

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 23 April 2013

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. WILLIAM SAMOEI RUTO and JOSHUA ARAP SANG

Confidential *ex parte* Prosecution and VWU only

**Decision on the Prosecution's application for authorisation to maintain certain
redactions**

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 the Defence

Legal Representatives of the Victims

Legal Representatives of the 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
Mr Herman von Hebel

Defence Support Section

Victims and Witnesses Unit
Ms Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Other

Trial Chamber V ("Chamber") of the International Criminal Court ("Court"), in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, having regard to Articles 64(2), 64(6)(e), 67 and 68(1) of the Rome Statute ("Statute"), Rules 76, 81(4) and 101(2) of the Rules of Procedure and Evidence ("Rules") and Regulations 33 to 35 of the Regulations of the Court (Regulations") hereby delivers the following Decision on the Prosecution's application for authorisation to maintain certain redactions ("Decision").

Background

1. On 9 July 2012, the Chamber issued its "Decision leading up to trial",¹ in which it set, *inter alia*, the date for completion of all disclosure by the Office of the Prosecutor ("Prosecution") to the defence teams for Mr Ruto and Mr Sang ("Defence") by 9 January 2013.² In the same decision the date for the commencement of the trial was set for 10 April 2013.³
2. 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 ("Protocol").⁴ The Protocol pre-approves certain categories of redactions and sets out a procedure for a case-by-case authorisation of redactions that do not fall within such categories. According to this procedure, identities of Prosecution witnesses may be withheld from disclosure, past the 9 January 2013 deadline, upon authorisation of the Chamber. The Prosecution is to apply to the Chamber for

¹ ICC-01/09-01/11-440.

² ICC-01/09-01/11-440, para. 14.

³ ICC-01/09-01/11-440, para. 20.

⁴ ICC-01/09-01/11-458 and ICC-01/09-01/11-458-AnxA-Corr.

authorisation of non-disclosure of identifying information relating to such witnesses ("B.1 Category").⁵ The Protocol does not set out any specific procedure for the disclosure of contact information of witnesses or identifying information for witnesses whose identities have already been disclosed. With regard to "other persons at risk" on account of the activities of the Court and their family members, the Protocol prescribes that their identifying information needs to be disclosed 60 days prior to the commencement of the trial "...unless otherwise ordered by the Chamber on the basis of exceptional circumstances..." but that redactions to their contact information shall be ongoing ("B.3 Category").⁶ With regard to family members of witnesses ("B.2 Category"), the Protocol provides that redactions to their identifying information made on the basis of their own security (as opposed to the security of the witness) are considered as falling under the B.3 Category and, as such, may be maintained until 60 days prior to the commencement of trial unless otherwise ordered.⁷ Redactions to the contact information of family members of witnesses shall be ongoing.

3. On 11 February 2013, the Prosecution filed its "Prosecution's application for the authorisation to maintain certain redactions" ("Application"), annexed by 38 documents containing the proposed redactions.⁸

⁵ ICC-01/09-01/11-458, para. 30 and ICC01/09-01/11-458-AnxA-Corr, para. 52 and 54.

⁶ ICC-01/09-01/11-458, para. 30 and ICC-01/09-01/11-458-AnxA-Corr, para. 58.

⁷ ICC-01/09-01/11-458, para. 30 and ICC-01/09-01/11-458-AnxA-Corr, para. 56.

⁸ ICC-01/09-01/11-599-Conf-Exp and confidential *ex parte* annexes 1 to 38. Confidential redacted versions of the Application and the annexes were filed on 13 February 2013.

4. On 7 March 2013, the Defence filed its response ("Response"),⁹ requesting the Chamber to reject the Application in its entirety.
5. On 8 March 2013, the Chamber vacated the trial start date of 10 April 2013 and set a new date of 28 May 2013.¹⁰
6. On 10 April 2013, the Prosecution filed a further application for authorisation to maintain redactions ("Additional Application") with two annexes.¹¹ The Chamber notes that the Additional Application is limited in nature and related to the Application. Given that the Defence has already filed a substantive response to the Application, the Chamber does not consider it necessary to receive a response from the Defence in order to determine the Additional Application.

