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Date: 08 June 2011

**PRE-TRIAL CHAMBER II**

**Before:** Judge Ekaterina Trendafilova, Presiding Judge  
Judge Hans-Peter Kaul, Judge  
Judge Cuno Tarfusser, Judge

**SITUATION IN THE REPUBLIC OF KENYA**

**IN THE CASE OF  
THE PROSECUTOR *v.* FRANCIS KIRIMI MUTHAURA, UHURU MUIGAI  
KENYATTA AND MOHAMMED HUSSEIN ALI**

**Public Document**

**Defence Request for Additional Information Concerning the 'Prosecution's 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 and for Immediate Disclosure of the Redacted Materials**

**Source:** Defence

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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Ms. Fatou Bensouda, Deputy Prosecutor

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Evans Monari and Gershom Otachi

**Legal Representatives of the Victims**

**Legal Representatives of the Applicants**

**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States' Representatives**

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Ms. Silvana Arbia, Registrar

**Deputy Registrar**

Mr. Didier Daniel Pereira, Deputy  
Registrar

**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

## I. PROCEDURAL HISTORY

1. On 20 April 2011, the Single Judge issued her “Decision on the ‘Prosecution’s application requesting disclosure after a final resolution of the Government of the Republic of Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure Between the Parties” (the “Disclosure Decision”).<sup>1</sup>
2. In the Disclosure Decision, the Single Judge ordered the Prosecution by 3 June 2011, *inter alia*, to submit properly justified proposals for redactions to the evidence it intends to rely upon for the purposes of the confirmation of charges hearing collected prior to 15 December 2010. The Learned Judge further ordered by 3 June, the Prosecution to permit the Defence to inspect materials falling under Rule 77 of the Rules of Procedure and Evidence (the “Rules”), in the possession or control of the Prosecutor which are intended to be used as evidence for the purposes of the confirmation hearing or were obtained from or belong to the suspects, and which were collected prior to 15 December 2010. The Single Judge ordered the Prosecution to disclose to the Defence any piece of evidence which is material to the preparation of the Defence within the scope of Rule 77 as soon as practicable.
3. On 30 May 2011, in the case of *The Prosecutor v Ruto et al*, the Defence of Mr Ruto and Mr Sang filed an “Urgent Defence Request for Additional Information Concerning the ‘Prosecution’s 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’, and for Immediate Disclosure of Redacted Materials” (the “Ruto Application”).<sup>2</sup>

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<sup>1</sup> Pre-Trial Chamber II, Prosecutor v Muthaura et al., “Decision on the ‘Prosecution’s application requesting disclosure after a final resolution of the Government of the Republic of Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure Between the Parties”, 20 April 2011, ICC-01/09-02/11-64.

<sup>2</sup> Pre-Trial Chamber II, Prosecutor v Ruto et al., “Urgent Defence Request for Additional Information Concerning the ‘Prosecution’s 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’, and for Immediate Disclosure of Redacted Materials”, 30 May 2011, ICC-01/09-01/11.

4. On 3 June 2011, the Prosecution disclosed to the Defence 154 documents for which no redactions were required. This comprised five packages: three labelled incriminating evidence disclosed under Article 61(3)(b) (a total of 84 documents), and two packages labelled evidence disclosed pursuant to Rule 77 of the Rules (a total of 70 documents).<sup>3</sup>
5. On 3 June 2011, the Prosecution filed a public redacted version of 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” (the “Application”).<sup>4</sup> In this Application, the Prosecution proposed redactions to materials it intends to rely upon at the confirmation hearing, and which were collected prior to 15 December 2011. The Prosecution also proposed redactions to materials collected pursuant to Rule 77 of the Rules prior to 15 December 2010 which it intends to rely upon at the confirmation hearing or which it considers are material to the preparation of the defence.
6. The Prosecution requested that the Single Judge receive the un-redacted version of the Application and its annexes as “confidential, *ex-parte*, Prosecution and VWU only”.<sup>5</sup>
7. On 6 June 2011, the Pre Trial Chamber (the “PTC”) issued its “Decision Ordering the Victims and Witnesses Unit to Submit Observations” on the Prosecution’s Application by 14 June 2011.<sup>6</sup>

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<sup>3</sup> Pre-Trial Chamber II, Prosecutor v Muthaura et al., “Prosecution’s First Communication of the Disclosure of Incriminating Evidence and Rule 7 Materials to the Defence, with public Annexes A,B, C, D and E and Confidential Annexes E, F and G”, 3 June 2011, ICC-01/09-02/11-100.

