

Corrigendum of ICC-01/09-02/11-495- AnxA

Protocol establishing a redaction regime in the case of *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*

1.1 General principles

1. This Protocol aims to improve the efficiency of trial management and the expeditiousness of disclosure while ensuring that the proceedings are conducted with full respect for the rights of the accused and with due regard for the protection of witnesses, victims and other persons who might be at risk as a result of the activities of the Court.
2. In order for these objectives to be achieved, it is of utmost importance that disclosure be effected expeditiously. In light of the 9 January 2013 deadline for completion of all prosecution disclosure,¹ any material containing redactions falling under the pre-approved categories is to be disclosed well in advance of the final deadline.
3. Any application for redactions that does not fall under the pre-approved categories set out below shall be made as soon as practicable on a rolling basis, but in any event no later than 27 November 2012. Unless otherwise provided, any deadline established by the Protocol shall be calculated in accordance with Regulation 33 of the Regulations of the Court (“Regulations”).

1.2 Standard set of redaction categories

¹ Decision on the schedule leading up to trial, 9 July 2012, ICC-01/09-02/11-451, paragraph 19.

4. For the purpose of the Protocol, the Chamber approves a standard set of redaction categories that will each be assigned a specific letter code. When the disclosing party discloses material in redacted form, each redaction will be identified by the relevant letter code in the redactions box. This format will allow the reader to immediately recognise, while reading the text, the type of underlying information that is redacted.
5. In this context and as set out in further detail in sections 1.10 to 1.14 below, the Chamber approves five main categories of redactions, identified by the letters A to E. Within each main category, the Chamber approves up to six sub-categories, identified by the numbers 1 to 6.

1.3 Justifications

6. The Chamber distinguishes two categories of justifications. The first category relates to redactions that are always justified in the same way, in line with the jurisprudence of Chambers of this Court ("Standard Justifications"). Redactions falling under this category are discussed in greater detail in sections 1.10 to 1.14 below. When a specific redaction falls under a category covered by a Standard Justification, the disclosing party merely needs to include the relevant letter code in the redaction box without repeating the justification for each redaction falling under this category.
7. The second category relates to redactions that need to be justified on a case-by-case basis ("Non-Standard Justifications"). Consequently, when the disclosing party seeks to apply redactions which are based on Non-Standard Justifications, disclosure of the relevant material must be accompanied by an application

justifying the requested redactions. To that end, the relevant material shall be disclosed in redacted form and each redaction shall be identified by the applicable letter code. At the same time, the disclosing party shall seize the Chamber with a formal application explaining why the redactions are justified. This application shall include a chart indicating the location of the redaction, its category and the justification.

8. A redacted version of this application shall be provided to the receiving party, and any observation by the receiving party shall be submitted to the Chamber within the 21-day time-limit established by Regulation 34 of the Regulations, unless otherwise ordered
9. Upon receiving these observations, the Chamber will examine the requested redactions on a case-by-case basis in light of the justifications provided by the disclosing party and the observations formulated by the receiving party and thereafter the Chamber will rule on the requested redactions.

1.4 Timing of the lifting of redactions

10. Redactions covered by Standard Justifications shall be lifted by the disclosing party in accordance with the timeline set out in sections 1.10 to 1.16 below. Redactions covered by Non-Standard Justifications shall be lifted in accordance with decisions to be taken by the Chamber on a case-by-case basis.
11. Should the receiving party consider that in relation to specific information, the timing for the lifting of redactions needs to be adjusted, it shall raise the request on an *inter partes* basis with the disclosing party. The parties shall then consult in good

faith with a view to resolving the matter and shall inform the Chamber of the outcome of the discussions. In the event of inability to agree, the receiving party may seek the Chamber's intervention through a written application.

1.5 Notification to the Chamber and uploading into Ringtail

12. After disclosure has been effected on an *inter partes* basis, the disclosing party will file with the Chamber a list of all the documents disclosed. This list shall include the following information:

- (a) document ID (ERN);
- (b) main date of document;
- (c) type of the document;
- (d) title of document;
- (e) number of pages of the document; and
- (f) proposed level of confidentiality.

13. Following the disclosure of material tending to incriminate, the prosecution will provide the Registry with the original items that are to be placed in the Registry's evidence vault and soft copies for uploading into e-Court. The Chamber will have access to both the unredacted and redacted versions of any material uploaded into e-Court.