Submissions

Prosecution's submissions

7. In the Application, the Prosecution requests the maintenance throughout trial of three categories of redactions: private personal information relating to witnesses ("proposed B.1 Redactions"); identifying information of family members of witnesses ("proposed B.2 Redactions"); and identifying information of other persons at risk on account of the activities of the Court ("proposed B. 3 Redactions").¹²

⁹ "Joint Defence Response to Prosecution Application for the Authorisation to Maintain Certain Redactions" ("Response"), ICC-01/09-01/11-641-Conf and confidential annex.

¹⁰ "Decision concerning the start date of trial", ICC-01/09-01/11-642.

¹¹ "Prosecution's additional application for authorisation to maintain certain limited redactions", ICC-01/09-01/11-674-Conf, with confidential annex A and confidential, *ex parte*, Prosecution and VWU only, annex B.

¹² ICC-01/09-01/11-599-Conf-Red, para. 1.

8. With regard to the proposed B.1 Redactions, the Prosecution requests the maintenance of redactions to certain pieces of information relating to the "personal and private lives" of the witnesses. This includes addresses, photographs of witnesses, identity card numbers, phone numbers and email addresses. The actual identities of the witnesses in question have already been disclosed to the Defence.
9. The Prosecution submits that the disclosure of this personal information would infringe on the "safety, physical and psychological well-being, dignity and privacy of the witnesses" contrary to Article 68(1) of the Statute.¹³ Further, the Prosecution avers that the information proposed for redaction is irrelevant to the case and of no use to the Defence.¹⁴ The Prosecution does not make submissions as to how the disclosure of the personal information to the Defence would prejudice the rights and interests of the witnesses in question. However, it does raise general concerns about the security situation in Kenya¹⁵ and refers to prior filings regarding security incidents and threats directed towards witnesses and their families that are allegedly attributable to the accused.¹⁶
10. With regard to the proposed B.2 and B.3 Redactions, the Prosecution requests the maintenance of redactions to the pre-approved category of identifying information, such as names, photographs and the location of residence, of the individuals in

¹³ ICC-01/09-01/11-599-Conf-Red, para. 11.

¹⁴ ICC-01/09-01/11-599-Conf-Red, para. 11.

¹⁵ ICC-01/09-01/11-599-Conf-Red, para. 9.

¹⁶ ICC-01/09-01/11-599-Conf-Exp, para. 9.

question.¹⁷ It argues that such “permanent redactions” have previously been granted in other cases before the Court.¹⁸ The Prosecution submits that the individuals in question may be perceived as collaborating with the Court and could therefore be subjected to intimidation or violence. For the proposed B.2. Redactions, the Prosecution additionally argues that family members may be targeted by the accused and their associates in order to influence the witnesses.¹⁹ It refers to prior filings, citing incidents of alleged witness interference by Mr Ruto and his supporters which, it states, demonstrate that the accused is “prepared to use any means necessary to interfere with witnesses and their family members in order to prevent the witnesses from testifying”.²⁰ For the proposed B.3 Redactions, the Prosecution submits that additional factual and legal justifications for each redaction proposed are included in the relevant annexes.²¹

11. The Prosecution submits that the information covered by the proposed B.2 and B.3 Redactions is irrelevant to the issues in dispute in the case and its non-disclosure does not affect the comprehension of the evidence or otherwise prejudice the rights of the Defence.²² With regard to the B.2 Redactions the Prosecution submits that witnesses often mention their family members only in passing or for administrative reasons like the information on the cover sheets of the interviews.²³

¹⁷ ICC-01/09-01/11-599-Conf-Red, paras 12 and 18.

¹⁸ ICC-01/09-01/11-599-Conf-Red, paras 12 and 18.

¹⁹ ICC-01/09-01/11-599-Conf-Red, paras 14 and 20.

²⁰ ICC-01/09-01/11-599-Conf-Exp, para. 15.

²¹ ICC-01/09-01/11-599-Conf-Red, para. 20.

²² ICC-01/09-01/11-599-Conf-Red, paras 16-17, 20.

²³ ICC-01/09-01/11-599-Conf-Red, para. 16.

