

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-01/09-02/11**

Original Date: **13 December 2012**

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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. FRANCIS KIRIMI MUTHAURA
AND
UHURU MUIGAI KENYATTA

Public redacted version of

**Decision on the prosecution's first request for the authorisation of redactions,
13 December 2012, ICC-01/09-02/11-569-Conf**

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

The Office of the Prosecutor

Ms Fatou Bensouda
Ms Adesola Abedoyejo

Counsel for Francis Kirimi Muthaura

Mr Karim Khan, Mr Essa Faal,
Mr Kennedy Ogetto, Ms Shyamala
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Counsel for Uhuru Muigai Kenyatta

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Legal Representatives of Victims

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

Ms Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* (“Muthaura and Kenyatta case”), pursuant to Articles 54(3)(f), 64(2), 67(2) and 68(1) of the Statute (“Statute”) and Rules 77 and 81 of the Rules of Procedure and Evidence (“Rules”), issues the following Decision on the prosecution’s first request for the authorisation of redactions.

I. Procedural Background

1. On 27 September 2012 the Chamber issued the Decision on the protocol establishing a redactions regime (“Redaction Decision”) along with the protocol (“Redaction Protocol”).¹
2. On 5 October 2012 the prosecution submitted the “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” (“Application”) with annexes A, B and C.² The Application and the three annexes were classified as “confidential, *ex parte*”. A confidential redacted version of the application was filed on 9 October 2012.³
3. On 16 October 2012, pursuant to a request by the prosecution,⁴ the Chamber ordered the reclassification of annexes B and C from “confidential, *ex parte*” to

¹ ICC-01/09-02/11-495 and Protocol establishing a redaction regime in the case of *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, ICC-01/09-02/11-495-AnxA-Corr.

² ICC-01/09-02/11-500-Conf-Exp, notified on 8 October 2012 with confidential *ex parte* annexes A, B and C.

³ ICC-01/09-02/11-500-Conf-Red.

⁴ Application for reclassification of annexes B and C to ICC-01/09-02/11-500-Conf-Exp, 9 October 2012, ICC-01/09-02/11-502-Conf, para. 1.

“confidential”⁵ and thereafter confirmed that the 21-day time limit for any defence submissions began to run on the date of reclassification of the annexes.⁶

4. On 7 November 2012 the defence teams for Mr Muthaura and Mr Kenyatta (together the “defence”) filed a joint response to the Application (“Response”).⁷ On 14 November 2012 the Chamber granted the prosecution’s application⁸ for leave to reply to the Response.⁹ On 21 November 2012 the prosecution filed its reply (“Reply”).¹⁰

II. Submissions and Analysis

5. The Application requests authorisation for two categories of redactions to four transcripts of the interview of an “Individual X”, namely the redaction of any information that would reveal the identity of “Individual X” and the redaction of the names of investigators operating in the field.¹¹ The four transcripts date from a [REDACTED] 2012 prosecution interview which was audio recorded pursuant to Article 55 of the Statute.¹² The transcripts have already been disclosed to the defence with the proposed redactions in place.¹³ The submissions of the parties and the Chamber’s analysis of the two categories of proposed redactions are set out below.

⁵ Decision reclassifying annexes B and C to ICC-01/09-02/11-500-Conf-Exp as “Confidential”, ICC-01/09-02/11-505-Conf.

⁶ Email communication from Trial Chamber V Communications to the parties on 22 October 2012 at 16:55.

⁷ 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, ICC-01/09-02/11-521-Conf.

⁸ Prosecution request for leave to reply to ICC-01/09-02/11-521-Conf, 9 November 2012, ICC-01/09-02/11-525-Conf.

⁹ Decision on the prosecution request for leave to reply, 14 November 2012, ICC-01/09-02/11-530.

¹⁰ Prosecution’s reply to “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” [ICC-01/09-02/11-521-Conf], ICC-01/09-02/11-539-Conf.

¹¹ Only one investigator’s name appears in the interview transcripts. However, as the Application consistently refers to “investigators”, the Chamber assumes that more than one investigator’s name appears in the transcripts’ metadata fields.

¹² ICC-01/09-02/11-500-Conf-Red, para. 6.

¹³ The redacted transcripts were disclosed to the defence on 4 October 2012. See ICC-01/09-02/11-500-Conf-Red, para. 13 and Prosecution’s Communication of the Disclosure of Evidence, 5 October 2012, ICC-01/09-02/11-499 and Annex 3 thereto.

