

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 21 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

**Decision on prosecution application to vary the Redaction Protocol and to
redact investigators' identifying information**

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

The Office of the Prosecutor

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Counsel for Francis Kirimi Muthaura

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Mr Kennedy Ogetto, Ms Shyamala
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Counsel for Uhuru Muigai Kenyatta

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Legal Representatives of Victims

Mr Fergal Gaynor

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paulina Massidda

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V (“Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, having regard to Articles 54(3)(f), 64(2), 64(6)(e), 67 and 68(1) of the Rome Statute (“Statute”) and Rules 76, 77, 81(2) and 81(4) of the Rules of Procedure and Evidence (“Rules”), issues the following Decision on prosecution application to vary the Redaction Protocol and to redact investigators’ identifying information (“Decision”).

I. Procedural Background

1. On 27 September 2012, the Chamber issued its “Decision on the protocol establishing a redaction regime” which annexed a protocol setting out a streamlined procedure for the application of redactions to materials subject to disclosure (“Redaction Protocol”).¹ The Redaction Protocol pre-approves certain categories of redactions and sets out a procedure for case by case authorisation of redactions that do not fall within such categories (“non-standard redactions”). According to this procedure, the disclosing party must apply for authorisation for any non-standard redactions to materials subject to disclosure and simultaneously disclose the relevant materials with the proposed redactions in place.² Non-standard redactions include, amongst others, redactions to investigators’ identifying information (category A.4).³ The Redaction Protocol directed that any application for non-standard redactions should be filed by no later than 27 November 2012.⁴ This deadline was later extended to 28 November 2012.⁵
2. Between October and November 2012, the Office of the Prosecutor (“Prosecution”) filed four applications for the authorisation of non-standard redactions to investigators’ identifying information in materials subject to

¹ ICC-01/09-02/11-495 and ICC-01/09-02/11-495-AnxA-Corr.

² ICC-01/09-02/11-495-AnxA-Corr, paras 7 – 9.

³ ICC-01/09-02/11-495-AnxA-Corr, paras 36 – 37.

⁴ ICC-01/09-02/11-495-AnxA-Corr, para. 3.

⁵ Order regarding redactions, 26 November 2012, ICC-01/09-02/11-541.

disclosure.⁶ In accordance with the Redaction Protocol, the relevant materials were disclosed with the proposed redactions in place prior to the filing of the four applications. The Chamber issued its decision on the first application on 13 December 2012⁷ and on the second, third and fourth applications on 17 December 2012.⁸

3. On 28 November 2012, the Prosecution filed a fifth application for the authorisation of non-standard redactions, wherein it requested authorisation to apply category A.4 redactions to investigators' identifying information in any material to be disclosed "going forward" and submitted that it was "unnecessary" to simultaneously disclose the materials affected by the proposed redactions ("Fifth Application").⁹
4. On 3 December 2012, the Chamber issued a decision dismissing the Fifth Application on grounds of procedural irregularity.¹⁰ Specifically, the Chamber ruled that the Prosecution could not unilaterally decide, upon the expiration of the deadline, to set aside the Redaction Protocol's requirement for simultaneous disclosure.¹¹
5. On 6 December 2012, the Prosecution submitted the present application requesting the Chamber to authorise the redaction of investigators' identifying

⁶ 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, 5 October 2012, ICC-01/09-02/11-500-Conf-Exp with confidential *ex parte* Annexes A, B and C (notified 8 October 2012); Second Prosecution application for the authorisation of non-standard redactions pursuant to Decision ICC-01/09-02/11-495, 22 October 2012, ICC-01/09-02/11-510-Conf-Exp with confidential *ex parte* Annex A; Third Prosecution application for the authorisation of non-standard redactions pursuant to Decision ICC-01/09-02/11-495, 6 November 2012, ICC-01/09-02/11-520-Conf-Exp; Fourth Prosecution application for the authorisation of non-standard redactions pursuant to Decision ICC-01/09-02/11-495, 19 November 2012, ICC-01/09-02/11-535 with Annex A (notified 20 November 2012).

