

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 4 August 2011

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single 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

Decision on the "Resubmitted Defence Request for Leave to Appeal the Redacted First Decision on the Prosecutor's Requests for Redactions and Related Requests"

Decision 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 Uhuru Muigai Kenyatta
Steven Kay and Gillian Higgins

Counsel for Mohammed Hussein Ali
Evans Monari, John Philpot and
Gershon Otachi Bw'omanwa

Legal Representatives of the Victims

Legal Representatives of the 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

Registrar & Deputy Registrar
Silvana Arbia, Registrar
Didier Preira, Deputy Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Ekaterina Trendafilova, acting as Single Judge on behalf of Pre-Trial Chamber II (the “Chamber”) of the International Criminal Court (the “Court”),¹ hereby renders the decision on the “Resubmitted Defence Request for Leave to Appeal the Redacted First Decision on the Prosecutor’s Requests for Redactions and Related Requests” (the “Request”).²

I. Procedural History

1. On 8 March 2011, the Chamber, by majority, decided to summon Francis Kirimi Muthaura, Uhuru Muigai Kenyatta (“Mr. Kenyatta”) and Mohammed Hussein Ali (“Mr. Ali”) to appear before the Court.³ Pursuant to this decision, the suspects voluntarily appeared before the Court at the initial appearance hearing held on 8 April 2011.⁴

2. On 3 June 2011, the Prosecutor submitted 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 “First Redaction Application”).⁵ A public redacted version of the application has also been filed.⁶

3. On 24 June 2011, the Prosecutor submitted the “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 to Rule 81(2) and Rule 81(4) for Redactions to Statements of Witnesses and Other Materials to be Relied Upon at

¹ Pre-Trial Chamber II, “Decision Designating a Single Judge”, ICC-01/09-02/11-9.

² ICC-01/09-02/11-183-Conf.

³ Pre-Trial Chamber II, “Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali”, ICC-01/09-02/11-1.

⁴ ICC-01/09-02/11-T-1-ENG.

⁵ ICC-01/09-02/11-101-Conf-Exp and annexes A to M.

⁶ ICC-01/09-02/11-101-Red.

the Confirmation Hearing” (the “Second Redaction Application”).⁷ A public redacted version of the application has also been filed.⁸

4. On 8 July 2011, the Single Judge issued the “First Decision on the Prosecutor’s Requests for Redactions and Related Requests” (the “Decision”).⁹ On 12 July, a confidential redacted version of the Decision was issued.¹⁰

5. On 19 July 2011, the “Defence Request for Leave to Appeal the Redacted First Decision on the Prosecutor’s Requests for Redactions and Related Requests” was jointly filed by the Defence of Mr. Ali and the Defence of Mr. Kenyatta (also referred to as the “Defence”).¹¹ On 20 July 2011, the Single Judge dismissed this filing for non-compliance with the prescribed page limit and ordered the Defence “to resubmit its Request for Leave to Appeal in compliance with Regulation 37(1) of the Regulations or to request an extension of page limit”, no later than 21 July 2011.¹²

6. On 20 July 2011, the Defence of Mr. Ali and the Defence of Mr. Kenyatta jointly submitted the Request, in which they sought leave to appeal the following issues:

- i. whether the Single Judge erred in finding that the assessment of risk for the purposes of rule 81(4) can include “an organization or an individual acting with malicious intent seeking to harm, kill or otherwise negatively influence a witness in order to have an adverse impact on the proceedings before the Court, or retaliate against a witness” [the “First Issue”];
- ii. whether the Single Judge erred by concluding that the Single Judge would not lift any redactions after the thirty day deadline prior to the confirmation hearing, insofar as such redactions might relate to material falling under either rule 77 or article 67(2) of the Statute [the “Second Issue”];
- iii. whether the Single Judge’s decision to redact the names of Prosecution investigators fails to comply with the criteria for redactions [the “Third Issue”]; and
- iv. whether -- in deciding that rule 81 applications are in principle, *ex parte* in nature and rejecting the Ali and Kenyatta requests for more detailed redaction applications - the

⁷ ICC-01/09-02/11-136-Conf-Exp and annexes A to G.

⁸ ICC-01/09-02/11-136-Red.

⁹ Pre-Trial Chamber II, ICC-01/09-02/11-165-Conf-Exp and Annexes 1 and 2.

¹⁰ Pre-Trial Chamber II, “Redacted First Decision on Redactions and Related Requests”, ICC-01/09-02/11-165-Red.

