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

Public Document

Prosecution's Response to the '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'

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

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I. Introduction

1. On 23 May 2011, the Prosecutor filed 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” (‘First Application’).¹ The motion and annexes identifying the redactions sought and their supporting justifications were filed *ex parte*. On 26 May 2011, the Prosecution filed a public redacted version² that did not include public redacted versions of the annexes.
2. On 30 May 2011, the Defence filed an urgent request for additional information concerning the Prosecution’s First Application and for immediate disclosure of the redacted materials (‘Defence Request’).³ The Defence sets forth two complaints: it cannot properly respond to the specific redaction requests absent a detailed chart indicating the basis for each redaction, and the Prosecution’s redactions to the Swahili text contained in transcribed interviews are inappropriate. It also requests that the redacted materials be disclosed immediately.
3. The Prosecution opposes each of these requests for the following reasons:
 - a) The request for a confidential annex to the First Application (and all future redaction requests) setting out the legal and factual justification for each redaction is 1) misplaced, 2) negates the very purpose of requesting

¹ ICC-01/09-01/11-96-Conf-Exp. The original deadline of 15 May 2011 for the Prosecution’s proposed redactions with respect to the evidence collected prior to 15 December 2010 (see ICC-01/09-01/11-62) was extended to 23 May 2011 (see ICC-01/09-01/11-82).

² ICC-01/09-01/11-96-Red. The Prosecution did not file public redacted versions of the annexes.

³ “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,” ICC-01/09-01/11-100.

redactions, and 3) has no bearing on the preservation of the Defence's ability to appeal.

- b) The request to lift blanket restrictions on Swahili text is without merit; these redactions do not prejudice the rights of the accused since they do not have an impact on Defence preparation, while giving the Defence access to the Swahili text creates an unnecessary risk of harm to victims and witnesses.
 - c) The request to receive the redacted materials prior to a ruling from Pre-Trial Chamber II (the 'Chamber') overlooks and may contravene the Chamber's duty to protect the safety of victims and witnesses. Such disclosure to the Defence would pre-empt additional security measures that may be considered necessary and appropriate by the Chamber and/or the Victims and Witnesses Unit (VWU).
4. Moreover, the Defence also misleadingly omits relevant portions of the decisions that it relies upon, leaving the Chamber with a mischaracterization of the law. Detailed submissions addressing each of the points raised by the Defence are set out below.

II. Submissions

- 5. As a preliminary point, it is well recognized that a confirmation hearing is neither a trial nor a rehearsal of the trial. It is a mechanism to filter out unfounded criminal allegations. Thus, the predicate for the Defence submissions – that this is necessary to defend against the charges – is misplaced.
- 6. The Prosecution thus submits that the Defence's reliance throughout the Defence Request upon decisions of various Trial Chambers to buttress its 'right' to specific material at the pre-confirmation stage of the present proceedings is

misplaced. There is a fundamental difference between the purposes of the confirmation proceeding and the trial, and the rights of the Defence at the latter do not necessarily attach at the former. Thus, decisions from Trial Chambers preserving the rights of the Accused to evidence at trial do not apply automatically at this early stage of the proceedings.

A. The Request for the Prosecution to produce an additional annex is without merit

7. First, the proposition that the Prosecution be required to submit to the Defence a chart and explanation of its non-disclosure requests, redaction by redaction, prior to a ruling by the Chamber of judicially approved redactions, is illogical. The Defence knows generally the basis for the requests for redactions: some seek redaction of information that if disclosed could lead to the identification of witnesses, victims or their families; some seek to redact information, the disclosure of which could jeopardize third parties or interfere with the Prosecution's ability to conduct its investigations. A more detailed line by line explanation of proposed redactions, which is done for the Chamber in the confidential annexes, would include the information that is sought to be redacted and negate the very purpose of requesting redactions.
8. Second, the Defence argument that they are entitled to this information as a right is without legal merit. Contrary to the Defence's contention, Rules 81(2) and 81(4) do not afford the Defence the 'right' to respond to the Prosecution's request for redactions.

