

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-02/11-01/11  
Date: 15 December 2014

**TRIAL CHAMBER I**

**Before: Judge Geoffrey Henderson, Single Judge**

**SITUATION IN THE REPUBLIC OF CÔTE D'IVOIRE  
IN THE CASE OF  
*THE PROSECUTOR v. LAURENT GBAGBO***

**Public  
with public annex A**

**Decision on the Protocol establishing a redaction regime**

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

**The Office of the Prosecutor**

Ms Fatou Bensouda  
Mr James Stewart  
Mr Eric MacDonald

**Counsel for Laurent Gbagbo**

Mr Emmanuel Altit  
Ms Agathe Bahi Baroan

**Legal Representatives of Victims**

Ms Paolina Massidda

**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**

Mr Herman von Hebel

**Counsel Support Section**

**Victims and Witnesses Unit**

Mr Nigel Verrill

**Detention Section**

**Victims Participation and Reparations  
Section**

**Others**

**Judge Geoffrey Henderson**, acting as Single Judge on behalf of Trial Chamber I (respectively ‘Single Judge’ and ‘Chamber’) of the International Criminal Court (‘Court’), in the case of *The Prosecutor v. Laurent Gbagbo* (‘Gbagbo case’), having regard to Articles 54(3), 64(2), (3) and (6)(c), 67 and 68 of the Rome Statute (‘Statute’), Rules 76 to 79, 81, 82, 84, 87 and 132*bis* of the Rules of Procedure and Evidence (‘Rules’) and Regulation 42 of the Regulations of the Court (‘Regulations’), issues the following ‘Decision on the Protocol establishing a redaction regime’.

## **I. Procedural history and submissions**

1. On 8 October 2014, the Chamber issued an ‘Order scheduling a status conference and setting a provisional agenda’,<sup>1</sup> whereby it instructed the parties to submit written observations on, *inter alia*, the timing, volume and modalities of disclosure of evidence pursuant to Rule 76 of the Rules, the protection of witnesses and other persons (including the need for redactions) as well as material already disclosed and intended to be disclosed by the Office of the Prosecutor (‘Prosecution’) pursuant to Article 67(2) of the Statute and Rule 77 of the Rules.
2. On 27 October 2014, the Prosecution<sup>2</sup> and the defence team for Mr Laurent Gbagbo (‘Defence’)<sup>3</sup> filed their observations, the former informing the Chamber that discussions on the redaction protocol to be adopted in the current proceedings were ongoing.<sup>4</sup>
3. On 4 November 2014, the Chamber convened a first status conference,<sup>5</sup> during which it encouraged the parties to enter into active discussions on the protocol

<sup>1</sup> Order scheduling a status conference and setting a provisional agenda, 8 October 2014, ICC-02/11-01/11-692.

<sup>2</sup> Prosecution's Submissions on the Provisional Agenda for the 4 November 2014 Status Conference, 27 October 2014, ICC-02/11-01/11-708 (‘Prosecution Submissions for the 4 November 2014 Status Conference’).

<sup>3</sup> *Observations de la Défense concernant l'ordre du jour de la conférence de mise en état prévue le 4 novembre 2014*, 27 October 2014, ICC-02/11-01/11-709-Conf-Exp (public redacted version at ICC-02/11-01/11-709-Red2).

<sup>4</sup> Prosecution Submissions for the 4 November 2014 Status Conference, ICC-02/11-01/11-708, para. 17.

<sup>5</sup> Transcript of hearing on 4 November 2014, ICC-02/11-01/11-T-25-CONF-ENG, page 26, lines 3-16.

to be used at trial. The Chamber stated that where possible, it would be beneficial to achieve 'some degree of uniformity' with regard to the protocols used at the trial stage. It further indicated its preference for the redaction protocols adopted in the Kenya cases ('Kenya Protocols') and invited the parties to consider these protocols as a starting point for future *inter partes* discussions.<sup>6</sup>

4. On 13 November 2014, the Single Judge issued its 'Order for Submissions on a Redaction Protocol',<sup>7</sup> whereby it instructed the parties to expeditiously conclude their discussions on a redaction protocol. It further directed the Prosecution to make a protocol proposal and submit any corresponding submissions by 19 November 2014 and the Defence to respond by 21 November 2014.
5. On 17 November 2014, the Single Judge granted a joint request for extension of time<sup>8</sup> and instructed the Prosecution to submit a proposed redaction protocol and any corresponding submissions by 26 November 2014 and the Defence to respond by 28 November 2014.<sup>9</sup>
6. On 26 November 2014, the Prosecution filed its submissions on the redaction regime to be adopted in the case at hand,<sup>10</sup> whereby it requested the Chamber to adopt a protocol identical to the Kenya Protocols, except for two modifications: i) the inclusion of a category for the ongoing redaction of

---

<sup>6</sup> ICC-02/11-01/11-T-25-CONF-ENG, page 26, lines 3-16. See, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Trial Chamber V, Corrigendum of Annex A to Decision on the protocol establishing a redaction regime, 27 September 2012, ICC-01/09-01/11-458-AnxA-Corr; *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Trial Chamber V, Corrigendum of Annex A to Decision on the protocol establishing a redaction regime ('Kenyatta Redaction Decision'), 27 September 2012, ICC-01/09-02/11-495-AnxA-Corr.

