

**Cour
Pénale
Internationale**

**International
Criminal
Court**



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

Date: 28 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**

**Confidential *Ex Parte*
Prosecution and VWU Only,
with Confidential *Ex Parte*
Prosecution and VWU Only Annexes A-C**

**Prosecution's First Application Pursuant to Rule 81(2) and Rule 81(4) for Redactions
to Potentially Exculpatory Evidence**

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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Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

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**Victims Participation and Reparations
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Other

1. The Prosecution hereby submits its first application pursuant to Rule 81(2) and Rule 81(4) for redactions to potentially exculpatory evidence.

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 did not provide specific deadlines for the disclosure of potentially exculpatory evidence, but stated that it expected the Prosecution to "comply with the obligations [...] to disclose any such evidence as soon as practicable, i.e. immediately after having identified any such evidence, and on a continuous basis."³
4. By this Application, the Prosecution proposes redactions to potentially exculpatory evidence collected prior to 31 March 2011. This Application is accompanied by illustrative charts identifying the legal and factual bases supporting the proposed redactions.
5. The Prosecution proposes redactions to these documents pursuant to Rules 81(2) and 81(4) of the Rules of Procedure and Evidence ("the Rules"). Following previous practice of the Court, blue highlights identify redactions requested pursuant to Rule 81(2), and red highlights identify redactions requested pursuant to Rule 81(4).

¹ ICC-01/09-01/11-44.

² ICC-01/09-01/11-62.

³ ICC-01/09-01/11-62, para. 21.

6. The Prosecution seeks redactions both to the face of documents that will be 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 documents.

II. Request for Confidentiality

7. 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.

III. Submissions

A. Legal foundation for the requested redactions

8. According to Article 67(2), the Prosecution shall, as soon as practicable, disclose to the defence evidence in the Prosecutor’s possession or control which he believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence.
9. The Prosecution must propose conditions under which it discloses potentially exculpatory evidence 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.”⁴ To that end, where necessary to protect the safety of witnesses and victims and members of their families, Rule 81(4) permits the Prosecution to seek the non-disclosure of their identities prior to the commencement of trial.

10. The Prosecution may also request redactions to material being disclosed to protect further and/or ongoing investigations, pursuant to Rule 81(2).
11. 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)

12. 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.⁵ The Prosecution requests that the Chamber apply the same rules to this Application.
13. The Prosecution has identified five documents containing potentially exculpatory evidence which it believes must be summarized in order to properly protect the sources of that evidence. The Prosecution is preparing those summaries and will separately submit them to the Chamber for approval as soon as practicable.

⁴ ICC-01/09-10/11-85, para. 18 (footnotes omitted).

⁵ ICC-01/09-01/11-96-Conf-Exp, paras. 17-25.

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

14. 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.”⁶
15. In this case, the Prosecution seeks to redact identifying information of investigators who continue to travel to the field, as well as staff based in the field, such as interpreters. This includes redactions to the face of evidence and to its metadata. It does not include information regarding Prosecution staff whose identities have already been revealed to the public (e.g. by their presence at public hearings). The Prosecution proposes these redactions for the same reasons cited in its First Application and incorporates them by reference.⁷

⁶ *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.

⁷ ICC-01/09-01/11-96-Conf-Exp, paras. 40-41.

IV. Relief

16. In light of the foregoing, the Prosecution requests that the Chamber approve the proposed redactions.

17. The Prosecution remains mindful of its continuing obligation to disclose to the Defence any additional potentially exculpatory evidence it collects, and, if collected, will disclose such additional evidence to the Defence as soon as practicable.



Luis Moreno-Ocampo

Prosecutor

Dated this 28th day of June 2011

At The Hague, The Netherlands