



Original: **English**

No.: ICC-01/09-02/11
Date: 28 November 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

**Fifth Prosecution application for the authorisation of non-standard redactions
pursuant to Decision ICC-01/09-02/11-495**

Source: The Office of the Prosecutor

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

The Office of the Prosecutor

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Other

Procedural History

1. In the “Protocol establishing a redaction regime in the case of *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*” (“Protocol”), the Chamber ruled that “any application for redactions that does not fall under the pre-approved categories set out [in the Protocol] shall be made . . . no later than 27 November 2012”.¹ On 26 November 2012, the Chamber granted the Prosecution a one-day extension, until 28 November 2012, to file any applications for non-standard redactions.²

Submissions

- I. Request to redact identifying information of Prosecution investigators.
2. The Prosecution seeks approval for only one category of “non-standard” redactions for as-yet undisclosed materials: information that would identify Prosecution investigators operating in the field. The Prosecution requests approval to redact this information from all materials to be disclosed to the Defence going forward.
3. The legal basis for this request is found in Articles 54(3)(f) and 68(1) of the Statute, Rule 81(2) and (4) of the Rules of Procedure and Evidence, and paragraphs 7 to 9 of the Protocol. In support, the Prosecution relies upon the arguments contained in paragraphs 20-27 of its 8 October 2012 “Prosecution application for the authorisation of redactions pursuant to Articles 54(3)(f), 64(2) and 68(1) of the Statute, Rule 81 and Decision ICC-01/09-02/11-495”.³
4. Other than the names and identifying information of Prosecution investigators, the Prosecution intends to disclose as-yet undisclosed materials with standard redactions, as set out in the Protocol. The Protocol

¹ ICC-01/09-02/11-495-AnxA-Corr, para 3.

² ICC-01/09-02/11-541, para 6.

³ ICC-01/09-02/11-500-Conf-Exp; *see also* ICC-01/09-02/11-500-Conf-Red.

establishes default timelines for the lifting of certain categories of redactions. For example, redactions to information identifying “other persons at risk” are to be lifted 60 days prior to the commencement of trial,⁴ *i.e.*, 11 February 2013.⁵ The Prosecution will continue to monitor the security situation and, if the situation at the time the redactions are due to be lifted renders lifting inadvisable, will advise the Chamber and seek authorisation not to lift the redactions by way of written application.

II. Disclosure of materials affected by the redaction sought.

5. In its 26 November 2012 “Order regarding redactions”, the Chamber clarified that when making an application for non-standard redactions, “[t]he disclosing party must simultaneously disclose the materials, with the proposed redactions in place, to the receiving party and provide a redacted version of its application to the receiving party”.⁶ Given the extraordinarily narrow relief sought in this application, the Prosecution submits that it is unnecessary to disclose to the Defence, simultaneously with this application, all materials affected by the proposed non-standard redaction.
6. *First*, the Defence’s ability to respond to this application will not be prejudiced. The Prosecution seeks approval of only one category of non-standard redactions to the investigators’ identities. The parties have litigated the merits of this same request on four occasions and the Prosecution does not add any new arguments or information in this application.⁷
7. Equally important, the requested redactions do not require the Defence to review the underlying materials to formulate a position thereon. Based on

⁴ See, *e.g.*, ICC-01/09-02/11-495-AnxA-Corr, paras 57-58.

⁵ ICC-01/09-02/11-451, para 25.

⁶ ICC-01/09-02/11-541, para 1.

⁷ See *Prosecution applications* ICC-01/09-02/11-500-Conf-Exp, paras 20-27; ICC-01/09-02/11-510-Conf-Exp, paras 4-5; ICC-01/09-02/11-520-Conf-Exp, para 4-5; ICC-01/09-02/11-535, paras 2-3. See *Defence responses* ICC-01/09-02/11-521-Conf, paras 36-47; ICC-01/09-02/11-528-Conf, paras 30-31.

the materials disclosed to date, the Defence is aware that investigators' names are listed on the front and back pages of witness statements and transcripts and, from time to time, may also appear in the body of the statement or transcript, such as when the witness refers to the investigator by name.⁸ These *pro forma* references do not require the Defence to undertake a contextual analysis in order to respond to this application. This situation is therefore distinguishable from other types of redactions, for which context has a greater impact on the Defence's ability to provide meaningful observations on the redactions sought.⁹ In short, disclosing the materials in which the names of investigators appear would not assist the Defence in any way to respond to this application.

8. *Second*, there are practical considerations. Most of the materials containing investigators' names and identifying information are witness statements and transcripts.¹⁰ For many of the witnesses, protective measures still need to be put in place before their identities can be safely disclosed. This process is ongoing and the period between now and 9 January 2013 is needed to complete it. In order to disclose the materials today, the Prosecution would also have to apply additional redactions to conceal the identities not just of the investigators but also of those witnesses. For several witnesses, the information required to be redacted to protect their identities is extensive. In the Prosecution's submission, it would be inefficient to provide the Defence with heavily redacted witness materials now, when the same materials will be disclosed with little or no redactions only a few weeks later – on or before 9 January 2013.

9. To be clear, the Prosecution will disclose witness statements and transcripts as and when protective measures are finalised, in accordance with the

⁸ *E.g.*, "My answer is the same as what I told John earlier in the interview".

⁹ See ICC-01/09-02/11-541, para 7.

¹⁰ Certain non-witness materials also refer to investigators in the chain of custody meta-data field.

Chamber's schedule. The proposed approach – notifying the Defence of the nature of proposed redactions without also providing each statement in which the investigators' names are redacted -- simply creates a more streamlined process that efficiently allocates resources and avoids providing the Defence with multiple iterations of the same materials in a short space of time.

Relief Requested

10. For the foregoing reasons, the Prosecution respectfully requests authorisation to redact identifying information of Prosecution investigators operating in the field from all materials to be disclosed to the Defence going forward.



Fatou Bensouda,
Prosecutor

Dated this 28th of November 2012
At The Hague, The Netherlands