

**Cour
Pénale
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**International
Criminal
Court**

Original: **English**

No.: ICC-01/09-02/11
Date: **9 September 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 Document

Request for Access to Confidential *Inter Partes* Material

Source: Victims' Legal Representative

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

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Legal Representative of the Victims

Mr. Morris Anyah

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
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**Victims Participation and Reparations
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Ms. Fiona McKay

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I. INTRODUCTION

1. The Legal Representative requests access to all *inter partes* filings in the present case. The parties have had the opportunity to redact their confidential *inter partes* disclosure, and the Prosecution has apparently done so extensively. Disclosure of the remaining material will in no way jeopardize the safety of protected persons or ongoing investigations, nor prejudice the rights of the defendants. The Legal Representative, who has long experience safeguarding confidential information and is of course bound by the Code of Professional Conduct, undertakes to keep the information confidential and, should the Single Judge consider it necessary, will undertake not to disclose the confidential information to his clients.

2. Access to this material is, on the other hand, indispensable to the protection and representation of the victims' interests during the confirmation hearing. The defendants, unlike the Prosecution, have chosen to file all their evidential material confidentially – including even their lists of evidence – and without redactions. The information is thus inaccessible to the Legal Representative, essentially depriving the victims of the ability through him to prepare and participate meaningfully during the confirmation hearing.

3. The Single Judge is respectfully requested under Regulation 35 of the Regulations of the Court to reduce the time-limits for any responses to the present motion, given the short time-period before the commencement of the confirmation hearings.

II. PROCEDURAL CONTEXT

4. The Decision on Victims' Participation authorizes the Legal Representative to make brief opening and closing statements, and to make other oral and written submissions upon a showing that the "victims' personal interests are affected by the

issues concerned.”¹ The Legal Representative was granted access to public “evidence” in the “same format ... in which it has been made available to the party which has not proposed it.”² The Chamber, following previous decisional law, held that “decisions, filings or evidence” classified as “confidential” would be subject to disclosure to the Legal Representative on a case-by-case basis.³

III. THE PROSECUTION’S CONFIDENTIAL MATERIAL HAS ALREADY BEEN REDACTED TO REMOVE THE MOST SENSITIVE MATERIAL

5. The Legal Representative requests access to all Prosecution confidential material on the basis that it has already been redacted in order to withhold the most sensitive material from the defendants. In particular, redactions have apparently been made to any information that could pose a risk to the safety of victims and witnesses, or their families, or jeopardize ongoing investigations.⁴ The Single Judge has reviewed these redactions to ensure that they are based on an “objectively justifiable risk to the safety of the person concerned ... [that] arise[s] from disclosing the particular information to the Defence, as opposed to the public at large.”⁵

6. The Legal Representative only seeks access to information as it has been disclosed to the non-moving party – i.e., in redacted form. These redactions presumptively ensure that the most sensitive material, as determined by the party itself under the Chamber’s supervision, has already been removed. The Legal Representative solemnly undertakes to safeguard any confidential material made available to him and is prepared to be bound by an order, should the Chamber

¹ Pre-Trial Chamber II, “Decision on Victims’ Participation at the Confirmation of Charges Hearing and in the Related Proceedings,” ICC-01/09-02/11-267, 26 August 2011, para. 105 (the “Decision”).

² *Id.* para. 108.

³ *Id.* para. 109.

⁴ See e.g. “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,” ICC-01/09-02/11-101-Red, 3 June 2011, paras. 12-40.

⁵ Although the Legal Representative does not have access to the confidential decisions of the Single Judge concerning the Prosecution’s requests for redactions, they are referred to in the Single Judge’s “Decision on the ‘Resubmitted Defence Request for Leave to Appeal the Redacted First Decision on the Prosecutor’s Requests for Redactions and Related Requests,’” ICC-01/09-02/11-211, 4 August 2011, para. 15.

consider it necessary, requiring him not to disclose any of the confidential information to his clients.⁶

7. No appreciable or objectively reasonable danger may be said to arise, should the requested material be disclosed to the Legal Representative. The victims have no capacity whatsoever – and no interest – to intimidate, threaten or pressure potential witnesses, much less to suppress any further information that might be obtained from future investigations. Furthermore, the Legal Representative is willing to withhold the information from his clients, should the Chamber deem that appropriate and necessary to further safeguard the information from disclosure.

8. Permitting the Legal Representative to review the Prosecution’s confidential *inter partes* material will in no way prejudice the rights of the defendants nor interfere with the Prosecution’s interest in a fair proceeding. On the contrary, and as discussed further below, the Legal Representative’s capacity to prepare properly for the proceedings, and to know the basis upon which confirmation is sought, will enhance the efficiency and effectiveness of the proceedings.

