



Original: **English**

No.: ICC-01/09-02/11
Date: **6 December 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

Prosecution's application to vary the "Decision on the protocol establishing a redaction regime, ICC-01/09-02/11-495" to allow redaction of investigators' names from relevant material and to allow consideration of this Application without requiring provision of redacted copies of that material to the Defence

Source: The Office of the Prosecutor

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

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Introduction

1. On 27 September 2012, the Trial Chamber V (“Chamber”) issued its “Decision on the protocol establishing a redaction regime” (“Protocol”),¹ which directs the disclosing party to disclose to the receiving party the relevant material in redacted form simultaneous with a redaction application.² The Chamber confirmed this procedure in its 26 November 2012 “Order regarding redactions”.³
2. On 28 November 2012, the Prosecution submitted its “Fifth Prosecution application for the authorisation of non-standard redactions pursuant to Decision ICC-01/09-02/11-495” (“Application”).⁴ In the Application, the Prosecution requested non-standard redactions to investigators’ names, and requested authorization to apply such redactions to all materials that would be disclosed on or before the final disclosure deadline of 9 January 2013.⁵ Given the narrow nature of the redactions sought, the Prosecution submitted that a departure from the Protocol’s requirement of contemporaneous disclosure was warranted.⁶
3. On 3 December 2012, the Chamber rendered its “Decision on fifth prosecution application for authorisation of non-standard redactions” (“Decision”),⁷ dismissing the Application and stating that the Prosecution should have sought “a modification to the procedure or an additional extension of time” if it found the Protocol to be problematic in implementation.⁸ The Chamber ruled that its dismissal of the Application was “without prejudice to the prosecution's right to take further steps to obtain the Chamber's authorisation for these redactions”.⁹ The Prosecution

¹ ICC-01/09-02/11-495.

² ICC-01/09-02/11-495-AnxA, paras 7-8.

³ ICC-01/09-02/11-541, para 1.

⁴ ICC-01/09-02/11-544.

⁵ ICC-01/09-02/11-544, para 2.

⁶ ICC-01/09-02/11-544, paras 5-9.

⁷ ICC-01/09-02/11-552.

⁸ ICC-01/09-02/11-552, para 7.

⁹ ICC-01/09-02/11-552, para 8.

now seeks modification of the procedure for redaction applications established in paragraph 7 of the Protocol.

Submissions

4. In accordance with the Decision, the Prosecution renews its previous request for the non-standard redactions of investigators' identities.¹⁰
5. The Prosecution also requests a narrow modification of the procedure established in paragraph 7 of the Protocol. The requested procedural modification is applicable only to this request to redact the identities of Prosecution investigators. In particular, the Prosecution asks the Chamber to alter the Prosecution's obligation to provide the Defence with the entirety of "relevant" material, for example, the full statements or transcripts wherein the investigators' identities are specifically redacted.
6. *First*, the Defence's ability to respond to the redaction Application will not be prejudiced in any way by a lack of simultaneous disclosure of the specific materials sought to be redacted. The Prosecution seeks approval of only one category of non-standard redactions: 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 its Application.¹¹ The Defence does not need to review the documents themselves to formulate a position on the issue of redacting the names of investigators -- which appear normally on the front and back pages of all witness statements and transcripts, as signatures on the bottom of the page, and only exceptionally also in the body of the statement or transcript, such

¹⁰ See ICC-01/09-02/11-495-AnxA, paras 7-8; ICC-01/09-02/11-541, para 1.

¹¹ 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.

as when the witness refers to the investigator by name.¹² These *pro forma* references to the names of investigators do not require the Defence to undertake a contextual analysis in order to respond to the Application. Instead, the Defence can take a position on the Prosecution's request based on its perceived need generally to know the names of the investigators. 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.¹³

7. Moreover, if the Chamber approves redacting investigators' names and the Defence thereafter receives the redacted materials and (a) deems it necessary or helpful to have the names of the investigator in a particular document or (b) believes that a redaction is over-inclusive and withholds additional information beyond the identities, it may ask the Prosecution to lift redactions in that instance in accordance with the procedure established by paragraph 16 of the Redaction Protocol and if necessary request the Chamber to order their lifting. In short, the requested modification will not deny the Defence the opportunity to object to specific instances of redactions as prejudicial or overbroad.
8. *Second*, requiring the disclosure of statements, transcripts and the other relevant materials, including metadata, in order to press this request will impose unnecessary burdens and delay on the Prosecution's ability to make the request and the Chamber's ability to resolve it promptly.¹⁴ For many of the witnesses, protective measures need to be put in place before their identities can be safely disclosed. The process is ongoing but cannot be completed for all witnesses before 9 January 2013. If required to disclose the full materials now, in order to justify a request to redact an investigator's

¹² *E.g.*, "My answer is the same as what I told John earlier in the interview".

¹³ See ICC-01/09-02/11-541, para 7.

¹⁴ Certain non-witness materials also refer to investigators in the chain of custody meta-data field.

name on the front and back pages or their signatures on multiple pages in the statements themselves, the Prosecution would also have to apply additional extensive redactions to also conceal the identities of those witnesses. The Prosecution calculates that providing the materials to the Defence would require reviewing and fully redacting thousands of pages. Contrary to the interests of all organs to be efficient and mindful of resources, this would impose a substantial burden on the Prosecution by requiring it to make full and heavy redactions now and then re-review and lift many of those redactions on the same materials for disclosure on or before 9 January 2013.

9. The Prosecution acknowledges that 9 January 2013 is the “latest deadline set out for disclosure” and is endeavouring to disclose as many materials before that date as possible. Indeed, a significant volume of materials have been disclosed to date and this will continue between now and 9 January. With respect to witness materials, the Prosecution will disclose statements and transcripts as and when protective measures are finalised, 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 investigators’ names are redacted, which effectively means providing every statement and transcript – 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 modification of the procedure established in paragraph 7 of the Protocol and permission to apply for redactions to investigators’ identities without also

having to provide the Defence with each relevant witness materials, such as the statement and or interview transcripts that reflects the proposed redactions.

11. The Prosecution also respectfully renews its Application to redact investigators' names from all disclosable material, and requests authorisation to redact identifying information of Prosecution investigators operating in the field from all materials to be disclosed between now and 9 January 2013.
12. The Prosecution would be grateful for an expedited consideration of the Application in view of the disclosure deadlines.



Fatou Bensouda,
Prosecutor

Dated this 6th of December 2012
At The Hague, The Netherlands