12. One of the B.3 Redactions sought is to the name of a staff member of the Prosecution which appears in meta-data of certain disclosed materials.²⁴ This staff member is of Kenyan nationality and the Prosecution submits that revealing the name could put at risk family members of this staff member who still reside in Kenya. It submits that the staff member's identity is of no relevance for the Defence.

13. In its Additional Application the Prosecution requests the Chamber to authorise B.2 and B.3 Category redactions to audio-recordings of interviews with four witnesses.²⁵ The witnesses are Witness 16, 19, 24 and 25. The audio-recordings formed the basis for witness statements, which were disclosed to the Defence and are part of the initial Application to maintain redactions.²⁶

14. The Prosecution disclosed the recordings of the interviews to the Defence on 2 and 8 April 2013 applying redactions which correspond to those of the witness statements.²⁷ In its Additional Application the Prosecution requests authorisation to maintain these redactions in the audio-recordings.²⁸

Defence's submissions

15. In its Response, the Defence opposes the Application in its entirety. First, it objects to the late timing of the request,²⁹ noting that under the Protocol the proposed redactions were to be lifted 60 days prior

²⁴ ICC-01/09-01/11-599-Conf-Exp, para. 21.

²⁵ ICC-01/09-01/11-674-Conf, para. 3.

²⁶ ICC-01/09-01/11-599-Conf-Exp-Anx3 for Witness 16, ICC-01/09-01/11-599-Conf-Exp-Anx4 for Witness 19, ICC-01/09-01/11-599-Conf-Exp-Anx5 for Witness 24 and ICC-01/09-01/11-599-Conf-Exp-Anx6 for Witness 25.

²⁷ ICC-01/09-01/11-674-Conf, para. 4.

²⁸ ICC-01/09-01/11-674-Conf, paras 4 and 7.

²⁹ ICC-01/09-01/11-641-Conf, paras 4-5, 9.

to the commencement of the trial. It notes that as of the time of filing of the Application, the trial was still scheduled to start on 10 April 2013 and therefore that the information should have been disclosed on 9 February 2013. It argues that the Prosecution has provided no justification or request for an extension of time to request the maintenance of redactions and that the Application should be rejected as being filed out of time.³⁰

16. As to the merits of the Application, the Defence argues that it is not in accordance with the applicable law for redactions as it effectively requests authorisation of permanent non-disclosure, without any indication that the Prosecution would periodically review the need for continued redactions.³¹ The Defence notes that in its Decision adopting the Protocol, the Chamber specifically ruled that the concept of "permanent" redactions is incompatible with the Prosecution's ongoing disclosure obligations.³²

17. The Defence submits that the Prosecution has failed to justify the proposed redactions on a case-by-case basis and to provide exceptional circumstances that could justify the ongoing maintenance of the B.2 and B.3 Redactions.³³ It argues that the Prosecution's reliance on concerns about the general security situation in Kenya is not a sufficient basis for the Chamber to find that exceptional circumstances exist.³⁴ Further, the Defence objects

³⁰ ICC-01/09-01/11-641-Conf, para. 5.

³¹ ICC-01/09-01/11-641-Conf, para. 10.

³² ICC-01/09-01/11-641-Conf, para. 10.

³³ ICC-01/09-01/11-641-Conf, paras 11-12.

³⁴ ICC-01/09-01/11-641-Conf, paras 12-13.

to the Prosecution's assertions that disclosure of the information to the Defence and accused will lead to a security risk.³⁵

18. Finally, the Defence opposes the arguments made by the Prosecution that the redacted information is of no value to the Defence. On the contrary, it argues that this information is "critical" to the Defence's ability to prepare for trial.³⁶ With respect to the information covered by the proposed B.1 Redactions, it submits that photographs are "crucial ... to ensure that the defence and its own sources or witnesses are talking about the same person", that identity cards are "necessary in order to obtain criminal background checks and other records relating to a witnesses testimony," and that phone numbers may be "necessary to track an individual's location during the relevant time period."³⁷ The Defence does not object in principle, to the current location of a witness's place of residence being redacted as long as it does not feature in the witness's evidence.³⁸

19. With respect to the information covered by the proposed B.2 and B.3 Redactions, the Defence argues that family members and other individuals mentioned in a witness's statement may be a significant source of information when investigating the veracity of the witness's account.³⁹

Analysis

Timing of the Application

³⁵ ICC-01/09-01/11-641-Conf, paras 20, 24.

