

**Cour
Pénale
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**International
Criminal
Court**



Original: English

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

Date: 1 August 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 Third 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

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1. The Prosecution hereby submits its third application for redactions and/or requests to use anonymous summaries in respect of evidence on which the Prosecution intends to rely for the purposes of the confirmation hearing and which was collected after 31 March 2011. This Application also applies to evidence which is potentially exculpatory in nature and Rule 77 evidence which is intended for use by the Prosecution for purposes of the confirmation hearing. The Prosecution can propose lifting these redactions or restrictions when circumstances permit.

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 29 July 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 was collected after 31 March 2011 and for which no redaction is needed; and (ii) submit to the Chamber properly justified proposals for redactions with respect to the evidence collected after 31 March 2011.³
4. In addition, the Second Decision requires the Prosecution to permit the Defence to inspect, no later than 29 July 2011, any books, documents, photographs and other

¹ ICC-01/09-02/11-48.

² ICC-01/09-02/11-64.

³ ICC-01/09-02/11-64, para. 19.

tangible objects in its possession or control which were collected after 31 March 2011 and are intended for use at the confirmation hearing pursuant to Rule 77 of the Rules of Procedure and Evidence (“the Rules”).⁴ 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.⁵

5. In compliance with the Second Decision, the Prosecution disclosed to the Defence on Friday, 29 July 2011, 14 documents for which no redactions were required.⁶ These comprise 11 documents which are incriminating in nature and 3 documents which, pursuant to Rule 77, are intended for use by the Prosecution or material to the preparation of the defence.⁷
6. By this Application, the Prosecution proposes redactions to materials that it intends to rely upon at the confirmation hearing, and which were collected after 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 requests authorization to disclose anonymous summaries pursuant to Articles 61(5) and 68(5) of the Statute and Rule 81(4) of the Rules in respect of the statements of two Prosecution witnesses it intends to rely on at the confirmation hearing.
7. Pursuant to Articles 61(5) and 68(5) of the Statute and Rule 81(2) and (4) of the Rules, the Prosecution also requests the disclosure of anonymous summaries of potential exculpatory materials under Article 67(2) of the Statute or which are intended for use

⁴ ICC-01/09-02/11-64, paras. 19-20.

⁵ ICC-01/09-02/11-64, para. 21.

⁶ The Office of the Public Counsel for the Defence (OPCD) received the disclosed documents on behalf of all three suspects.

⁷ Office of the Prosecutor, “Prosecution’s Third Communication of the Disclosure of Incriminating Evidence and Rule 77 Materials to the Defence”, filed simultaneously on 29 July 2011.

by the Prosecution under Rule 77 of the Rules. The Prosecution further proposes redactions to materials collected pursuant to Rule 77 which are intended for use by the Prosecution. These are also accompanied by illustrative charts identifying the legal and factual bases supporting the proposed redactions.

8. 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).
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.”⁸ 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 protect further and/or ongoing investigations, pursuant to Rule 81(2). And it may seek redactions to portions of 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 bases and legal justifications are set forth in the annexes to this Application.⁹ Justifications which require further explanation are discussed below.

B. Request for redactions pursuant to Rule 81(4)

⁸ ICC-01/09-02/11-88, para. 20 (footnotes omitted).

⁹ See Annexes A – I. 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 anonymous summaries of the statements of witnesses interviewed by the Prosecution and of the screening note of one source. Annex A contains a list of the annexes.

Legal basis for redactions pursuant to Rule 81(4)

15. In 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" ("First Application")¹⁰ and "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" ("Second Application"),¹¹ the Prosecution set forth the legal and factual bases for seeking redactions pursuant to Rule 81(4) and incorporates them by reference.¹² The Prosecution requests that the Chamber apply the same rules to this Application.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁰ ICC-01/09-02/11-101-Conf-Exp.

¹¹ ICC-01/09-02/11-136-Conf-Exp.

¹² ICC-01/09-02/11-101-Conf-Exp, paras. 15-20; ICC-01/09-02/11-136-Conf-Exp, paras. 16-21.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

18. The Prosecution also requests the redaction of corresponding identifying information in the metadata of these documents. If the Chamber grants the proposed redactions or approves the submission of anonymous summary evidence under the present conditions, the Prosecution will propose lifting these redactions or restrictions when circumstances permit. A number of proposed redactions require limited further explanation, as set forth below.

Anonymous Summaries of a Witness Statement and Screening Notes of a Potential Exculpatory Nature

19. Pursuant to its obligations under Article 67(2) and Rule 77, the Prosecution intends to disclose information contained in the statement of one individual who has been interviewed by the Prosecution and the screening notes of another who has undergone a screening process. The Appeals Chamber has held that “it may be permissible to withhold the disclosure of certain information from the Defence prior

■ [REDACTED]

to the hearing to confirm the charges that could not be withheld prior to trial.”¹⁵ In relation to potentially exculpatory material, the Appeals Chamber held in the same case that applications to withhold such material at the stage of proceedings prior to the confirmation hearing can be made pursuant to Rule 81(2).¹⁶

20. 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”.¹⁷ 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.¹⁸

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁵ *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.

¹⁶ *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.

¹⁷ *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.

¹⁸ *Ibid.*, paras. 36 and 45.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

27. 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]

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[REDACTED]

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). In the First and Second Applications, the Prosecution set forth the legal and factual bases for seeking redactions pursuant to Rule 81(2) and incorporates them by reference.²³ The Prosecution requests that the Chamber apply the same rules to this Application.

²³ ICC-01/09-02/11-101-Conf-Exp, paras. 37-40; ICC-01/09-02/11-136-Conf-Exp, paras. 34-37.

[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 [REDACTED]

[REDACTED]

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

[REDACTED]

[REDACTED]

37. The Prosecution also requests the redaction of corresponding identifying information in the metadata of the documents specified in Annex I.

D. Redactions as to each suspect

38. 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

[REDACTED]

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. Relief

39. In light of the foregoing, the Prosecution requests that the Chamber approve the proposed redactions, the request to use anonymous summary evidence and the request for authorization not to disclose certain documents pursuant to Articles 61(5) and 68(5) and Rule 81(2) and (4).



Luis Moreno-Ocampo

Prosecutor

Dated this 1st day of August 2011

At The Hague, The Netherlands