

**Cour
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**International
Criminal
Court**

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

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

Public Redacted Version

**Prosecution's Submissions on the "Decision on the Defence Requests for the
Disclosure of the Unredacted Article 58 Application and all Statements,
Declarations, Testimonies and Utterances of the Suspects" (ICC-01/09-02/11-
151)**

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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I. Introduction

1. Pursuant to the Single Judge's decision dated 4 July 2011¹, the Prosecution herewith submits a new confidential redacted version of the "Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali" (the "Article 58 Application") with justification for the maintenance of certain redactions. These redactions are necessary to protect ongoing investigations as well as the safety, physical and psychological well-being of victims and witnesses.

II. Procedural History

2. On 15 December 2010, the Prosecution submitted the Article 58 Application with 23 annexes.² The Prosecution's Application and 19 out of the 23 annexes were classified "confidential *ex parte*, Prosecutor only". A public redacted version of the Prosecution's Application was simultaneously filed with 4 annexes classified as "public".³
3. On 8 March 2011, the Chamber, by majority, decided to summon Francis Kirimi Muthaura ("Muthaura"), Uhuru Muigai Kenyatta ("Kenyatta") and Mohammed Husesin Ali ("Ali") (collectively, "Suspects") to appear before the Court.⁴
4. On 21 March 2011, the Single Judge directed the Prosecution to make observations on the possible reclassification of the Article 58 Application and its annexes and to provide proposals on redactions to be made to the

¹ See ICC-01/09-02/11-151 detailed *infra*.

² ICC-01/09-31-Conf-Exp and its annexes.

³ ICC-01/09-31-Red, Annexes 11, 12, 13 and 15.

⁴ ICC-01/09-02/11-1.

documents concerned.⁵ Pursuant to this order, the Prosecution proposed a new public redacted version of the Article 58 Application and submitted observations on the possible reclassification of the annexes.⁶

5. On 1 April 2011, the Single Judge issued the "Decision on Reclassification of Certain Documents", whereby, *inter alia*, the Prosecution was ordered to file the newly proposed public redacted version of the Article 58 Application, and a number of annexes were reclassified.⁷ Additionally, the Registrar was ordered to copy the Article 58 Application and its annexes from the record of the Situation in the Republic of Kenya into the record of the case with the same level of classification.⁸
6. The current public redacted version of the Article 58 Application is accessible in the record of the Situation in the Republic in Kenya under the registration number ICC-01/09-31-Red2, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
7. On 4 July 2011, in the Decision on the Defence Requests for Disclosure of the Unredacted Article 58 Application and all Statements, Declarations, Testimonies and Utterances of the Suspects ("Decision") the Single Judge ordered the Prosecution to file in the record of the case a proposed new public, or if deemed necessary, confidential redacted version of the Article 58

⁵ ICC-01/09-02/11-10.

⁶ ICC-01/09-02/11-18.

⁷ Annexes 2, 9, 16, 17 and 18 were reclassified as "public", Annexes 1, 3, 7, 8, 14, 19, 20 and 21 as "confidential" and the Single Judge concurred with the Prosecution that Annexes 4, 6, 10, 22 and 23 should retain the classification of "confidential *ex parte*, Prosecution only".

⁸ ICC-01/09-02/11-30.

Application and to provide justification for redactions proposed no later than 7 July 2011.⁹

8. The Prosecution herewith submits a new confidential redacted version of the Article 58 Application with justification of certain remaining redactions. The Prosecution submits that the current public redacted version satisfies the principle of publicity of proceedings vis-à-vis the public and that maintenance of the redactions is necessary to protect confidential information (and/or information which comes from a confidential source) which cannot be disclosed to the public at this time. The Prosecution is proposing a new confidential redacted version in the present case in order to provide the Suspects with the greatest amount of information from the Article 58 Application as is possible without compromising the safety, physical and psychological well-being of victims and witnesses.

III. Request for Confidentiality

9. Pursuant to Regulation 23*bis* of the Regulations of the Court (“Regulations”), the Prosecution requests that this Application and its annexes be treated as confidential *ex parte* (1) to protect victims and witnesses, (2) to protect ongoing investigations and (3) to ensure the confidentiality of sensitive information not previously available to the public. The Prosecution will file simultaneously a public redacted version of the Application.

IV. Submissions

Legal Basis of Redactions

⁹ ICC-01/09-02/11-151.