³⁶ ICC-01/09-01/11-641-Conf, para. 14.

³⁷ ICC-01/09-01/11-641-Conf, paras 15-16..

³⁸ ICC-01/09-01/11-641-Conf, para. 18.

³⁹ ICC-01/09-01/11-641-Conf, paras 21-22, 24-26.

20. Taking into account the fact that the disclosure deadline of 60 days prior to the trial⁴⁰ fell on a weekend (9 February 2013), and having regard to Regulation 33(1)(d) of the Regulations, the Chamber considers that by filing its Application on the next working day of the Court the Prosecution was not technically out of time. However, the Chamber is concerned by the Prosecution's conduct in waiting until the latest possible date to file the Application.

21. The Chamber recalls that according to Rule 101(2) of the Rules all parties and participants are to "endeavour to act as expeditiously as possible" in respecting time limits. The Appeals Chamber has previously considered the question of timeliness of applications filed before Chambers of this Court. In upholding, by majority, a decision of Trial Chamber II to reject a motion for being filed in an untimely fashion, it stated: "a party to a proceeding who claims to have an enforceable right must exercise due diligence in asserting such a right. This is as it should be in order for the Trial Chamber to take account of the interests of the other parties to and participants in the proceedings and of the statutory injunction for fairness and expeditiousness."⁴¹ The Appeals Chamber continued that "...what is reasonable and unreasonable in relation to time always turns on all the circumstances of the case".⁴²

22. In the present case, the Prosecution does not provide any explanation as to why it waited until the latest possible date to file

⁴⁰ As noted earlier, the Protocol does not address the disclosure of contact information and other identifying information of witnesses whose identities have been disclosed. In such circumstances, the Chamber is prepared to apply the deadline applicable to identifying information of family members and other persons at risk, namely 60 days before trial, to these categories of information.

⁴¹ Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings", 19 July 2010, ICC-01/04-01/07-2259, para. 54.

⁴² ICC-01/04-01/07-2259, para. 54.

its Application. No unexpected developments in the case or unforeseeable events are relied on in the Application which could justify the timing of the request. Consequently, the Chamber concludes that the Prosecution acted without due diligence in waiting until the deadline to file its Application.

23. The consequence of the Prosecution's last minute filing of the Application is that it has *de facto* granted itself an extension of the Chamber's deadline for disclosure. The Chamber cannot accept the Prosecution's lack of diligence in filing these applications so late. However, in the present circumstances, given the delay to the commencement of trial, the Chamber does not consider that the delay in filing has resulted in undue prejudice to the Defence. Nevertheless, the Chamber notes that under other circumstances an unjustified delay in filing may, in itself, be the basis for rejecting this kind of application and may result in the Prosecution being sanctioned for breach of the Chamber's orders.

Deficiencies in the Application

24. The Chamber is also concerned by the number of technical errors and oversights in the Application and its annexes and the Additional Application and its annexes. By way of illustration the Chamber refers to: redaction requests for names that are revealed at other places of the statement;⁴³ discrepancies between the proposed

⁴³ See for example: ICC-01/09-01/11-599-Conf-Exp-Anx2, a name is requested for redaction at KEN-OTP-0052-0134 but revealed at KEN-OTP-0052-0138. The same goes for ICC-01/09-01/11-599-Conf-Exp-Anx8 where a name is requested to be redacted on several occasion KEN-OTP-0047-0201, -0207 and -209 but at the same time revealed at KEN-OTP-0047-0189, -0191, -0202, -0211 and 0219. Further, on some occasion information is requested to be redacted in the audio tapes of the Additional Application, whereas the same information is revealed in the corresponding written witness statement. See for example, ICC-01/09-01/11-674-Conf-Exp-AnxB, in KEN-OTP-0037-0024, request for redaction of 10:43 min to 11:12 min and 11:32 min to 11:33 min, whereas this information is revealed in ICC-01/09-01/11-599-Conf-Exp-Anx6, at KEN-OTP-0037-0060 and ICC-01/09-01/11-674-Conf-

