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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.* FRANCIS KIRIMI MUTHAURA, UHURU MUIGAI
KENYATTA AND MOHAMMED HUSSEIN ALI**

Public Document

Prosecution's Consolidated Response to the Defence Requests 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 (ICC-01/09-02/11-109 and ICC-01/09-02/11-110)

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

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I. Introduction

1. On 3 June 2011, the Prosecutor filed 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” (‘First Application’).¹ The motion and annexes identifying the redactions sought and their supporting justifications were filed *ex parte*. The Prosecution then filed a public redacted version² that did not include public redacted versions of the annexes.
2. On 8 June 2011, the Defence team of Uhuru Muigai Kenyatta (“Kenyatta”) filed a request for additional information concerning the Prosecution’s First Application and for immediate disclosure of the redacted materials (“First Defence Request”).³ On the same day, the Defence team of Mohammed Hussein Ali (“Ali”) also filed a similar request for an order compelling the Prosecutor to supply additional information to the Defence with regard to the Prosecution’s First Application (“Second Defence Request”).⁴
3. In these Defence requests, both Defence teams complain that they cannot properly respond to the specific redaction requests absent a detailed chart indicating the basis for each redaction. The Ali Defence Team also contends that the provision of such information will avoid re-litigation of issues if the Defence

¹ ICC-01/09-02/11-101-Conf-Exp.

² ICC-01/09-02/11-101-Red. The Prosecution did not file public redacted versions of the annexes.

³ “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”, ICC-01/09-02/11-109.

⁴ “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’”, ICC-01/09-02/11-110.

were to be dissatisfied with the decision and seek leave to appeal. The Kenyatta Defence team, incorporating by reference parts of the submissions made by the Defence of Mr Ruto in the case *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey, and Joshua Arap Sang*, further argues that “the delay caused by late disclosure of redacted material would frustrate the Defence’s ability to file an informed request for leave to appeal of any subsequent redactions decision”. To counterbalance, in part, such prejudicial effect, the Kenyatta Defence also requests that the redacted materials be disclosed immediately.⁵

4. The Prosecution opposes these two requests for the following reasons:
 - a) The request for a confidential annex to the First Application setting out the legal and factual justification for each redaction is 1) misplaced, 2) negates the very purpose of requesting redactions, and 3) has no bearing on the preservation of the Defence’s ability to appeal.
 - b) The request to receive the redacted materials prior to a ruling from Pre-Trial Chamber II (the ‘Chamber’) overlooks and may contravene the Chamber’s duty to protect the safety of victims and witnesses. Such disclosure to the Defence would pre-empt additional security measures that may be considered necessary and appropriate by the Chamber and/or the Victims and Witnesses Unit (VWU).
5. Moreover, the Defence team of Kenyatta⁶ also misleadingly omits relevant portions of the decisions that it relies upon, leaving the Chamber with a

⁵ See ICC-01/09-02/11-109, para. 9 incorporating by reference *The Prosecutor v. Ruto et al.*, ICC-01/09-01/11-100, at paras. 4, 6, 7-10 and 12-14.

⁶ The Defence team of Kenyatta relied extensively on submissions made in ICC-01/09-02/11-100.

mischaracterization of the law. Detailed submissions addressing each of the points raised by the Defence are set out below.

II. Submissions

6. As a preliminary point, it is well recognized that a confirmation hearing is neither a trial nor a rehearsal of the trial. It is a mechanism to filter out unfounded criminal allegations. Thus, the predicate for the Defence submissions – that this is necessary to defend against the charges – is misplaced.
7. The Prosecution thus submits that the Defence’s reliance throughout the Defence Request upon decisions of various Trial Chambers to buttress its ‘right’ to specific material at the pre-confirmation stage of the present proceedings is misplaced. There is a fundamental difference between the purposes of the confirmation proceeding and the trial; the rights of the Defence at the latter do not necessarily attach at the former. Thus, decisions from Trial Chambers preserving the rights of the Accused to evidence at trial do not apply automatically at this early stage of the proceedings.

