

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

No.: ICC-01/09-01/11
Date: 27 September 2012

TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding
Judge Christine Van den Wyngaert
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
*THE PROSECUTOR v. WILLIAM SAMOEI RUTO and JOSHUA ARAP SANG***

**Public
with public Annex A**

Decision on the protocol establishing a redaction regime

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms Fatou Bensouda

Counsel for William Samoei Ruto

Mr Kioko Kilukumi Musau

Mr David Hooper

Counsel for Joshua Arap Sang

Mr Joseph Kipchumba Kigen-Katwa

Mr Joel Kimutai Bosek

Legal Representatives of Victims

Ms Sureta Chana

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

Registrar

Ms Silvana Arbia

Deputy Registrar

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court” or “ICC”), in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* (“Ruto and Sang case”), pursuant to Articles 54(3)(e), 64(2) and (3) of the Rome Statute (“Statute”), Rules 77, 78, 81, 82, 84 and 87 of the Rules of Procedure and Evidence (“Rules”) and Regulations 33 and 34 of the Regulations of the Court (“Regulations”), issues the following Decision on the protocol establishing a redaction regime (“Decision”).

I. Background and Submissions

1. On 14 May 2012, the Chamber issued its “Order scheduling a status conference,”¹ whereby it requested the Office of the Prosecutor (“prosecution”) and the defence teams (together “parties”) to make written submissions by 28 May 2012 on, *inter alia*, the timing, volume and format of disclosure of evidence by the prosecution pursuant to Rule 76 of the Rules, and of material already disclosed or provided for inspection and intended to be disclosed or provided for inspection pursuant to Article 67 of the Statute and Rule 77 of the Rules.²
2. On 28 May 2012, the prosecution filed its submissions on the agenda for the status conference,³ proposing, *inter alia*, that the Chamber adopt a new approach to the redaction procedure providing for a streamlined redaction process and a system of *inter partes* disclosure.⁴

¹ Order scheduling a status conference, 14 May 2012, ICC-01/09-01/11-413.

² ICC-01/09-01/11-413, paragraphs 2(D) and (E) and 3.

³ Prosecution’s Submissions on the Agenda for Status Conference, 28 May 2012, ICC-01/09-01/11-417.

⁴ ICC-01/09-01/11-417, paragraphs 19 to 23.

3. On the same day, the defence teams filed their respective submissions on the agenda for the status conference.⁵ In relation to the issue of redactions, the Ruto defence team does not make any specific submission on the redaction procedure, but “emphasises that it seeks the earliest and fullest disclosure possible.”⁶ The Sang defence team submits that the Trial Chamber should strictly supervise the redaction process, scrutinise all requests for redactions on a case-by-case basis,⁷ and “show ‘particular vigilance’ with regard to redactions to potentially exculpatory material, in order to safeguard the rights of the accused.”⁸
4. This issue was further addressed during the status conference of 11 June 2012, where the Ruto defence team expressed its opposition to the prosecution’s proposal.⁹ The Sang Defence team submitted that (i) in principle, it would have no objection to consultations with the prosecution in this regard; (ii) it is strongly opposed to the maintenance of redactions approved at the confirmation of charges stage; and (iii) the Chamber should adopt an approach whereby each individual redaction is justified by the prosecution separately and ruled upon by the Chamber on a case-by-case basis.¹⁰
5. Further to the parties’ submissions, the Chamber instructed the parties and the Registry to liaise with a view to achieving a common redactions proposal and to submit this proposal by 3 July 2012.¹¹

⁵ Written Submissions in Response to Order Scheduling a Status Conference, 28 May 2012, ICC-01/09-01/11-415; and Written Submissions in Response to “Order Scheduling a Status Conference,” 28 May 2012, ICC-01/09-01/11-416.

⁶ ICC-01/09-01/11-416, paragraph 6.

⁷ ICC-01/09-01/11-415, paragraph 16.

⁸ ICC-01/09-01/11-415, paragraph 18 (quotation marks in original).

⁹ Hearing of 11 June 2012, ICC-01/09-01/11-T-15, page 16, lines 24 to 25.

¹⁰ Hearing of 11 June 2012, ICC-01/09-01/11-T-15, page 17, lines 6 to 16.

¹¹ Hearing of 11 June 2012, ICC-01/09-01/11-T-15, page 21, lines 15 to 18.