redactions highlighted in the annexes and corresponding tables;⁴⁴ redaction requests mentioned in the Application which appear not to exist;⁴⁵ redactions sought under the B.3 Category ("other persons at risk") for individuals who seem to be Prosecution witnesses;⁴⁶ failure to note the crucial fact that one of the individuals falling under the B.3 category⁴⁷ appears to be a former Prosecution witness who was the subject of previous requests for delayed disclosure⁴⁸ and was ultimately withdrawn as a result of stated concerns for his safety.⁴⁹

25. In the Chamber's view the number of deficiencies in the Application is not in accordance with the level of care and diligence that is necessary when dealing with the fundamental matter of protection of witnesses, family members and other people. It is not the role of the Chamber to serve as a 'safety mechanism' to correct oversights and discrepancies the Prosecution's applications.

Exp-AnxB, in KEN-OTP-0037-0019, request for redaction of 52:45 min to 52:59 min, whereas this information is revealed in ICC-01/09-01/11-599-Conf-Exp-Anx6, at KEN-OTP-0037-0063.

⁴⁴ See for example: ICC-01/09-01/11-599-Conf-Exp-Anx11, at KEN-OTP-0005-0273 there is highlighted information that is not mentioned in the table at the end of the annex listing the requested redactions; ICC-01/09-01/11-599-Conf-Exp-Anx5, at KEN-OTP0044-0033 the telephone number of the witness is highlighted for redaction but the table lists the identification card number as the information to be redacted. In ICC-01/09-01/11-599-Conf-Exp-Anx21 and ICC-01/09-01/11-599-Conf-Exp-Anx32 it appears that the highlights of a previous redaction request are still shown. In some cases the requested information for redaction is not highlighted in the text, see ICC-01/09-01/11-599-Conf-Exp-Anx36. In ICC-01/09-01/11-674-Conf-Exp-AnxB, in KEN-OTP-0037-0006 the name 'Saina' is requested for redaction thirteen times and is not mentioned at the indicated locations.

⁴⁵ The Chamber did not find any 'private medical information' which Prosecution avers to be part of the request under the proposed B.1 Redactions.

⁴⁶ In ICC-01/09-01/11-599-Conf-Exp-Anx6, the Prosecution requests redactions under the B.3 Category at KEN-OTP-0037-0045 and 0054 for a person who appears to be Witness 15. The identity of this witness is already revealed to the Defence. Additionally his name is revealed in the same annex on -0054, -0055, -0063 and -0064. In ICC-01/09-01/11-599-Conf-Exp-Anx8, the Prosecution requests redactions under the B.3 Category at KEN-OTP-0047-0201, -0207 and -0209 for a person who seems to be witness 24. The identity of this witness is already revealed to the Defence. In ICC-01/09-01/11-599-Conf-Exp-Anx34, the Prosecution requests redactions under the B.3 Category for a person who seems to be Witness 534. Since the identity of this person is not yet revealed to the Defence, the requested redactions fall under the B.1 Category and are subject to the specific authorization of the Chamber with regard to the disclosure of the identity of this witness to the Defence.

⁴⁷ ICC-01/09-01/11-Conf-Exp-Anx7, KEN-OTP-0028-1532, at 1557 to 1563; KEN-OTP-0028-1572, at 1573 to 1579 and KEN-OTP-0028-1630, at 1631 to 1637.

⁴⁸ ICC-01/09-01/11-468-Conf-Exp, ICC-01/09-01/11-572-Conf-Exp.

⁴⁹ ICC-01/09-01/11-597-Conf.

Furthermore, they greatly add to the time and complexity of the Chamber's review and determination which is not in the interests of any party or judicial economy. The Chamber expects counsel who appear before it to show a greater sense of professionalism and diligence than is revealed in this Application and Additional Application.

