

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11
Date: 27 September 2012

TRIAL CHAMBER V

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

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
*THE PROSECUTOR v. FRANCIS KIRIMI MUTHAURA
AND
UHURU MUIGAI KENYATTA***

**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 Francis Kirimi Muthaura
Mr Karim Khan, Mr Essa Faal,
Mr Kennedy Ogetto, Ms Shyamala
Alagendra

Legal Representatives of Victims
Mr Morris Anyah

Counsel for Uhuru Muigai Kenyatta
Mr Steven Kay
Ms Gillian Higgins
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. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, 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-01/09-02/11-422.

² ICC-01/09-02/11-422, paragraphs 2(D) and (E) and 3.

³ Prosecution’s Submissions on the Agenda for Status Conference, 28 May 2012, ICC-01/09-02/11-428.

⁴ ICC-01/09-02/11-428, 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 this context, neither defence team made any specific submission on the redaction procedure.
4. This issue was further addressed during the status conference of 12 June 2012. The Muthaura defence team submitted that the prosecution should be entitled to apply redactions and to directly disclose the material to the defence but that it should always apply to the Chamber thereafter for authorisation for the requested redactions.⁶ The Kenyatta defence team similarly agreed with the approach of direct disclosure, but emphasised that each redaction should be individually justified.⁷
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 2012.⁸
6. On 3 July 2012, the Registry filed its submissions related to the redaction regime proposal.⁹ 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.¹⁰

⁵ Defence Submissions on the status conference agenda items contained in the Trial Chamber's "Order Scheduling a Status Conference" of 14 May 2012, 28 May 2012, ICC-01/09-02/11-427; Defence for Uhuru Muigai Kenyatta Submissions on Status Conference Agenda In Response to Trial Chamber Order dated 14 May 2012 (ICC-01/09-02/11-422), 28 May 2012, ICC-01/09-02/11-429.

⁶ Hearing of 12 June 2012, ICC-01/09-02/11-T-18, page 27, line 22 to page 28, line 15.

⁷ Hearing of 12 June 2012, ICC-01/09-02/11-T-18, page 28, line 19 to page 29, line 11.

⁸ Hearing of 12 June 2012, ICC-01/09-02/11-T-18, page 29, lines 13 to 16.

⁹ Registry submissions related to the redactions regime proposal raised by the prosecution during the Status Conference held on 12 June 2012, 3 July 2012, ICC-01/09-02/11-448.

¹⁰ ICC-01/09-02/11-448, paragraphs 8 to 10.

7. On the same day, the prosecution filed the “Joint Prosecution/Defence Submission 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”).¹¹ 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.¹² 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,”¹³ 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 2012;¹⁴ (ii) the identities of witnesses in the ICC protection programme (“ICCP”) who have been subject of an application for delayed disclosure by 11 February 2013;¹⁵ (iii) the reports of any expert witness who will be called during the prosecution case by 14 February 2012;¹⁶ and (iv) of identities of non-ICCP

¹¹ 3 July 2012, ICC-01/09-02/11-447 with Conf-Anx1 and Conf-Exp-Anx2.

¹² ICC-01/09-02/11-447-Conf-Anx1, page 2.

¹³ Decision on the schedule leading up to trial, 9 July 2012, ICC-01/09-02/11-451.

¹⁴ ICC-01/09-02/11-451, paragraph 19.

¹⁵ ICC-01/09-02/11-451, paragraph 21.

¹⁶ ICC-01/09-02/11-451, paragraph 22.

prosecution witnesses who have been the subject of an application for delayed disclosure by 12 March 2013.¹⁷

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.¹⁸

10. Rules 81 and 82 of the Rules provide the legal basis for restrictions on disclosure and the application of redactions:

- (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

¹⁷ ICC-01/09-02/11-451, paragraph 24.

¹⁸ 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.

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.”¹⁹

- (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,”²⁰ 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”²¹ to the safety of the person concerned or which may prejudice further or ongoing investigations;²² (ii) the risk must arise from disclosing the particular information to the accused;²³ (iii) the infeasibility or insufficiency of less restrictive protective measures;²⁴ (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”;²⁵ and (v) the obligation to periodically review the decision authorising the redactions should circumstances change.²⁶

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

¹⁹ ICC-01/04-01/07-475, paragraph 56.

²⁰ ICC-01/04-01/07-475, paragraph 97.

²¹ 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.

²² *Ibid.*, paragraph 97.

²³ *Ibid.*, paragraph 71(b).

²⁴ ICC-01/04-01/06-568, paragraph 37; ICC-01/04-01/06-773, paragraph 33.

²⁵ ICC-01/04-01/06-773, paragraph 34.

²⁶ ICC-01/04-01/07-475, paragraph 73(c).

Decision) is appropriate to expedite the disclosure process.²⁷ 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 has 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.

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.²⁸ 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

²⁷ 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.

²⁸ ICC-01/04-01/06-568.

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”.²⁹ Since this judgment, the Appeals Chamber has confirmed the necessity of a judicial case-by-case assessment in subsequent disclosure disputes brought before it.³⁰ 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 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

²⁹ ICC-01/04-01/06-568, paragraph 39.

³⁰ ICC-01/04-01/06-773, paragraph 51; ICC-01/04-01/07-475, 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.

