

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 21 December 2012

TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding
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***

Confidential

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

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 William Samoei Ruto
Mr Kioko Kilukumi Musau
Mr David Hooper

Legal Representatives of Victims

Counsel for Joshua Arap Sang
Mr Joseph Kipchumba Kigen-Katwa
Mr Joel Kimutai Bosek
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

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V ("Chamber") of the International Criminal Court in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, 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 applications to redact investigators' identifying information and to vary the Redaction Protocol ("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. On 22 November 2012, the Office of the Prosecutor ("Prosecution") filed a confidential *ex parte* application for the authorisation of non-standard redactions to

¹ ICC-01/09-01/11-458 and ICC-01/09-01/11-458-AnxA-Corr.

² ICC-01/09-01/11-458-AnxA-Corr, paras 7 – 9.

³ ICC-01/09-01/11-458-AnxA-Corr, paras 36 – 37.

⁴ ICC-01/09-01/11-458-AnxA-Corr, para. 3.

⁵ Order regarding redactions, 26 November 2012, ICC-01/09-01/11-482.

investigators identifying information in disclosed materials ("First Application").⁶ A confidential redacted version of the First Application was notified on 28 November 2012.⁷ Neither the defence for Mr Ruto nor the defence for Mr Sang (together "the Defence") filed a response to the First Application.⁸

3. On 28 November 2012, the Prosecution filed a second 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 ("Second Application").⁹
4. On 3 December 2012, the Chamber issued a decision dismissing the Second 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 a fresh application requesting the Chamber to authorise the redaction of investigators' identifying information and to

⁶ First Prosecution application for the authorisation of non-standard redactions pursuant to Decision ICC-01/09-01/11-458, 22 November 2012, ICC-01/09-01/11-477-Conf-Exp ("First Application").

⁷ Confidential redacted version of the First Prosecution application for the authorisation of non-standard redactions pursuant to Decision ICC-01/09-01/11-458 and Annex A, 27 November 2012, ICC-01/09-01/11-477-Conf-Red (notified 28 November 2012).

⁸ In accordance with Regulations 24 and 34 of the Regulations of the Court, the final date for the Defence to file a response was 20 December 2012.

⁹ Second Prosecution application for the authorisation of non-standard redactions pursuant to Decision ICC-01/09-01/11-458, ICC-01/09-01/11-488.

¹⁰ Decision on second prosecution application for authorisation of non-standard redactions, ICC-01/09-01/11-493.

¹¹ ICC-01/09-01/11-493, para. 5.

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

6. On 12 December 2012, in accordance with a direction of the Chamber,¹³ the Defence filed a joint response to the Renewed Application ("Response to Renewed Application").¹⁴
7. Due to the commonality of issues raised in the First Application and in the Renewed Application, the Chamber rules on both applications in this Decision.

II. Submissions and analysis

Prosecution submissions

(i) First Application

8. In the First Application, the Prosecution requests redaction of investigators' names from the metadata fields of 38 documents.¹⁵ The relevant materials were disclosed to the Defence with the proposed redactions in place in June 2012 and September 2012,¹⁶ prior to the adoption of the Redaction Protocol.
9. The Prosecution submits that there are foreseeable risks to witnesses still residing in Kenya if the investigators' identities are disclosed to the Defence at this time, including the exposure of the witnesses' identities and places of residence and increased potential for threats to and other interference with witnesses.¹⁷ To support

¹² Prosecution's application to vary the "Decision on the protocol establishing a redaction regime, ICC-01/09-01/11-458" 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-01/09-01/11-498.

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 Prosecution's application to vary the "Decision on the protocol establishing a redaction regime, ICC-01/09-01/11-458" 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-01/09-02/11-509.

¹⁵ First Application, ICC-01/09-01/11-477-Conf-Red, paras 6 - 7 and ICC-01/09-01/11-477-Conf-AnxA-Red.

¹⁶ First Application, ICC-01/09-01/11-477-Conf-Red, para. 1.

¹⁷ First Application, ICC-01/09-01/11-477-Conf-Red, para. 8.

this contention, the Prosecution provides details of other instances of confidential information concerning witnesses in the present case being revealed.¹⁸

10. The Prosecution also submits that the disclosure of investigators' identities to the Defence in this case makes it more likely that their identities will become publicly known, hampering their ability to effectively investigate in other cases.¹⁹ It submits that designating investigators' identities as "confidential" is inadequate as demonstrated by prior leaks of confidential information to the media and other third parties in this case.²⁰

11. The Prosecution submits that it could provide the Defence with a list of witness interviews in which pseudonyms or letter codes are used to identify investigators and witnesses whose identities have not yet been disclosed in order to enable the Defence to determine which witnesses have been interviewed by the same investigators.²¹

(ii) Renewed Application

12. In the Renewed Application, the Prosecution resubmits its request in the Second Application to apply category A.4 redactions to investigators' identifying information in any materials disclosed to the Defence between the date of the Renewed Application and the final disclosure deadline of 9 January 2013.²² The Prosecution relies on the arguments set out in the First Application, as summarised above, in support of this request.