Merits of the Application

26. Turning now to the merits of the Application and the Additional Application, the Chamber recalls the previous jurisprudence of this and other Chambers of this Court stating that full disclosure is the principle in proceedings before the Court, that redactions are an exception to this principle and that each exception needs to be individually justified. The requirements for redactions are: (i) the existence of an objectively justifiable risk to the safety of the person concerned in case of disclosure, (ii) the risk must emanate from the disclosure to the accused in particular and not the public in general, (iii) the infeasibility of less restrictive measures and (iv) an overall assessment as to whether the requested redactions are prejudicial to or inconsistent with the rights of the accused and the requirements of a fair and impartial trial. Further, there is the need to periodically review the decision authorising the redactions should the circumstances change.⁵⁰

⁵⁰ ICC-01/09-01/11-458, para. 11; The Prosecutor v. Thomas Lubanga Dyilo, "Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence'", 13 October 2006, ICC-01/04-01/06-568, paragraphs 36 and 39; The Prosecutor v. Germain Katanga "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements'", 13 May 2008, ICC-01/04-01/07-475, paras 71-73, 97; The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, "Version publique expurgée de «la Décision relative à

27. The Chamber considers that, as the redaction requests made in the Application and Additional Application are interrelated and concern the same information, it is appropriate to address the two submissions at the same time.

28. Concerning the proposed B.1 Redactions, the Chamber notes that the information at issue is not covered by the Protocol, since as mentioned earlier, the Protocol does not address the disclosure of contact information of witnesses or of other personal or identifying information for witnesses whose identities have already been disclosed. However, the Chamber may be guided in its assessment by other relevant provisions of the Protocol, by the standard principles for redactions recalled above, and by its overriding duty set out in Article 68(1) of the Statute to protect the "safety, physical and psychological well being, dignity and privacy of victims and witnesses."

29. Regarding addresses, telephone numbers and email addresses⁵¹ the Chamber notes that some of this information may also fall under the standard category of contact information for family members of witnesses (B.2 Category) of the Protocol and, as such, may be redacted on an ongoing basis.⁵²

30. In addition, the Chamber notes that under the protocol established by the Chamber for contact with witnesses whom the opposing party intends to call, contact has to be established via the calling

la levée, au maintien et au prononcé de mesures d'expurgation » du 22 Octobre 2009 (ICC-01/04-01/07-1551-Conf-Exp), 28 Octobre 2009, ICC-01/04-01/07-1551-Red2, para. 4.

⁵¹ Redactions for this kind of information were requested in 12 annexes, namely annex 2, 4, 6, 9, 11, 13, 14, 15, 16, 20, 21 and 26.

⁵² ICC-01/09-01/11-458-AnxA-Corr, para. 56.

party (the Prosecution in this case).⁵³ Therefore, under normal circumstances, this information cannot be used by the Defence for the purposes of contact. Further, in the Response, the Defence did not raise any objections to the proposed redactions of email addresses or of current residential addresses (except where featured in the evidence). With regard to phone numbers proposed to be redacted as proposed B.1 Redactions, the Chamber fails to see how they could legitimately be used by the Defence to “track an individual’s location during the relevant time period.”⁵⁴ Having regard to Article 68(1) of the Statute, the Chamber considers that disclosure of this personal information may have an impact on the witnesses’ privacy and in the present circumstances this interest is not outweighed by necessary investigative purposes. Accordingly, it will grant the proposed redactions.

31. However, the Chamber reiterates its earlier statement in the decision adopting the Protocol that the Defence always has the right to request the Chamber to lift redactions should the need arise.⁵⁵ Should the Defence consider it necessary for the purposes of its investigation to be provided with information which remains redacted, it can apply for the lifting of the redaction.

32. Regarding identity card numbers and photographs of Prosecution witnesses,⁵⁶ the Chamber accepts the Defence arguments that this information is necessary for its investigation, for instance with

⁵³ Annex 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-01/09-01/011-449-Anx, para.4.

⁵⁴ ICC-01/09-01/11-641-Conf, para. 16.

⁵⁵ ICC-01/09-01/11-458, paras 19-21.