<sup>7</sup> Order for Submissions on a Redaction Protocol, 13 November 2014, ICC-02/11-01/11-719.

<sup>8</sup> *Demande conjointe de la Défense et de l'Accusation aux fins de prorogation du délai fixé par le Juge unique aux parties afin qu'elles déposent des soumissions concernant le protocole d'expurgations*, 14 November 2014, ICC-02/11-01/11-720.

<sup>9</sup> Decision on request for extension of time to make submissions on a redaction protocol, 17 November 2014, ICC-02/11-01/11-722.

<sup>10</sup> Prosecution's Submissions on a Redaction Protocol, 26 November 2014, ICC-02/11-01/11-729, 28 November 2014, ICC-02/11-01/11-729-Corr ('Prosecution Submissions') and confidential annex.

investigators' identifying and contact information; and ii) a dispute process requiring the receiving party, instead of the disclosing party, to seise the Chamber of specific contested redaction falling under the standard justifications ('Prosecution Proposal').

7. On 28 November 2014, the Defence filed its submissions on a redaction regime,<sup>11</sup> to which it annexed an alternative protocol proposal ('Defence Proposal'). It argued, *inter alia*, that: i) the scope of redactions, especially for redactions covered by standard justifications, should be as narrow as possible; ii) that redactions should only be authorised for a limited period of time; and iii) that the negative impact of non-disclosure should be compensated by the provision of alternative information to the receiving party. It further argued that, while redactions constituted an exception to the general rule of full disclosure, the Prosecution Proposal would place the burden on the Defence to justify the appropriateness of disclosure. Finally, the Defence submitted that existing redactions authorised by the Pre-Trial Chamber should not be maintained.

## II. Applicable law

8. The Single Judge recalls that, under Rules 76 and 77 of the Rules, the Prosecution has a disclosure obligation for all incriminatory material in the form of witness statements and any other material to be relied on at trial. It also has an obligation to disclose material falling under the ambit of Article 67(2) of the Statute and to permit inspection of all items that are material to the preparation of the Defence under Rule 77 of the Rules.

---

<sup>11</sup> *Soumissions relatives au dépôt d'un protocole d'expurgations*, 28 November 2014, ICC-02/11-01/11-732-Conf, 5 December 2014, ICC-02/11-01/11-732-Conf-Corr ('Defence Response') and confidential annex.

9. Chambers of this Court have consistently emphasised that disclosable material should be served in full and any redactions need to be justified and authorised individually under the provisions of the Statute.<sup>12</sup>
10. In this regard, Rules 81 and 82 provide the legal basis for restrictions on disclosure. Under Rule 81(2), where the disclosure of information may prejudice further or ongoing investigations, the Prosecution is entitled to request redactions. Rule 81(4) of the Rules provides for non-disclosure where the disclosure of information would compromise the safety of victims, witnesses, their families, or any other 'person at risk on account of activities of the Court'.<sup>13</sup> Lastly, Rules 81(4) and 82 of the Rules set out the regime for non-disclosure of material and information, under Article 54(3)(e) of the Statute, where the Prosecution has obtained information on the condition of confidentiality.
11. The Appeals Chamber has held that 'it will be for the Prosecutor seeking redactions to establish that such redactions are warranted',<sup>14</sup> while it is for the Chamber to rule upon such requests. It further held that the requirements to authorise the non-disclosure of information are the following: i) the existence of an 'objectively justifiable risk'<sup>15</sup> to the safety of the person concerned or which may prejudice further or ongoing investigations;<sup>16</sup> ii) the risk must arise from disclosing the particular information to the Defence;<sup>17</sup> iii) the infeasibility

---

<sup>12</sup> See, for example, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Trial Chamber V, Decision on the protocol establishing a redaction regime, 27 September 2012, ICC-01/09-01/11-458 ('*Ruto* Redaction Decision'), para 9; *The Prosecutor v. Germain Katanga*, Appeals Chamber, 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, OA, ('*Katanga* OA Judgment'), para. 70; *The Prosecutor v. Thomas Lubanga Dyilo*, Appeals Chamber, 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 ('*Lubanga* OA 3 Judgment'), paras 36-39.

