

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/11
Date: 27 September 2012

TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding
Judge Christine Van den Wyngaert
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
*THE PROSECUTOR v. WILLIAM SAMOEI RUTO and JOSHUA ARAP SANG***

**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

Counsel for William Samoei Ruto

Mr Kioko Kilukumi Musau

Mr David Hooper

Counsel for Joshua Arap Sang

Mr Joseph Kipchumba Kigen-Katwa

Mr Joel Kimutai Bosek

Legal Representatives of Victims

Ms Sureta Chana

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Deputy Registrar

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court” or “ICC”), in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* (“Ruto and Sang case”), pursuant to Articles 54(3)(e), 64(2) and (3) of the Rome Statute (“Statute”), Rules 77, 78, 81, 82, 84 and 87 of the Rules of Procedure and Evidence (“Rules”) and Regulations 33 and 34 of the Regulations of the Court (“Regulations”), issues the following Decision on the protocol establishing a redaction regime (“Decision”).

I. Background and Submissions

1. On 14 May 2012, the Chamber issued its “Order scheduling a status conference,”¹ whereby it requested the Office of the Prosecutor (“prosecution”) and the defence teams (together “parties”) to make written submissions by 28 May 2012 on, *inter alia*, the timing, volume and format of disclosure of evidence by the prosecution pursuant to Rule 76 of the Rules, and of material already disclosed or provided for inspection and intended to be disclosed or provided for inspection pursuant to Article 67 of the Statute and Rule 77 of the Rules.²

2. On 28 May 2012, the prosecution filed its submissions on the agenda for the status conference,³ proposing, *inter alia*, that the Chamber adopt a new approach to the redaction procedure providing for a streamlined redaction process and a system of *inter partes* disclosure.⁴

¹ Order scheduling a status conference, 14 May 2012, ICC-01/09-01/11-413.

² ICC-01/09-01/11-413, paragraphs 2(D) and (E) and 3.

³ Prosecution’s Submissions on the Agenda for Status Conference, 28 May 2012, ICC-01/09-01/11-417.

⁴ ICC-01/09-01/11-417, paragraphs 19 to 23.

3. On the same day, the defence teams filed their respective submissions on the agenda for the status conference.⁵ In relation to the issue of redactions, the Ruto defence team does not make any specific submission on the redaction procedure, but “emphasises that it seeks the earliest and fullest disclosure possible.”⁶ The Sang defence team submits that the Trial Chamber should strictly supervise the redaction process, scrutinise all requests for redactions on a case-by-case basis,⁷ and “show ‘particular vigilance’ with regard to redactions to potentially exculpatory material, in order to safeguard the rights of the accused.”⁸

4. This issue was further addressed during the status conference of 11 June 2012, where the Ruto defence team expressed its opposition to the prosecution’s proposal.⁹ The Sang Defence team submitted that (i) in principle, it would have no objection to consultations with the prosecution in this regard; (ii) it is strongly opposed to the maintenance of redactions approved at the confirmation of charges stage; and (iii) the Chamber should adopt an approach whereby each individual redaction is justified by the prosecution separately and ruled upon by the Chamber on a case-by-case basis.¹⁰

5. Further to the parties’ submissions, the Chamber instructed the parties and the Registry to liaise with a view to achieving a common redactions proposal and to submit this proposal by 3 July 2012.¹¹

⁵ Written Submissions in Response to Order Scheduling a Status Conference, 28 May 2012, ICC-01/09-01/11-415; and Written Submissions in Response to “Order Scheduling a Status Conference,” 28 May 2012, ICC-01/09-01/11-416.

⁶ ICC-01/09-01/11-416, paragraph 6.

⁷ ICC-01/09-01/11-415, paragraph 16.

⁸ ICC-01/09-01/11-415, paragraph 18 (quotation marks in original).

⁹ Hearing of 11 June 2012, ICC-01/09-01/11-T-15, page 16, lines 24 to 25.

¹⁰ Hearing of 11 June 2012, ICC-01/09-01/11-T-15, page 17, lines 6 to 16.

¹¹ Hearing of 11 June 2012, ICC-01/09-01/11-T-15, page 21, lines 15 to 18.