<sup>4</sup> Pre-Trial Chamber II, Prosecutor v Muthaura et al., “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”, 3 June 2011, ICC-01/09-02/11-101-Red.

<sup>5</sup> Pre-Trial Chamber II, Prosecutor v Muthaura et al., “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”, 3 June 2011, ICC-01/09-02/11-101-Red, at para. 10.

<sup>6</sup> Pre-Trial Chamber II, Prosecutor v Muthaura et al., “Decision Ordering the Victims and Witnesses Unit to Submit Observations”, 6 June 2011, ICC-01/09-02/11-106

## II. SUBMISSIONS

8. The Defence submits that the Application is extensively redacted and only identifies the rules under which the relief is sought and generic subject headings.<sup>7</sup> It is therefore impossible for the Defence to discern how the Prosecution seeks to justify substantively the proposed redactions. The Application by the Prosecution causes prejudice to the Defence as it:
- (i) renders illusory the right of the Defence to respond; and
  - (ii) has the potential to cause delay to the proceedings due to (a) the fact that in the absence of further relevant information, the Defence will be forced to withhold submissions on the proposed redactions until the PTC has rendered a decision and the materials provided; and (b) the Prosecution's application for an extension of the time limit to disclose.
9. In the instant case, the Defence relies upon several of the submissions made in the Ruto Application,<sup>8</sup> and in particular draws to the Pre-Trial Chamber's attention, the prejudice that will be suffered by the Defence in the event the Prosecution's Application is determined in the absence of further submissions from the Defence.

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<sup>7</sup> Rules 81(2) and (4) of the Rules. See Pre-Trial Chamber II, Prosecutor v Muthaura et al., "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", 3 June 2011, ICC-01/09-02/11-101-Red, at sections B and C.

<sup>8</sup> Pre-Trial Chamber II, Prosecutor v Ruto et al., "Urgent Defence Request for Additional Information Concerning the 'Prosecution's 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', and for Immediate Disclosure of Redacted Materials", 30 May 2011, ICC-01/09-01/11, at paras. 4, 6, 7-10 and 12-14.

## A) Prejudice to the Defence

### i) The Redacted Application renders illusory the right of the Defence to respond

10. The redacted version of the Application fails to provide the Defence with any means of ascertaining *inter alia*, the rationale for the redactions (the objective risk of harm), the type of information for which redactions are being sought (for example names of witnesses, names of family members, screening notes of investigators or locations of interviews) or the type of evidence the Prosecution are seeking to redact (witness statements, reports, intercepts). As a result the Defence are prevented from being able to file any meaningful response and the PTC is denied the opportunity of hearing substantive argument from the Defence upon the issues.<sup>9</sup>
11. Without access to relevant information to the extent possible, the Defence are unable to make any submissions in relation to those key requirements which must be fulfilled in order to permit redactions including (i) the danger that disclosure of the information may cause, (ii) the necessity of the redactions including whether or not less intrusive measures are available, (iii) the fact that any measure requested shall be prejudicial to or inconsistent with the rights of the Defence and a fair and impartial trial.<sup>10</sup> Furthermore, the Prosecution has failed to provide the Defence with any information on the alternative measures they purport to have considered.<sup>11</sup>

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<sup>9</sup> The Defence are entitled to file such a response under Regulations 24 and 34 of the Regulations of the Court.

<sup>10</sup> See, Prosecutor v. Lubanga, Judgment on Appeal against First Redaction Decision, 14. December 2006, ICC-01/04-01/06-773 OA5, at para. 21; Prosecutor v. Katanga, Judgment on Prosecution's Appeal against the First Redaction Decision, 13 May 2008, ICC-01/04-01/07-475 OA, at para. 67; Prosecutor v. Katanga, Judgment on Katanga's Appeal against the First Redaction Decision, 13 May 2008, ICC-01/04-01/07-476 OA2, at para. 59.

