

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 10 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 Application Pursuant to Rules 81(2) and 81(4) to Disclose in Summary
Form Material of a Potential Exculpatory Value under Article 67(2) and Material for
the Preparation of the Defence under Rule 77**

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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1. The Prosecution hereby submits its application pursuant to Rule 81(2) and 81(4) of the Rules of Procedure and Evidence (the “Rules”) to disclose anonymous summaries that are either potentially exculpatory evidence under Article 67(2) of the Rome Statute (the “Statute”) or material for the preparation of the defence under Rule 77 of the Rules. The Prosecution can propose lifting these 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
4. In the Second Decision, 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 and on a continuous basis.³ The Single Judge also ordered the Prosecution to disclose to the Defence any items that are material for the preparation of the defence and thus subject to inspection, within the meaning of Rule 77, as soon as practicable and on a continuous basis.⁴

¹ ICC-01/09-02/11-48.

² ICC-01/09-02/11-64.

³ ICC-01/09-02/11-64, para. 21.

⁴ ICC-01/09-02/11-64, para. 21.

5. The Prosecution requests authorization to disclose anonymous summaries pursuant to Article 68(5) of the Statute and Rule 81(2) and 81(4) of the Rules in respect of evidence which may be of potential exculpatory value under Article 67(2) of the Statute or which is material to the preparation of the defence under Rule 77 of the Rules. This request is dictated by the sensitive security situation of the individuals who provided the materials as set forth below.

II. Request for Confidentiality

6. Pursuant to Regulation 23*bis* of the Regulations of the Court, the Prosecution requests that the unredacted version of this Application be received by the Single Judge as “Confidential, *ex parte*, Prosecution and VWU only” as it contains sensitive security information about individuals contacted by the Prosecution and non-ICC witnesses. The Prosecution will simultaneously file a public redacted version of this filing.

III. Submissions

A. Legal foundation for the requested redactions

7. Article 67(2) and Rule 77 are, on their face, subject to Article 68(5) and Rule 81(2) and 81(4), by which the Prosecution may request, and the Chamber may authorize, the non-disclosure of information where such disclosure would prejudice further or ongoing investigations, or where it is necessary to protect the safety of witnesses and victims and members of their families, respectively.
8. 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”)⁵ 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”),⁶ the Prosecution set forth the legal and factual bases for seeking redactions or the submission of anonymous summaries pursuant to Rule 81(4) and incorporates them by reference.⁷ The Prosecution requests that the Chamber apply the same rules to this Application.

9. 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.”⁸ 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).⁹
10. Pursuant to Article 68(5), at the confirmation hearing the Prosecution may submit 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

⁵ ICC-01/09-02/11-101-Conf-Exp.

⁶ ICC-01/09-02/11-136-Conf-Exp.

⁷ ICC-01/09-02/11-101-Conf-Exp, particularly at paras. 15-20; ICC-01/09-02/11-136-Conf-Exp, particularly at paras. 16-21.

⁸ *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.

⁹ *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.

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”.¹⁰ 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.¹¹

B. Factual Basis

11

12. Features that may identify the individuals include: their names, signatures and initials; date and place of birth; names and number of children; parent’s names; their residences and, where applicable, the residences of family members; current and prior occupations (and related dates); education (and related dates); languages spoken where applicable; the date(s) of the screening; [REDACTED]

¹⁰ *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.

¹¹ *Ibid.*, paras. 36 and 45.

■ [REDACTED]
■ [REDACTED]

[REDACTED]

[REDACTED]

13. If the Chamber approves the submission of anonymous summary evidence under the present conditions, the Prosecution will propose lifting these restrictions when circumstances permit.

Anonymous Summaries of Screening Notes of a Potential Exculpatory Nature

- 14 [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

17. The Prosecution has assessed that there are objectively justifiable risks associated with the disclosure of the identity of Witnesses 0157 and 0159 because they reside in Kenya, are likely to possess valuable knowledge about the post-election violence, are not under any protection from the Court, and are not known to be in any protection program within Kenya. If the suspects perceive that they also possess information that is valuable to the Prosecution's case, their security will no doubt be jeopardized, and they will likely be targeted by the suspects, their supporters, or other associated persons to prevent cooperation with the Court or publicly recant.

18 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

22 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

23. These anonymous summaries are intended to be as specific and detailed as possible without revealing the persons' identities. The Prosecution is of the view that this is the least restrictive measure available to protect these individuals. With the approach, the suspects will be provided with as much detail as possible about the exculpatory information and Rule 77 material in the screening notes and testimonies without jeopardising the safety of the concerned individuals.

24. 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.

IV. Relief

25. In light of the foregoing, the Prosecution requests that the Chamber approve the request to disclose anonymous summary evidence pursuant to Article 68(5) and Rule 81(2) and (4).

[REDACTED]



Luis Moreno-Ocampo

Prosecutor

Dated this 10th day of August 2011

At The Hague, The Netherlands