<sup>13</sup> *Katanga* OA Judgment, ICC-01/04-01/07-475, para. 56.

<sup>14</sup> *Katanga* OA Judgment, ICC-01/04-01/07-475, para. 97.

<sup>15</sup> *Katanga* OA Judgment, ICC-01/04-01/07-475, para. 71.

<sup>16</sup> *Katanga* OA Judgment, ICC-01/04-01/07-475, para. 97.

<sup>17</sup> *Katanga* OA Judgment, ICC-01/04-01/07-475, para. 71(b).

or insufficiency of less restrictive protective measures;<sup>18</sup> 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’;<sup>19</sup> and v) the obligation to periodically review the decision authorising the redactions should circumstances change.<sup>20</sup>

### III. Analysis

12. The Chamber shall ensure, pursuant to Article 64(2) of the Statute, that the trial is fair and expeditious, and conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

13. The Single Judge recalls that the Chamber set the commencement date for trial for 7 July 2015 and directed the Prosecution to disclose to the Defence all Rule 76, Rule 77 and Article 67(2) materials as soon as practicable, and in any event, no later than 6 February 2015.<sup>21</sup>

14. In light of its statutory obligations and taking into consideration the specific circumstances of the case at hand, the Single Judge adopts the redaction regime to be followed in this case, as set out in the redaction protocol appended in the annex to the present decision (‘Protocol’).

#### A. General principles underlying the redaction regime adopted

15. In the Protocol, the Single Judge has followed the approach that he considers most appropriate to increase the expeditiousness and focus of the proceedings

---

<sup>18</sup> *Lubanga* OA 3 Judgment, ICC-01/04-01/06-568, para. 37; 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, OA 5 (‘*Lubanga* OA5 Judgment’), para. 33.

<sup>19</sup> *Lubanga* OA5 Judgment, ICC-01/04-01/06-773, para. 34.

<sup>20</sup> *Katanga* OA Judgment, ICC-01/04-01/07-475, para. 73(c); *The Prosecutor v. Germain Katanga*, Appeals Chamber, Judgment on the appeal of Mr Germain Katanga 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-01/04-01/07-476, OA2, para. 64.

<sup>21</sup> Order setting the commencement date for the trial and the time limit for disclosure, 17 November 2014, ICC-02/11-01/11-723.

whilst remaining fully consistent with the rights of the accused. As recalled above, the Chamber has indicated that, where possible, it would be beneficial to achieve ‘some degree of uniformity’ with regard to the protocols used at the trial stage.<sup>22</sup>

16. The Single Judge adopts a redaction regime whereby, in addition to the rules regulating retention or lifting of existing redactions, exceptions to disclosure are ruled upon by way of two procedures:

- i. *Standard redactions.* Redactions corresponding to categories covered by standard justifications authorised by the Chamber by virtue of the present decision can be automatically applied by the disclosing party, the Chamber being informed of any dispute arising and seised with a request for relief on a case-by-case basis if needed; and
- ii. *Non-standard redactions.* Redactions that do not fall under the above-mentioned categories will be subject to a case-by-case review by the Chamber following receipt of an application justifying the requested redactions (‘application-based procedure’).

17. The Single Judge has considered and assessed both proposals and relevant submissions submitted by the parties, with due regard to the competing interests at stake.

18. The Prosecution suggested adopting standard justifications which, for each category upheld by the Single Judge, were considered sufficiently circumscribed and necessary, at this stage, to protect the interests warranting restrictions to disclosure under Rule 81(2) of (4) of the Rules. The Single Judge considers that the procedures laid out in the Protocol do not result in any prejudice to the accused and are consistent with a fair and impartial trial.

---

<sup>22</sup> See, para. 3. See also, *The Prosecutor v. Bosco Ntaganda*, Trial Chamber I, Decision on the Protocol establishing a redaction regime, ICC-01/04-02/06-411 and public annex a.



19. The Single Judge emphasises that, under the redaction regime outlined in the Protocol, a case-by-case assessment is never foreclosed and mechanisms are put in place to ensure that every contested redaction is reassessed by the Chamber in light of all relevant information. Indeed, the receiving party can, at any moment after reception, request that specific redactions falling under any of the standard categories be submitted to the Chamber for adjudication. Furthermore, the Single Judge recalls that the disclosing party is required: i) to individually assess whether the standard justifications are met for each document disclosed; and ii) to review and lift redactions applied should circumstances change.