<sup>11</sup> The Prosecution merely state that they are of the opinion that there are no less restrictive measures that can be taken, however, they fail to state other options that have been considered and why they do not prove to be efficient. See Pre-Trial Chamber II, Prosecutor v Muthaura et al., "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", 3 June 2011, ICC-01/09-02/11-101-Red, at para 36

12. Although it is accepted that there may be certain pieces of information that cannot, due to their nature, be disclosed to the Defence, the Prosecution's blanket redaction approach is neither warranted nor justifiable. The extent of the proposed redactions violates the principle that *ex-parte* procedures should only be utilised in a manner which is necessary and proportionate and which does not violate the rights of the Defence.<sup>12</sup>
13. The PTC is seeking observations from the Victims and Witnesses Unit in relation to the Prosecution's Application.<sup>13</sup> In the circumstances, it is submitted that it is also necessary for the PTC to hear submissions from the Defence before determining the Application in order to allow the Chamber to properly assess the need and extent of permissible redactions. In particular, the Defence submits that it is in a unique position to provide submissions in relation to the prejudicial effect of the proposed redactions. Previous Chambers have on a number of occasions reversed their findings on redactions, due to the fact that they were only in a position to fully evaluate the impact of the redactions on the rights of the Defence after having been apprised of key information concerning Defence strategy and preparation.<sup>14</sup>
14. Furthermore, the Application in its current form prevents the Defence from knowing, addressing, correcting and/or contextualizing the substance of the Prosecution's submissions on clearly contentious issues referred to in the

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<sup>12</sup> Appeals Chamber, Prosecutor v. Lubanga, 'Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81', 14 December 2006, ICC-01/04-01/06-773, at para. 22. See also Trial Chamber I, Prosecutor v. Lubanga, 'Decision on the Procedure to be Adopted for Ex Parte Procedures', 6 December 2007, ICC-01/04-01/06-1058, at para. 12.

<sup>13</sup> Pre-Trial Chamber II, Prosecutor v Muthaura et al., "Decision Ordering the Victims and Witnesses Unit to Submit Observations", 6 June 2011, ICC-01/09-02/11-106

<sup>14</sup> See for example, Prosecutor v. Lubanga, Redacted Decision on Intermediaries, ICC-01/04-01/06-2434-Red2, 31 May 2010; Prosecutor v. Katanga, Oral Decision, Transcript of 14 May 2010, pages 13-18, ICC-01/04-01/07- T-141-Red; Prosecutor v. Katanga, Oral Decision, Transcript of 21 October 2010, pages 2-3, ICC-01/04-01/07- T-208 ; Prosecutor v. Lubanga, Oral decisions, 4-5 March 2009, pages 21-23 (4 March), ICC-01/04-01/06-T- 142-ENG, and pages 1-2 (5 March) ICC-01/04-01/06-T-144-ENG.

Application such as “Dangers inherent in disclosing evidence to the suspects”,<sup>15</sup> and the “Atmosphere of witness corruption in Kenya”.<sup>16</sup> In the absence of submissions from the Defence, there is a risk that the PTC may be misled by incomplete information and inadequately informed as regards both the suspects and the situation in Kenya concerning witness protection.

ii) The Redacted Application has the potential to cause delay to the proceedings

15. In the absence of further relevant information, the Defence will be forced to withhold submissions on the proposed redactions until the PTC has rendered a decision and the materials provided. Not only will this impact on the Defence’s right to be informed as soon and as fully as possible of the evidence against them,<sup>17</sup> but it also has the potential to cause delay to the proceedings up to and including the confirmation hearing.
16. In the event the Defence are forced to wait until after the PTC’s decision before being able to make properly considered submissions, the Chamber will be burdened by having to consider the correctness of the same redaction proposals on two separate occasions. Provision of the legal and factual justifications for each proposed redaction as well as the redacted material would alleviate this burden and allow the Defence to address the substance of the Application.
17. Further, the Prosecution’s request to defer the implementation of disclosure will have the inevitable consequence of shortening the amount of time that the Defence will have to review the material, develop its strategy, and conduct its investigations prior to the start of the confirmation hearing. Such a measure causes prejudice to the Defence and prevents it from having reasonable time to prepare its case and challenges to the Prosecution evidence. Given that the

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<sup>15</sup> Pre-Trial Chamber II, Prosecutor v Muthaura et al., “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”, 3 June 2011, ICC-01/09-02/11-101-Red, at para. 19

<sup>16</sup> Pre-Trial Chamber II, Prosecutor v Muthaura et al., “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”, 3 June 2011, ICC-01/09-02/11-101-Red at paras. 20-22

<sup>17</sup> Article 67 of the Rome Statute.



Prosecution's evidence has to be disclosed ultimately in order to enable a fair hearing, the purposes for such delayed disclosure are hard to justify. In the absence of proper justification as to why such a delay is sought, and the impact of any such delay upon the rights of the Defence to prepare and review the evidence, the Defence submits that the Pre-Trial Chamber should reject the requested extension of the time limit for disclosure.