A. Identifying information of “Individual X”

Prosecution submissions

6. In the Application, the prosecution requests authorisation to redact the identity and identifying information of “Individual X” from the four transcripts of his interview.¹⁴ The prosecution suggests that this individual falls under the “B.0” category of the Redactions Protocol governing “other” requests for Rule 81(4) redactions because he will not be called to testify at trial and “because his unique security concerns render it inappropriate for his identifying information to be disclosed automatically 60 days before trial” as is the case for persons categorised as “other persons at risk as a result of the activities of the Court” under category B.3 of the Redaction Protocol.¹⁵
7. The prosecution suggests that, even if the Chamber considers that the relevant individual falls within category B.3 of the Redactions Protocol, it should exercise its discretion pursuant to Articles 54(3)(f), 64(2) and 68(1) of the Statute and Rule 81(4) of the Rules to authorise redactions to the identifying information of the individual concerned because of the risks to his security.¹⁶
8. According to the prosecution, Individual X was notified that his identity would likely be disclosed to the defence in the event that he agreed to be interviewed. Individual X stated that his life would be in danger if his identity was revealed to the defence and explained that his fear was based in part on [REDACTED].¹⁷ After receiving legal advice, Individual X agreed to proceed with the interview and stated that he understood the disclosure rules but asked that the prosecution request

¹⁴ The details of the proposed redactions are set out in a chart in Annex B to the Application. ICC-01/09-02/11-500-Conf-AnxB.

¹⁵ ICC-01/09-02/11-500-Conf-Red, para. 7.

¹⁶ ICC-01/09-02/11-500-Conf-Red, para. 8.

¹⁷ ICC-01/09-02/11-500-Conf-Red, para. 10.

authorisation from the Chamber to withhold his identity from the defence on the basis of his security concerns.¹⁸

9. The prosecution submits that Individual X's security concerns are objectively justified and that less restrictive measures would be insufficient to ensure his safety.¹⁹ The prosecution states that [REDACTED] and contends that the risk is heightened for Individual X.²⁰
10. The prosecution submits that the transcripts of Individual X's interview contain information of a potentially exonerating nature, which is subject to disclosure under Article 67(2) of the Statute, as well as some information of an incriminatory nature and Rule 77 information that may be material to the preparation of the defence.²¹ The prosecution does not intend to rely on the incriminatory evidence provided by Individual X.²² The prosecution also submits that the proposed redactions are consistent with the rights of the accused. Although it acknowledges that "it would be more advantageous to the Defence to know Individual X's identity", the prosecution submits that the information provided will still allow the defence to meaningfully analyse the transcripts.²³
11. The prosecution requests that the information related to the identity of Individual X be redacted until such time as he consents to the disclosure to the defence or his security situation changes such that disclosure would not cause undue risk to his security.²⁴

Defence submissions

¹⁸ ICC-01/09-02/11-500-Conf-Red, para. 11.

¹⁹ ICC-01/09-02/11-500-Conf-Red, para. 17.

²⁰ ICC-01/09-02/11-500-Conf-Red, para. 17.

²¹ ICC-01/09-02/11-500-Conf-Red, para. 12.

²² ICC-01/09-02/11-500-Conf-Red, para. 13.

²³ ICC-01/09-02/11-500-Conf-Red, paras 18 – 19.

²⁴ ICC-01/09-02/11-500-Conf-Red, para. 19.

12. The defence submits that Individual X falls within the “B.3” category of the Protocol as a “[person] at risk as a result of the activities of the Court”.²⁵ It submits that, as a result, the redactions to the identifying information of this individual must be lifted *vis-à-vis* the defence no later than 60 days before the start of trial and that his security concerns can only impact *when* (60 days before trial or sooner), as opposed to *whether*, disclosure takes place.²⁶
13. The defence also submits that even if the Chamber considers that Individual X falls within the residual category “B.0” or that the Redactions Protocol includes an exception from the explicitly stated disclosure deadlines for “B.3” redactions, the redactions requested to the identity of Individual X are not justified.²⁷
14. The defence first contends that there is no objectively justifiable risk to Individual X. It states that although the prosecution’s request for redactions is premised on [REDACTED], “it does not appear to the Defence that the OTP submits that these allegations are credible”.²⁸ The defence contends that redactions on the basis of such allegations are unfounded.²⁹
15. The defence objects to the allegation that the [REDACTED]³⁰ and further suggests that less restrictive protective measures are possible in light of: the Chamber’s protocol governing the handling of confidential information;³¹ defence counsel’s obligations under the Code of Professional Conduct for Counsel to ensure confidentiality of information; and the fact that defence counsel “have issued internal protocols and verbal instructions”, including to their clients, on the issue of

²⁵ ICC-01/09-02/11-521-Conf, para. 15.