⁷ Decision on the prosecution's first request for the authorisation of redactions, ICC-01/09-02/11-569-Conf ("Decision on First Application").

⁸ Decision on the second, third and fourth applications for the authorisation of redactions, ICC-01/09-02/11-574-Conf ("Decision on Second, Third and Fourth Applications").

⁹ Fifth Prosecution application for the authorisation of non-standard redactions pursuant to Decision ICC-01/09-02/11-495, ICC-01/09-02/11-544.

¹⁰ Decision on fifth prosecution application for authorisation of non-standard redactions, ICC-01/09-02/11-552.

¹¹ ICC-01/09-02/11-552, para. 5.

information and to modify the procedure set out in the Redaction Protocol for the authorisation of category A.4 redactions ("Application").¹²

6. On 12 December 2012, in accordance with a direction of the Chamber,¹³ the defence for Mr Muthaura and Mr Kenyatta (together the "Defence") filed a joint response to the Application ("Response").¹⁴

II. Submissions and analysis

Prosecution submissions

7. In the Application, the Prosecution renews its request in the Fifth Application to apply category A.4 redactions to investigators' identifying information in any materials to be disclosed to the Defence on or before the final disclosure deadline of 9 January 2013.¹⁵ It also requests the Chamber to lift the requirement, set out in the Redaction Protocol, to effect simultaneous disclosure of the relevant materials to the Defence.¹⁶
8. In support of the latter request, the Prosecution makes two arguments. First, it submits that the Defence's ability to meaningfully respond to its application will not be prejudiced in any way by a lack of simultaneous disclosure as the proposed redactions relate only to "*pro forma*" references to investigators' identities which do not require a contextual analysis of the entire document.¹⁷ In the event that the Defence, upon receiving the redacted materials, considers that specific instances of redactions are "prejudicial or overbroad" it can raise

¹² 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, ICC-01/09-02/11-558 ("Application").

¹³ Email from Trial Chamber V Communications, 7 December 2012, shortening the timeframe for response pursuant to Regulation 34 of the Regulations of the Court.

¹⁴ Joint Defence Response to the "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, ICC-01/09-02/11-567.

¹⁵ Application, ICC-01/09-02/11-558, para. 4.

¹⁶ Application, ICC-01/09-02/11-558, para. 5.

¹⁷ Application, ICC-01/09-02/11-558, para. 6.

an objection in line with the dispute resolution procedure set out in the Redaction Protocol.¹⁸

9. The Prosecution's second submission is that simultaneous disclosure would impose "unnecessary burdens and delay on [its] ability to make the request and the Chamber's ability to resolve it promptly."¹⁹ In this regard, it asserts that requiring simultaneous disclosure of the relevant materials would require "reviewing and fully redacting thousands of pages" in order to conceal the identities of witnesses for whom protective measures still need to be put in place before 9 January 2013.²⁰ The Prosecution acknowledges that this date is the final deadline for disclosure and states that it will disclose statements and transcripts as and when protective measures are finalised.²¹

Defence submissions

10. The Defence objects to the Application on both procedural and substantive grounds and requests the Chamber to reject it *in toto*.²²
11. As to its procedural objections, the Defence submits that it is "manifestly unfair" for the Prosecution to seek to vary the procedure established through an *inter partes* process, that it is not a matter for the Prosecution to determine that simultaneous disclosure would be inefficient, and that if the Prosecution foresaw difficulties in meeting its obligations it should have raised the issue earlier.²³
12. As to its substantive objections, the Defence reaffirms its "consistent position" that the identifying information of all investigators must be disclosed and that, pending such disclosure, pseudonyms should be provided for investigators

¹⁸ Application, ICC-01/09-02/11-558, para. 7.

¹⁹ Application, ICC-01/09-02/11-558, para. 8.

²⁰ Application, ICC-01/09-02/11-558, para. 8.