¹¹ ICC-01/09-02/11-176-Conf.

¹² Pre-Trial Chamber II, “Order on the Resubmission of the ‘Defence Request for Leave to Appeal the Redacted First Decision on the Prosecutor’s Requests for Redactions and Other Related Requests’”, ICC-01/09-02/11-182, p. 4.

Single Judge improperly applied the jurisprudence of the ICC, and failed to exercise her discretion in a manner which is consistent with article 21(3) of the Statute [the "Fourth Issue"].¹³

7. The specific arguments of the Defence in relation to the four issues identified for appeal are laid out below at paragraphs 13, 18, 25 and 34 of this decision. In addition, the Defence submits in general that a decision of the Appeals Chamber on all four issues would materially advance the proceedings. In the submission of the Defence:

All four issues concern the redaction process and impact on the ability of the Defence to contest the Prosecution case, and lead its own evidence. An incorrect decision would therefore undermine the legitimacy of the confirmation process, and cast doubts as to the correctness of a possible decision to commit the case to trial. An immediate decision of the Appeals Chamber would therefore materially advance the proceedings by "[r]emoving doubts concerning the correctness of a decision or mapping a course of action along the right lines [...]."¹⁴

8. On 25 July 2011 the "Prosecution's Response to the 'Resubmitted Defence Request for Leave to Appeal the Redacted First Decision on the Prosecutor's Requests for Redactions and Related Requests'" (the "Response") was submitted,¹⁵ wherein the Prosecutor requests that the Request be rejected.¹⁶

9. The present decision is classified as public although it refers to the existence of documents and, as the case may be, to a limited extent to their content, which have been submitted and are currently treated as confidential. The Single Judge considers that the references made in the present decision are required by the principle of publicity and judicial reasoning. Moreover, those references are not inconsistent with the nature of the documents referred to.

II. Applicable Law

10. The Single Judge notes articles 21(1)(a), (2), (3) and 82(1)(d) of the Rome Statute (the "Statute").

¹³ ICC-01/09-02/11-183-Conf, para. 51.

¹⁴ ICC-01/09-02/11-183-Conf, para. 49.

¹⁵ ICC-01/09-02/11-192-Conf.

¹⁶ ICC-01/09-02/11-192-Conf, para. 30.

11. The Single Judge, mindful of the exceptional nature of the remedy of interlocutory appeal, recalls that for leave to be granted, the following requirements must be met:

- (a) the decision involves an “issue” that would significantly affect (i) *both* the fair and expeditious conduct of the proceedings or (ii) the outcome of the trial; *and*
- (b) in the opinion of the Pre-Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

12. According to the established jurisprudence of this Court,¹⁷ an “issue” is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. Concerning the further requirements set out in (a) and (b) above, the Single Judge recalls that they are cumulative. Failure in demonstrating that one of the requirements in (a) and (b) is fulfilled makes it unnecessary for the Single Judge to address the remaining requirements under article 82(1)(d) of the Statute.

III. The First Issue

13. The Defence argues that in finding that the risk can emanate from an organization or an individual acting with malicious intent without simultaneously making a finding that the suspects or the Defence teams were likely to disclose confidential information to third parties, the Decision is conditioning disclosure to

¹⁷ Appeals Chamber, “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, ICC-01/04-168, paras 9-14; Pre-Trial Chamber II, “Decision of the ‘Prosecution’s Application for Leave to Appeal 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’”, ICC-01/09-02/11-88, paras 9-11; Pre-Trial Chamber II, Decision on the ‘Defence Request for Variation of Decision on Summons or in the Alternative Request for Leave to Appeal’, ICC-01/09-02/11-89, para. 29; Trial Chamber IV, “Decision on the Prosecution’s Application for Leave to Appeal the “Decision on the Prosecution’s Request to Invalidate the Appointment of Counsel to the Defence”, ICC-02/05-03/09-179, paras 5-6; Pre-Trial Chamber I, “Decision on the Defence request for leave to appeal the ‘Decision on the Defence Request for a Permanent Stay of Proceedings’ (ICC-01/04-01/10-264)”, ICC-01/04-01/10-288, pp. 5-6.

the Defence on circumstances which fall completely beyond its control, and which the Single Judge has not linked to any legitimate or illegitimate Defence activity.¹⁸ According to the Defence, this minimizes the amount of information available to it to contest the Prosecutor's evidence, and thus impacts the fairness of the proceedings.¹⁹ In relation to the impact on the expeditious conduct of the proceedings, it is submitted that the Decision reduces the amount and type of information available to the Defence, while access to the non-disclosed information would have served to enhance and focus its preparation.²⁰