6. On 3 July 2012, the Registry filed its submissions related to the redaction regime proposal.¹² The Registry explains that the prosecution's proposal is technically feasible and makes suggestions to the parties and participants concerning the proposal's technical aspects.¹³
7. On the same day, the prosecution filed joint prosecution/defence submissions on Redactions, submitting a proposal for a streamlined redaction process and an *inter partes* disclosure system prepared by the prosecution and integrating the position of both defence teams ("Proposal").¹⁴ The Proposal outlines a system whereby the disclosing party (i) applies redactions to information according to a pre-approved set of categories decided upon by the Chamber; (ii) relies on – where possible – a standard set of justifications for redaction categories pre-approved by the Chamber; (iii) lifts – where possible – certain categories of redactions according to a fixed timeline decided upon by the Chamber; and (iv) only in limited cases that fall outside the pre-approved categories, submits redaction applications to the Chamber on a case-by-case basis.¹⁵ This Proposal is ruled upon in the present Decision.
8. On 9 July 2012, the Chamber issued its "Decision on the schedule leading up to trial,"¹⁶ in which it instructs the prosecution to complete disclosure to the defence of (i) all incriminatory material in the form of witness statements and any other material to be relied on at trial, as well as disclosure of all Article 67(2) material and provision of all Rule 77 material for inspection to the defence by 9 January

¹² Registry submissions related to the redactions regime proposal raised by the prosecution during the Status Conference held on 11 June 2012, 3 July 2012, ICC-01/09-01/11-434.

¹³ ICC-01/09-01/11-434, paragraphs 8 to 10.

¹⁴ Joint Submissions on Redactions, 3 July 2012, ICC-01/09-01/11-435+Conf-Anx1 and Conf-Exp-Anx2.

¹⁵ ICC-01/09-01/11-435-Conf-Anx1.

¹⁶ Decision on the schedule leading up to trial, 9 July 2012, ICC-01/09-01/11-440.

2012;¹⁷ (ii) the identities of witnesses in the ICC protection programme (“ICCPP”) who have been subject of an application for delayed disclosure by 11 February 2013;¹⁸ (iii) the reports of any expert witness who will be called during the prosecution case by 14 February 2012;¹⁹ and (iv) the identities of non-ICCPP prosecution witnesses who have been the subject of an application for delayed disclosure by 12 March 2013.²⁰

II. Analysis

A. General conditions for the application of redactions

9. Chambers of this Court have consistently emphasised the overriding principle that the presumption is that disclosable material will be served in full while redactions need to be justified and authorised individually under the provisions of the Rome Statute framework.²¹

10. Rules 81 and 82 of the Rules provide the legal basis for restrictions on disclosure and the application of redactions:

¹⁷ ICC-01/09-01/11-440, paragraph 14.

¹⁸ ICC-01/09-01/11-440, paragraph 16.

¹⁹ ICC-01/09-01/11-440, paragraph 17.

²⁰ ICC-01/09-01/11-440, paragraph 19.

²¹ Appeals Chamber, *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; Appeals Chamber, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 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, paragraphs 64 and 70; Appeals Chamber, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 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, paragraph 64.

- (i) Rule 81(2) of the Rules entitles the prosecution to apply for non-disclosure of information that, if disclosed, would prejudice further or ongoing investigations;
- (ii) Rule 81(4) of the Rules provides for non-disclosure in order “to protect the safety of witnesses and victims and members of their families.” This Rule was further elaborated upon by the Appeals Chamber, which found that Rule 81(4) of the Rules is to be read to include the words “[other] persons at risk on account of the activities of the Court.”²²
- (iii) Rules 81(4) and 82 of the Rules sets out the regime for non-disclosure of material and information protected under Article 54(3)(e) of the Statute, where the Prosecutor has obtained information on the condition of confidentiality.

11. It has been settled that “it will be for the Prosecutor seeking redactions to establish that such redactions are warranted,”²³ while it is the responsibility of the Chamber to rule upon such requests. The Appeals Chamber held that the requirements to authorise the non-disclosure of information are the following: (i) the existence of an “objectively justifiable risk”²⁴ to the safety of the person concerned or which may prejudice further or ongoing investigations;²⁵ (ii) the risk must arise from disclosing the particular information to the accused;²⁶ (iii) the infeasibility or

²² ICC-01/04-01/07-475, paragraph 56.

²³ ICC-01/04-01/07-475, paragraph 97.

²⁴ 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, paragraph 71.

²⁵ *Ibid.*, paragraph 97.