IV. ACCESS TO THE CONFIDENTIAL *INTER PARTES* DISCLOSURE, PARTICULARLY THAT OF THE DEFENSE, IS ESSENTIAL FOR BASIC PARTICIPATION BY THE VICTIMS

9. Victims have a “core interest” in ensuring that those responsible for the crimes against them are put on trial and convicted.⁷ That interest cannot be vindicated

⁶ Disclosure of confidential material to Legal Representatives has been conditioned on precisely this basis in the past: *The Prosecutor v. Katanga & Ngudjolo*, “Decision on the Modalities of Victim Participation at Trial,” ICC-01/04-01/07-1788-tENG, 22 January 2010 (*Katanga* Trial Participation Decision), para. 112 (“The Chamber ... makes a clear distinction between the Legal Representatives of the Victims and the victims themselves, since the victims are unable to access the confidential documents in the record or the evidence contained therein”).

⁷ *The Prosecutor v. Katanga & Ngudjolo*, “Decision on the Set of Procedural Rights Attached to the Procedural Status of Victim at the Pre-Trial Stage of the Case,” ICC-01/04-01/07-474, 13 May 2008 (*Katanga* Pre-Trial Participation Decision), paras. 32-36; *The Prosecutor v. Bahar Idriss Abu Garda*, “Decision on victims’ modalities of participation at the Pre-Trial Stage of the Case,” ICC-02/05-02/09, 6 October 2009, para. 5 (“the personal interests of victims are affected by the outcome of the pre-trial stage of the case insofar as it is directed

without permitting victims to have, as has been previously held, “a meaningful role in criminal proceedings before the Court so that they can have a substantial impact on proceedings.”⁸ The speed and limited scope of a confirmation hearing, if anything, enhances the significance of advance disclosure of all *inter partes* material. The Legal Representative wishes to ensure that his interventions are focused on those matters which are genuinely in dispute, and it will be necessary to make quick determinations during the hearing as to whether a particular intervention is warranted. These are basic elements of competent representation, and necessary to ensure that victims’ recognized interests are properly represented before the Chamber.⁹ Allowing the Legal Representative to make an opening and closing statement, but depriving him of access to the material on which the confirmation hearing is based,¹⁰ would be tantamount to participation by the victims in form, but not substance.

10. Facilitating victim participation has even been cited as one of the main justifications for requiring *inter partes* disclosure to be filed with the Pre-Trial Chamber:

[Rules 121(2)(c) and 122(1)] aim at placing the Pre-Trial Chamber in a position to properly organize and conduct the confirmation hearing, which is best achieved by the Chamber having advance access to the evidence to be presented at the hearing. Filing the evidence to be presented at the

at either (i) confirming the charges against those allegedly responsible for perpetrating the crimes which caused the victims to suffer harm; or (ii) declining to confirm the charges against those not responsible for such crimes, so that the search for those who are criminally liable can continue.”

⁸ *Katanga* Pre-Trial Participation Decision, para. 157.

⁹ Access to confidential material is a well-recognized prerequisite of effective victim-participation at trial: *Katanga* Trial Participation Decision, para. 121: “The Chamber is of the view that, in order to promote effective participation of victims in the trial, the Legal Representatives *must be able to consult all of the public and confidential decision and documents in the record of the case*, with the exception of any document classified as *ex parte*” (italics added).

¹⁰ Indeed, the Chamber has previously confirmed that it may rely upon any of the *inter partes* material in reaching its decision on confirmation: “[A]rticle 69(3), second sentence, of the Statute implies that such evidence must not have been presented previously by either party, but is known to the Chamber, and could, after it is submitted by dint of article 69(3) of the Statute, be discussed, contested and analyzed by both the Prosecutor and the Defence during the confirmation of charges hearing. Thus, it is entirely for the Chamber to base its determination, or parts thereof, on such evidence namely, after the Chamber has requested its submission at the confirmation of charges hearing and after the parties have made their observations, if any, at the hearing.” (“Decision on the ‘Prosecution’s Application for Leave to Appeal the ‘Decision Setting the Regime for Evidence Disclosure and Other Related Matter’” (ICC-01/09-02/11-48),” ICC-01/09-02/11-77, 2 May 2011, para. 34.

confirmation hearing in the record of the case will fulfill two additional important functions. First, it puts the victims of the case in a position to adequately exercise their procedural rights during the confirmation hearing by giving them prior access to the evidence that is going to be presented.¹¹

11. The defendants in this case have apparently chosen to file their evidence, lists of evidence and analysis charts confidentially,¹² thus withholding any disclosure to the Legal Representative. The Legal Representative has no information about the defence material to be presented at the confirmation hearing, and does not even have a basis for identifying individual documents whose disclosure might be particularly important. The blanket categorization of all defense material as confidential, in effect, precludes the Legal Representative's from making case-by-case requests for documents of particular importance and substantially impairs his ability to prepare properly for the confirmation hearings. Victim participation, in effect, is rendered ineffective by the inaccessibility of this material.