Rule 81(2) envisages no role by the Defence

9. The Rules of Procedure and Evidence explicitly provide that matters under Rule 81(2) shall be heard on an ex-parte basis by the Chamber. The *ex parte* character of these applications has been repeatedly affirmed by chambers of this Court.⁴ Rule 81(2) therefore provides no right to the Defence to respond or otherwise participate in such applications.⁵ Requiring the Prosecution to provide the Defence with the information it seeks would undermine the very protection that Rule 81(2) is meant to guarantee.

Rule 81(4) gives the Defence no right to examine ex parte materials

10. The same rationale applies to redactions made pursuant to Rule 81(4). While Rule 81(4) does not expressly provide for applications to be heard *ex parte*, this sub-section is rooted in the protection and safety of witnesses, members of their families, victims, sources and other persons identified in statements from Prosecution witnesses.⁶ In order to properly justify its proposals, the Prosecution submitted sensitive information exclusively to the Chamber and the VWU. The ability of the Prosecution to freely provide information of this nature *ex parte* is crucial to the proper functioning of the Court and enables the Chamber to make informed decisions and meaningfully uphold its responsibility to protect victims and witnesses. Providing this information to the Defence would compromise the safety of the persons affected by the redactions – thereby undermining the very protection that Rule 81(4) seeks to guarantee.

⁴ See for example ICC-01/04-01/06-108-Corr, at para. 9 (Pre-Trial Chamber I); ICC-01/04-01/06-1058, at para. 4 (Trial Chamber I); ICC-01/04-01/06-774 (OA06), at para. 13 (Appeals Chamber, separate opinion of Judge Pikis); and ICC-01/04-01/07-475 (OA2) (Appeals Chamber).

⁵ The Prosecution notes however that Rule 81(2) nevertheless preserves the rights of the accused by requiring the Prosecution to give adequate notice before such evidence can be used in a trial or hearing.

⁶ ICC-01/09-01/11-96-Red, para. 26.

The contents of ex parte proceedings should be protected

11. Any concern about the Prosecution's unfettered discretion to propose redactions is balanced by the Chamber's decision requesting the VWU to provide observations on the Prosecutor's risk assessment.⁷ Further, a potential disclosure of the contents of *ex parte* applications to the Defence upon its request may have longstanding consequences such as discouraging the Prosecution from revealing information that could be helpful to the Chamber.⁸

The case law cited by the Defence is misleading

12. On more than one occasion the Defence mischaracterizes decisions of other ICC Chambers to argue that the Prosecution is misusing *ex parte* procedures through a request for extensive redactions. The Defence cites to a decision of Trial Chamber I in the *Prosecutor v. Lubanga* case to support its proposition that a heavily redacted request violates 'the principle that *ex parte* procedures are only to be used exceptionally when they are truly necessary and when no other, lesser, procedures are available'.⁹ Their reliance is misleading as they fail to include a subsequent sentence from the same paragraph which states that "complete secrecy would, for instance, be justified if providing information

⁷ "Decision Requesting the Victims and Witnesses Unit to Submit Observations", ICC-01/09-01/11-103.

⁸ "Decision on the procedures to be adopted for ex parte proceedings", ICC-01/04-01/06-1058, at para. 14: "It is important that the parties and the participants should be able to make applications and submissions, when strictly necessary, on a private basis. The Chamber considers that it would undermine the proper functioning of this procedure if the expectation was that everything that had been said during the hearing or set out in the application would be made public once the reason for protection ceased to exist. That could discourage the parties and participants from revealing information of a sensitive, confidential or personal nature".

⁹ ICC-01/09-01/11-100, para. 14, citing "Decision on the procedures to be adopted for ex parte proceedings," ICC-01/04-01/06-1058, at para. 12.

about the procedure would risk revealing the very thing that requires protection.”¹⁰

13. Reading the quotation in its entirety supports a conclusion that is contrary to the Defence assertion. In fact, ICC case law reflects an appreciation of the *ex parte* nature of proceedings under Rules 81(2) and 81(4). In the pre-trial phase of the Lubanga case, the Single Judge held that:

the Defence is not entitled to obtain a redacted version of any document filed *ex parte*, or of transcripts of any hearing held *ex parte*, pursuant to rule 81 (2) and (4) because the very meaning of *ex parte* excludes any opportunity for the Defence to present arguments, documents, materials or orders in relation to the specific content of the Prosecution *ex parte* application.¹¹

14. Although other aspects of the Single Judge’s ruling on this issue were overturned, the Appeals Chamber upheld this portion of the decision and went further by holding that in exceptional circumstances the Defence need not even be made aware of the existence, let alone be permitted to respond to the contents, of a request made under Rule 81.¹²

15. Finally, whilst the Prosecution acknowledges the Appeals Chamber’s rule that “prior to ruling on the application for redactions, the Pre-Trial Chamber should give the Defence the greatest possible opportunity to make submissions on the

¹⁰ ICC-01/04-01/06-1058, at para. 12.