²⁶ *Ibid.*, paragraph 71(b).

insufficiency of less restrictive protective measures;²⁷ (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”;²⁸ and (v) the obligation to periodically review the decision authorising the redactions should circumstances change.²⁹

12. Against this background, the Chamber is of the view that the adoption of a streamlined redaction procedure outlined in the Protocol (Annex A to this Decision) is appropriate to expedite the disclosure process.³⁰ The procedure outlined in the Protocol is consistent with the rights of the accused. The Chamber notes that the defence has generally agreed upon the system proposed by the prosecution, and the Chamber carefully assessed any areas of disagreement.

13. In addition, under the Protocol, the Chamber’s oversight role concerning the redactions will not be compromised, to the extent that (a) direct application of redactions is limited to those categories that are usually covered by common justifications (“Standard Justifications”) and that are pre-approved by virtue of the present Decision; (b) the Protocol provides for a procedure to address disputes concerning the application of redactions covered by pre-approved categories on a case-by-case basis; (c) redactions that do not fall under the pre-approved categories will always be subject to a case-by-case review by the Chamber.

²⁷ ICC-01/04-01/06-568, paragraph 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, paragraph 33.

²⁸ ICC-01/04-01/06-773, paragraph 34.

²⁹ ICC-01/04-01/07-475, paragraph 73(c).

³⁰ Pre-Trial Chamber I in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo and Pre-Trial Chamber III in the case of The Prosecutor v. Laurent Gbagbo limited the case-by-case review to incriminating material: See Pre-Trial Chamber I in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo, Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules, 25 April 2008, ICC-01/04-01/07-428-Corr, paragraphs 143-144 and Pre-Trial Chamber III in the case of The Prosecutor v. Laurent Gbagbo, Decision establishing a disclosure system and calendar for disclosure, 24 January 2012, ICC-02/11-01/11-30, paragraphs 49 to 57.

14. The Chamber considers this approach to be consistent with the jurisprudence of the Appeals Chamber. In its judgment of 13 October 2006 (“13 October 2006 *Lubanga* Appeals Judgment”), the Appeals Chamber reversed a decision by a Pre-Trial Chamber I Single Judge which required the prosecution to apply for protective measures with the Victims and Witnesses Unit prior to requesting non-disclosure of the identity of the witnesses.³¹ The Appeals Chamber rejected the decision to impose such a pre-condition on the prosecution, reasoning that redaction applications must be approved by the Chamber on a “case-by-case basis” and that the Chamber is not vested “with the competence to pre-determine the merits of future applications for authorisation of non-disclosure pursuant to rule 81 (4) of the Rules”.³² Since this judgment, the Appeals Chamber has confirmed the necessity of a judicial case-by-case assessment in subsequent disclosure disputes brought before it.³³ Importantly, the Appeals Chamber’s reasoning in the 13 October 2006 *Lubanga* Appeals Judgment is made in the context where a Chamber had foreclosed the possibility of making a case-by-case assessment in a situation where the parties disagree on non-disclosure.

15. Under the Protocol, in contrast to the decision reversed by the Appeals Chamber, a case-by-case assessment is never foreclosed and careful procedures are put in place to ensure that every contested redaction can be analysed by the Chamber. The only times when the Protocol dispenses with an individualised assessment of redaction requests are situations where both parties are satisfied that such an assessment is unnecessary. In these circumstances, the Protocol allows for

³¹ ICC-01/04-01/06-568.

³² ICC-01/04-01/06-568, paragraph 39.

³³ ICC-01/04-01/06-773, paragraph 51; ICC-01/04-01/07-475, paragraph 66; Judgment on the appeal of Mr Mathieu Ngudjolo against the decision of Pre-Trial Chamber I entitled “Decision on the Prosecution Request for Authorisation to Redact Statements of Witnesses 4 and 9”, 27 May 2008, ICC-01/04-01/07-521, paragraph 35.

disclosure pursuant to the Standard Justifications which the Chamber has considered to be appropriate in the circumstances of this case.

B. The Chamber's approach in assessing the Joint Proposal

16. For purposes of the Protocol, the Chamber has given considerable weight to the submissions of the parties. Regarding areas on which there is agreement, the Chamber has generally accepted the proposed procedure in the form presented in the Proposal, at times with minor modifications. In relation to issues not agreed upon by the parties, the Chamber has adopted the approach that it considers most appropriate to increase the expeditiousness of the proceedings whilst remaining consistent with the rights of the accused.

C. Points of disagreement between the parties

17. In the section below, the Chamber will discuss some of the general issues on which there was no agreement and will give its reasons for preferring one option to another. Disagreements relating to specific categories of redactions will be addressed in the Protocol.