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.

1. Request for disclosure of identifying information of prosecution investigators, intermediaries, leads and sources

18. At the outset, the Chamber notes that the Proposal 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.³¹ 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. In the context of information covered by ongoing redactions, the defence submits that the prosecution should disclose identifying information of prosecution

³¹ See Trial Chamber II, The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Decision on the lifting, Maintenance and Ordering of Redactions, 22 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.

investigators, intermediaries, leads and sources. The prosecution submits that in principle, there is no need to disclose the identities of these individuals.³²

20. Given the volatile security situation in Kenya at present, the Chamber considers that disclosure to the defence of the identities of intermediaries, leads and sources in the field heightens the possibility that they will be identified and therefore face an increased risk in carrying out their activities on behalf of the ICC. Unlike investigators, these individuals are generally based in the region and ensuring their protection is often difficult.

21. As set out above, the prosecution's disclosure obligations are ongoing, and redactions to the identifying information of prosecution intermediaries, leads and sources are only justified insofar as the security situation is such that disclosure may put the persons and/or the ongoing investigation at risk. Such redactions should be lifted once it appears that non-disclosure is no longer required to protect an ongoing or continuing investigation and/or the security of the individuals concerned. The information must also be disclosed in the event that it becomes relevant to the defence's preparation of its case, subject to the right of a concerned party or participant to show cause or the Chamber recognising, *suo motu*, that security considerations militate wholly or partially against disclosure.

22. In relation to the identities of intermediaries, leads and sources, the Chamber further finds that in order to facilitate the case preparation of the receiving party, pending disclosure of identifying information the disclosing party shall provide the receiving party with supplemental information, as set out in the Protocol.³³ If

³² ICC-01/09-02/11-447-Conf-Anx1, pages 6 to 9.

³³ See paragraphs 40 and 43 in the attached Protocol.

the receiving party considers that further information is required, it is to follow the procedure set out in part 1.7 of the attached Protocol.

23. Regarding the identities of OTP investigators, the defence submits that these are relevant “because of questions that the Defence has already raised regarding the OTP’s – and in particular the OTP investigators’ - links to intermediaries as well as to other aspects of the OTP investigation”.³⁴ Given the potential relevance of this information to the case preparation of the defence, and in view of the fact that investigators are not permanently based in the field, the Chamber is of the view that requests for redactions to the names of OTP investigators must be applied for in accordance with paragraphs 7 – 9 of the Protocol.

2. Redactions to other information on ongoing and further investigations

24. The 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).”³⁵ The defence submits that these categories are broad and proposes that the prosecution provide a detailed justification for each such redaction in order to assist the defence in evaluating the necessity and appropriateness of such redactions.³⁶
25. 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.

³⁴ ICC-01/09-02/11-447-Conf-Anx1, page 6.

³⁵ ICC-01/09-02/11-447-Conf-Anx1, page 9.

³⁶ ICC-01/09-02/11-447-Conf-Anx1, page 9.

3. Disclosure of identifying information of prosecution witnesses and of “other persons at risk as a result of the activities of the Court” and their family members

26. The Proposal provides that identifying information in relation to prosecution witnesses shall be disclosed “30/60” days prior to the trial in the case of the prosecution and that identifying information in relation to “other persons at risk as a result of the activities of the Court” and their family members shall be disclosed 30 days prior to trial.³⁷ The defence submits that the disclosure of the identities of prosecution witnesses should take place significantly in advance of the 30/60 day deadlines proposed by the prosecution and that a minimum timeline of 60 days should be required for disclosure of the identifying information of “other persons at risk as a result of the activities of the Court.”³⁸
27. The Chamber considers that any request for delayed disclosure of witness identities must be addressed on a case-by-case basis. In accordance with part B.1 of the Protocol, the prosecution is to file any application for delayed disclosure of the identity of a witness by 5 November 2012. In relation to witnesses identified by the prosecution after 5 November 2012 and with regard to whom the prosecution seeks temporary non-disclosure of their identities, the prosecution shall disclose any witness statement or related information in redacted form and seize the Chamber of an application for redactions in accordance with paragraph 53 of the Protocol. In relation to the identities of “other persons at risk as a result of the activities of the Court” and their family members, 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.

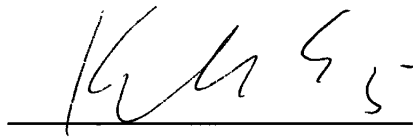
³⁷ ICC-01/09-02/11-447-Conf-Anx1, pages 10 to 12.

³⁸ ICC-01/09-02/11-447-Conf-Anx1, pages 11 to 12.

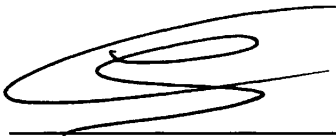
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

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

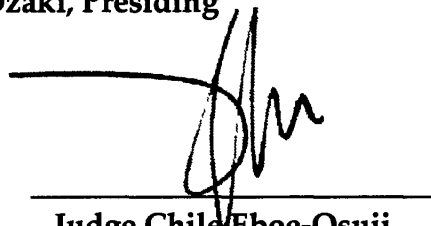
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding



Judge Christine Van den Wyngaert



Judge Chile Eboe-Osuji

Dated this 27 September 2012

At The Hague, The Netherlands