14. The Prosecutor argues that the First Issue does not arise from the Decision, and that the Defence is misconstruing the Single Judge's ruling.²¹ He further submits that the Decision did not conclude that redactions of sensitive information were justified by the risk posed by third parties, completely divorced from disclosure to the Defence.²² He emphasizes that the Decision found that the first requirement for restrictions on disclosure was that disclosure would pose an objectively justifiable risk to the particular person that would arise from disclosing the particular information to the Defence, as opposed to disclosing the information to the public at large.²³ Additionally, the Prosecutor avers that the Single Judge's definition of the source of the risk is not incompatible with the requirement that the danger must arise from disclosure to the Defence.²⁴

15. The Single Judge finds that the Defence's argument that the Decision is "conditioning disclosure to the Defence on circumstances which fall completely beyond the control of the Defence"²⁵ is based on a selective reading of the Decision not taking into account the entirety of the Single Judge's determinations. In

¹⁸ ICC-01/09-02/11-183-Conf, paras 17-18.

¹⁹ ICC-01/09-02/11-183-Conf, para. 20.

²⁰ ICC-01/09-02/11-183-Conf, para. 21.

²¹ ICC-01/09-02/11-192-Conf, para. 11.

²² ICC-01/09-02/11-192-Conf, para. 11.

²³ ICC-01/09-02/11-192-Conf, para. 11.

²⁴ ICC-01/09-02/11-192-Conf, para. 12.

²⁵ ICC-01/09-02/11-183-Conf, paras 17-18.

particular, the Single Judge notes that in the same paragraph in which the interpretation of the source of the risk is to be found, the Decision states:

The danger must involve an objectively justifiable risk to the safety of the person concerned, and must arise from disclosing the particular information to the Defence, as opposed to disclosing the information to the public at large.²⁶

16. Furthermore, in discussing the various categories of redactions proposed by the Prosecutor and authorized by the Single Judge, the Decision clearly states that the determination of individual redaction proposals is undertaken upon consideration whether disclosure of certain information to the Defence would pose an objectively justifiable risk to witnesses, members of their families or other persons.²⁷

17. In these circumstances, the Single Judge is of the view that the Defence interpretation of the Decision is untenable. Accordingly, the arguments presented by the Defence do not constitute an “issue” arising out of the Decision, within the meaning of article 82(1)(d) of the Statute. Therefore, the request for leave to appeal on the First Issue must be rejected.

IV. The Second Issue

18. In relation to the Second Issue, the Defence submits that the finding of the Single Judge significantly impacts on the fairness of the proceedings by depriving the Defence of information falling under article 67(2) of the Statute and rule 77 of the Rules of Procedure and Evidence (the “Rules”) for which protective measures are no longer required.²⁸ In the submission of the Defence, the impact arises due to the fact that the Single Judge has decided not to lift any redactions within the 30-day period prior to the confirmation of charges hearing. According to the Defence, this is a violation of its right to receive exculpatory material under article 67(2) of the Statute as soon as practicable.²⁹ Furthermore, the Defence argues that by not adjudicating

²⁶ Pre-Trial Chamber II, “Redacted First Decision on Redactions and Related Requests”, ICC-01/09-02/11-165-Red, para. 28.

²⁷ See Pre-Trial Chamber II, “Redacted First Decision on Redactions and Related Requests”, ICC-01/09-02/11-165-Red, paras 42, 43, 56 and 60.

²⁸ ICC-01/09-02/11-192-Conf, para. 28.

²⁹ ICC-01/09-02/11-192-Conf, para. 27.

upon whether any requests for redactions should be lifted after the 30-day cut-off period, the Decision simply defers potentially problematic disclosure issues to the trial stage, which impacts the overall expeditiousness of the proceedings.³⁰

19. In his Response, the Prosecutor submits that the Second Issue is predicated on a fundamental misunderstanding of the terms of the Decision.³¹ In the view of the Prosecutor, the Decision was taken in light of rule 121(3) of the Rules, which establishes a 30-day deadline for the Prosecutor to provide to the Chamber a list of evidence that he intends to present at the hearing.³² Thus, according to the Prosecutor's submission, the Decision intended to prevent the lifting of redactions with a view to relying on newly unredacted portions of the documents at the confirmation hearing, and that this finding would be incomprehensible if it was intended to apply to article 67(2) or rule 77 material.³³