6. On 3 July 2012, the Registry filed its submissions related to the redaction regime proposal.¹² The Registry explains that the prosecution's proposal is technically feasible and makes suggestions to the parties and participants concerning the proposal's technical aspects.¹³

7. On the same day, the prosecution filed joint prosecution/defence submissions on Redactions, submitting a proposal for a streamlined redaction process and an *inter partes* disclosure system prepared by the prosecution and integrating the position of both defence teams ("Proposal").¹⁴ The Proposal outlines a system whereby the disclosing party (i) applies redactions to information according to a pre-approved set of categories decided upon by the Chamber; (ii) relies on – where possible – a standard set of justifications for redaction categories pre-approved by the Chamber; (iii) lifts – where possible – certain categories of redactions according to a fixed timeline decided upon by the Chamber; and (iv) only in limited cases that fall outside the pre-approved categories, submits redaction applications to the Chamber on a case-by-case basis.¹⁵ This Proposal is ruled upon in the present Decision.

8. On 9 July 2012, the Chamber issued its "Decision on the schedule leading up to trial,"¹⁶ in which it instructs the prosecution to complete disclosure to the defence of (i) all incriminatory material in the form of witness statements and any other material to be relied on at trial, as well as disclosure of all Article 67(2) material and provision of all Rule 77 material for inspection to the defence by 9 January

¹² Registry submissions related to the redactions regime proposal raised by the prosecution during the Status Conference held on 11 June 2012, 3 July 2012, ICC-01/09-01/11-434.

¹³ ICC-01/09-01/11-434, paragraphs 8 to 10.

¹⁴ Joint Submissions on Redactions, 3 July 2012, ICC-01/09-01/11-435+Conf-Anx1 and Conf-Exp-Anx2.

¹⁵ ICC-01/09-01/11-435-Conf-Anx1.

¹⁶ Decision on the schedule leading up to trial, 9 July 2012, ICC-01/09-01/11-440.

2012;¹⁷ (ii) the identities of witnesses in the ICC protection programme ("ICCPP") who have been subject of an application for delayed disclosure by 11 February 2013;¹⁸ (iii) the reports of any expert witness who will be called during the prosecution case by 14 February 2012;¹⁹ and (iv) the identities of non-ICCPP prosecution witnesses who have been the subject of an application for delayed disclosure by 12 March 2013.²⁰

II. Analysis

A. General conditions for the application of redactions

9. Chambers of this Court have consistently emphasised the overriding principle that the presumption is that disclosable material will be served in full while redactions need to be justified and authorised individually under the provisions of the Rome Statute framework.²¹
10. Rules 81 and 82 of the Rules provide the legal basis for restrictions on disclosure and the application of redactions:

¹⁷ ICC-01/09-01/11-440, paragraph 14.

¹⁸ ICC-01/09-01/11-440, paragraph 16.

¹⁹ ICC-01/09-01/11-440, paragraph 17.

²⁰ ICC-01/09-01/11-440, paragraph 19.

²¹ Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, 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', 13 October 2006, ICC-01/04-01/06-568, paragraphs 36 and 39; Appeals Chamber, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 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', 13 May 2008, ICC-01/04-01/07-475, paragraphs 64 and 70; Appeals Chamber, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements', 13 May 2008, ICC-01/04-01/07-476, paragraph 64.

- (i) Rule 81(2) of the Rules entitles the prosecution to apply for non-disclosure of information that, if disclosed, would prejudice further or ongoing investigations;
- (ii) Rule 81(4) of the Rules provides for non-disclosure in order “to protect the safety of witnesses and victims and members of their families.” This Rule was further elaborated upon by the Appeals Chamber, which found that Rule 81(4) of the Rules is to be read to include the words “[other] persons at risk on account of the activities of the Court.”²²
- (iii) Rules 81(4) and 82 of the Rules sets out the regime for non-disclosure of material and information protected under Article 54(3)(e) of the Statute, where the Prosecutor has obtained information on the condition of confidentiality.

11. It has been settled that “it will be for the Prosecutor seeking redactions to establish that such redactions are warranted,”²³ while it is the responsibility of the Chamber to rule upon such requests. The Appeals Chamber held that the requirements to authorise the non-disclosure of information are the following: (i) the existence of an “objectively justifiable risk”²⁴ to the safety of the person concerned or which may prejudice further or ongoing investigations;²⁵ (ii) the risk must arise from disclosing the particular information to the accused;²⁶ (iii) the infeasibility or

²² ICC-01/04-01/07-475, paragraph 56.