#### **B. Single Judge's approach in assessing the proposals**

20. The Single Judge notes that, in the Protocol, he has streamlined and reordered some of the introductory paragraphs. In addition, having noted a degree of duplication, the Single Judge has deleted from the Protocol the provisions relating to inadvertent disclosure and considers that this matter shall be addressed in a protocol on the handling of confidential information to be adopted in the current proceedings.<sup>23</sup> The Single Judge has also, as suggested by the Defence,<sup>24</sup> corrected the semantic inconsistencies in the Prosecution Proposal. Accordingly, the Protocol refers to: i) two procedures; ii) eleven categories; and iii) eleven corresponding standard justifications and letter codes.

21. In case of dispute over redactions covered by standard justifications, the Protocol provides, as suggested by the Defence,<sup>25</sup> that it is for the disclosing

---

<sup>23</sup> Protocole régissant la divulgation de l'identité des témoins de la partie adverse et Protocole régissant l'utilisation de matériel confidentiel par les parties pendant les enquêtes, 6 March 2012, ICC-02/11-01/11-49-Anx. *See also*, transcript of hearing of 4 December 2014, ICC-02/11-01/11-T-27-CONF-ENG ET.

<sup>24</sup> Defence Response, ICC-02/11-01/11-732-Conf-Corr, paras 15-24.

<sup>25</sup> Defence Response, ICC-02/11-01/11-732-Conf-Corr, para. 32.

party to justify the appropriateness of contested redactions.<sup>26</sup> As provided for in the Defence Proposal,<sup>27</sup> a receiving party's challenge to a redaction applied on the basis of standard justification activates the burden of the disclosing party to justify the specific redaction in accordance with the criteria outlined above.<sup>28</sup>

22. With regard to the Defence's concern that redactions be applied on a permanent basis,<sup>29</sup> the Single Judge underlines that the Prosecution's disclosure obligations are continuing and, in light of the fact that circumstances justifying the maintenance of redactions are subject to change, recalls that the redactions authorised by virtue of the present decision will be subject to review.

23. Moreover, in order to ensure that the trial is conducted with full respect for the rights of the accused and taking into consideration that the stage of the proceedings necessarily impacts on the assessment of the appropriateness of non-disclosure, the Single Judge also considered that a modification of the Prosecution Proposal's procedure for existing redactions was warranted. The Defence had rightly indicated<sup>30</sup> that information material for the preparation of the Defence *at trial* might be unduly withheld because non-disclosure was authorised *at the confirmation stage*. Hence, redactions already approved by the Pre-Trial Chamber, in the context of the present case, or another Chamber, in the context of other proceedings, shall remain so long as they are covered by standard justifications outlined in the Protocol or Regulation 42 of the Regulations. The Prosecution shall follow the application-based procedure to maintain all other already approved redactions. All *proprio motu* non-standard

---

<sup>26</sup> Protocol, para. 5.

<sup>27</sup> Defence Proposal, ICC-02/11-01/11-732-Conf-Anx, para. 20.

<sup>28</sup> See above, para. 11.

<sup>29</sup> Defence Response, ICC-02/11-01/11-732-Conf-Corr, paras 30-36. See also, Defence Proposal, ICC-02/11-01/11-732-Conf-Anx, paras 3 and 14-15.

<sup>30</sup> Defence Response, ICC-02/11-01/11-732-Conf-Corr, paras 28-29; Defence Proposal, ICC-02/11-01/11-732-Conf-Anx, paras 16-18.

redactions applied at the confirmation stage shall be lifted no later than 6 February 2015 and will only be maintained if individually authorised by the Chamber following the application-based procedure.

24. Lastly, the Single Judge considers it appropriate to set a deadline for requests for delayed disclosure. The Prosecution shall make applications for delayed disclosure, if any, by no later than 16 January 2015 and responses thereto, if any, shall be filed by no later than 23 January 2015. In order to increase the clarity of the redacted material and in the event redactions to witnesses' identities are granted, the Prosecution shall include in each corresponding redaction box the witnesses' assigned pseudonym.

### **C. Specific categories and points of disagreement between the parties**

25. The Single Judge observes that the parties held preliminary consultations on the basis of the Kenya Protocols and were in agreement with regard to a certain number of categories. The Single Judge will therefore limit itself to discussing: i) the points of disagreement as raised by the parties, giving reasons for its decision in favour of one over the other; and ii) a small number of amendments which he considers appropriate to make on a *proprio motu* basis.

