

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 15 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. WILLIAM SAMOEI RUTO, HENRY KIPRONO KOSGEY
AND JOSHUA ARAP SANG***

PUBLIC

Response on behalf of Henry Kiprono Kosgey to the 'Prosecution's Second Application pursuant to Rules 81(2) and Rule 81(4) for Redactions to Statements of Witnesses and Related Materials to be Relied Upon at the Confirmation Hearing

Source: Defence

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

Luis Moreno-Ocampo, Prosecutor
Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Counsel for William Samoei Ruto:
Kioko Kilukumi Musau, Joseph
Kipchumba Kigen-Katwa and Kithure
Kindiki, David Hooper QC
Counsel for Henry Kiprono Kosgey:
George Odinga Oraro, Julius Kemboy
and Allan Kosgey
Counsel for Joshua Arap Sang:
Joseph Kipchumba Kigen-Katwa, Joel
Kimutai Bosek and Philemon K.B. Koech

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

Registrar

Ms. Silvana Arbia, Registrar

Counsel Support Section

Deputy Registrar

Mr. Didier Daniel Preira, Deputy
Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Procedural History

1. On 7 April 2011, the Single Judge rendered 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters', establishing the modalities by which the parties would execute disclosure.
2. On 20 April 2011, the Single Judge issued 'Decision on the 'Prosecution's application requesting disclosure after a final resolution of the Government of Kenya's admissibility challenge' and Establishing a Calendar of Disclosure between the Parties'. This Decision required the Prosecution to, *inter alia*:
 - (i) By 13 May 2011¹ - disclose to the Defence any evidence collected prior to 15 December 2010 on which it intends to rely for the purpose of confirmation and submit to the Chamber properly justified proposals for any redactions of such evidence.
 - (ii) By 3 June 2011 - disclose to the Defence any evidence collected between 15 December 2010 and 31 March 2011 on which it intends to rely for the purpose of confirmation and submit to the Chamber properly justified proposals for any redactions of such evidence.
 - (iii) By 8 July 2011 - disclose to the Defence any evidence collected after 31 March 2011 on which it intends to rely for the purpose of confirmation and submit to the Chamber properly justified proposals for any redactions of such evidence.
 - (iv) In each case, to disclose to the Defence the evidence for which redactions will be requested no later than 5 days after the Chamber's decision regarding such redactions.
3. On 23 May 2011 the Prosecution submitted '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' [the "First Application"] and on 3 June 2011 submitted 'Prosecution's

¹ Later varied to 23 May 2011 in Single Judge's 'Decision on the 'Prosecution's Application for Extension of Time for Disclosure'.

Second Application Pursuant to Rule 81(2) and Rule 81(4) for the Redactions to Statements to Witnesses and Related Materials to be Relied Upon at the Confirmation Hearing' [the "Second Application"].

4. The First and Second Applications are in almost identical terms. They are both, *inter alia*:
 - (i) Heavily redacted, thus providing little detail as to the merits for the proposed redactions, obviously making it difficult for the Defence to respond substantively to them;
 - (ii) Refer to 'Confidential, *ex parte*, Prosecutor only' annexes which 'relate to material that is currently confidential and *ex parte* or contain information for which redactions are sought', which are, obviously, not provided to the Defence;
 - (iii) Seek full redactions of Swahili transcripts on the basis that 'the Prosecution does not have the resources to also prepare redactions to Swahili text'; and
 - (iv) Seek an increase from 5 to 10 days from the date of any Decision for the Prosecution to make the required disclosure to the Defence.

5. On 30 May 2011, the Defence for Mr Ruto and Mr Sang submitted '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'.

6. In the Ruto and Sang Defences to the First Application, they responded by asking the Pre-Trial Chamber to:
 - (i) Order the Prosecution to file a confidential annex to the Prosecution Request, which, to the extent possible, sets out the legal and factual justification for each redaction;

- (ii) Order the Prosecution to immediately disclose to the Defence the redacted materials, subject to the caveat that the Prosecution will lift any redactions which the Chamber subsequently decides not to authorise; and
 - (iii) Reject the Prosecution request for blanket redactions to the Swahili text pending the submission of detailed justification by the Prosecution.
7. For the reasons set out below, the Defence of Mr Kosgey responds to the Prosecution's Second Application in terms of the response set out hereunder.