²¹ Application, ICC-01/09-02/11-558, para. 9.

²² Response, ICC-01/09-02/11-567, para. 4.

²³ Response, ICC-01/09-02/11-567, para. 11.

whose identifying information is withheld.²⁴ It submits that it is imperative for the Defence to receive all materials affected by the proposed redactions as soon as possible so that it can evaluate the content and manner of questioning by particular investigators.²⁵ The critical factor is not, according to the Defence, the identity of any investigator *per se*, but the Defence's ability to identify when a particular investigator has questioned a witness.²⁶

Analysis

(i) Variation of Redaction Protocol

13. Looking first to the Prosecution's request to lift the requirement in the Redaction Protocol for simultaneous disclosure, the Chamber recalls that the primary purpose of this procedure is to enable the Defence to respond meaningfully to proposed non-standard redactions to documents. As a general matter, unless the Defence has access to the documents containing the proposed redactions its ability to make submissions as to, for example, the proportionality of the proposed redactions or the potential prejudice they may cause to the Defence's ability to use the document is significantly limited.

14. In the present case, however, the Chamber accepts the Prosecution's argument that the Defence does not need access to the underlying documents to evaluate the proposed redaction of investigators' identifying information. The Defence is aware, based on the disclosure that has taken place to date, where the investigators' identifying information routinely appears. As the Prosecution notes, for witness statements and transcripts, the investigators' names appear on the front and back pages and their signatures on the bottom of each page.²⁷ The names also appear in the metadata fields for witness statements or transcripts as well as non-witness related documents.

²⁴ Response, ICC-01/09-02/11-567, para. 4.

²⁵ Response, ICC-01/09-02/11-567, para. 14.

²⁶ Response, ICC-01/09-02/11-567, para. 14.

²⁷ Application, ICC-01/09-02/11-558, para. 6.

15. For witness statements and transcripts, the Defence argues that it must be able to evaluate the content, context and manner of questions put to the relevant witness.²⁸ Whilst this argument is true with respect to the Defence's ability to evaluate the accuracy and credibility of the document as a whole, in the Chamber's view it does not apply to the Defence's evaluation of proposed redactions to investigators' identifying information appearing in such a document. Indeed, the Chamber notes that, in responding to prior applications to redact investigators' identifying information, the Defence adopted a general position that the identifying information of all investigators must be disclosed rather than taking a document-by-document approach even though the relevant documents were simultaneously disclosed.²⁹ This "consistent position" was reaffirmed by the Defence in the present Response.³⁰ For these reasons, the Chamber concludes that the requirement for simultaneous disclosure may be lifted for proposed redactions to investigators' identifying information in documents disclosed between the date of the Application and 9 January 2013.

16. In view of this conclusion, the Chamber does not need to consider in any detail the Prosecution's second argument as to "unnecessary burdens and delay" caused by simultaneous disclosure. The Chamber notes only that these considerations would not alone be sufficient to displace the simultaneous disclosure requirement or, more generally, to outweigh the interests of the

²⁸ Response, ICC-01/09-02/11-567, para. 14.

²⁹ See Joint Defence Response to the Confidential redacted version of the Prosecution's 5 September 2012 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, with confidential annexes B and C, 7 November 2012, ICC-01/09-02/11-521-Conf, paras 36 – 47; Joint Defence (1) Response to the "Confidential redacted version of the Second Prosecution application for the authorisation of non-standard redactions pursuant to Decision ICC-01/09-02/11-495, with confidential redacted Annex A" and (2) Application for an Order requiring the Prosecution to provide additional information to the Defence with respect to applications for non-standard redactions, 13 November 2012, ICC-01/09-02/11-528-Conf, paras 30 – 31; Joint Defence Response to the "Confidential redacted version of the Third Prosecution application for the authorisation of non-standard redactions pursuant to Decision ICC-01/09-02/11-495", 28 November 2012, ICC-01/09-02/11-545-Conf, paras 8 – 9; and Joint Defence Response to the Fourth Prosecution application for the authorisation of non-standard redactions pursuant to Decision ICC-01/09-02/11-495, 11 December 2012, ICC-01/09-02/11-564, para. 7.