## **B) Counterbalancing Measures and the Right to Respond**

18. The Defence submits that if the Prosecution were to provide (i) more detailed information in relation to the type of redactions, the legal/factual basis for redactions and the type of evidence being redacted in a 'confidential parties only' annex and (ii) the evidence as redacted by the Prosecution, the Defence would then be in a position to provide practical and informed submissions to the PTC. The provision of such submissions on the potential impact of the proposed redactions on the preparation and the rights of the Defence as well as potential counterbalancing measures which may mitigate any prejudice is essential in order to ensure that the PTC makes a correct decision in accordance with the law which requires the PTC to consider *inter alia* that the measure would not be prejudicial to or inconsistent with the rights of the suspect and a fair impartial trial.<sup>18</sup>
  
19. The jurisprudence and practice of both Trial Chamber I and II demonstrates that an essential component of the fairness of the redaction process is for the Prosecution to provide detailed reasons and information in an annex available to the Defence.<sup>19</sup> Although the Prosecution filed a public redacted version of the

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<sup>18</sup> Prosecutor v. Lubanga, Judgment on Appeal against First Redaction Decision, ICC-01/04-01/06-773 OA5, 14. December 2006, para. 21; see also Prosecutor v. Katanga, Judgment on Prosecution's Appeal against the First Redaction Decision, ICC-01/04-01/07-475 OA, 13 May 2008, para. 67.

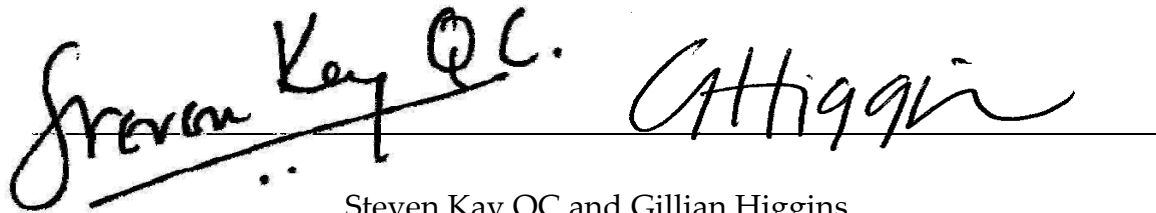
<sup>19</sup> See, Trial Chamber II, Prosecutor v. Katanga and Ngudjolo, 'Decision on the Redaction Process', 12 January 2009, ICC-01/04-01/07-819-tENG, at para 10; Trial Chamber I, Prosecutor v. Lubanga, Order on prosecution's application for redactions pursuant to Rule 81(2) filed on 14 February 2008, ICC-01/04-01/06-1172, 15 February 2008 at para 2. Trial Chamber I, Prosecutor v. Lubanga, Prosecution's Request for Non-Disclosure of Information in Six Documents, 26 April 2011, ICC-01/04-01/06-2724-RED.

confidential Application, the heavily redacted nature of this submission prevents the Defence from making any informed arguments concerning the issues raised.

20. In the instant case, the Defence submits that the expedition of the proceedings and the fair trial rights of the Defence to be informed of the evidence and to make properly considered, timely submissions requires disclosure to the Defence of a copy of the materials with redactions as proposed, pending a decision from the PTC. It is submitted that this disclosure must take place subject to the understanding that the Prosecution will subsequently lift any redactions not authorised by the PTC.

### **III. RELIEF SOUGHT**

21. The Defence respectfully requests the PTC to order the Prosecution to:
  - i) File a 'confidential parties only' annex, which, to the extent possible, sets out the legal and factual justifications for each proposed redaction; and
  - ii) Immediately disclose to the Defence the relevant documents in their redacted form, subject to the caveat that the Prosecution will lift any redactions the PTC decides not to authorise in its decision.
22. Further, the Defence respectfully requests the PTC to reject the Prosecution's application for an extension of the time limit to disclose the redacted material.

Handwritten signatures of Steven Kay QC and Gillian Higgins. The signature 'Steven Kay QC' is written in a cursive style with a large 'S' and 'K'. The signature 'Gilligan' is also in cursive. Both signatures are written above a horizontal line.

Steven Kay QC and Gillian Higgins  
On behalf of Uhuru Muigai Kenyatta

Dated this, Wednesday 8 June 2011

At London, UK