A. The Request for the Prosecution to produce an additional annex is without merit

8. First, the proposition that the Prosecution be required to submit to the Defence a chart and explanation of its non-disclosure requests, redaction by redaction, prior to a ruling by the Chamber of judicially approved redactions, is illogical. The Defence knows generally the basis for the requests for redactions: some seek redaction of information that if disclosed could lead to the identification of witnesses, victims or their families; some seek to redact information, the disclosure of which could jeopardize third parties or interfere with the

Prosecution's ability to conduct its investigations. A more detailed line by line explanation of proposed redactions, which is done for the Chamber in the confidential annexes, would include the information that is sought to be redacted and negate the very purpose of requesting redactions.

9. Second, the Defence argument that they are entitled to this information as a right is without legal merit. Contrary to the Defence's contention, Rules 81(2) and 81(4) do not afford the Defence the 'right' to respond to the Prosecution's request for redactions.

Rule 81(2) envisages no role by the Defence

10. The Rules of Procedure and Evidence explicitly provide that matters under Rule 81(2) shall be heard on an ex-parte basis by the Chamber. The *ex parte* character of these applications has been repeatedly affirmed by chambers of this Court.⁷ Rule 81(2) therefore provides no right to the Defence to respond or otherwise participate in such applications.⁸ Requiring the Prosecution to provide the Defence with the information it seeks would undermine the very protection that Rule 81(2) is meant to guarantee.

Rule 81(4) gives the Defence no right to examine ex parte materials

11. The same rationale applies to redactions made pursuant to Rule 81(4). While Rule 81(4) does not expressly provide for applications to be heard *ex parte*, this sub-section is rooted in the protection and safety of witnesses, members of their

⁷ See for example ICC-01/04-01/06-108-Corr, at para. 9 (Pre-Trial Chamber I); ICC-01/04-01/06-1058, at para. 4 (Trial Chamber I); ICC-01/04-01/06-774 (OA06), at para. 13 (Appeals Chamber, separate opinion of Judge Pikić); and ICC-01/04-01/07-475 (OA2) (Appeals Chamber).

⁸ The Prosecution notes however that Rule 81(2) nevertheless preserves the rights of the accused by requiring the Prosecution to give adequate notice before such evidence can be used in a trial or hearing.

families, victims, sources and other persons identified in statements from Prosecution witnesses. In order to properly justify its proposals, the Prosecution submitted sensitive information exclusively to the Chamber and the VWU. The ability of the Prosecution to freely provide information of this nature *ex parte* is crucial to the proper functioning of the Court and enables the Chamber to make informed decisions and meaningfully uphold its responsibility to protect victims and witnesses. Providing this information to the Defence would compromise the safety of the persons affected by the redactions thereby undermining the very protection that Rule 81(4) seeks to guarantee.

The contents of ex parte proceedings should be protected

12. Any concern about the Prosecution's unfettered discretion to propose redactions is balanced by the Chamber's decision requesting the VWU to provide observations on the Prosecutor's risk assessment.⁹ Further, a potential disclosure of the contents of *ex parte* applications to the Defence upon its request may have longstanding consequences such as discouraging the Prosecution from revealing information that could be helpful to the Chamber.¹⁰

The approach entails no delay to the proceedings

13. The Prosecution submits that the approach of submitting redaction proposals *ex parte* to the Chamber is in line with the statutory obligation of the Chamber to

⁹ "Decision Ordering the Victims and Witnesses Unit to Submit Observations", ICC-01/09-02/11-106.

¹⁰ "Decision on the procedures to be adopted for *ex parte* proceedings", ICC-01/04-01/06-1058, at para. 14: "It is important that the parties and the participants should be able to make applications and submissions, when strictly necessary, on a private basis. The Chamber considers that it would undermine the proper functioning of this procedure if the expectation was that everything that had been said during the hearing or set out in the application would be made public once the reason for protection ceased to exist. That could discourage the parties and participants from revealing information of a sensitive, confidential or personal nature".

protect the safety and well-being of victims, witnesses and other persons at risk on account of the activities of the Court. The Defence argument that such an approach would entail a delay is merely hypothetical and in any case does not provide any justifiable reason for the Chamber to consider this request as superseding its duty of protection. In fact, lengthy litigation by the parties concerning redaction proposals will certainly result in further delay of the disclosure of evidence to the Defence.