1. Exceptional requests for lifting redactions or amending the timing for the lifting of pre-approved redactions

18. At the outset, the Chamber notes that the Protocol repeatedly refers to redactions classified as "permanent". In the view of the Chamber, the concept of "permanent" redactions is not compatible with the general principle 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.³⁴ As a result, for the purpose of the present Decision and its Protocol, reference will be made to “ongoing” redactions rather than “permanent” redactions.

19. The defence submits that it “reserves the right, at any time, to request the Chamber to lift or amend the timing of the redactions (...) should the need arise.”³⁵ The prosecution recognises the defence’s right to request the Chamber to lift or amend the redactions but emphasises that this should be the exception and not the rule.

20. The Chamber agrees with the defence that in some instances, it might be necessary for the preparation of the defence to obtain information that is covered by ongoing redactions or by redactions that are scheduled to be lifted at a later stage. In such cases, the receiving party shall raise the issue with the disclosing party. The parties shall then consult in good faith with a view to resolving the dispute and inform the Chamber of the outcome of the discussions.

21. In cases of inability to reach agreement, the receiving party may seek the Chamber’s intervention through a written application.

³⁴ See Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Version publique expurgée de « la Décision relative à la levée, au maintien, et au prononcé de mesures d'expurgation » du 22 Octobre 2009 (ICC-01/04-01/07-1551-Conf-Exp), 28 October 2009, ICC-01/04-01/07- 1551-Red2, paragraph 72; Trial Chamber III, *The Prosecutor vs. Jean-Pierre Bemba Gombo*, Redacted Decision on the Prosecution's Requests to Lift, Maintain and Apply Redactions to Witness Statements and Related Documents, 20 July 2010, ICC-01/05-01/08-813-Red, paragraph 88. 1551-Red2, paragraph 72.

³⁵ ICC-01/09-01/11-435-Conf-Anx1, pages 5 to 6.

2. Existing redactions

22. The parties disagree as to the procedure to be applied to redactions that have been authorised by the Pre-Trial Chamber. The defence submits that these redactions should not be maintained and that the prosecution should be required to make a new application to the Chamber justifying these redactions. The prosecution asserts that this proposal undermines the utility of the Protocol, which is to streamline the disclosure process. Accordingly, the prosecution is of the view that the parties should undertake to review such material on an ongoing basis to see if and when the redactions can be lifted and the material disclosed.³⁶
23. The Chamber agrees with the prosecution that a new application for redactions previously granted by the Pre-Trial Chamber would slow down the disclosure process. Therefore, no new application will be required. However, in accordance with the Protocol, the disclosing party must review such material and lift redactions in accordance with the timelines provided therein.

3. Inadvertent disclosure

24. The defence argues that in the event that material has been disclosed inadvertently, any further restrictions on the receiving party's use of the disclosed material should be requested from the Chamber by the disclosing party. The prosecution stresses that (i) it should be presumed that all inadvertently disclosed confidential material could potentially lead to security risks and must not be used in any manner; (ii) inadvertently disclosed material cannot be used in a manner that breaches Court orders and/or provisions set out in the Code of Professional

³⁶ ICC-01/09-01/11-435-Conf-Anx1, pages 6 to 8.

Conduct for counsel (“Code of Conduct”); and (iii) the defence wishes to profit from material that is inadvertently disclosed.³⁷ The defence replies that “it remains aware of and in compliance with Court orders” and the Code of Conduct.³⁸

25. The Chamber considers that as a fundamental principle, parties and participants are presumed to act in good faith. In addition, by virtue of Article 8 of the Code of Conduct, counsel are duty bound to respect professional secrecy and confidentiality of information in accordance with the Statute, the Rules and the Regulations. Article 8(4) of the Code of Conduct specifically prevents counsel from disclosing to third parties any information relating to the identity of protected victims and witnesses, absent an order of the Court. As these obligations continue to apply in cases of inadvertent disclosure, the Chamber is of the view that no restrictions beyond the obligations set out in the Protocol³⁹ need to be ordered by the Chamber.

26. As regards the receiving party’s entitlement of continued use within the trial process itself of information derived from inadvertently disclosed material, it is the Chamber’s hope that the best sense of the spirit of professionalism will guide disputing counsel in their respective reactions in this regard, beyond the ability of the Protocol to provide guidance. Failing that, the Chamber will intervene to resolve related disputes as they arise.