¹¹ “Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence,” ICC-01/04-01/06-108-Corr, at para. 18.

¹² ICC-01/04-01/06-568 (OA03), at para. 65. Trial Chamber I also noted that protecting the content of *ex parte* hearings is so important that even when the reasons for making an *ex parte* filing no longer exist, the material will not necessarily be disclosed: see ICC-01/04-01/06-1058, at para. 14. It follows that, *a fortiori*, when the reasons for non-disclosure are still present, the contents of the application should not be revealed.

issues involved,”¹³ this is qualified. It is to be given “necessarily without revealing to the Defence the information which the Prosecutor alleges should be protected.”¹⁴ Here, transmitting the chart requested by the Defence would reveal the information which the Prosecution is submitting ought to be protected. Under these circumstances, the Defence’s request should be denied.

The Defence can understand rulings of the Chamber without an annex

16. The Defence’s insistence that it needs the factual and legal basis for the redactions in order to file an informed request for leave to appeal is clearly misguided. The Chamber can be expected to identify sufficiently the grounds for its decision on the Prosecution’s First Application.
17. Furthermore, the Defence again mis-cites legal authorities in making its argument, citing language from cases in support without acknowledging that the decisions themselves undermine its assertions. For example, the Appeals Chamber decision involving redaction issues before the Lubanga Pre-Trial Chamber, which the Defence relies on as authority that an annex is necessary for it to exercise its right to appeal,¹⁵ stated that information may be withheld in a decision in order to avoid the disclosure of information that needs to be protected:

If the provision of the full reasoning would have led to the identification of the witness in question or would otherwise have disclosed information that needed to be protected, the Pre-Trial Chamber could have considered whether the full reasoning should be provided in a

¹³ “Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Request for Authorisation to Redact Witness Statements’”, ICC-01/04-01/07-475 (OA01), at para. 73.

¹⁴ *Ibid.*

¹⁵ ICC-01/09-01/11-100 at para. 14

decision marked confidential and ex parte, Prosecutor only, with a separate redacted version made available to the defence.¹⁶

18. If rendering a decision *ex parte* does not curtail the Defence's right to seek appeal, an *ex parte* submission by the Prosecution should not do so either.
19. Similarly, the Prosecution's request for an extension of the 5-day deadline to comply with the Chamber's decision on proposed redactions to 10 days has no impact on "the ability of the Defence to file an informed request for leave to appeal."¹⁷ The extra time is necessary, in the event that the order requires more disclosure than the Prosecution requested, for the Prosecution to make an informed decision whether to provide extra measures to protect the witnesses' safety or to withdraw the evidence. That decision, however, has no impact on the ability of the Defence to decide whether to seek leave to appeal. That Defence decision will turn on the reasons for the decision, not on the actual materials that the Prosecution will disclose. As noted above, the Prosecution is confident that the Chamber will sufficiently identify the grounds in any decision it renders.

B. Blanket redactions to the Swahili text of transcribed interviews are necessary and do not prejudice the accused

20. The Defence argues that the Chamber should not allow the Prosecution to withhold the Swahili versions of the transcripts of witness interviews. The interviews at issue were taken in Swahili and translated into English. The Prosecution will disclose, with appropriate redactions, the English versions but not the Swahili ones because it lacks sufficient trained staff to effect the

¹⁶ "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 (OA05), at para. 22 (emphasis added).