26. As regards the Defence's request to be provided with alternative information on the individuals whose identifying information is redacted,<sup>31</sup> the Single Judge has duly considered the two proposals and ruled on each individual category. In general, the Single Judge considers the Defence's argument to have merit: the Defence should be in a position to understand the documents disclosed and scrutinise the circumstances of all witness interviews. The Single Judge finds it appropriate to expand the pseudonym requirement to a larger number of categories of redacted material. This measure will allow the

---

<sup>31</sup> Defence Response, ICC-02/11-01/11-732-Conf-Corr, paras 25-27.

Defence to better contextualise the information and, as applicable, to cross-reference relevant persons across multiple statements and thus increase the usefulness of material disclosed with redactions.<sup>32</sup> The Single Judge however considers other 'compensating information' requested in the Defence Proposal, such as for example the nationality or the title of the person whose identity is withheld, to be inappropriate. The information sought is likely to lead to the identification of the individuals involved and hence defeat the very purpose of redactions applied.

27. The Single Judge further considers that the category A.6.2, providing for redactions of identifying and contact information of potential witnesses, as included in the Prosecution and Defence proposals, is duplicative. Potential witnesses will either be considered as 'persons at risk', and hence be protected under the corresponding category, or be considered as witnesses if and when the disclosing party intends to rely on them at trial.

*Category A.2. and A.3. Identifying and contact information of parties' staff (excluding investigators), as well as translators, interpreters, stenographers and psycho-social experts assisting during interviews who are not prosecution staff members, and VWU or other Court staff members (including VWU partners), who travel frequently to, or are based in, the field*

28. The Prosecution requests the Chamber to approve ongoing redactions to the information covered by categories A.2. and A.3.<sup>33</sup>

29. The Defence opposes the lifting deadline contained in the Prosecution Proposal and submits that redactions under categories A.2. and A.3. should be lifted five months prior to trial.<sup>34</sup>

30. The Single Judge considers that the information covered by categories A.2. and A.3. is usually irrelevant and, taking into consideration that lack of

---

<sup>32</sup> Protocol, para. 12.

<sup>33</sup> Prosecution Proposal, ICC-02/11-01/11-729-Conf-AnxA-Corr, pages 4-5 and 8-9.

<sup>34</sup> Defence Proposal, ICC-02/11-01/11-732-Conf-Anx, paras 26-27, 30-31 and 54-55.

anonymity may put the ongoing investigations, and victims or witnesses with whom the staff interact, at increased risk, it is of the view that non-disclosure appears, in the case at hand, necessary. The Single Judge is further of the view that redactions to this information do not affect the substance of the witness statement or the comprehensibility of the document for the purpose of dealing with trial issues, and are the least intrusive way to protect the integrity of further and ongoing investigations.

31. Given it will be apparent how many individuals were present, and given their identification by pseudonyms, the Single Judge is of the view that, under the Protocol, the Defence will be able to use the material disclosed and understand the circumstances of the witnesses' interviews. The Single Judge also considers that the Defence will be able to seek a ruling of the Chamber in the event that there is a change in the circumstances of the case which would warrant a modification of its assessment.

*Category A.4. Identifying and contact information of investigators*

32. The Prosecution proposes that the Chamber pre-approves redactions of investigators' identifying and contact information on an ongoing basis.<sup>35</sup> In order to avoid putting at risk further and ongoing investigations, and taking into consideration that it only has a 'limited pool' of investigators, the Prosecution considers that their identities should not be disclosed because it could compromise the security of the witnesses they regularly meet with.<sup>36</sup>
33. The Defence opposes the ongoing redaction of investigators' identifying and contact information and considers that the Chamber should rule on each instance of non-disclosure on a case-by-case basis.<sup>37</sup> The Defence argues that if redacted, this information should be disclosed to the Defence at the latest five

<sup>35</sup> Prosecution Proposal, ICC-02/11-01/11-729-Conf-AnxA-Corr, page 6.

<sup>36</sup> Prosecution Submissions, ICC-02/11-01/11-729-Corr, para. 7(a).

<sup>37</sup> Defence Proposal, ICC-02/11-01/11-732-Conf-Anx, para. 34.

months prior to trial, unless the Chamber decides otherwise after reception of a motivated request.<sup>38</sup>

34. The Single Judge notes that identifying information of investigators was not covered by a redaction category in the Kenya Protocols and that Trial Chamber V considered that standard justification was only appropriate for investigator's contact information. In rejecting the Prosecution's proposal, Trial Chamber V decided that, 'given the potential relevance of this information to the case preparation of the defence, and in view of the fact that investigators are not permanently based in the field', redactions to the names of Prosecution's investigators must be applied for individually.<sup>39</sup> Trial Chamber V subsequently amended its redaction regime and granted temporary redactions of the investigators' identifying information until the disclosure of the identity of the last witness interviewed or contacted by that investigator.<sup>40</sup>

