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

Date: 8 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

Defence Request for an Order Compelling the Prosecutor to Supply Additional Information to the Defence with regard to the "Prosecutor's First Application Pursuant to Rule 81(2) and Rule 81(4) for Redactions to Statements of Witness and Other Materials to be Relied Upon at the Confirmation Hearing."

Source: Defence of General Mohammed Hussein Ali

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

Counsel for the Defence

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Counsel for Uhuru Muigai Kenyatta:

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Evans Monari and Gershom Otachi Bw'omanwa

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**

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REGISTRY

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Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations

Other

Introduction

1. The Defence of Mohammed Hussein Ali requests the Chamber to Order the Prosecution to provide sufficient information to the Defence to enable the Defence to make a meaningful response to the Prosecutor's Application for redactions.
2. The Defence submits that 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,"¹ (hereinafter the "Prosecution Application") makes it impossible for the Defence to interrogate whether the suggested redactions meet the necessary threshold.
3. The Defence, therefore, reserves its right to submit observations on the Prosecutor's application upon availing of sufficient information by the Prosecution.

Procedural history

4. 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"² in which she directed the Prosecution, by 3 June 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 has been collected prior to 15 December 2010 and for which no redaction is needed; and (ii) submit to the Chamber properly justified proposals for redactions with respect to the evidence collected prior to 15 December 2010.³
5. On 3 June 2011, the Prosecution filed the Prosecution Application pursuant to Rule 81(2) and Rule 81(4) of the Rules of Procedure and Evidence. The heavily

¹ ICC-01/09-02/11-101-Red

² ICC-01/09-02/11-64

³ *Id.*, para 17.

redacted application available to the Defence seeks to set out justifications for the proposed redactions.

Submissions

6. The Defence notes the provisions of Rule 81(2) and Rule 81(4) of the Rules of Procedure and Evidence.
7. While the Defence acknowledges that certain information sought to be redacted cannot be disclosed to the Defence prior to a decision by the Chamber, the Defence disagrees with the approach adopted by the Prosecution in the application by redacting all the important information that is important to determine whether or not the suggested redactions meet the criteria as set out by the Appeals Chamber. A case by case determination by the Chamber will be greatly assisted by submissions by both the Prosecution and the Defence protecting the interests of the persons at risk and the Defence simultaneously. The Defence is guided by the Appeals Chamber's holding in this regard where it was stated that:

while the non-disclosure of information for the protection of persons at risk is permissible in principle pursuant to rule 81(4) of the Rules, whether any such non-disclosure should be authorised on the facts of an individual case will require a careful assessment by the Pre-Trial Chamber on a case-by-case basis, balancing the various interests at stake.⁴

8. The Defence reiterates that in order for the Chamber to reach a reasoned decision on the kind of redactions to be allowed, it ought to benefit from meaningful submissions from the Defence. This will ensure that the Defence is not unfairly disadvantaged in the preparation of its case and to avoid re-litigation of issues if the Defence were to be dissatisfied with the decision and seek leave to appeal. In regard to the need for Defence submissions, the Appeals Chamber above has clearly stated that:

b) prior to ruling on the application for redactions, the Pre-Trial Chamber should give the Defence the greatest possible

⁴ Para 66, *infra* note 6.

opportunity to make submissions on the issues involved, necessarily without revealing to the Defence the information which the Prosecutor alleges should be protected;⁵ (emphasis added)

9. The Prosecution has redacted virtually all the necessary information leaving out general statements which are irrelevant for the Defence to make any submissions.
10. The Defence notes the factors in relation to the alleged risk of danger laid down by the Appeals Chamber⁶. The same guidelines have been relied upon by the Prosecution in its application.⁷ However, the Defence points out that the interrogation of whether the proposals for redactions meet the criteria are not the sole reserve of the Prosecutor in a system where the parties should enjoy equality of arms. The Defence has a role to play to assist the Chamber in determining whether the proposed redactions are justifiable.
11. Furthermore, Chambers of this court have held that the Prosecution is obliged to provide more details on the factual and legal basis for seeking redactions and which details ought to be available to the Defence.⁸ Both Trial Chamber I and II have taken the position affirmed by the Appeals Chamber that the Defence ought to be given an “opportunity to make submissions on the issues involved, necessarily without revealing to the Defence the information which the Prosecutor alleges should be protected...”⁹
12. The Defence submits that its position is virtually crippled and is not in a position to make any submissions to the Prosecution application. It is the

⁵ Para 73, *infra*.

⁶ See *Prosecutor v. Katanga*, Judgment on Prosecution’s Appeal Against the First Redaction Decision, ICC-01/04-01/07-475 OA, 13 May 2008, paras. 71-72. The Appeals Chamber determined that the following factors should be considered in regard to the alleged risk of danger:

- a) the alleged danger must involve an objectively justifiable risk to the safety of the person concerned;
- b) the risk must arise from disclosing the particular information to the Defence, as opposed to disclosing the information to the public at large. The Chamber should consider, inter alia whether the danger could be overcome by ruling that the information should be kept confidential between the parties. In making this assessment, the circumstances of the individual suspect should be considered, including, inter alia, whether there are factors indicating that he or she may pass on the information to others or otherwise put an individual at risk by his or her actions.

⁷ Para 17, Prosecution application.

⁸ See *Prosecutor v. Katanga and Ngudjolo*, ‘Decision on the Redaction Process’, 12 January 2009, ICC-01/04-01/07-819-tENG, para 10

⁹ *Id.*

Defence's contention that the Prosecution has either misunderstood the difference between "issues involved" and the "information sought to be protected" or has simply not differentiated between the two. It is evident from the Prosecution application that the issues involved have also been redacted in the same measure as the information sought to be protected in blatant disregard of the jurisprudence of this court.

13. Pending the provision of further information, the Defence wishes to point out that the Prosecution has already categorically stated in public that all its witnesses have been flown out of the territory of the Republic of Kenya.¹⁰ The Chamber ought to take this into consideration in analyzing whether the sought redactions are necessary as any perceived risk of danger has been effectively lowered.

14. In regard to the extension of time sought by the Prosecution, the Defence submits that the same is not only improperly brought before the Chamber but that the same is unwarranted as the Prosecution has not provided any reasonable grounds for granting extension. The Prosecution has sought similar extensions in this case in regard to his disclosure obligations which have been rejected. The instant request is therefore a request for reconsideration which is not permitted.

Relief Sought

15. For the foregoing reasons, the Defence requests the Chamber to:

- a) order the Prosecutor to file a confidential annex to the Prosecution application, available to the Defence, setting out detailed issues for the proposed redactions;
- b) reject the Prosecution request for more time as the same is baseless;
- c) grant the Defence reasonable time to respond to the Prosecutor's application once a confidential annex with more details has been filed

¹⁰ See Evelyn Kwamboka, 'ICC Prosecution witnesses already out of Kenya,' available at <http://m.standardmedia.co.ke/news.php?id=2000036253> accessed on 8 June 2011

Respectfully submitted,



Evans Monari and Gershom Otachi Bw'omanwa
On behalf of Mohammed Hussein Ali

Dated this 8th day of June, 2011,

At Nairobi, Kenya.