20. At the outset the Single Judge considers it appropriate to refer to the relevant paragraph of the Decision:

Finally, the Single Judge deems it necessary to emphasize that redactions are authorized by this decision based on the security and risk assessment provided by the Prosecutor and the VWU. However, information which has been withheld from the Defence must be kept under review and may be subsequently disclosed. As the Appeals Chamber has clarified, it is the obligation of the Prosecutor to promptly bring to the attention of the Chamber any new facts which may warrant a variation of the Single Judge's ruling on redactions. As a result, in case evidence must be re-disclosed due to the lifting of redactions, the Single Judge cautions that this must be done in compliance with the Prosecutor's obligation to effectively disclose all evidence for the purposes of the confirmation of charges *no later than* 30 days before the commencement of the confirmation of charges hearing. This means that all related steps, such as the Prosecutor's request for lifting the redactions, the Single Judge's related decision and the Prosecutor's implementation of the Single Judge's decision must take place sufficiently in advance to the 30-day deadline established by rule 121(3) of the Rules. The Single Judge holds that redactions may not be lifted thereafter so as to ensure fairness of the proceedings and meet the requisite that the Defence is put on sufficient notice for its preparation.³⁴

³⁰ ICC-01/09-02/11-183-Conf, para. 31.

³¹ ICC-01/09-02/11-192-Conf, para. 17.

³² ICC-01/09-02/11-192-Conf, para. 18.

³³ ICC-01/09-02/11-192-Conf, paras 18-19.

³⁴ Pre-Trial Chamber II, "Redacted First Decision on Redactions and Related Requests", ICC-01/09-02/11-165-Red, para. 32.

21. In the view of the Single Judge, there are compelling reasons which objectively prevent such interpretation of the Decision pursuant to which the analysis and conclusion quoted in the preceding paragraph would extend to potentially exculpatory evidence within the meaning of article 67(2) of the Statute, or to all of the material covered by rule 77 of the Rules. The relevant finding is made under rule 121(3) of the Rules, which stipulates that the Prosecutor shall provide to the Chamber and the suspects, no later than 30 days before the confirmation of charges hearing, *inter alia*, the list of evidence which he or she intends to present at the hearing. It has to be noted that rule 121(3) of the Rules does not impose any deadlines for the disclosure of material falling under the Prosecutor's disclosure obligations pursuant to article 67(2) of the Statute or rule 77 of the Rules. The disclosure of such material must take place as soon as practicable, *i.e.* immediately after its identification, and on a continuous basis.³⁵

22. Moreover, the parameters of the analysis and conclusions of the disputed part of the Decision are reflected by the references to relevant previous decisions in the case. At footnote 39, the Decision refers to two previous findings of the Single Judge, wherein the importance of compliance with time limits for disclosure of evidence to be relied upon by the parties is emphasized,³⁶ but it does not address any previous findings in relation to potentially exculpatory evidence or evidence covered by rule 77 of the Rules.³⁷

23. Therefore, the Single Judge considers that the Defence is incorrect in construing the Decision as preventing the Prosecutor from requesting, and the Chamber from

³⁵ See Pre-Trial Chamber II, "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", ICC-01/09-02/11-64, para. 21.

³⁶ See Pre-Trial Chamber II, "Decision Setting the Regime for Evidence Disclosure and Other Related Matters", ICC-01/09-02/11-48, paras 11 and 13; Pre-Trial Chamber II, "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", ICC-01/09-02/11-64, paras 13-14.

³⁷ See *e.g.* Pre-Trial Chamber II, "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", ICC-01/09-02/11-64, para. 21.

authorizing, the lifting of redactions of potentially exculpatory information within the period of 30 days before the confirmation of charges hearing. In the view of the Single Judge, this is irrespective of the question whether such information is found in items of evidence to be relied upon by the Prosecutor or in items identified only as potentially exculpatory.³⁸

24. Thus, the Single Judge opines that the issue as identified by the Defence does not arise out of the Decision, and that therefore the request for leave to appeal on the Second Issue must be rejected.