²³ ICC-01/04-01/07-475, paragraph 97.

²⁴ 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”, 13 May 2008, ICC-01/04-01/07-475, paragraph 71.

²⁵ *Ibid.*, paragraph 97.

²⁶ *Ibid.*, paragraph 71(b).

insufficiency of less restrictive protective measures;²⁷ (iv) an assessment as to whether the redactions sought are “prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”;²⁸ and (v) the obligation to periodically review the decision authorising the redactions should circumstances change.²⁹

12. Against this background, the Chamber is of the view that the adoption of a streamlined redaction procedure outlined in the Protocol (Annex A to this Decision) is appropriate to expedite the disclosure process.³⁰ The procedure outlined in the Protocol is consistent with the rights of the accused. The Chamber notes that the defence has generally agreed upon the system proposed by the prosecution, and the Chamber carefully assessed any areas of disagreement.

13. In addition, under the Protocol, the Chamber’s oversight role concerning the redactions will not be compromised, to the extent that (a) direct application of redactions is limited to those categories that are usually covered by common justifications (“Standard Justifications”) and that are pre-approved by virtue of the present Decision; (b) the Protocol provides for a procedure to address disputes concerning the application of redactions covered by pre-approved categories on a case-by-case basis; (c) redactions that do not fall under the pre-approved categories will always be subject to a case-by-case review by the Chamber.

²⁷ ICC-01/04-01/06-568, paragraph 37; 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”, 14 December 2006, ICC-01/04-01/06-773, paragraph 33.

²⁸ ICC-01/04-01/06-773, paragraph 34.

²⁹ ICC-01/04-01/07-475, paragraph 73(c).

³⁰ Pre-Trial Chamber I in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo and Pre-Trial Chamber III in the case of The Prosecutor v. Laurent Gbagbo limited the case-by-case review to incriminating material: See Pre-Trial Chamber I in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo, Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, 25 April 2008, ICC-01/04-01/07-428-Corr, paragraphs 143-144 and Pre-Trial Chamber III in the case of The Prosecutor v. Laurent Gbagbo, Decision establishing a disclosure system and calendar for disclosure, 24 January 2012, ICC-02/11-01/11-30, paragraphs 49 to 57.

14. The Chamber considers this approach to be consistent with the jurisprudence of the Appeals Chamber. In its judgment of 13 October 2006 (“13 October 2006 *Lubanga* Appeals Judgment”), the Appeals Chamber reversed a decision by a Pre-Trial Chamber I Single Judge which required the prosecution to apply for protective measures with the Victims and Witnesses Unit prior to requesting non-disclosure of the identity of the witnesses.³¹ The Appeals Chamber rejected the decision to impose such a pre-condition on the prosecution, reasoning that redaction applications must be approved by the Chamber on a “case-by-case basis” and that the Chamber is not vested “with the competence to pre-determine the merits of future applications for authorisation of non-disclosure pursuant to rule 81 (4) of the Rules”.³² Since this judgment, the Appeals Chamber has confirmed the necessity of a judicial case-by-case assessment in subsequent disclosure disputes brought before it.³³ Importantly, the Appeals Chamber’s reasoning in the 13 October 2006 *Lubanga* Appeals Judgment is made in the context where a Chamber had foreclosed the possibility of making a case-by-case assessment in a situation where the parties disagree on non-disclosure.

15. Under the Protocol, in contrast to the decision reversed by the Appeals Chamber, a case-by-case assessment is never foreclosed and careful procedures are put in place to ensure that every contested redaction can be analysed by the Chamber. The only times when the Protocol dispenses with an individualised assessment of redaction requests are situations where both parties are satisfied that such an assessment is unnecessary. In these circumstances, the Protocol allows for

³¹ ICC-01/04-01/06-568.

³² ICC-01/04-01/06-568, paragraph 39.

³³ ICC-01/04-01/06-773, paragraph 51; ICC-01/04-01/07-475, paragraph 66; Judgment on the appeal of Mr Mathieu Ngudjolo against the decision of Pre-Trial Chamber I entitled “Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9”, 27 May 2008, ICC-01/04-01/07-521, paragraph 35.

disclosure pursuant to the Standard Justifications which the Chamber has considered to be appropriate in the circumstances of this case.