35. Concerning the investigators' identifying information, the Chamber acknowledges the Prosecution's argument that their disclosure may prejudice further or ongoing investigations in the current proceedings as well as other cases pending before the Court. The Chamber also deems necessary to minimise the chances of any link being made between the investigators and those with whom they are meeting. Disclosing the investigators' identities at this stage of the proceedings may also create security risks to witnesses whose identities are not yet known to the Defence. Notwithstanding the fact that investigators might be relied on in the course of the Defence case or in the context of other proceedings, the Chamber is of the view that risks to witnesses are minimal after their identity has been disclosed. Therefore

---

<sup>38</sup> Defence Proposal, ICC-02/11-01/11-732-Conf-Anx, para. 39.

<sup>39</sup> *Kenyatta* Redaction Decision, ICC-01/09-02/11-495, para. 23.

<sup>40</sup> *The Prosecutor v. Francis Kirihi Muthaura and Uhuru Muigai Kenyatta*, Trial Chamber V, Decision on prosecution application to vary the Redaction Protocol and to redact investigators' identifying information, ICC-01/09-02/11-579, para. 17.

investigators' identifying information shall be covered by a temporary standard redaction, *i.e.* until the disclosure of the identity of the last witness interviewed or contacted by that investigator. By this time, the Prosecution's investigations in this case should be sufficiently complete so that the investigators' identities can be disclosed without any undue prejudice to the Prosecution's investigations. If the Prosecution seeks a longer timeframe than that conferred by the standard redaction timeline, it may file a request for non-standard redactions.

36. The Single Judge fails to see lesser measures practicable at this stage and considers that the systematic use of pseudonyms in the material disclosed sufficiently mitigates the impact the non-disclosure will have on the receiving party's ability to use the documents.<sup>41</sup> Before the identifying information is lifted, the Defence will already be in a position to know which investigators interviewed which witnesses, assess this information and request, at any time, that the Prosecution supplement the justification for such redaction for the Chamber to re-assesses their necessity and their impact on the fairness of trial.

*Category A.5. Identifying and contact information of intermediaries*

37. The Prosecution asks the Chamber to approve ongoing redactions to the information covered by category A.5.,<sup>42</sup> as in the Kenya Protocols.
38. The Defence agrees to the redaction of identifying and contact information of intermediaries, as long as they are lifted five months prior to trial.<sup>43</sup> Emphasising the role played by intermediaries during investigations, the Defence considers that this information is of great importance for the preparation of the Defence's case.<sup>44</sup> Hence, it submits that redactions under

---

<sup>41</sup> Protocol, para. 12.

<sup>42</sup> Prosecution Proposal, ICC-02/11-01/11-729-Conf-AnxA-Corr, pages 6-7.

<sup>43</sup> Defence Proposal, ICC-02/11-01/11-732-Anx, para. 41.

<sup>44</sup> Defence Proposal, ICC-02/11-01/11-732-Anx, page 9.

category A.5. should be of a temporary nature, unless the Chamber specifically decides otherwise.<sup>45</sup>

39. The Single Judge considers that the disclosure of intermediaries' identifying and contact information, and subsequent potential use of such information in the context of investigations, would pose an objectively identifiable risk to the further or ongoing investigation, including by impacting on their future usefulness, and that there is currently no indication that this information is material to the preparation of the Defence in the present case. Furthermore, the Single Judge finds that the scope of the proposed redaction category is necessary and proportionate. Nonetheless, the current determination, under Rule 81(2) of the Rules, can be reassessed at a later stage should circumstances change or new information emerge. Indeed, as detailed in the Protocol, the Defence retains the right, upon receipt, to raise objections requiring the Prosecution to justify any specific instances of redaction.

40. Moreover, in order to facilitate such investigations and the Defence's preparation for trial, the Protocol provides for the disclosing party's obligation to provide the receiving party with a document identifying each individual intermediary by pseudonym.

41. In light of this measure, the Single Judge is of the view that the proposed redactions are not prejudicial to or inconsistent with the rights of the accused and fair and impartial proceedings.

*Category A.6. Identifying and contact information of leads and sources*

42. The Prosecution submits that non-disclosure of identifying and contact information of leads and sources, as provided for in the Kenya Protocols, should be authorised by way of a category.<sup>46</sup>

---

<sup>45</sup> Defence Proposal, ICC-02/11-01/11-732-Anx, para. 43.



