

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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

Date: 8 July 2011

Date of submission: 2 February 2017

**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-D**

**Public redacted version of "Prosecution's Third 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", 8 July 2011,  
ICC-01/09-01/11-167-Conf-Exp**

**Source:** Office of the Prosecutor

**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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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  
Defence**

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Defence Support Section**

**Victims and Witnesses Unit**  
Maria Luisa Martinod-Jacome

**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

1. The Prosecution hereby submits its third 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 which do not 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 by which the parties would execute disclosure.<sup>1</sup>
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”).<sup>2</sup> In the Second Decision, the Single Judge ordered that, *inter alia*, the Prosecution shall, by 8 July 2011, submit to the Chamber properly justified proposals for redactions with respect to the evidence collected after 31 March 2011.<sup>3</sup>
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”).<sup>4</sup> 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”).<sup>5</sup>

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<sup>1</sup> ICC-01/09-01/11-44.

<sup>2</sup> ICC-01/09-01/11-62.

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

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

<sup>5</sup> 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.<sup>6</sup> On 4 July 2011, the Single Judge granted an extension of the deadline only with respect to transcripts of recently conducted witness interviews and any other witness related materials collected after 1 July 2011 (“the Third Decision”).<sup>7</sup>
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 do not 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

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<sup>6</sup> ICC-01/09-01/11-155-Red.

<sup>7</sup> 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 this evidence be disclosed, with a view to its obligations pursuant to Articles 54(1)(b) and 68 to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. 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.”<sup>8</sup> 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: (i) protect further and/or ongoing investigations, pursuant to Rule 81(2); or (ii) portions of documents which constitute reports, memoranda or other internal documents prepared by the Prosecution in connection with the investigation or preparation of the case, pursuant to Rule 81(1).

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

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 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.<sup>9</sup> The Prosecution requests that the Chamber apply the same rules to this Application. A few proposed redactions require limited further explanation, as set forth below.

*Proposed redactions to evidence from Prosecution witnesses*

15. First, the Prosecution seeks redactions to the statements and related documents of the second interviews of W-0016 and W-0019. The Single Judge has already approved redactions to statements and other documents related to the first interviews of these witnesses, in the "First Decision on the Prosecutor's Requests for Redactions and Related Requests".<sup>10</sup> To maintain the protection afforded these witnesses, the Prosecution requests the redaction of similar information from the second interviews of W-0016 and W-0019.

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

<sup>10</sup> ICC-01/09-01/11-145-Conf-Exp, *passim*. See also related Annex 1, p. 4-7, and Annex 2, p. 12-59, 308-311.

16. [REDACTED]  
[REDACTED]  
[REDACTED]

17. The Prosecution requests that, when considering this application for redactions to the second statements of W-0016 and W-0019, the Chamber also take into account the security situation of these witnesses and their families, as explained in previous representations to the Chamber.<sup>11</sup>

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.”<sup>12</sup>

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

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<sup>11</sup> ICC-01/09-01/11-96-Conf-Exp-AnxC5 (W-0016); ICC-01/09-01/11-96-Conf-Exp-AnxD4 (W-0019); ICC-01/09-01/11-T-3-CONF-EXP-ENG ET, *passim*; ICC-01/09-01/11-140-Conf-Exp, *passim*.

<sup>12</sup> *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.<sup>13</sup> The Single Judge approved such redactions in the First and Second Decisions on Redactions.<sup>14</sup>

#### IV. Relief

20. In light of the foregoing, the Prosecution requests that the Chamber approve the proposed redactions.



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Luis Moreno-Ocampo

Prosecutor

Dated this 8th day of July 2011

At The Hague, The Netherlands

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<sup>13</sup> ICC-01/09-01/11-96-Conf-Exp, paras. 40-41.

<sup>14</sup> 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*.