B. The Chamber's approach in assessing the Joint Proposal

16. For purposes of the Protocol, the Chamber has given considerable weight to the submissions of the parties. Regarding areas on which there is agreement, the Chamber has generally accepted the proposed procedure in the form presented in the Proposal, at times with minor modifications. In relation to issues not agreed upon by the parties, the Chamber has adopted the approach that it considers most appropriate to increase the expeditiousness of the proceedings whilst remaining consistent with the rights of the accused.

C. Points of disagreement between the parties

17. In the section below, the Chamber will discuss some of the general issues on which there was no agreement and will give its reasons for preferring one option to another. Disagreements relating to specific categories of redactions will be addressed in the Protocol.

1. Exceptional requests for lifting redactions or amending the timing for the lifting of pre-approved redactions

18. At the outset, the Chamber notes that the Protocol repeatedly refers to redactions classified as "permanent". In the view of the Chamber, the concept of "permanent" redactions is not compatible with the general principle that the prosecution's disclosure obligations are continuing and in light of the fact that

circumstances justifying the maintenance of redactions are subject to change.³⁴ As a result, for the purpose of the present Decision and its Protocol, reference will be made to “ongoing” redactions rather than “permanent” redactions.

19. The defence submits that it “reserves the right, at any time, to request the Chamber to lift or amend the timing of the redactions (...) should the need arise.”³⁵ The prosecution recognises the defence’s right to request the Chamber to lift or amend the redactions but emphasises that this should be the exception and not the rule.

20. The Chamber agrees with the defence that in some instances, it might be necessary for the preparation of the defence to obtain information that is covered by ongoing redactions or by redactions that are scheduled to be lifted at a later stage. In such cases, the receiving party shall raise the issue with the disclosing party. The parties shall then consult in good faith with a view to resolving the dispute and inform the Chamber of the outcome of the discussions.

21. In cases of inability to reach agreement, the receiving party may seek the Chamber’s intervention through a written application.

³⁴ See Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Version publique expurgée de « la Décision relative à la levée, au maintien, et au prononcé de mesures d'expurgation » du 22 Octobre 2009 (ICC-01/04-01/07-1551-Conf-Exp), 28 October 2009, ICC-01/04-01/07-1551-Red2, paragraph 72; Trial Chamber III, *The Prosecutor vs. Jean-Pierre Bemba Gombo*, Redacted Decision on the Prosecution's Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents, 20 July 2010, ICC-01/05-01/08-813-Red, paragraph 88. 1551-Red2, paragraph 72.

³⁵ ICC-01/09-01/11-435-Conf-Anx1, pages 5 to 6.

2. Existing redactions

22. The parties disagree as to the procedure to be applied to redactions that have been authorised by the Pre-Trial Chamber. The defence submits that these redactions should not be maintained and that the prosecution should be required to make a new application to the Chamber justifying these redactions. The prosecution asserts that this proposal undermines the utility of the Protocol, which is to streamline the disclosure process. Accordingly, the prosecution is of the view that the parties should undertake to review such material on an ongoing basis to see if and when the redactions can be lifted and the material disclosed.³⁶
23. The Chamber agrees with the prosecution that a new application for redactions previously granted by the Pre-Trial Chamber would slow down the disclosure process. Therefore, no new application will be required. However, in accordance with the Protocol, the disclosing party must review such material and lift redactions in accordance with the timelines provided therein.

3. Inadvertent disclosure

24. The defence argues that in the event that material has been disclosed inadvertently, any further restrictions on the receiving party's use of the disclosed material should be requested from the Chamber by the disclosing party. The prosecution stresses that (i) it should be presumed that all inadvertently disclosed confidential material could potentially lead to security risks and must not be used in any manner; (ii) inadvertently disclosed material cannot be used in a manner that breaches Court orders and/or provisions set out in the Code of Professional

³⁶ ICC-01/09-01/11-435-Conf-Anx1, pages 6 to 8.

Conduct for counsel (“Code of Conduct”); and (iii) the defence wishes to profit from material that is inadvertently disclosed.³⁷ The defence replies that “it remains aware of and in compliance with Court orders” and the Code of Conduct.³⁸

25. The Chamber considers that as a fundamental principle, parties and participants are presumed to act in good faith. In addition, by virtue of Article 8 of the Code of Conduct, counsel are duty bound to respect professional secrecy and confidentiality of information in accordance with the Statute, the Rules and the Regulations. Article 8(4) of the Code of Conduct specifically prevents counsel from disclosing to third parties any information relating to the identity of protected victims and witnesses, absent an order of the Court. As these obligations continue to apply in cases of inadvertent disclosure, the Chamber is of the view that no restrictions beyond the obligations set out in the Protocol³⁹ need to be ordered by the Chamber.