V. The Third Issue

25. As to the Third Issue, the Defence avers that by referring to the fact that the activities of the Prosecutor are followed by the media and the general public and by not discussing whether any risk would emanate from the suspects or the Defence teams or whether disclosure to the Defence on a confidential basis would mitigate such risk, the Decision disproportionately affects the rights of the Defence, in particular by eliminating the possibility for the Defence to challenge the conduct of investigation.³⁹ The Defence also argues that the Decision affects the expeditiousness of proceedings, as it reduces the amount and type of information available to the Defence, while access to the non-disclosed information would have served to enhance and focus its preparation.⁴⁰

26. The Prosecutor submits in relation to the Third Issue that it does not arise out of the Decision because contrary to the Defence's assertions, the Single Judge applied the relevant Appeals Chamber's jurisprudence and balanced all the relevant interests before deciding on the redactions.⁴¹ Moreover, in the view of the Prosecutor the Third Issue does not impact on the fairness of the proceedings because the Defence's statement that it is prevented from challenging defective statements by identifying

³⁸ See ICC-01/09-02/11-183-Conf, para. 24.

³⁹ ICC-01/09-02/11-183-Conf, paras 33-34.

⁴⁰ ICC-01/09-02/11-183-Conf, para. 38.

⁴¹ ICC-01/09-02/11-192-Conf, para. 22.

and calling the investigators responsible is purely speculative as to date the Defence has not identified any purportedly faulty statement.⁴²

27. Upon review of the arguments presented by the Defence, the Single Judge is of the view that despite the expansive wording of the Third Issue in the relief sought by the Defence,⁴³ the issue is in fact narrower and relates not generally to the correctness of the Single Judge's decision with respect to redaction of investigators' names but rather to the question whether the Single Judge improperly authorized redactions of names of investigators solely in light of an assessment of the general situation in Kenya. Accordingly, the Single Judge considers that the Third Issue must be examined within these more specific parameters.

28. The Defence relies on a passage in the Decision in which it is stated that "[t]he Single Judge takes note of the fact that the activities of the Prosecutor are followed attentively by the media and the general public in Kenya which impacts on the integrity and conduct of the Prosecutor's investigations".⁴⁴ However, the Single Judge wishes to point out that the disputed passage does not state that the authorization of redactions of names of the Prosecutor's staff working in the field is exclusively based on the assessment of the general situation in Kenya, which the Defence appears to be alleging. Instead, the passage is a reference to the general background against which the Decision examines the potential prejudice to the investigation by way of disclosure of investigators' names to the Defence. In this respect, the Single Judge notes that the Defence does not dispute the corresponding passage in the section of the Decision dealing with redactions under rule 81(4) of the Rules, according to which in determining the existence of an objectively justifiable

⁴² ICC-01/09-02/11-192-Conf, para. 23.

⁴³ ICC-01/09-02/11-183-Conf, para. 51.

⁴⁴ Pre-Trial Chamber II, "Redacted First Decision on Redactions and Related Requests", ICC-01/09-02/11-165-Red, para. 66.

risk that would arise through disclosure of particular information to the Defence, the Court must also take into account the general situation in the region.⁴⁵

29. In addition, the Single Judge notes that the Decision both in the section interpreting the applicable law and particularly in the section concerning proposals for redactions to names and identifying information of the Prosecutor's staff expresses clearly that authorization to redact certain information can only be granted if disclosure to the Defence (as opposed to the public) would bring about an objectively justifiable risk or prejudice to investigations.⁴⁶

30. In light of the foregoing, the Single Judge considers that the Third Issue is likewise not founded in the Decision, and accordingly, the Defence failed to show the existence of an "issue" within the meaning of article 82(1)(d) of the Statute. Therefore, the request for leave to appeal on the Third Issue must be rejected.

31. Even assuming *arguendo* that an appealable issue were to be found in the decision to redact the names of the Prosecutor's staff, the arguments presented by the Defence as to the significant impact of the issue on the fairness and expeditiousness of the proceedings are not convincing.

32. In this regard, the Single Judge is of the view that despite the redactions of some names of the Prosecutor's staff, the Defence will still be able to identify possible faults in the evidence itself and bring them to the attention of the Chamber. In particular, the Single Judge is convinced that the ability of the Defence to identify statements bearing "striking resemblance or utilis[ing] similar language"⁴⁷ is not impaired by the redactions of investigators' names, as the Defence suggests.

33. Thus, the Single Judge considers that the Defence's concern about its ability to challenge evidence is too abstract and hypothetical to enable the conclusion that the

⁴⁵ See Pre-Trial Chamber II, "Redacted First Decision on Redactions and Related Requests", ICC-01/09-02/11-165-Red, para. 43.