1.6 Existing redactions

14. Redactions already approved by the Pre-Trial Chamber will remain in place unless and until the reasoning justifying their application changes, due to a change in circumstances. The disclosing party shall conduct a review of the material in order

to identify all redactions with the relevant letter code (these codes are discussed in paragraphs 27 – 66 below) and provide this information to the receiving party no later than 27 November 2012. In addition, the parties shall review the material on an ongoing basis to see if and when redactions can be lifted and the material fully disclosed. In doing so, they shall follow the timeline indicated in sections 1.10 to 1.14 below.

15. Whenever a lifting timeline is triggered (either by date or circumstances), the disclosing party will proceed with lifting and disclosure without seeking the prior leave of the Chamber.

1.7 Dispute

a) Time limit for raising an issue

16. *Redactions covered by Standard Justifications.* If it appears to the receiving party that any redaction applied in accordance with Standard Justifications is improper, it shall contact the disclosing party within 14 days following disclosure. If the volume of disclosure received at any particular point in time is of such an amount that the receiving party believes it will require more than 14 days to properly review the redactions within the material disclosed, it shall inform the disclosing party prior to the expiration of the 14 day deadline and the parties shall in good faith consult on an appropriate extension of this deadline. This shall be dealt with on an *inter partes* basis and the Chamber shall only be informed of the outcome of the negotiations.

17. *Redactions subject to Non-Standard Justifications.* In relation to redactions that are not covered by pre-approved Standard Justifications, and unless otherwise provided,

the receiving party shall have 21 days to respond to a filing submitted by the disclosing party, in accordance with paragraph 8 above.

18. These deadlines do not apply to redactions to identifying information and contact details of witnesses, identified by category B1. The regime applicable to this category will be set out in section 1.11 below.

b) Manner of resolving a dispute

19. *Redactions covered by Standard Justifications.* With respect to disputes concerning redactions applied in accordance with Standard Justifications, the parties shall first attempt to resolve the issue themselves. If the parties are unable to resolve the dispute, the disclosing party shall seize the Chamber and provide a justification for the redactions. Beyond the 14 day deadline, or any extension of the deadline mutually agreed upon by the parties, the receiving party may still seek the Chamber's intervention upon showing good cause, namely that it only became aware of the relevance of the information after the expiry of the deadline.

20. *Redactions subject to Non-Standard Justifications.* As set out in paragraph 17 above, objections to redactions applied according to Non-Standard Justifications shall be submitted via a written application that will be considered by the Chamber when examining the disclosing party's request for redactions.

1.8. Inadvertent disclosure

21. In the event that the disclosing party discovers that it has disclosed material that should not have been disclosed or should have been disclosed in redacted form, the disclosing party shall immediately inform the receiving party.
22. In the event that the receiving party discovers that it has received material that it believes should not have been disclosed or should have been disclosed in redacted form, the receiving party shall bring that fact immediately to the attention of the disclosing party. Pending confirmation by the disclosing party that the material should not have been disclosed or should have been disclosed in redacted form, the receiving party shall act in good faith and refrain from sharing the material in any manner.
23. As soon as the disclosing party informs the receiving party or confirms that the material should not have been disclosed or should have been disclosed in redacted form, the receiving party will return to the disclosing party the material as well as any copies that it may have made.
24. Should a dispute arise as to whether the material should not have been disclosed or should have been disclosed in redacted form, the parties shall first seek to resolve the dispute on an *inter partes* basis. If they are unable to do so, the matter may be brought to the attention of the Chamber by way of written application.
25. Moreover, the receiving party will instruct any individuals who have read or have had access to the inadvertently disclosed material to refrain from using the material any further.

26. In addition, in relation to inadvertently disclosed material, the parties shall adhere to the high standards of confidentiality set out, as applicable, in the Statute and in the Code of Professional Conduct for counsel.

1.9. Proposed categories of redactions

27. For the purpose of the present Protocol, the Chamber approves five main categories of redactions. The categories are covered by different justifications and they are subject to different timelines for lifting.

28. Redactions falling under the categories covered by Standard Justifications will be applied automatically and be lifted in accordance with the timelines established hereunder. Redactions falling under categories that are not covered by Standard Justifications are subject to the procedure set out in paragraph 17 above and will be lifted in accordance with an order of the Chamber. The procedure applicable to the identities of witnesses subject to an application for delayed disclosure is set out in Section 1.11 below.