26. As regards the receiving party’s entitlement of continued use within the trial process itself of information derived from inadvertently disclosed material, it is the Chamber’s hope that the best sense of the spirit of professionalism will guide disputing counsel in their respective reactions in this regard, beyond the ability of the Protocol to provide guidance. Failing that, the Chamber will intervene to resolve related disputes as they arise.

³⁷ ICC-01/09-01/11-435-Conf-Anx1, pages 10 to 11.

³⁸ ICC-01/09-01/11-435-Conf-Anx1, page 12.

³⁹ Protocol, paragraphs 22 to 23.

4. Redactions to other information on ongoing and further investigations

27. The prosecution's proposal provides for redactions to "other information on the ongoing investigations (i.e. in the current case)" as well as to "other information on the further investigation (i.e. other cases)."⁴⁰ The defence objects to the prosecution redaction of these categories and submits that in line with the Appeals Chamber's jurisprudence,⁴¹ these categories should be assessed on a case-by-case basis.

28. The Chamber is of the view that these proposed categories are too broad and therefore agrees with the defence that redactions to any such information need to be justified and assessed on a case-by-case basis.

5. Rule 81(4) redactions – protection of victims, witnesses, members of their families and other persons at risk

29. Although the defence agrees to a number of proposed categories for redactions to the identities of individuals covered by Rule 81(4), it argues that the prosecution should not be allowed to determine the scope of redactions to witness statements.⁴² It also submits that the prosecution cannot be authorised to decide for itself which witnesses, family members of witnesses, victims or others at risk require protection, as authorisation must come from the Chamber, on a case-by-case basis.⁴³ The defence submits that although an assessment of the security situation of prosecution witnesses was carried out by the Pre-Trial Chamber in June 2011, the Trial Chamber should reassess the continued need for non-

⁴⁰ ICC-01/09-01/11-435-Conf-Anx1, pages 17 to 18.

⁴¹ ICC-01/04-01/07-476, paragraph 59.

⁴² ICC-01/09-01/11-435-Conf-Anx1, pages 25 to 26.

⁴³ ICC-01/09-01/11-435-Conf-Anx1, page 26.

disclosure and thereafter the prosecution could “self-redact” the identifying and contact information of the relevant individuals.⁴⁴

30. The Chamber considers that any request for delayed disclosure of witness identities must be addressed on a case-by-case basis. The Protocol provides that all requests for temporary non-disclosure of the identities of prosecution witnesses will be the subject of a case-by-case determination by the Chamber.⁴⁵ The scope of the redactions applied by the prosecution to identifying information of any witnesses for whom delayed disclosure is granted should not exceed that which is strictly necessary to protect the identity of the individual in question. In relation to the identities of family members and “other persons at risk as a result of the activities of the Court”, as a general rule, disclosure will take place 60 days prior to the commencement of the trial unless otherwise ordered by the Chamber on the basis of exceptional circumstances. On this basis the Chamber is satisfied that the defence will not be prejudiced by the temporary non-disclosure of this information.

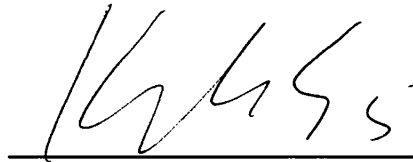
⁴⁴ ICC-01/09-01/11-435-Conf-Anx1, pages 26 to 27.

⁴⁵ See Protocol, sections B.1 and B.2.

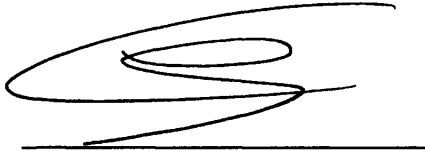
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

DECIDES that the parties shall apply the Protocol set out in the annex to the present Decision.

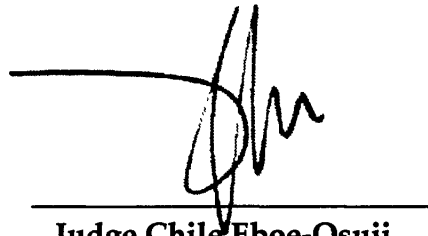
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding



Judge Christine Van den Wyngaert



Judge Chile Eboe-Osuji

Dated this 27 September 2012

At The Hague, The Netherlands