13. The Prosecution also requests the Chamber to lift the requirement, set out in the Redaction Protocol, to effect simultaneous disclosure of the relevant materials to the

¹⁸ First Application, ICC-01/09-01/11-477-Conf-Red and ICC-01/09-01/11-477-Conf-Exp, para. 10.

¹⁹ First Application, ICC-01/09-01/11-477-Conf-Red, para. 12.

²⁰ First Application, ICC-01/09-01/11-477-Conf-Red and ICC-01/09-01/11-477-Conf-Exp, para. 13.

²¹ First Application, ICC-01/09-01/11-477-Conf-Red, para. 15.

²² Renewed Application, ICC-01/09-01/11-498, para. 4.

Defence.²³ In support of this 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.²⁴ In the event that the Defence, upon receiving the redacted materials, considers that specific instances of redactions are "prejudicial or overbroad" it can raise an objection in line with the dispute resolution procedure set out in the Redaction Protocol.²⁵

14. 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."²⁶ 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 2013.²⁷ 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.²⁸

Defence submissions

15. The Defence did not file a response to the First Application. As noted below, however, in its Response to the Renewed Application it does address certain submissions made in the First Application.

²³ Renewed Application, ICC-01/09-02/11-498, para. 5.

²⁴ Renewed Application, ICC-01/09-02/11-498, paras 6-7.

²⁵ Renewed Application, ICC-01/09-02/11-498, para. 8.

²⁶ Renewed Application, ICC-01/09-02/11-498, para. 9.

²⁷ Renewed Application, ICC-01/09-02/11-498, para. 9.

²⁸ Renewed Application, ICC-01/09-02/11-498, para. 10.

16. In the Response to the Renewed Application, the Defence does not object to the relief sought by the Prosecution with two caveats. Firstly, it does not accept the Prosecution's submissions, in the First Application, as to alleged security risks to witnesses and victims arising from disclosure to the Defence of investigators' identifying information.²⁹ It recalls that the members of the Defence team are "officers of the court" and "understand their obligations with respect to confidentiality and ensuring the integrity of investigations."³⁰ Secondly, it requests the Chamber to order the Prosecution to provide the Defence with a list of pseudonyms or letter codes for investigators whose identifying information is redacted from witness statements or transcripts and to further require the Prosecution to add those pseudonyms at the appropriate places when the redacted versions of those documents are disclosed.³¹

Analysis

(i) Variation of Redaction Protocol

17. Looking first to the Prosecution's request in the Renewed Application to lift the requirement in the Redaction Protocol for simultaneous disclosure, the Chamber notes that the Defence does not object to the request, subject to the provision of pseudonyms for investigators, a matter which is addressed later in this Decision.

18. The Chamber is also satisfied, based on its own review, that the requirement for simultaneous disclosure may be lifted for proposed redactions to investigators' identifying information. In particular, 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 prior disclosures in the case, where the investigators'

²⁹ Response to Renewed Application, ICC-01/09-01/11-509, para. 4, footnote 5 citing First Application, ICC-01/09-01/11-477-Conf-Red, paras 7 – 11.

³⁰ Response to Renewed Application, ICC-01/09-01/11-509, para. 4.

³¹ Response to Renewed Application, ICC-01/09-01/11-509, para. 5.

identifying information routinely appears. For witness statements and transcripts, investigators' names appear on the front and back pages and their signatures appear on the bottom of each page. The names also appear in the metadata fields for witness statements and transcripts as well as non-witness related documents.

19. In view of the above, 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 Defence in receiving disclosure at the earliest opportunity. Recalling that the Redaction Protocol was put in place in order to facilitate expeditious disclosure, and being concerned at the relatively small number of documents that have been spontaneously disclosed by the Prosecution in the trial phase of the case, the Chamber encourages the Prosecution to do its utmost to fulfil its stated commitment³² to disclose as many materials as possible before the final disclosure deadline 9 January 2013.