10. Article 54(3)(f) of the Rome Statute empowers the Prosecution to “take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.” Article 68(1) places an obligation to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses on the Court as a whole, including the Prosecution.
11. Regulation 23 *bis* of the Regulations empowers a Chamber to review the classification of documents and reclassify documents in the case where the factual or legal basis for the original classification no longer exists. In carrying out this exercise, the Single Judge acknowledged in the Decision that a Chamber must balance the need for protection of victims and witnesses on the one hand and the fair trial rights of the suspects on the other hand.¹⁰
12. In *The Prosecutor v. Jean-Pierre Bemba Gombo*, the Single Judge in that case proposed the following guiding principles for the review of the classification of documents, including where appropriate, proposals for redactions:

With regard to the documents filed by the Prosecutor, the Defence, the participants or the Registrar in the records of the situation and of the Case, currently classified as “confidential”, “under seal” as well as marked “*ex parte*” [...] the Single Judge examines (i) whether the content of these documents is already known to the Defence and to the public and if not (ii), whether if it would have an impact, if so revealed to the public: (aa) on the protection and privacy of victims and witnesses in accordance with articles 57(3)(c) and 68(1) of the Statute; (bb) on the effectiveness of a request for cooperation between States Parties and the Court in

¹⁰ ICC-01/09-02/11-151, para. 13.

accordance with articles 57(3)(e), 87 and 93 of the Statute as well as rule 99 of the Rules; (cc) on the privacy of Mr. Jean-Pierre Bemba; and (dd) on the effectiveness of further or ongoing investigations.¹¹

13. It is undisputed that the Court is responsible, as a whole, for “ensur[ing], as a matter of the highest priority, that witnesses are appropriately protected [...] pursuant to article 68 of the Statute”¹² and that the Chambers have an ultimate duty and responsibility to that effect.¹³ Any unilateral disclosure of witness-sensitive information by the Prosecution is likely to frustrate the exercise of the Single Judge’s duty to protect the interests of witnesses, members of their families, victims and other persons at risk on account of the activities of the Court.¹⁴

14. In light of the above provisions, the Prosecution proposes the redaction of certain information contained in the Article 58 Application for the protection of victims and witnesses and ongoing investigations. In the section below, the Prosecution outlines the factual basis for its request to maintain certain said redactions. A newly proposed confidential redacted version of the Article 58 Application is submitted with this Application.¹⁵

Redactions for the Protection of Victims and Witnesses

¹¹ ICC-01/5-01/08-528, para. 11.

¹² ICC-01/04-01/07-776 OA7, para. 101.

¹³ ICC-01/04-01/07-776 OA7, para. 93-98; ICC-01/04-01/06-2582 OA18, paras. 50-51. See also Article 57(3)(c) of the Statute.

¹⁴ See *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, “Redacted First Decision on the Prosecutor’s Requests for Redactions and Related Requests”, ICC-01/09-01/11-145-Conf-Red, para. 102.

¹⁵ See Confidential *ex parte* Annexes A and B. In Annex A, the document is marked for redaction, allowing the Chamber to see the underlying information proposed for redaction. In Annex B, the proposed redactions have been accepted and the underlying information is obscured.

15. The Prosecution seeks to maintain, as redacted, any information likely to expose the identity of victims and witnesses. Prior to submitting the current requested redactions, the Prosecution has taken the following into account from the recent Chamber's rulings on redactions: (i) whether the information is currently available to the Defence or to the public; and (ii) whether the disclosure of the information is likely to expose the identity of victims and witnesses and others at risk on account of the activities of the Court. In relation to the second issue, the Prosecution submits that when determining whether the disclosure of information is likely to expose victims and witnesses to an individual (or individuals) receiving the information this assessment must consider that said individual (or individuals) is an informed person.

16. The Prosecution seeks to maintain redactions to all footnotes indicating the source of information contained in the Article 58 Application, other than materials disclosed to the Defence or publicly available. [REDACTED]

17. [REDACTED]

[REDACTED]

[REDACTED]

Redactions to Protect Ongoing Investigations

18. Pursuant to Article 54(3)(f), the Prosecution requests redactions which are necessary to preserve the integrity of the evidence that may be collected in respect of ongoing investigations. [REDACTED]

[REDACTED]

19. [REDACTED]

17 [REDACTED]

18 [REDACTED]

[REDACTED]

[REDACTED] The Prosecution, however, proposes removing redactions only when such removal, according to the Prosecution's assessment, does not prejudice further or ongoing investigations.

No Further Reclassification of Annexes to the Article 58 Application

20. The Prosecution does not propose any further reclassification of the annexes to the Article 58 Application other than that already ordered by the Single Judge on 1 April 2011.¹⁹ The Prosecution submits that the reasoning provided in its Observations on the Possible Reclassification of Certain Documents and with which the Single Judge concurred, remains applicable to those annexes reclassified as confidential²⁰ and confidential *ex parte*, Prosecution only.²¹

V. Conclusion

21. In light of the above, the Prosecution requests that the Chamber approve the proposals for redactions as contained in Annex A to this Application. The Prosecution further requests that Annex B be filed in the record of the case as a new confidential redacted version of the Article 58 Application, should the Chamber approve the proposed redactions.

¹⁹ ICC-01/09-02/11-30.

²⁰ That is, documents which contain evidence not yet in the public domain or knowledge of their use by the OTP could prejudice the future work of organizations using the materials: ICC-01/09-02/11-30, para. 10.

²¹ That is, documents which contain information which, "can easily be traced back to the providers who are not currently in any protection program" and potentially "bear on witness protection": ICC-01/09-02/11-30, para. 11.



Luis Moreno-Ocampo
Prosecutor

Dated this 7th day of July 2011

At The Hague, The Netherlands