¹⁷ ICC-01/09-01/11-100, para. 6.

redactions in Swahili. The Defence complains, arguing that the Prosecution did not explain “why it was unable to either prepare the redactions in time, or seek an extension of time before the deadline expired.”¹⁸

21. This complaint is frivolous. The Prosecution notes that the Chamber has found each of the accused fluent in English.¹⁹ It is therefore unclear to the Prosecution why its provision at this stage of only English transcripts, while withholding the Swahili ones, is ‘unacceptable’ or otherwise prejudicial to or inconsistent with the rights of the accused. Moreover, the Prosecution clearly justified its need to withhold those statements until they can be redacted by Swahili experts. As the Prosecution stated in the First Application, at the current time it does “not have the resources to also prepare the redactions to the Swahili text.”²⁰ The Prosecution thus requested that it be allowed the time to ensure that specific redactions were properly made, and submitted that it would then seek authorisation and disclose the Swahili transcripts with appropriate approved redactions. To do otherwise would be to risk the inadvertent disclosure of information which should be redacted.

22. Thus, the Prosecution’s position is entirely reasonable and is predicated upon the practical difficulties in ensuring accurate corresponding redactions are made to the Swahili text. It is in fact a complex job to identify and hire certified Swahili translators who are competent to translate the particular materials and do not present security risks, and then to provide them with sufficient training with respect to the issues concerning redactions. At this stage, it would be impossible for the Prosecution to carry out the task with confidence that it was not

¹⁸ ICC-01/09-01/11-100, paras. 17-19.

¹⁹ ICC-01/09-01/11-42; ICC-01/09-01/11-T-1-ENG ET, page 6, lines 18-25 and page 7, lines 8-12.

²⁰ ICC-01/09-01/11-96-Red, para. 45.

inadvertently revealing information that should be redacted. And since the statements are available in a language fully accessible to each suspect, there is no conceivable prejudice to the Defence interests at this stage.

C. Advanced disclosure of the redacted materials endangers the security of victims and witnesses by pre-empting additional security measures

23. The Prosecution opposes the Defence request to receive redacted materials prior to the Chamber rendering its decision. Once material has been disclosed to the Defence, it cannot be undisclosed. It is entirely foreseeable that the Chamber may, in accordance with its *proprio motu* powers under Rule 81(4), order protective measures in addition to those proposed by the Prosecutor in its First Application, particularly since the Chamber has requested observations from the VWU.

The Defence should not be allowed to circumvent safety precautions proposed by the VWU

24. To “properly rule” on the First Application, the Single Judge requested the VWU to “provide its observations [...] as well as to propose any additional or alternative protective measures that might be necessary or appropriate in order to ensure the proper protection of a given witness and/or his family members.”²¹ Disclosure by the Prosecutor of the redacted materials in advance of the Chamber’s decision would usurp the Chamber’s powers and render the VWU’s observations useless. Disclosure accordingly should not occur until it is fully resolved by the Chamber, upon receiving the advice of the VWU, that additional protective measures are not required.

²¹ “Decision Requesting the Victims and Witnesses Unit to Submit Observations”, ICC-01/09-01/11-103, at para. 7 (emphasis added).

25. The Prosecution submits that, while in two cases cited by the Defence the Prosecutor had to turn over redacted materials in advance, such an approach is not appropriate in the instant case. Again, those decisions arose during trial, not in advance of the confirmation proceedings; the rights of the Accused to material to prepare for trial are broader than at this stage. Secondly, the security concerns in the present case – as outlined in a number of recent filings²² – are particularly pressing and require taking a more cautious approach to disclosure (and non-disclosure) in the pre-confirmation phase.

III. Relief sought

26. For the above reasons, the Prosecution respectfully asks that the Chamber reject the relief sought by the Defence in the Defence Request.



Luis Moreno-Ocampo
Prosecutor

Dated this 20th day of June 2011

At The Hague, The Netherlands

²² See for example First Application for Redactions, ICC-01/09-01/11-96-Conf-Exp; “Prosecution’s Second Application Pursuant Rule 81(2) and Rule 81(4) for Redactions to Statements of Witnesses and Related Materials to Be Relied Upon at the Confirmation Hearing”, ICC-01/09-01/11-105-Conf-Exp; “Prosecution’s Submissions Regarding Proposal to Conduct the confirmation Hearing in Kenya”, ICC-01/09-01/11-127; and “Observations of Victim-Applicants on the Place of the Proceedings for the Purposes of the Confirmation of Charges Hearing”, ICC-01/09-01/11-123