43. The Defence opposes the ongoing redaction of information covered by category A.6.<sup>47</sup> It further submits that the provision of pseudonyms is essential to facilitating the Defence's understanding of the Prosecution's case.<sup>48</sup>
44. The Single Judge observes that the aim of this category is to protect leads and sources and to shield them from intimidation or interference which could prejudice further investigations. The Single Judge recalls that Trial Chamber V decided that identifying and contact information of leads and sources shall be subject to ongoing redaction with the exception of disclosed material provided by the lead, in which case the lead will be disclosed as the source.<sup>49</sup> It sees no reason to deviate from the general approach that was taken previously by Trial Chamber V when adopting the Kenya Protocols.
45. The Single Judge has taken note of the Defence's contention that one source could, in and of itself, have unduly influenced the Prosecution's case.<sup>50</sup> In this regard, the Single Judge considers that providing the Defence with a separate document identifying leads and sources by pseudonym will increase the intelligibility of the information contained in the document and facilitate its use in the preparation of the Defence's case.<sup>51</sup> It will notably give the recipient a clear indication of the number of leads and sources as well as their relevance in a specific context by allowing cross-referencing of information. Consequently, if in light of the disclosure it becomes apparent to the Defence that one source 'unduly influence[d] the Prosecution's case', it can raise objections to specific redactions that in its view are unduly prejudicial or are not justified in light of particular circumstances.

---

<sup>46</sup> Prosecution Proposal, ICC-02/11-01/11-729-Conf-AnxA-Corr, pages 7-8.

<sup>47</sup> Defence Proposal, ICC-02/11-01/11-732-Conf-Anx, paras 45 and 49.

<sup>48</sup> Defence Proposal, ICC-02/11-01/11-732-Conf-Anx, page 10.

<sup>49</sup> Annex A to *Ruto* Redaction Decision, ICC-01/09-01/11-458-AnxA-Corr, paras 41-43; Annex A to *Kenyatta* Redaction Decision, ICC-01/09-02/11-495-AnxA-Corr, paras 41-43.

<sup>50</sup> Defence Proposal, ICC-02/11-01/11-732-Conf-Anx, page 10.

<sup>51</sup> See Protocol, paras 12 and 30.

*Category B.1. Recent contact information of witnesses*

46. Notwithstanding the parties' agreement on the standard justification for category B.1. redactions,<sup>52</sup> the Single Judge considers that the category of 'contact information of witnesses' requires further specification. The Single Judge accepts that witnesses' recent contact information would not ordinarily be relevant to the preparation of the Defence and may be permitted as an ongoing redaction on the basis of the potential risk posed to witnesses from dissemination of such information. However, historical contact information, relating in particular to the time period of the crimes charged, may be of assistance in the preparation of the Defence's case. Hence, the Single Judge directs the parties to follow the application-based approach for any redaction of historical contact information of witnesses and approves, by way of the present decision, only the non-disclosure of the witnesses' recent contact information under the category B.1.

*Category B.2. Identifying and contact information of family members of witnesses*

47. The Prosecution submits that contact information of family members of witnesses should be redacted on an ongoing basis and that their identifying information should also be redacted on the basis of standard justification and lifted 60 days prior to trial.<sup>53</sup> It further suggests that redactions to identifying information in relation to minor children shall be ongoing and that redactions to identifying information of family members not mentioned in the witness' narrative be lifted at the commencement of trial.<sup>54</sup>

<sup>52</sup> Defence Proposal, ICC-02/11-01/11-732-Conf-Anx, para. 73; Prosecution Proposal, ICC-02/11-01/11-729-Conf-AnxA-Corr, page 11.

<sup>53</sup> Prosecution Proposal, ICC-02/11-01/11-729-Conf-AnxA-Corr, pages 11-12.

<sup>54</sup> Prosecution Proposal, ICC-02/11-01/11-729-Conf-AnxA-Corr, page 12.

48. The Defence agrees that identifying information of family members not mentioned by the witness may be withheld until the effective start of trial.<sup>55</sup> However, it considers that identifying information of other family members shall be disclosed five months prior to trial, or otherwise lifted in accordance with the Chamber's case-by-case determination.<sup>56</sup> The Defence further suggests an *inter partes bona fide* procedure allowing for extended lifting deadline.<sup>57</sup>

49. The Single Judge notes that witnesses testifying before the Court make a deliberate choice to contribute to its activities, thereby advancing the interests of justice. The Single Judge has the duty, under Article 68(1) of the Statute and in accordance with Rule 81(4) of the Rules, to ensure that their involvement does not lead to a situation where their safety and well-being are put at stake. This is all the more the case for family members of witnesses; they have not agreed to be part of the Court process and may not even be aware of their relative's involvement with the Court.