³⁰ Response, ICC-01/09-02/11-567, para. 4.

Defence in receiving disclosure at the earliest opportunity. Recalling that the Redaction Protocol was put in place in order to facilitate expeditious disclosure, the Chamber encourages the Prosecution to do its utmost to fulfil its stated commitment³¹ to disclose as many materials as possible before the final disclosure deadline of 9 January 2013.

(ii) Redaction of investigators' identifying information

17. Turning next to the merits of the proposed redactions, for the reasons set out in its decisions on the first, second, third and fourth applications,³² the Chamber is of the view that disclosure of investigators' identifying information to the Defence at this time may pose security risks to witnesses whose identities are not yet known to the Defence. Accordingly, the Chamber authorises the redaction of the identifying information of each of the investigators contained in the content or metadata fields of documents disclosed between the date of the Application and 9 January 2013 until the disclosure of the identity of the last witness interviewed or contacted by that investigator.

18. With respect to non-witness related documents, in which investigators' identifying information appears only in the metadata fields, this temporary redaction should not hinder the Defence's ability to evaluate the documents once disclosed. With respect to witness statements and transcripts, the potential prejudice caused by the temporary redaction can be mitigated by the provision of pseudonyms for the relevant investigators. In this regard, the Chamber notes the Defence's submission that "the critical factor is not the name of the investigator *per se*, but the Defence's ability to evaluate and identify [...] when a *particular* investigator has put a question to an

³¹ Application, ICC-01/09-02/11-558, para. 9.

³² Decision on First Application, ICC-01/09-02/11-569-Conf, paras 28 - 31; Decision on Second, Third and Fourth Applications, ICC-01/09-02/11-574-Conf, paras 18 - 21.

interviewee.”³³ The provision of pseudonyms will enable the Defence to determine when a witness has questioned by a particular investigator even if the actual identity of that investigator is not known. Furthermore, as noted by the Prosecution,³⁴ the Defence retains the right, upon receiving the materials, to raise objections to any specific instance of redaction which it considers to be unduly prejudicial or overbroad.

For the foregoing reasons, the Chamber hereby:

GRANTS the Prosecution’s request for modification of the procedure established in paragraph 7 of the Redaction Protocol with respect to redactions to investigators’ identifying information in documents disclosed between the date of the Application and 9 January 2013; and

GRANTS the Prosecution’s request for the temporary redaction of investigators’ identifying information in the content or metadata fields of documents disclosed between the date of the Application and 9 January 2013 until the disclosure of the identity of the last witness interviewed or contacted by that investigator; and

DIRECTS the Prosecution to provide the Defence with a list of pseudonyms or letter codes for investigators whose identifying information is redacted in any witness statements or transcripts disclosed between the date of the Application and 9 January 2013.

³³ Response, ICC-01/09-02/11-567, para. 14 (emphasis in original).

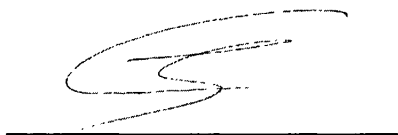
³⁴ Application, ICC-01/09-02/11-558, para. 7.

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



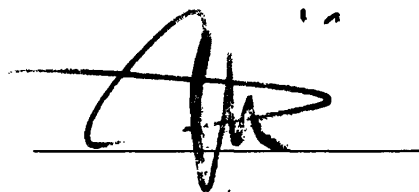
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Judge Kuniko Ozaki, Presiding



A handwritten signature in black ink, appearing to read 'C. Van den Wyngaert', written over a horizontal line.

Judge Christine Van den Wyngaert



A handwritten signature in black ink, appearing to read 'Chile Eboe-Osuji', written over a horizontal line.

Judge Chile Eboe-Osuji

Dated 21 December 2012

At The Hague, The Netherlands