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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. WILLIAM SAMOEI RUTO and JOSHUA ARAP SANG*

Public

**Second Prosecution application for the authorisation of non-standard redactions
pursuant to Decision ICC-01/09-01/11-458**

Source: 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

Fatou Bensouda

Cynthia Tai

Counsel for the Defence

For William Samoei Ruto:

David Hooper

Kioko Kilukumi Musau

For Joshua Arap Sang:

Joseph Kipchumba Kigen-Katwa

Joel Kimutai Bosek

Legal Representatives of Victims

Wilfred Nderitu

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

Paolina Massidda

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Maria Luisa Martinod-Jacome

Detention Section

Victims Participation and Reparations Other Section

Introduction

1. The Prosecution hereby requests authorisation to redact information that would identify Prosecution investigators operating in the field in all material that the Prosecution seeks to disclose to the Defence from this point onward. This application is made pursuant to Articles 54(3)(f), 64(2) and 68(1) of the Rome Statute ("Statute"), Rules 81(2) and 81(4) of the Rules of Procedure and Evidence ("Rules"), and the Protocol establishing a redaction regime in this case ("Protocol"),¹ set out by the Trial Chamber V ("Chamber").
2. The Prosecution intends to disclose the remainder of its relevant material with standard redactions, as set out in the Protocol. The Protocol establishes default timelines for the lifting of certain categories of standard redactions, such as "other persons at risk" and family members of witnesses, to be lifted 60 days prior to the commencement of trial.² 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.

Background

3. In the Protocol, the Chamber ruled that "any application for redactions that does not fall under the pre-approved categories set out shall be made . . . no later than 27 November 2012".³ 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 and clarified that the redacted version of the concerned material was to be provided by the receiving party simultaneously.⁴ The Chamber decided that requests for redactions to names

¹ ICC-01/09-01/11-458-AnxA.

² ICC-01/09-01/11-458, AnxA, paras 55-58.

³ ICC-01/09-01/11-482.

⁴ ICC-01/09-01/11-482, para 1.

and identifying information of Prosecution investigators would need to be applied for pursuant to paragraphs 7 to 9 of the Protocol,⁵ namely the procedure for non-standard justifications for redactions (“Non-Standard Justifications”).

4. Articles 54(3)(f), 64(2) and 68(1) of the Statute, Rules 81(2) and (4), and paragraph 36 of the Protocol (category A.4) provide the Chamber with the legal basis to authorize the redactions sought in the present application.

Submissions

Identifying information of Prosecution investigators – a.81 (2) and 81(4)

5. The Prosecution seeks the Chamber’s authorisation to redact the names, signature and initials of certain Prosecution investigators operating in the field under the procedure established in paragraphs 7 to 9 of the Protocol for Category A.4 redactions. The Prosecution clarifies that it only seeks redactions to identifying information of investigators that have not yet been exposed and remain unknown to the Defence.
6. To avoid repetition, the Prosecution refers to and hereby includes in their entirety the submissions and arguments developed in its “First Prosecution application for the authorisation of non-standard redactions pursuant to Decision ICC-01/09-01/11-458”.⁶

Disclosure of the material affected by the non standard redactions sought.

7. 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

⁵ ICC-01/09-01/11-458-AnxA-Corr, para.36.

⁶ ICC-01/09-01/11-477.

to the receiving party”.⁷ 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.

8. *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 requested redactions are not context-specific and do not require the Defence to review the underlying materials to assess the propriety of the redaction and to formulate a position thereon. Based on 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 type 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.
9. *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 the date of disclosure of their

⁷ ICC-01/09-01/11-482, para 1.

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

⁹ See ICC-01-09/11-482, para 8.

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

identity 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 concerned. 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.

10. To be clear, the Prosecution will disclose witness statements and transcripts as and when protective measures are finalized, in accordance with the Chamber's schedule. The proposed approach - notifying the Defence of the nature of proposed redactions without also providing each statement in which the investigator's 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.
11. Finally, the Prosecution emphasizes as a general matter that it continues to take all steps to disclose materials to the Defence consistent with the Chamber's protocol and schedule. To this end, the Prosecution will now disclose 61 items to the Defence and will disclose an additional 70 items by the end of this week. The remainder of the material, mostly witness-related, will be disclosed no later than 9 January 2013 for witnesses not concerned by delayed disclosure, and sooner if security arrangements can be completed before that date.

Relief Requested

12. For the foregoing reasons, the Prosecution respectfully requests that the Chamber authorise the redactions of identifying information of Prosecution investigators for all material to be disclosed going forward.



Fatou Bensouda,
Prosecutor

Dated this 28th day of November 2012

At The Hague, The Netherlands