29. In relation to redaction categories A.5 and A.6.1, with a view to facilitating the preparation of the receiving party, the disclosing party shall provide the receiving party, in addition to the relevant letter-code, with the supplemental information set out in paragraphs 40 and 43 below.

1.10 Rule 81(2) Redactions – Protection of further and ongoing investigations

A.1: Locations of witness interviews/accommodation

30. *Justification:* not to unduly attract attention to the movements of the parties' staff and witnesses; disclosure poses an objective risk to ongoing or future investigations; redaction allows the party to continue using these locations safely. The information is in principle not relevant to the other party.

31. *Timeline for lifting:* until the location is no longer used in ongoing or future investigations.

A.2: Identifying and contact information of parties' staff, excluding investigators, and VWU or other Court staff members (including VWU intermediaries) who travel frequently to, or are based in, the field

32. *Justification:* disclosure of this information may put the persons and/or the ongoing investigation at risk. The information is in principle not relevant to the other party.

33. *Timeline for lifting:* Ongoing.

A.3: Identifying and contact information of translators, interpreters, stenographers and psycho-social experts assisting during interviews who are not prosecution staff members but who travel frequently to or are based in the field

34. *Justification:* disclosure of this information may put the persons and/or the ongoing investigation at risk. The information is in principle not relevant to the other party.

35. *Timeline for lifting:* Ongoing.

A.4: Identifying and contact information of investigators

36. For redactions to the identifying information of investigators, the procedure set out in paragraphs 7 to 9 above applies.

37. Contact information only: *Timeline for lifting*: Ongoing.

A.5: Identifying and contact information of intermediaries

38. *Justification*: disclosure of this information may put the persons and/or the ongoing investigation at risk. Non-disclosure ensures that intermediaries can continue assisting the disclosing party in the investigation in a safe and effective manner.

39. *Time-line for lifting*: Ongoing.

40. In addition, in order to facilitate defence investigations, intermediaries shall be assigned a pseudonym to be provided in addition to the redaction code for each intermediary-related redaction.

A.6: Identifying and contact information of leads, sources and potential witnessesA.6.1: Leads and Sources

41. *Justification*: to ensure that they are not intimidated or interfered with, which, in turn, could prejudice ongoing or further investigations.

42. *Time-line for lifting*: Identifying information: Ongoing. In case the lead provides material that is disclosed, and provided there are no additional security concerns,

the lead will be disclosed as the source in the context of that disclosure. Contact information: Ongoing.

43. In addition, in order to facilitate the preparations of the defence, the specific categories of leads or sources should be indicated in accordance with the following code:

- A.6.1 (Individual): Individual sources
- A.6.1 (NGO): Non-governmental organisations
- A.6.1 (IO): International organisations
- A.6.1 (NGA): National governmental agencies
- A.6.1 (academic): Academic institutions
- A.6.1 (Private companies): Private companies
- A.6.1 (Other): Other categories

A.6.2: Potential witnesses

44. *Justification*: those individuals will be considered “other persons at risk” (category B.3), and the corresponding regime will be applied unless and until the individuals become witnesses – in which case the regime applicable to “witnesses”(category B.1) applies.

45. *Timeline for lifting*: Redactions shall be lifted in accordance with the provisions applicable to, as the case may be, category B.3 or B.1, set out in Section 1.11 below.

A.7: Means used to communicate with witnesses

46. *Justification*: disclosure may compromise investigative techniques and/or the location of witnesses. The information is in principle not relevant to the other party.

47. *Time-line for lifting*: ongoing.

A.0: Other Information

48. The Proposal includes additional categories: “other information on the ongoing investigations; i.e. in the current case”; “other information on the further investigation; i.e. in other cases” and “Other”. For the reasons set out in the Decision, these categories shall fall under the general category of “Other Information” that will be identified by the letter code A.0

49. Redactions falling under this category are subject to the procedure set out in paragraphs 7 to 9 above.

1.11 Rule 81(4) redactions – protection of victims, witnesses, members of their families and other persons at risk

B.1 – Identifying and contact information of prosecution witnesses

50. The regime applicable to defence witnesses will be determined prior to the start of the presentation of evidence by the defence.

51. In relation to prosecution witnesses, upon notification of the prosecution's provisional list of witnesses to the Chamber and the VWU² (16 October 2012), the prosecution shall identify the witnesses with regard to whom it requests delayed disclosure of their identities. Applications for delayed disclosure of witness identities are to be filed with the Chamber by 5 November 2012 .

