

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

No.: ICC-01/09-02/11

Date: 24 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 Materials of a Potential Exculpatory Nature and Second 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:

The Office of the Prosecutor

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
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Silvana Arbia, Registrar

Didier Preira, Deputy-Registrar

Victims and Witnesses Unit

Maria Luisa Martinod-Jacome

Defence Support Section

Detention Section

**Victims Participation and Reparations
Section**

Other

1. The Prosecution hereby submits its first application for redactions as regards evidence of a potential exculpatory nature to be disclosed to the Defence. The Prosecution also 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. This application for redactions also applies to Rule 77 evidence which is material to the preparation of the defence.
2. Pursuant to Article 68(5) of the Rome Statute and Rule 81(2) and (4) of the Rules, the Prosecution seeks authorization to submit summaries of certain evidence collected between 15 December 2010 and 31 March 2011, evidence of a potential exculpatory nature and evidence material to the preparation of the defence. The Prosecution can propose lifting these redactions or restrictions when circumstances permit.

I. Procedural History

3. 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
4. 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 24 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 between 15 December 2010 and 31 March 2011 and for which

¹ ICC-01/09-02/11-48.

² ICC-01/09-02/11-64.

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

5. In addition, the Second Decision requires the Prosecution to permit the Defence to inspect, as soon as practicable, pursuant to Rule 77 of the Rules of Procedure and Evidence (“the Rules”), any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor which are material to the preparation of the defence. Further, the Single Judge ordered the Prosecution to disclose to the Defence any piece of evidence which is potentially exculpatory in nature under Article 67(2) as soon as practicable.⁴
6. In compliance with the Second Decision, the Prosecution disclosed to the Defence on Friday, 24 June 2011, 61 documents for which no redactions were required.⁵ These comprise 1 document which is incriminating in nature, 52 documents which are of a potential exculpatory nature, and 8 documents which, pursuant to Rule 77, are material to the preparation of the defence.⁶
7. 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 aspect of the Application is accompanied by an illustrative chart identifying the legal and factual bases supporting the proposed redactions. The Prosecution also proposes the submission of summary evidence

³ ICC-01/09-02/11-64, para. 18.

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 Potentially Exculpatory Evidence and Second Communication of the Disclosure of Incriminating Evidence and Rule 77 Materials to the Defence”, filed simultaneously on 24 June 2011.

pursuant to Article 68(5) of the Statute and Rule 81(4) of the Rules in respect of one Prosecution witness.

8. The Prosecution also proposes redactions to materials of a potential exculpatory nature under Article 67(2) and materials collected pursuant to Rule 77 which are material to the preparation of the defence. These are also accompanied by illustrative charts identifying the legal and factual bases supporting the proposed redactions. The Prosecution notes that it has no materials which were obtained from or belonged to the suspects.
9. The Prosecution proposes redactions pursuant to Rule 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(2) and (4) of the Rules.
10. 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

11. 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

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.”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.
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).

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

15. 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)

16. 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

17. 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

⁸ See Annexes A – G. 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 the statement of a Prosecution witness and of non-Prosecution witnesses. Annex A contains a list of the annexes.

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.

not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.¹²

18. 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.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

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.

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.

19. A variety of factors necessitate the use of redactions, pursuant to Rule 81(4), to evidence that the Prosecution intends to disclose. These are set out below.

Dangers inherent in disclosing evidence to the suspects

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

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Atmosphere of witness corruption in Kenya

21. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

22. The Prosecution is currently requesting heavy redactions or the submission of summary evidence to protect the identities of one of its witnesses and of other persons who are not Prosecution witnesses. If the Chamber grants the proposed redactions or approves the submission of summary evidence under the present conditions, the Prosecution will propose lifting these redactions or restrictions when circumstances permit.

23. [REDACTED]

[REDACTED]

Summaries of the statement of a Prosecution witness and of non-Prosecution witnesses²¹ and other proposed redactions

24. 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 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".²² The Appeals Chamber thus 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.²³

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

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

²² *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.

²³ *Ibid.*, paras. 36 and 45.

26.

[REDACTED]

27. Pursuant to its obligations under Article 67(2) and Rule 77, the Prosecution also intends to disclose a limited number of statements of persons who are not Prosecution witnesses. The Appeals Chamber has held that “it may be permissible to withhold the disclosure of certain information from the Defence prior to the hearing to confirm the charges that could not be withheld prior to trial.”²⁴ In relation to potentially exculpatory material, the Appeals Chamber also held that applications to withhold such material at the stage of proceedings prior to the confirmation hearing can be made pursuant to Rule 81(2).²⁵

28.

[REDACTED]

²⁴ *Prosecutor v. Katanga*, 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 (OA), 13 May 2008, para. 68.

²⁵ *Prosecutor v. Katanga*, Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, ICC-01/04-01/07-476 (OA2) 13 May 2008, para. 57. See also *Prosecutor v. Lubanga*, Judgment on Appeal against First Redaction Decision, ICC-01/04-01/06-773 OA5, 14 December 2006, paras. 44-46.

[REDACTED]

29. [REDACTED]

30. [REDACTED]

31. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

32. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

33. 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)

34. 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.”²⁷

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

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

36.

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

37.

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

²⁷ *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.

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

38.

[REDACTED]

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

D. Redactions as to each suspect

40. 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.

[REDACTED]

IV. Relief

41. In light of the foregoing, the Prosecution requests that the Chamber approve the proposed redactions and the request to use summary evidence pursuant to Article 68(5) and Rule 81(2) and (4).



Luis Moreno-Ocampo

Prosecutor

Dated this 24th day of June 2011

At The Hague, The Netherlands