⁴⁶ Pre-Trial Chamber II, "Redacted First Decision on Redactions and Related Requests", ICC-01/09-02/11-165-Red, paras 28 and 65.

⁴⁷ ICC-01/09-02/11-183-Conf, para. 35.

Third Issue significantly affects the fair and expeditious conduct of proceedings in the present case.

VI. The Fourth Issue

34. Lastly, the Defence submits in relation to the Fourth Issue that the Decision significantly affects the fairness of the proceedings as it contravenes the right of the Defence to actively participate in the proceedings and violates equality of arms.⁴⁸ According to the Defence, the Decision fundamentally misconstrues the relevant findings of the Appeals Chamber and constitutes an improper exercise of discretion.⁴⁹ In the view of the Defence, the Fourth Issue also affects the expeditiousness of the proceedings since it forces the Defence to litigate fundamental issues at appellate level.⁵⁰ Furthermore, effective Defence participation in the redaction process would serve to focus and expedite the resolution of the requests, as the Defence could identify redactions which are uncontested and those which are likely to significantly impede Defence preparation.⁵¹

35. In the Response, the Prosecutor asserts that the Fourth Issue is not an appealable issue but merely advances a disagreement of the Defence with the Single Judge's application of the Appeals Chamber's jurisprudence.⁵² Second, the Prosecutor submits that the Defence misconstrues the Appeals Chamber's jurisprudence and omits relevant judgments of the same Chamber which clearly state that, in principle, redaction proceedings are *ex parte*.⁵³ Lastly, the Prosecutor argues that the arguments advanced by the Defence do not show any impact on the purported issue of the fairness of the proceedings, also because the Defence arguments with respect to the

⁴⁸ ICC-01/09-02/11-183-Conf, para. 46.

⁴⁹ ICC-01/09-02/11-183-Conf, para. 40.

⁵⁰ ICC-01/09-02/11-183-Conf, para. 48.

⁵¹ ICC-01/09-02/11-183-Conf, para. 48.

⁵² ICC-01/09-02/11-192-Conf, para. 25.

⁵³ ICC-01/09-02/11-192-Conf, para. 25.

purported impact of the Decision to its future applications for protective measures are purely speculative.⁵⁴

36. The Single Judge accepts that the proper exercise of the Chamber's discretion with respect to the extent of information relating to redaction proceedings initiated by the Prosecutor under rules 81(2) and (4) of the Rules constitutes an issue arising out of the Decision within the meaning of article 82(1)(d) of the Statute.

37. The Single Judge recalls the relevant finding of the Appeals Chamber, upon which the Defence relies, which states that the Pre-Trial Chamber has "discretion [...] to determine, within the framework of the applicable law, whether applications by participants are kept *ex parte* or are made *inter partes* and whether or not to hold proceedings on an *ex parte* basis."⁵⁵

38. The Single Judge further recalls that while the Decision stated clearly that rule 81 proceedings are in principle *ex parte*, with participation of the party submitting proposals for redactions only, and that in the opposite case, the very purpose of redactions would be defeated, it also acknowledged the rights of the Defence and determined the appropriate extent to which it could be made aware of the redaction proceedings in the case.⁵⁶ Thus, the Defence was duly notified of the public redacted versions of the First and the Second Redaction Applications.

39. In the present Request, the Defence disputes the *extent* of information it has been given, in a way which is unsubstantiated and speculative. The Defence argues in the abstract that it should be given "the greatest possible opportunity to make

⁵⁴ ICC-01/09-02/11-192-Conf, para. 29.

⁵⁵ Appeals Chamber, "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence'", ICC-01/04-01/06-568, para. 66.

⁵⁶ See Pre-Trial Chamber II, "Redacted First Decision on Redactions and Related Requests", ICC-01/09-02/11-165-Red, para. 93.


submissions",⁵⁷ without demonstrating the actual impact of the issue on the fairness and expeditiousness of proceedings in the present case.

40. In these circumstances, the Single Judge considers that the Defence failed to demonstrate how the Fourth Issue significantly affects the fairness and expeditiousness of the proceedings and therefore, the request for leave to appeal the Fourth Issue must be rejected.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

rejects the Request.

Done in both English and French, the English version being authoritative.



Judge Ekaterina Trendafilova
Single Judge

Dated this Thursday, 4 August 2011

At The Hague, The Netherlands

⁵⁷ ICC-01/09-02/11-183-Conf, para. 42; see also paras 43 and 45.