

**Cour
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**International
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Court**



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

Date: 13 July 2011

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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. WILLIAM SAMOEI RUTO, HENRY
KIPRONO KOSGEY AND JOSHUA ARAP SANG**

Public

With Confidential *ex parte* Annexes A-E

Public redacted version of "Prosecution's Fourth 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", 13 July 2011, ICC-01/09-01/11-192-Conf-Exp

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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Fatou Bensouda, Deputy 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
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Maria Luisa Martinod-Jacome

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**Victims Participation and Reparations
Section**

Other

1. The Prosecution hereby submits its fourth application for redactions, pertaining to materials on which the Prosecution intends to rely for the purposes of the confirmation hearing, which were collected after 31 March 2011, and constitute transcripts of witness interviews or witness-related material collected after 1 July 2011.

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 according to 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 that, *inter alia*, the Prosecution shall submit to the Chamber, by 8 July 2011, properly justified proposals for redactions with respect to the evidence collected after 31 March 2011.³
4. On 24 June 2011, the Single Judge issued the "First Decision on the Prosecutor's Requests for Redactions and Related Requests" ("the First Decision on Redactions").⁴ On 28 June 2011, the Single Judge issued the "Second Decision on the Prosecutor's Requests for Redactions and Related Requests" ("the Second Decision on Redactions").⁵

¹ ICC-01/09-01/11-44.

² ICC-01/09-01/11-62.

³ ICC-01/09-01/11-62, paras. 19-20, p. 12.

⁴ ICC-01/09-01/11-145-Conf-Exp and related Annexes.

⁵ ICC-01/09-01/11-152-Conf-Exp and related Annexes.

5. On 1 July 2011, the Prosecution sought an extension of the deadline for requesting redactions to documents collected after 31 March 2011.⁶ On 4 July 2011, the Single Judge granted an extension of the deadline to 13 July 2011, with respect only to transcripts of recently conducted witness interviews, and any other witness related materials collected after 1 July 2011 (“the Third Decision”).⁷
6. In compliance with these Decisions, the Prosecution herewith submits proposals for redactions to materials upon which it intends to rely for the purposes of the confirmation hearing, which were collected after 31 March 2011, and which constitute transcripts of witness interviews, or witness-related material collected after 1 July 2011.
7. The Prosecution proposes redactions 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).
8. The Prosecution seeks redactions both to the face of documents being 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 incriminating materials.

II. Request for Confidentiality

9. 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

⁶ ICC-01/09-01/11-155-Red.

⁷ ICC-01/09-01/11-161, p. 6.

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

10. 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.
11. The Prosecution must select the evidence on which it relies and the conditions under which it proposes to disclose this evidence subject to its obligations to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, as provided in Articles 54(1)(b) and 68 of the Statute. 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, Rule 81(4) provides that to protect the safety of witnesses and victims and members of their families, Prosecutor may seek the non-disclosure of their identities prior to the commencement of trial.
12. The Prosecution may also request redactions to material being disclosed to protect further and/or ongoing investigations, pursuant to Rule 81(2).
13. The proposed redactions and their factual and legal justifications are set forth in the annexes to this Application. The Prosecution proposes to redact the same

⁸ ICC-01/09-01/11-85, para. 18 (footnotes omitted).

information from the material disclosed to all three suspects. 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)

14. 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.⁹ The Prosecution requests that the Chamber apply the same rules to this Application. Some proposed redactions require limited further explanation, as set forth below.

Proposed redactions to evidence from Prosecution witnesses

15. The Prosecution seeks redactions to the transcripts and related documents of the second interviews of W-0015, W-0016 and W-0028. The Single Judge previously approved redactions to statements, transcripts and other documents related to the first interviews of these witnesses, in the First¹⁰ and Second¹¹ Decisions on Redactions. This included redactions to identifying features of these witnesses. To maintain the protection afforded these witnesses, the Prosecution requests the redaction of similar information from the transcripts and related documents from the second interviews of W-0015, W-0016 and W-0028.

⁹ ICC-01/09-01/11-96-Conf-Exp, paras. 17-25.

¹⁰ W-0016: ICC-01/09-01/11-145-Conf-Exp, *passim*. See also related Annex 1, p. 4-6, and Annex 2, p. 12-31, 308-309.

¹¹ W-0015 and W-0028: ICC-01/09-01/11-152-Conf-Exp, *passim*. See also related Annex 1, p. 1-6, 7-9, and Annex 2, p. 3-457.

16. [REDACTED]
[REDACTED]
[REDACTED]
17. The Prosecution requests that, when considering this application for redactions, the Chamber also take into account the security situation of W-0015, W-0016 and W-0028, as explained in previous representations to the Chamber.¹²

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

18. 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.”¹³
19. In this case, the Prosecution seeks to redact, in particular, the names, signatures and initials 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. The request for redactions does not extend to Prosecution staff whose identities have already been revealed to the public (e.g. by their presence at public

¹² ICC-01/09-01/11-96-Conf-Exp-AnxB5 (W-0015); ICC-01/09-01/11-96-Conf-Exp-AnxC5 (W-0016); ICC-01/09-01/11-96-Conf-Exp-AnxH4 (W-0028); ICC-01/09-01/11-T-3-CONF-EXP-ENG ET, *passim*; ICC-01/09-01/11-140-Conf-Exp, *passim*.

¹³ *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.

hearings). The Prosecution proposes these redactions for the same reasons cited in its First Application and incorporates them by reference.¹⁴ The Single Judge approved such redactions in the First and Second Decisions on Redactions.¹⁵

IV. Swahili transcription

20. In the Third Decision on Redactions, the Single Judge ordered the Prosecution to provide transcripts of the second interviews of W-0016 and W-0028 which contain both the English and the Swahili portions of the transcripts within 10 days after the Single Judge issues a decision on redactions proposed to these transcripts.¹⁶

21. The Prosecution will be unable to produce complete transcriptions of the Swahili portions of the interviews within this time limit. Thus, to fulfill the Single Judge's order, the Prosecution will:

- Disclose to the Defence transcripts which contain the English portions only, with redactions approved by the Chamber; and
- Disclose to the Defence audio tapes of the interviews, which contain (i) redactions to the English and Swahili portions as approved by the Chamber, and (ii) voice distortion of all participants, so that the voices of the witnesses and investigators¹⁷ cannot be recognized.

¹⁴ ICC-01/09-01/11-96-Conf-Exp, paras. 40-41.

¹⁵ ICC-01/09-01/11-145-Conf-Exp, paras. 56-61, and Annex 2, *passim*; ICC-01/09-01/11-152-Conf-Exp, paras. 17-18, and Annex 2, *passim*.

¹⁶ ICC-01/09-01/11-161, para. 9.

¹⁷ Whose identity will remain undisclosed, in keeping with previous orders of the Single Judge.

V. Relief

22. In light of the foregoing, the Prosecution requests that the Single Judge approve the proposed redactions.



Luis Moreno-Ocampo

Prosecutor

Dated this 13th day of July 2011

At The Hague, The Netherlands