²⁶ ICC-01/09-02/11-521-Conf, para. 16.

²⁷ ICC-01/09-02/11-521-Conf, para. 17.

²⁸ ICC-01/09-02/11-521-Conf, para. 18.

²⁹ ICC-01/09-02/11-521-Conf, para. 19.

³⁰ ICC-01/09-02/11-521-Conf, paras 19 – 20.

³¹ ICC-01/09-02/11-521-Conf, para. 21, referring to Decision on the protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call, 24 August 2012, ICC-01/09-02/11-469 with Annex.

confidentiality.³² The defence also submits that the OTP has not indicated whether the possibility of other protective measures were discussed with Individual X.³³

16. The defence notes that Individual X has provided the prosecution with information that is material to the defence case as well as important exculpatory evidence.³⁴ The defence submits that in order to be able to effectively use the information contained in Individual X's interview transcripts, it must have his identity – both to evaluate the credibility of the statements and to contact the individual to see whether he is willing to speak to the defence.³⁵ As a result, the defence submits that withholding the identity of Individual X is prejudicial to the rights of the accused and a fair and impartial trial.³⁶
17. The defence additionally submits that the prosecution acted improperly in agreeing to Individual X's request to seek the permission of the Chamber to withhold his identity from the defence despite being aware that the interview would result in the production of information subject to disclosure.³⁷

Prosecution's submissions in reply

18. In its reply, the prosecution refutes the defence suggestion that it acted improperly and states that Individual X has informed the prosecution that "he does not wish to ever speak to the Defence, for fear of his safety."³⁸

Analysis of the Chamber

³² ICC-01/09-02/11-521-Conf, paras 21 – 22.

³³ ICC-01/09-02/11-521-Conf, para. 23.

³⁴ ICC-01/09-02/11-521-Conf, para. 25.

³⁵ ICC-01/09-02/11-521-Conf, para. 27.

³⁶ ICC-01/09-02/11-521-Conf, paras 26 and 28.

³⁷ ICC-01/09-02/11-521-Conf, paras 29 – 35.

³⁸ ICC-01/09-02/11-539-Conf, paras 5 – 6.

19. As an initial matter, the Chamber considers that Individual X falls under the B.3 category of the Redactions Protocol, "other persons at risk as a result of the activities of the Court", for whom disclosure of identifying information would normally take place 60 days prior to the commencement of trial.³⁹ This label, rather than B.0, is applicable to the redactions at issue, as B.3 is a broad category that clearly encompasses persons such as Individual X who have been interviewed by the prosecution but are not witnesses. The prosecution's request is therefore treated as a request for variance of the disclosure deadline "on the basis of exceptional circumstances" as provided for in paragraph 27 of the Redaction Decision.
20. The Chamber recalls that the requirements that have to be met in order to authorise redactions pursuant to Rule 81(2) and 81(4) are the following: (i) the existence of an "objectively justifiable risk" to the safety of the person concerned or which may prejudice further or ongoing investigations; (ii) the risk must arise from disclosing the particular information to the accused; (iii) the infeasibility or insufficiency of less restrictive protective measures; (iv) an assessment as to whether the redactions sought are "prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial"; and (v) the obligation to periodically review the decision authorising the redactions should circumstances change.⁴⁰
21. The prosecution acknowledges that the transcripts of Individual X contain both Article 67(2) material and information which may be relevant to the preparation of the defence within the meaning of Rule 77 of the Rules.⁴¹ As a result, the non-disclosure of this information is potentially prejudicial to the rights of the defence. After considering the justifications in the *ex parte* version of the prosecution's application for redactions, the Chamber notes that the individual circumstances of

³⁹ Redactions Protocol, ICC-01/09-02/11-495-AnxA-Corr, paras 57 – 58.

⁴⁰ See Decision on the prosecution's application to authorise redactions to a statement of Witness 4 and to withhold documents from disclosure, 16 August 2012, ICC-01/09-02/11-464-Conf, para. 7.

⁴¹ ICC-01/09-02/11-500-Conf-Red, para. 12.

the person at issue may require measures to be taken to mitigate any security risks.⁴² However, the prosecution has not shown the infeasibility of less restrictive protective measures. In particular, based on the information provided to the Chamber in the Application, the prosecution does not appear to have explored whether any other protective measures are available.