50. The Single Judge notes that Trial Chamber V decided, in relation to identifying information of family members, that redactions were to be:

- i. Lifted when the identity of the witness was to be disclosed, for family members whose identifying information was redacted only for the witness' protection;
- ii. Lifted 60 days prior to the commencement of the trial (unless otherwise ordered by the Chamber on the basis of exceptional circumstances), for family members whose identifying information was redacted on the basis of their own security; and

---

<sup>55</sup> Defence Proposal, ICC-02/11-01/11-732-Conf-Anx, para. 76.

<sup>56</sup> Defence Proposal, ICC-02/11-01/11-732-Conf-Anx, paras 75 and 77.

<sup>57</sup> Defence Proposal, ICC-02/11-01/11-732-Conf-Anx, para. 78.

iii. Ongoing, for minor family members.<sup>58</sup>

51. The Single Judge authorises ongoing redaction of contact information of family members. However, the Single Judge finds the approach put forward in the Prosecution Proposal in respect of the identities of family members to be overly broad. The Single Judge further considers that the identity of family members might be material to the preparation of the Defence, including, for example, if the family members are relevant to the evidence of the witness.

52. In the view of the Single Judge, the security considerations, which arise primarily from the potential use of the information during investigations, militate only partially against disclosure and require a differentiation between family members on the basis of their apparent relevance to the case. Redaction of a family member's identifying information is authorised by virtue of the present decision only where his or her identity has no relevance to a known issue in the case. The authorisation is intended to capture only family members who are mentioned in an incidental manner or by way of general biographical background. Identifying information for all other family members should be disclosed, either immediately or, in the case of any witnesses for whom delayed disclosure may be granted, at the time of disclosing the identity of the relevant witness. Allowing for timely disclosure of information potentially material to the Defence, as proposed, will avoid any prejudice to the accused and is, in the view of the Single Judge, the least restrictive protective measure available to it.

*Category B.3. Identifying and contact information of 'other persons at risk as a result of the activities of the Court' (also known as 'innocent third parties')*

53. The Prosecution requests that identifying and contact information of 'innocent third parties' be redacted and lifted 60 days prior to trial.<sup>59</sup>

---

<sup>58</sup> *Ruto* Redaction Decision, ICC-01/09-01/11-458, para 30. See also, Annex A to *Ruto* Redaction Decision, ICC-01/09-01/11-458-AnxA-Corr, para. 56; Annex A to *Kenyatta* Redaction Decision, ICC-01/09-02/11-495-AnxA-Corr, para. 56.

54. The Defence agrees with the Prosecution that this information can be temporarily redacted but suggests a lifting deadline of five months prior to trial.<sup>60</sup>

55. The Single Judge notes that under the relevant provisions of the Kenya Protocols, redaction of identifying information of persons at risk was lifted 60 days before trial while ongoing redactions were limited to contact information.<sup>61</sup> The Single Judge is mindful of the fact that these individuals might be unknowingly processed in the context of the proceedings. However, again, the Single Judge considers the approach of the Prosecution to be overly broad. It is recalled that, should particular risks arise, the disclosing party can seek authorisation to redact information in accordance with the application-based procedure as set out in paragraphs 48-50 of the Protocol. Hence, in accordance with its approach to redaction of identifying information of family members, the Single Judge authorises redactions beyond contact information only for individuals who are of no relevance to a known issue in the case.

---

<sup>59</sup> Prosecution Proposal, ICC-02/11-01/11-729-Conf-AnxA-Corr, page 12.

<sup>60</sup> Defence Proposal, ICC-02/11-01/11-732-Conf-Anx, para. 81.

<sup>61</sup> Annex A to *Ruto* Redaction Decision, ICC-01/09-01/11-458-AnxA-Corr, para. 58; Annex A to *Kenyatta* Redaction Decision, ICC-01/09-02/11-495-AnxA-Corr, para. 58.

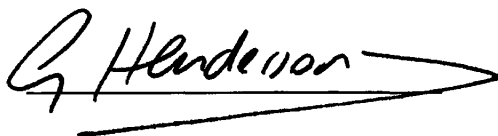
**FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY**

**DECIDES** that the parties shall apply the Protocol set out in the annex to the present Decision;

**SETS** the deadline for requests for delayed disclosure for 16 January 2015, as described in paragraph 24 above, and the deadline for any responses thereto for 23 January 2015; and

**ORDERS** the Prosecution to include the relevant witness pseudonym when making any redactions to witness identity prior to the relevant date for disclosure of the identity of the witness.

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

A handwritten signature in black ink, reading "G. Henderson", followed by a long horizontal line that tapers to a point on the right.

**Judge Geoffrey Henderson, Single Judge**

Dated 15 December 2014

At The Hague, The Netherlands