The case law cited by the Defence is misleading

14. The Defence team of Kenyatta cites to a decision of Trial Chamber I in the *Prosecutor v. Lubanga* case to support its proposition that a heavily redacted request 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”.¹¹ Their reliance is misleading as they fail to note a subsequent sentence from the passage relied on which states that “complete secrecy would, for instance, be justified if providing information about the procedure would risk revealing the very thing that requires protection.”¹²
15. The decision in that case supports a conclusion that is contrary to the Defence’s assertion. In fact, ICC case law reflects an appreciation of the *ex parte* nature of proceedings under Rules 81(2) and 81(4). In the pre-trial phase of the *Lubanga* case, the Single Judge held that:

the Defence is not entitled to obtain a redacted version of any document filed *ex parte*, or of transcripts of any hearing held *ex parte*, pursuant to rule 81 (2) and (4) because the very meaning of *ex parte* excludes any

¹¹ ICC-01/09-02/11-109, para. 12, citing “Decision on the procedures to be adopted for *ex parte* proceedings,” ICC-01/04-01/06-1058, at para. 12.

¹² ICC-01/04-01/06-1058, at para. 12.

opportunity for the Defence to present arguments, documents, materials or orders in relation to the specific content of the Prosecution *ex parte* application.¹³

16. Although other aspects of the Single Judge's ruling on this issue were overturned, the Appeals Chamber upheld this portion of the decision and went further by holding that in exceptional circumstances the Defence need not even be made aware of the existence, let alone be permitted to respond to the contents, of a request made under Rule 81.¹⁴
17. Finally, whilst the Prosecution acknowledges the Appeals Chamber's rule that "prior to ruling on the application for redactions, the Pre-Trial Chamber should give the Defence the greatest possible opportunity to make submissions on the issues involved,"¹⁵ this is qualified. It is to be given "necessarily without revealing to the Defence the information which the Prosecutor alleges should be protected."¹⁶ Here, transmitting the chart requested by the Defence would reveal the information which the Prosecution is submitting ought to be protected. Under these circumstances, the Defence's request should be denied.

The Defence can understand rulings of the Chamber without an annex

¹³ "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence," ICC-01/04-01/06-108-Corr, at para. 18.

¹⁴ ICC-01/04-01/06-568 (OA03), at para. 65. Trial Chamber I also noted that protecting the content of *ex parte* hearings is so important that even when the reasons for making an *ex parte* filing no longer exist, the material will not necessarily be disclosed: see ICC-01/04-01/06-1058, at para. 14. It follows that, *a fortiori*, when the reasons for non-disclosure are still present, the contents of the application should not be revealed.

¹⁵ "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 (OA01), at para. 73.

¹⁶ *Ibid.*

18. The insistence by the Defence team of Kenyatta that it needs the factual and legal basis for the redactions in order to file an informed request for leave to appeal¹⁷ is clearly misguided. The Chamber can be expected to identify sufficiently the grounds for its decision on the Prosecution's First Application.
19. Furthermore, the Defence team of Kenyatta mis-cites legal authorities in making its argument when using language from cases in support without acknowledging that the decisions themselves undermine its assertions. For example, the Appeals Chamber decision involving redaction issues before the *Lubanga* Pre-Trial Chamber, which the Defence relies on as authority that an annex is necessary for it to exercise its right to appeal,¹⁸ stated that information may be withheld in a decision in order to avoid the disclosure of information that needs to be protected:

If the provision of the full reasoning would have led to the identification of the witness in question or would otherwise have disclosed information that needed to be protected, the Pre-Trial Chamber could have considered whether the full reasoning should be provided in a decision marked confidential and ex parte, Prosecutor only, with a separate redacted version made available to the defence.¹⁹

20. If rendering a decision *ex parte* does not curtail the Defence's right to seek appeal, an *ex parte* submission by the Prosecution should not do so either.
21. Similarly, the Prosecution's request for an extension of the 5-day deadline to comply with the Chamber's decision on proposed redactions to 10 days has no impact on "the ability of the Defence to file an informed request for leave to

¹⁷ ICC-01/09-02/11-109, para. 9, incorporating by reference, ICC-01/09-01/11-100, paras. 4, 6, 7-10 and 12-14.