³⁷ ICC-01/09-01/11-435-Conf-Anx1, pages 10 to 11.

³⁸ ICC-01/09-01/11-435-Conf-Anx1, page 12.

³⁹ Protocol, paragraphs 22 to 23.

4. Redactions to other information on ongoing and further investigations

27. The prosecution's proposal provides for redactions to "other information on the ongoing investigations (i.e. in the current case)" as well as to "other information on the further investigation (i.e. other cases)."⁴⁰ The defence objects to the prosecution redaction of these categories and submits that in line with the Appeals Chamber's jurisprudence,⁴¹ these categories should be assessed on a case-by-case basis.

28. The Chamber is of the view that these proposed categories are too broad and therefore agrees with the defence that redactions to any such information need to be justified and assessed on a case-by-case basis.

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

29. Although the defence agrees to a number of proposed categories for redactions to the identities of individuals covered by Rule 81(4), it argues that the prosecution should not be allowed to determine the scope of redactions to witness statements.⁴² It also submits that the prosecution cannot be authorised to decide for itself which witnesses, family members of witnesses, victims or others at risk require protection, as authorisation must come from the Chamber, on a case-by-case basis.⁴³ The defence submits that although an assessment of the security situation of prosecution witnesses was carried out by the Pre-Trial Chamber in June 2011, the Trial Chamber should reassess the continued need for non-

⁴⁰ ICC-01/09-01/11-435-Conf-Anx1, pages 17 to 18.

⁴¹ ICC-01/04-01/07-476, paragraph 59.

⁴² ICC-01/09-01/11-435-Conf-Anx1, pages 25 to 26.

⁴³ ICC-01/09-01/11-435-Conf-Anx1, page 26.

disclosure and thereafter the prosecution could “self-redact” the identifying and contact information of the relevant individuals.⁴⁴

30. The Chamber considers that any request for delayed disclosure of witness identities must be addressed on a case-by-case basis. The Protocol provides that all requests for temporary non-disclosure of the identities of prosecution witnesses will be the subject of a case-by-case determination by the Chamber.⁴⁵ The scope of the redactions applied by the prosecution to identifying information of any witnesses for whom delayed disclosure is granted should not exceed that which is strictly necessary to protect the identity of the individual in question. In relation to the identities of family members and “other persons at risk as a result of the activities of the Court”, as a general rule, disclosure will take place 60 days prior to the commencement of the trial unless otherwise ordered by the Chamber on the basis of exceptional circumstances. On this basis the Chamber is satisfied that the defence will not be prejudiced by the temporary non-disclosure of this information.

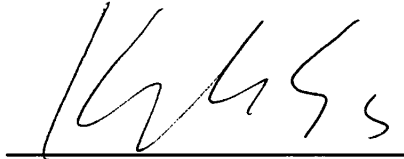
⁴⁴ ICC-01/09-01/11-435-Conf-Anx1, pages 26 to 27.

⁴⁵ See Protocol, sections B.1 and B.2.

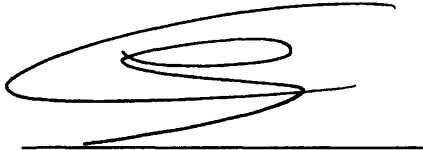
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

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

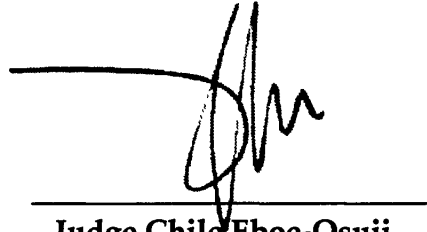
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding



Judge Christine Van den Wyngaert



Judge Chile Eboe-Osuji

Dated this 27 September 2012

At The Hague, The Netherlands

**Corrigendum of
ICC-01/09-01/11-458-
AnxA**

Protocol establishing a redaction regime in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*

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-01/09-01/11-440, paragraph 14.

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 witnesses

A.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 8 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 in paragraphs 49 – 51 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-01/09-01/11-440, paragraph 11.

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.

ANNEX

1. On 27 September 2012 the Chamber issued the “Decision on the protocol establishing a redaction regime” and Annex A thereto, containing the protocol.¹

2. The following typographical errors in Annex A to the Decision have been corrected:
 - In paragraph 43, the numbers for each of the specific categories of leads or sources should read “A.6.1”,
 - In paragraph 53, the reference to the final disclosure deadline should read 9 January 2013.

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