52. In line with the Chamber's decision as to each individual witness, the prosecution will disclose the relevant material along with any redactions that were granted by the Chamber. These redactions shall be marked with the letter code B.1.

53. In relation to any witnesses identified by the prosecution after 5 November 2012 with regard to whom the prosecution seeks to temporarily withhold their identities from the defence, the prosecution shall disclose any witness statement or related information to the defence in redacted form and seize the Chamber with an application for redactions. This application shall explain why the applied redactions are justified and should indicate whether the prosecution seeks to delay disclosure of the witness's identity beyond the final disclosure deadline of 9 January 2012. A redacted version of the application shall be provided to the defence for the submission of any observations, unless otherwise provided, within 21 days.

54. *Timeline for lifting*: Redactions to identifying information of witnesses shall be lifted in accordance with the Chamber's case-by-case determinations as discussed above.

B.2: Identifying and contact information of family members of witnesses

² In accordance with the Chamber's decision on the schedule leading up to trial, this list is to be provided by 16 October 2012. ICC-01/09-02/11-451, paragraph 16.

55. *Justification:* disclosure would identify the witness or nondisclosure is necessary to protect the safety and well-being of the family member.

56. *Time-line for lifting:*

Identifying information:

For family members whose identifying information is redacted in order to protect the witness (for whom there are no security reasons justifying ongoing redaction), redactions shall be lifted when the identity of the witness is disclosed. Family members whose identifying information is redacted on the basis of their own security will be considered as "other persons at risk" (Category B.3) and the corresponding regime will be applied. Consequently, with respect to individuals identified in material disclosed by the prosecution, such information shall be disclosed 60 days prior to trial. With respect to individuals identified in material disclosed by the defence, redactions shall be lifted in accordance with the Chamber's future directions regarding defence disclosure. Redactions to identifying information in relation to minor children shall be ongoing.

Contact information:

Redactions to contact information for family members of witnesses shall be ongoing.

B.3: Identifying and contact information of "other persons at risk as a result of the activities of the Court" and their family members

57. *Justification:* disclosure would identify individuals mentioned by, for example, witnesses, and who are at risk of being perceived as potential witnesses or collaborators with the Court.

58. *Timeline for lifting*

Identifying information: with respect to individuals identified in material disclosed by the prosecution, such information shall be disclosed 60 days prior to the commencement of the trial. With respect to individuals identified in material disclosed by the defence, redactions shall be lifted in accordance with the Chamber's future directions regarding defence disclosure.

Contact information: Redactions to contact information for "other persons at risk as a result of the activities of the Court" and their family members shall be ongoing.

B.4: Victims

59. The regime applicable to victims will be addressed in a separate decision.

B.5: Location of protected witnesses (i.e. witnesses who are part of the ICC protection programme ("ICCPP")) and information revealing the places used for present and future relocation of these witnesses (including before they enter the ICCPP).

60. *Justification:* The confidentiality of these places needs to be maintained. The information is in principle not relevant to the other party.

61. *Timeline for lifting:* Redactions to the location of protected witnesses shall be ongoing.

B.0: Other

62. For any other Rule 81(4) redactions that do not fall under the above-mentioned categories, the procedure set out in paragraphs 7 to 9 above applies.

1.12 Rule 81(4) Redactions in combination with Article 54(3)(e) or Articles 72 and 93 – protection of Confidential Information

C.1: Confidential information provided under Article 54(3)(e) of the Statute; and

C.2: Information or documents of a State, the disclosure of which, in the State's opinion, would prejudice its national security interests under Articles 72 and 93(4) of the Statute

63. The Chamber is of the view that redactions falling under categories C.1 and C.2 need to be justified by the prosecution and assessed by the Chamber on a case-by-case basis. Accordingly, such redactions are subject to the procedure described in paragraphs 7 to 9 above.

1.13. Rule 81(1) Redactions – Protection of internal work product

D.1: Protection of internal work product

64. *Justification:* In accordance with Rule 81(1) of the Rules, internal work product is not subject to disclosure. Accordingly, redactions falling under this category will, in principle, be ongoing.

65. *Timeline for lifting:* Ongoing.

1.14. Other

E.0: Redactions considered to be necessary on any other basis

66. For any other redactions that do not fall under the above-mentioned categories, the disclosing party shall disclose the material in redacted form, with redactions to be identified by the letter code E.0 and subject to the procedure described in paragraphs 7 to 9 above.