⁵⁶ Redactions for this kind of information were requested in 7 annexes, namely annex 5, 13, 14, 15, 16, 20 and 21.

regard to a potential criminal record of the witness. The Defence has an interest to be provided with this information. Further, the Prosecution fails to provide, either in the body of the Application or the annexes of the Application,⁵⁷ an individual case-by-case analysis of the requested redactions for each of the witnesses demonstrating that disclosure to the accused would present an objectively justifiable risk to the witness's safety. Therefore, the Chamber rejects the Prosecution's request for ongoing redaction of the identity card numbers and photographs. However, the Chamber emphasises that the use of such information for an investigation must be in accordance with the protocol established by the Chamber for contact with witnesses whom the opposing party tends to call.⁵⁸

33. Turning to the proposed B.2 and B.3 Redactions, the Chamber notes that a number of the Prosecution's requests relate to contact information for family members of witnesses or other persons at risk. The Chamber notes that since the Protocol already provides for the ongoing redaction of this information as a preapproved category⁵⁹ no request is necessary for such redaction.

34. With regard to the rest of the proposed B.2 Redactions, which relate to identifying information, the Chamber is not convinced that the fact that a person is a family member of a witness is sufficient to demonstrate, generally, the existence of an objectively justifiable risk, without any further justification provided.

⁵⁷ The table at the end of each annex which lists the requested redactions simply names the type of information for which redaction is requested (address, ID number, telephone number, email address, etc.) without providing further justification as to why redaction of this information is requested in this specific case.

⁵⁸ ICC-01/09-01/11-449-Anx, paras 19-21.

⁵⁹ ICC-01/09-01/11-458-AnxA-Corr, paras 56 and 58.

35. The Prosecution has not provided an individual case-by-base analysis. In the tables provided at the end of each annex the Prosecution, for most part, simply repeats the assertion that revealing the information would put the person at risk, without any explanation why this is the case. In its Application the Prosecution alleges on several occasions that the Accused entertain a network which engages in coercive activities and witness intimidation.⁶⁰ However, it fails to provide any linkage to the persons for which identifying information is proposed to be redacted. Therefore, the Chamber does not consider that this substantiates an objectively justifiable risk. If the Chamber were to follow the general security concerns put forward by the Prosecution in order to allow redactions the principle of full disclosure as the rule and redactions as the exception would be reversed.

36. Similarly, with regard to the majority of the proposed B.3 Redactions the Prosecution has not provided an adequate showing of an objectively justifiable risk. In the Application and Additional Application the Prosecution relies on general concerns in respect of the security situation in Kenya. Although the Prosecution submits that "...detailed [...] factual and legal justification for each redaction proposed..."⁶¹ is included in the annexes, the Chamber notes that for the most part the annexes use 'standard explanations'⁶² which do not indicate an objective risk. In addition, reliance on the fact that the third person spoke to or met with a witness or that he or she worked for a specific organisation and interacted on behalf of

⁶⁰ ICC-01/09-01/11-599-Conf-Exp, paras. 9, 14 and 15.

⁶¹ ICC-01/09-01/11-599-Conf-Red, para. 20.

⁶² See for example the justification for the proposed B.3 Redactions in ICC-01/09-01/11-599-Conf-Exp annexes 3, 6, 8, 11, 26, 27 or 28. In some the table simply states that it is "an innocent third party", see for example: ICC-01/09-01/11-599-Conf-Anx15-Red, page 4.

this organisation with a witness is not sufficient to prove the existence of an objectively justifiable risk.⁶³

37. In a limited number of cases, addressed below, the Chamber finds that the proposed redactions are justified. The specific details of each of the granted redaction requests under the B.3 Category are listed in an annex to this Decision ("Annex").

38. In annex 3 of the Application the Prosecution requests the redaction of the name and identifying information of a neighbour of a Prosecution witness from that witness's statement.⁶⁴ In the statement, the witness states that this person received threats from a village elder because he supported the mother of the interviewee. Further, the witness states that he is still in contact with this person, that this person provides him with news of his home village and that this contact is not known to people in his home village. Given that this person has already received threats and that the fact that his contact with the witness is not known at the moment the Chamber is of the view that revealing this information could put the third person at risk.⁶⁵ Further, the redacted information is not related to the case and is therefore, in principle, of no value to the Defence. Consequently, the non-disclosure of this information does not unduly prejudice the Defence.