12. Much like with access to Prosecution material, the Legal Representative undertakes not to disclose any confidential Defense material to the public and, if deemed necessary by the Pre-Trial Chamber, to his clients. Disclosure will in no way prejudice the rights of the defendants, and will only enhance the proper, fair and expeditious conduct of the confirmation hearings.

V. NO DISTINCTION SHOULD BE DRAWN BETWEEN ANONYMOUS AND NON-ANONYMOUS VICTIMS

13. Some Pre-Trial (but not Trial) Chambers have drawn a distinction between the scope of disclosure accorded to anonymous and non-anonymous victims. The

¹¹ *The Prosecutor v. Lubanga*, "Decision on the Final System of Disclosure and the Establishment of a Timetable," ICC-01/04-01/06-102, 15 May 2006, para. 34.

¹² "Defence First Communication of Pre-Trial Evidence, Pursuant to Rule 78 of the Rules of Procedure and Evidence to the Prosecution," ICC-01/09-02/11-295, 5 September 2011; "Defence Communication of its List of Evidence in Compliance with the Decision of Time Limit for Disclosure under Rule 122(6) of the Rules of Procedure and Evidence," ICC-01/09-02/11-300, 5 September 2011; "Defence Submission of its List of Evidence and In-Depth Analysis Chart," ICC-01/09-02/11-301, 5 September 2011.

alleged basis for this distinction is “the fundamental principle prohibiting anonymous accusations.”¹³

14. The Single Judge is not bound by these previous decisions.¹⁴ Even if they were to be accorded any persuasive value, they are manifestly inapplicable in the present case. The prohibition on anonymous accusations has to do with the anonymity of *witnesses*.¹⁵ The right of confrontation requires that *witnesses*, not lawyers or their clients, be available for questioning by the defense. The names and addresses of victim-participants is immaterial to the defendants’ ability to fully confront and contest any evidence presented during the confirmation hearing, including any questions to witnesses on the stand that may be authorized by the Chamber. The person who needs to be confronted – the witness – is available for full questioning regardless of whether the identity of the questioner is known.

15. Indeed, participation by victims should not be limited because of the legitimate and heart-felt fears inspired by the very crimes, and the responsibility of these defendants, that will be under consideration during the confirmation hearings.

VI. DISCLOSURE OF ALL CONFIDENTIAL MATERIAL SAVES JUDICIAL RESOURCES

16. Judicial economy favors categorical disclosure of confidential *inter partes* material. As previously mentioned, truly sensitive material has presumptively been redacted. Requiring the parties to make submissions for and/ or against disclosure

¹³ *The Prosecutor v. Lubanga*, “Decision on the Arrangements for Participation of Victims a/0001/06, a/0002/06 and a/0003/06 at the Confirmation Hearing,” ICC-01/04-01/06-462-tEN, 22 September 2006, p. 7.

¹⁴ “Decision on the ‘Prosecution’s Application for Leave to Appeal the “Decision Setting the Regime for Evidence Disclosure and Other Related Matter” (ICC-01/09-02/11-48),” ICC-01/09-02/11-77, 2 May 2011, para. 23 (“the Single Judge recalls that the usage of the verb ‘may’ in article 21(2) of the Statute provides the Chamber with the discretion as to whether to follow previous precedents. Consequently, the provision as drafted rejects the *stare decisis* doctrine.”)

¹⁵ See e.g. ICC Statute Art. 67(1)(e); *Kostovski v. The Netherlands* (European Court of Human Rights, Application no. 11454/84) (1989) (conviction based on testimony of anonymous witnesses violates Article 6 of the European Convention); K. Vanderpuye, “Traditions in Conflict: The Internationalization of Confrontation,” 43 Cornell Int’l LJ 513 (2010).

based upon the importance of a document to victims' interests relative to any potential sensitivity of the material would be time-consuming and require individual determination. Further, because the Defense has chosen to file all its evidential material – including even the lists of such material – confidentially, the Legal Representative would have to await an initial determination for disclosure of the lists of evidence before a request for individual documents could be fashioned. This procedure would, in itself, frustrate meaningful participation of victims in the confirmation hearings, given the very short time-period before they commence.

VII. CONCLUSION

17. The Legal Representative requests access to all *inter partes* confidential material filed in the record of the case, and seeks an order accelerating the time-limits for any responses to the present motion to ensure its resolution sufficiently in advance of the confirmation hearing, thereby ensuring meaningful participation by the victims. The Legal Representative is prepared to be bound by any orders or conditions for the receipt of the confidential material as may be deemed appropriate by the Single Judge or the Pre-Trial Chamber.

Respectfully submitted,



Morris Anyah

Victims' Legal Representative

Dated this 9th day of September 2011

At The Hague, The Netherlands.