22. Therefore, given the relevance of this material to the defence,⁴³ the prosecution is directed to disclose the identity of Individual X to the defence 60 days before the start of trial.⁴⁴ Having regard to the discussion in paragraph 21 above, the prosecution may revert to the Chamber with a request to delay disclosure past this deadline if this step is required for reasons of witness security.

B. Name of prosecution investigators operating in the field

Prosecution submissions

23. The prosecution seeks authorisation to redact the identity of the prosecution investigators whose names appear in the metadata field and transcripts of the interview with Individual X pursuant to Rule 81(2) and (4). It 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.⁴⁵ To support this contention, the prosecution provides details of other instances of confidential information concerning witnesses in the present case being revealed.⁴⁶
24. 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

⁴² ICC-01/09-02/11-500-Conf-Exp, paras 10 and 17.

⁴³ ICC-01/09-02/11-521-Conf, paras 25 – 28.

⁴⁴ See Redaction Protocol, ICC-01/09-02/11-495-AnxA-Cor, para. 58.

⁴⁵ ICC-01/09-02/11-500-Conf-Red, para. 21.

⁴⁶ ICC-01/09-02/11-500-Conf-Red, para. 23.

known, hampering their ability to effectively investigate in other cases. It submits that designating investigators' identities as "confidential" is inadequate and provides two examples of the unauthorised disclosure of confidential information in this case.⁴⁷

25. 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 prosecution 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.⁴⁸

Defence submissions

26. The defence opposes the redactions to the identities of prosecution investigators as it submits that it has concerns about the conduct of the prosecution's investigations.⁴⁹ The defence additionally submits that the prosecution's reliance on the precarious security situation in Kenya is too general to justify the non-disclosure of the identities of its investigators.⁵⁰ Finally, the defence objects to the prosecution's suggestion that disclosure of the identities of OTP investigators to the defence would create a security risk or prejudice prosecution investigations as it is submitted that the prosecution has not provided any evidence linking any leaks of confidential material to the two accused.⁵¹
27. The defence states that it would be willing to accept the use of pseudonyms in relation to the names of investigators until the date of final disclosure by which

⁴⁷ ICC-01/09-02/11-500-Conf-Red, paras 25 – 26.

⁴⁸ ICC-01/09-02/11-500-Conf-Red, para. 27.

⁴⁹ ICC-01/09-02/11-521-Conf, para. 39.

⁵⁰ ICC-01/09-02/11-521-Conf, para. 41, referring to *The Prosecutor v. Lubanga*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", 14 December 2006, ICC-01/04-01/06-773, para. 21.

⁵¹ ICC-01/09-02/11-521-Conf, paras 44 – 46.

time, it submits, the prosecution should have completed its investigations in the field.⁵²

Analysis of the Chamber

28. The Chamber is not persuaded that disclosure to the defence of the identities of the prosecution investigators at issue will interfere with the prosecution's ongoing or future investigations in other cases.
29. On the other hand, the Chamber does accept the prosecution's submission 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 and other individuals who are assisting the Court and residing in Kenya. 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 the proposed redactions do not affect the ability of the defence to use the transcripts.
30. The Chamber further considers that any risk of potential prejudice to the defence caused by temporary redactions to the names of investigators can be mitigated by the prosecution's provision of a list of witness interviews in which pseudonyms or letter codes are used to identify OTP investigators and witnesses whose identities have not yet been disclosed.
31. Accordingly, the Chamber grants the requested redactions to the names of each of the prosecution investigators at issue until the disclosure to the defence of the identity of the last witness interviewed or contacted by that investigator. If there is a

⁵² ICC-01/09-02/11-521-Conf, para. 47.

specific justification for the continued non-disclosure of the name of the investigators at that stage, the prosecution can re-apply for continued non-disclosure to maintain the redactions.

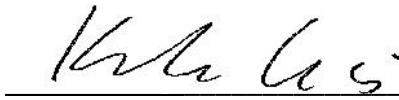
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the prosecution's request to maintain redactions to the identity of Individual X beyond 60 days prior to the commencement of trial;

PARTIALLY GRANTS the prosecution's request for the temporary non-disclosure of the identities of each of the prosecution investigators contained in the metadata and transcripts of the interview with Individual X until the disclosure to the defence of the identity of the last witness interviewed or contacted by that investigator; and

DIRECTS the prosecution to provide the defence with the list of pseudonyms or letter codes referred to in paragraph 30 above.

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



Judge Kuniko Ozaki, Presiding Judge



Judge Robert Fremr



Judge Geoffrey Henderson

Dated 3 February 2017

At The Hague, The Netherlands