redactions in this first Application, and the cumbersome process of implementing redactions in the in-depth analysis charts, the Prosecution fears that five days is insufficient for the purpose of carefully and properly implementing the approved redactions.

43. The Prosecution thus requests that it be granted ten days within which to disclose this set of documents to the Defence. In the alternative, the Prosecution requests that it be granted the ten days only in respect of the submission of the in-depth analysis charts given the volume of the charts and complexity involved in ensuring that sensitive information is not inadvertently disclosed. This time will allow it to carefully and properly implement the approved redactions.

V. Relief

²⁷ ICC-01/09-02/11-64 p. 11.

44. In light of the foregoing, the Prosecution requests that the Chamber: (i) approve the proposed redactions and the Prosecution's request to use summary evidence pursuant to Article 68(5); and (ii) give the Prosecution 10 days in which to apply approved redactions and disclose the documents to the Defence or alternatively ten days within which to submit the in-depth analysis charts.



Luis Moreno-Ocampo

Prosecutor

Dated this 3rd day of June 2011

At The Hague, The Netherlands