Submissions

Requirement that Prosecution file confidential annex setting out legal and factual justification for each redaction

8. The Pre-Trial Chamber II in its Decision dated 31 July 2008, set out the jurisprudence relating to the regime for disclosure to be as follows:

"40. The Chamber observes that in the Statute and the Rules reference is made to the process of disclosure between the parties namely the Prosecutor and the Defence regarding the modalities of disclosure, the Chamber notes the relevant provision in articles 61(3) and 67(2) of the Statute and rules 76 to 83 and 121 of the Rules.

41. The Chamber further notes that the modalities of disclosure will be subject to any decision taken by the Chamber in respect of restrictions on disclosure pursuant to rules 81 and 82 of the Rules.

[...]

43. The Chamber notes that under rule 121(2)(c) of the Rules "all evidence disclosed between the Prosecutor and the person for the purposes of the confirmation hearing shall be communicated to the Pre-Trial Chamber". The reference to 'all evidence' in rule 121 (1) of the Rules implies that

communication to the Chamber comprises all the evidence disclosed between the parties and that it is not limited to the evidence which the parties intend to rely on or to present at the confirmation”²

9. In discharge of his obligations under the Statute, the Prosecutor is required to disclose all the evidence in his possession, subject to restrictions under rules 81 and 82.

10. Each application for redaction attracts different considerations under rule 81(2) of the Rules. The Appeals Chamber has clarified that it is for the Prosecution to establish that redactions are warranted and that disclosure could “prejudice further or ongoing investigations”³. Moreover, any permitted redaction must be restricted to that which is absolutely necessary.

11. A similar approach is applied in respect of an application under rule 81(4) of the Rules. The Court and Prosecution should, on a case by case basis, cautiously and carefully assess, taking into account all relevant factors, the individual facts and circumstances of each case and each specific request for individual redaction. Any restriction on disclosure of the statement upon which the Prosecutor wishes to rely at the confirmation hearing may only be permitted after evaluating the exceptionality of the request and the absence of any less restrictive protective measure.⁴

12. It is in those circumstances that the application by the Prosecutor is both unfair and oppressive to the Defence. So as to be able to respond to the Prosecution’s Applications in a meaningful way, it is imperative that the Prosecution provide detailed reasons for the redactions sought. Both the

² *Prosecutor v Jean-Pierre Bemba Gombo*, Situation in the Central African Republic, ICC -01/05-01/08 Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties, paras 40, 41, and 43.

³ *Prosecutor v. Katanga and Ngudjolo*, Appeals Chamber Judgment on the appeal “First Decision on the Prosecution Request on Authorisation to Redact witness statements” ICC-01/04-01/07-475 para 99.

⁴ *Prosecutor v. Lubanga*, Appeals Chamber Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I “Decision establishing the general principles governing applications to restrict disclosure pursuant to rule 81(2) and (4) of the Rules of Procedure and Evidence” ICC-01/04-0106-658 para 1; *Prosecutor v. Katanga and Ngudjolo* judgment on appeal “First Decision on the Prosecution Request For Authorisation to Redact Witness Statements” ICC -01/04-01/07-475 , 13 May 2008, para 69.

Prosecution's First and Second Applications are themselves so heavily redacted that it is extremely difficult to decipher the basis upon which the Prosecution seeks to justify redactions to the disclosure material. Obviously, without knowing the full basis and justification for redaction, it is impossible to properly respond.

13. In order to facilitate a meaningful Defence response to the Applications, it is respectfully submitted that the Pre-Trial Chamber should order the Prosecution to file confidential annexes to the Prosecution Applications setting out, to the extent possible, the legal and factual justification for each redaction sought.
14. If such an Order is made, the Defence of Mr Kosgey reserves the right, at that stage, to respond in full to the Prosecution's Applications for redaction.