(ii) Redaction of investigators' identifying information

20. Turning next to the merits of the proposed redactions requested in the First Application and Renewed Application, the Chamber is not persuaded by the Prosecution's submissions³³ that disclosure to the Defence of the identities of the investigators at issue will interfere with the Prosecution's ongoing or future investigations in other cases.

21. On the other hand, the Chamber does accept the Prosecution's argument that disclosing the identities of the investigators to the Defence may make surveillance of their activities easier, thus heightening the potential risks to current witnesses

³² Renewed Application, ICC-01/09-01/11-498, para. 10.

³³ First Application, ICC-01/09-01/11-477-Conf-Red, para. 12.

and other individuals who are assisting the Court and residing in Kenya.³⁴ Given the need to ensure the security of witnesses, the Chamber is of the view that non-disclosure of the identities of the investigators at issue is necessary at this stage to minimise the chances of any link being made between the investigators and those with whom they are meeting. The Chamber considers that no lesser measure is feasible at this stage and, as discussed further below, the proposed redactions do not unduly affect the ability of the Defence to use the documents.

22. Accordingly, the Chamber authorises the redaction of the identifying information of each of the investigators contained in the metadata fields of the documents identified in the First Application and in the content or metadata fields of documents disclosed to the Defence between the date of the Renewed Application and 9 January 2013, such redactions to remain in place until the disclosure to the Defence of the identity of the last witness interviewed or contacted by that investigator.

23. Noting that all documents at issue in the First Application are non-witness related documents in which investigators' identifying information appears only in the metadata fields, the Chamber considers that this temporary redaction should not hinder the Defence's ability to evaluate the documents. With respect to witness statements and transcripts, the Chamber considers that potential prejudice caused by the temporary redaction can be mitigated by the provision of pseudonyms for the relevant investigators. This 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, and as noted by the Prosecution,³⁵ the Defence retains the right, upon receiving the materials, to raise objections to any

³⁴ First Application, ICC-01/09-01/11-477-Conf-Red and ICC-01/09-01/11-477-Conf-Exp, paras 7 – 11, 13.

³⁵ Renewed Application, ICC-01/09-01/11-498, para. 8.

specific instance of redaction which it considers to be unduly prejudicial or overbroad.

24. As a final point, the Chamber notes that the Defence has interpreted the Prosecutions' submissions as to the security risks arising from disclosure as extending to members of the Defence. However, as is made clear from paragraph 14 of the *ex parte* version of the First Application, the Prosecution is referring to risks arising from disclosure to the accused persons, through the Defence, and not from disclosure to the Defence itself.³⁶ The Prosecution's submissions in this regard were redacted in the confidential redacted version of the First Application and, as such, were not seen by the Defence. The Chamber sees no basis for the redaction of these submissions and directs the Prosecution to file a confidential, lesser redacted version of the First Application in order to correct the misunderstanding caused thereby. The Chamber further wishes to note that this Decision should not be interpreted necessarily as an acceptance that the accused persons have or will intentionally leak confidential information to third parties. Rather, it is a recognition of the simple fact that the more widely this information is disseminated, the greater the risks of disclosure to third parties.

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 filing of the Renewed Application and 9 January 2013;

GRANTS the Prosecution's request for the temporary redaction of investigators' identifying information in the metadata fields of documents identified in the First

³⁶ First Application, ICC-01/09-01/11-477-Conf-Exp, para. 14.

Application and in the content or metadata fields of documents disclosed between the date of filing of the Renewed Application and 9 January 2013, such redactions to remain in place until the disclosure of the identity of the last witness interviewed or contacted by that investigator;

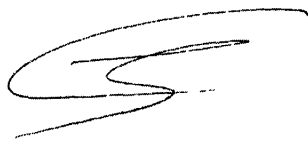
DIRECTS the Prosecution to provide the Defence with a list of pseudonyms or letter codes for investigators whose identifying information are redacted in any witness statements or transcripts disclosed between the date of the Renewed Application and 9 January 2013, and

DIRECTS the Prosecution to file a lesser redacted version of the First Application lifting the redactions referred to in paragraph 24 of this Decision.

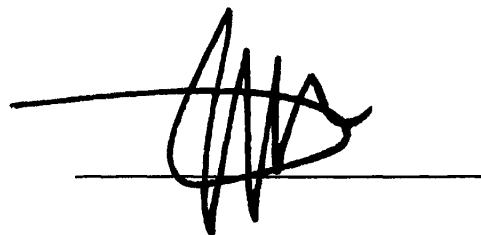
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding



Judge Christine Van den Wyngaert



Judge Chile Eboe-Osuji

Dated 21 December 2012

At The Hague, The Netherlands