¹⁸ ICC-01/09-02/11-109, para. 9, incorporating by reference, ICC-01/09-01/11-100 at para. 14

¹⁹ "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'", ICC-01/04-01/06-773 (OA05), at para. 22 (emphasis added).

appeal.”²⁰ The extra time is necessary, in the event that the order requires more disclosure than the Prosecution requested, for the Prosecution to make an informed decision whether to provide extra measures to protect the witnesses’ safety or to withdraw the evidence.²¹ That decision, however, has no impact on the ability of the Defence to decide whether to seek leave to appeal. The Defence’s election to do so will turn on the reasons for the decision, not on the actual materials that the Prosecution will disclose. As noted above, the Prosecution is confident that the Chamber will sufficiently identify the grounds in any decision it renders.

B. Advanced disclosure of the redacted materials endangers the security of victims and witnesses by pre-empting additional security measures

22. The Prosecution opposes the Defence request to receive redacted materials prior to the Chamber rendering its decision. Once material has been disclosed to the Defence, it cannot be undisclosed. It is entirely foreseeable that the Chamber may, in accordance with its *proprio motu* powers under Rule 81(4), order protective measures in addition to those proposed by the Prosecutor in its First Application, particularly since the Chamber has requested observations from the VWU.

The Defence should not be allowed to circumvent safety precautions proposed by the VWU

23. To “properly rule” on the First Application, the Single Judge requested the VWU to “provide its observations [...] as well as to propose any additional or

²⁰ ICC-01/09-02/11-109, para. 9, incorporating by reference, ICC-01/09-01/11-100, para. 6.

²¹ Alternatively, the Prosecution requested the additional time for the purpose of implementing approved redactions in the in-depth analysis charts.

alternative protective measures that might be necessary or appropriate in order to ensure the proper protection of a given witness and/or his family members.”²² Disclosure by the Prosecutor of the redacted materials in advance of the Chamber’s decision would usurp the Chamber’s powers and render the VWU’s observations useless. Disclosure accordingly should not occur until it is fully resolved by the Chamber, upon receiving the advice of the VWU, that additional protective measures are not required.

24. The Prosecution submits that, while in two cases cited by the Defence the Prosecutor had to turn over redacted materials in advance, such an approach is not appropriate in the instant case. Again, those decisions arose during trial, not in advance of the confirmation proceedings; the rights of the Accused to material to prepare for trial are broader than at this stage. Secondly, the security concerns in the present case – as outlined in a number of recent filings²³ – are particularly pressing and require taking a more cautious approach to disclosure (and non-disclosure) in the pre-confirmation phase.

III. Relief sought

25. For the above reasons, the Prosecution respectfully asks that the Chamber reject the relief sought by the Defence in the First and Second Defence Requests.

²² “Decision Ordering the Victims and Witnesses Unit to Submit Observations”, ICC-01/09-02/11-106, at para. 7 (emphasis added).

²³ See for example First Application for Redactions, ICC-01/09-02/11-101-Conf-Exp; “Prosecution’s First Application Pursuant to Rule 81(2) and Rule 81(4) for Redactions to Materials of a Potential Exculpatory Nature and Second Application Pursuant Rule 81(2) and Rule 81(4) for Redactions to Statements of Witnesses and Related Materials to Be Relied Upon at the Confirmation Hearing”, ICC-01/09-02/11-136-Conf-Exp; “Prosecution’s Submissions Regarding Proposal to Conduct the confirmation Hearing in Kenya”, ICC-01/09-02/11-122; “Observations of Victim-Applicants on the Place of the Proceedings for the Purposes of the Confirmation of Charges Hearing”, ICC-01/09-02/11-123; and “Prosecution’s Report on its Mission to Kenya”, ICC-01/09-02/11-127-Conf-Exp.



Luis Moreno-Ocampo
Prosecutor

Dated this 30th day of June 2011

At The Hague, The Netherlands