Requirement that Prosecution immediately disclose the redacted materials to the Defence

15. In order for the Defence to realise their fundamental rights guaranteed by the Statute, it is absolutely necessary that the disclosure system be interpreted and applied in a manner that guarantees the rights envisioned under the Statute and the Rules as provided for under Articles 61(3), 67(1) (a) and (b), 67 (2) and rules 76, 77 and 121 of the Rules⁵.
16. The provision to the Defence of the material the Prosecution seeks to rely upon, even in its current redacted form, will assist the Defence to (i) make more informed submissions in response to any Prosecution justification for redaction, and (ii) commence some aspects of its preparation for the Confirmation Hearing.

⁵ Pre-Trial Chamber III Situation in the Central African Republic ICC-01/05-01/08-55 paras 22 and 23.

17. Obviously it will assist the Defence enormously in responding to the Prosecution Applications for redactions if the Defence is able to see the redactions within the context of the document in which they occur. If the Defence is able to gain the gist of the document from the unredacted portion there may be less concern about the redactions requested. Seeing the redaction in context will assist the Defence to respond fully and appropriately to any redaction sought.
18. Moreover, given the time pressure of preparing for the Confirmation Hearing, and keen to ensure that the Confirmation Hearing is heard on the dates already set aside by the Pre-Trial Chamber, provision of the material at this stage, even in redacted form, will afford the Defence precious time to commence work in earnest in preparation for the Hearing.
19. In balancing the competing interests at stake, the Chamber ought to ensure prior to ruling on the application for redactions that the Defence is granted greatest possible opportunity to make submissions on the issues involved without revealing the information the Prosecutor alleges should be protected.⁶

Rejection of blanket redaction to the Swahili text

20. The Prosecution seeks to justify blanket redaction to all Swahili text on the basis that it does not have the resources to prepare redactions to such text. This is not a proper justification. The Prosecution should have anticipated such problems in advance and sought an extension of time accordingly. At this stage the Prosecution should provide full and individualised justification for any redaction sought of any Swahili text. In the event, since the interpretation is derived from the Swahili text, no advantage can be gained from non disclosure of the text from which the interpretation has been drawn. In the event Rule 76 of the Rules of Procedure and Evidence requires that statements of Prosecution witnesses, if made available, must be in the original

⁶ Situation in the Democratic Republic of the Congo First Appeal Chamber Judgment ICC-01/04-0/07-425 para 73

and therefore in the language it was drawn, accompanied with an interpretation in a language the suspect understands.

Extension of time for disclosure of redacted materials after Decision of Pre-Trial Chamber

21. The Prosecution's request to increase the time period to make necessary redactions from 5 to 10 days after receipt of the Pre-Trial Chambers decision on the matter is, on the face of it, without merit. The Prosecution has provided no detailed explanation as to why the Pre-Trial Chamber should depart from its earlier calculation of 5 days being sufficient time. Accordingly, it is respectfully submitted that the Chamber should deny such extension.

Relief Sought

22. For the reasons set out above, the Kosgey Defence respectfully requests the Pre-Trial Chamber to:
- (i) Order the Prosecution to file a confidential annex to the Second Prosecution Application which, to the extent possible, sets out the legal and factual justification for each redaction sought;
 - (ii) Order the Prosecution to immediately disclose to the Defence the redacted materials referred to in the Second Applications, subject to the caveat that the Prosecution will lift any redactions which the Chamber subsequently decides not to authorise; and
 - (iii) Reject the Prosecution request to apply for blanket redactions to the Swahili text pending the submission of detailed justifications by the Prosecution.
 - (iv) Reject the Prosecution request for a 5 day extension of time to make necessary redactions before disclosure of redacted material to the Defence following the Pre-Trial Chamber's decision.



George Odinga Oraro
On behalf of Henry Kiprono Kosgey

Dated this 15th June 2011 at Nairobi, Kenya