39. In annex 7 of the Application the Prosecution requests the redaction from a Prosecution witness's statement of the name and identifying

⁶³ This concerns redaction requests in which the Prosecution notes that the third person has worked for an organisation that dealt with the aftermath of the post election violence and interacted with the witness in this context.

⁶⁴ Item one and two of the granted redactions in the Annex.

⁶⁵ The Chamber is aware that the Prosecution requested the redaction of the name and identifying information of this person in other parts of the same annex. However, it is of the view that the identification of this person in these parts of the statement would not put the person at risk nor is it possible to connect him to the parts for which redaction is granted.

information of a third person who monitored public incitement of violence after the post election violence on behalf of a development organisation.⁶⁶ The third person appears to be a former Prosecution witness.⁶⁷ In the statement, the witness notes this person provided him with minutes of meetings in which threats to witnesses who gave testimony about the post election violence were discussed. Considering that this person appears to have provided evidence to the Prosecution and that the Prosecution decided not to rely on the witness for trial, because of his security concerns,⁶⁸ the Chamber is of the view that revealing this information would put the person at risk. Since the redacted information relates to events that happened after the post election violence and thus is only indirectly related to the case, the Chamber is of the view that the non-disclosure of information does not unduly prejudice the Defence.

40. In annex 8 of the Application the Prosecution requests the redaction of the name of a person who was relocated for security reasons by a different organisation.⁶⁹ The Chamber is of the view that revealing this information could put the third person at risk. The information proposed to be redacted is not related to the case, therefore the Chamber is of the view that its non-disclosure does not prejudice the Defence unduly.

41. In respect of the Prosecutions' request to redact the name of a staff member in the meta-data,⁷⁰ the Chamber is of the view that the

⁶⁶ Item three, four and five of the granted redactions in the Annex.

⁶⁷ ICC-01/09-01/11-468-Conf-Exp, ICC-01/09-01/11-572-Conf-Exp.

⁶⁸ ICC-01/09-01/11-597-Conf.

⁶⁹ Item six of the granted redactions in the Annex.

⁷⁰ Item seven of the granted redactions in the Annex. The Chamber notes that in annex 10 the information does not appear in the meta-data but in the cover page for an audio transcript. However, there is no substantial difference to the request of redaction of information appearing in the meta-data

information provided by the Prosecution shows an objectively justifiable risk. The fact the person is a staff member and thus necessarily associated with the Court creates a risk for the members of her family who still reside in Kenya and might be perceived as supporting the work of the Court. Further, this information is not, in principle, of relevance to the Defence. Consequently, its redaction does not prejudice the Defence in an unduly manner.

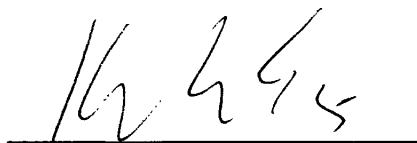
42. The Chamber wishes to remind the Prosecution that it has the obligation to review if the circumstances granting the authorisation and alert the Chamber if the need for any of the authorised redactions should change.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY:

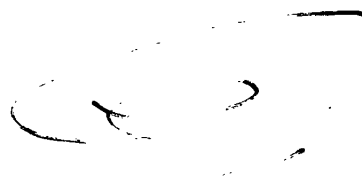
- **AUTHORISES** the Prosecution to maintain on an ongoing basis the redactions specified in paragraphs 28 and 38 to 41 of the Decision and in the Annex to the Decision;
- **REJECTS** the remainder of the Application and the Additional Application; and
- **DIRECTS** the Prosecution to immediately disclose the information for which the Chamber has not authorised redaction.

as this document appears to be an internal working document. Therefore, the Chamber will not make any distinction in its analysis.

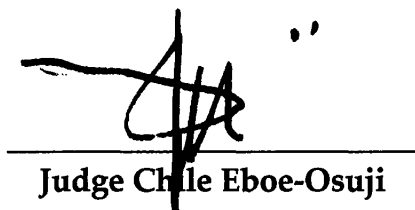
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki



Judge Christine Van den Wyngaert



Judge Chale Eboe-Osuji

Dated this 23 April 2013

At The Hague, The Netherlands