

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11
Date: 3 December 2012

TRIAL CHAMBER V

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

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
*THE PROSECUTOR v. FRANCIS KIRIMI MUTHAURA
AND
UHURU MUIGAI KENYATTA***

URGENT

Public

Decision on fifth prosecution application for authorisation of non-standard 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 Francis Kirimi Muthaura
Mr Karim Khan, Mr Essa Faal,
Mr Kennedy Ogetto, Ms Shyamala
Alagenda

Legal Representatives of Victims
Mr Fergal Gaynor

Counsel for Uhuru Muigai Kenyatta
Mr Steven Kay
Ms Gillian Higgins
Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**
Ms Paolina Massidda

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V (“Trial Chamber” or “Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, pursuant to Articles 64(6) and 68(1) of the Rome Statute, issues this Decision on the fifth prosecution application for non-standard redactions.

1. 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 (“Redaction Protocol”).¹ The Redaction Protocol emphasised that “[i]n light of the 9 January 2013 deadline for completion of all prosecution disclosure, any material containing redactions falling under the pre-approved categories is to be disclosed well in advance of the final deadline”.² It further set out a procedure for other redactions falling outside a pre-approved category (“non-standard redactions”)³ including, notably, redactions to investigators’ names.⁴ According to the Redaction Protocol, “when the disclosing party seeks to apply [non-standard] redactions [...] 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” at the time that the application is made to the Chamber.⁵ The Redaction Protocol directed that any application for non-standard redactions should be filed by no later than 27 November 2012.⁶

2. On 26 November 2012, the Chamber issued an Order granting the prosecution’s request for a one day extension for submission of applications for non-standard

¹ ICC-01/09-02/11-495 and its Annex ICC-01/09-01/11-495-AnxA-Corr.

² ICC-01/09-02/11-495-AnxA-Corr, para. 2.

³ ICC-01/09-02/11-495-AnxA-Corr, paras 7-8.

⁴ ICC-01/09-02/11-495-AnxA-Corr, para. 36.

⁵ ICC-01/09-02/11-495-AnxA-Corr, para. 7.

⁶ ICC-01/09-02/11-495-AnxA-Corr, para. 3.

redactions.⁷ In the Order, the Chamber also recalled the applicable procedure set out in the Redaction Protocol for requesting authorisation for non-standard redactions.

3. On 28 November 2012 the prosecution filed the “Fifth Prosecution application for the authorisation of non-standard redactions pursuant to Decision ICC-01/09-02/11-495” (“Application”),⁸ requesting authorisation to apply non-standard (“A.4”) redactions to the identities of prosecution investigators contained in any material to be disclosed to the defence “going forward.”⁹ Despite the procedure set out by the Chamber in the Redaction Protocol and recalled in the Order of 26 November 2012, the prosecution submits that “it is unnecessary to disclose to the Defence, simultaneously with this application, all materials affected by the proposed non-standard redaction”.¹⁰
4. In support of this alternative approach, the prosecution advances two arguments. Firstly it asserts that the requested redactions are not context-specific and thus disclosing the materials “would not assist the Defence in any way to respond” to the Application.¹¹ Secondly, it asserts that there are “practical considerations” in that most of the unidentified materials which are the subject of the Application are witness statements and transcripts. As such, in order to simultaneously disclose these materials to the defence, additional redactions would have to be applied to the identities of witnesses contained in these materials because protective measures still need to be put in place for those witnesses. The prosecution submits that “it would be inefficient to provide the Defence with heavily redacted witness materials

⁷ Order regarding redactions, ICC-01/09-02/11-541.

⁸ ICC-01/09-02/11-544.

⁹ ICC-01/09-02/11-544, para. 2.

¹⁰ ICC-01/09-02/11-544, para. 5.

¹¹ ICC-01/09-02/11-544, para. 7.

now” given that the same materials will be disclosed with fewer redactions on 9 January 2013.¹²

5. Given that the prosecution waited until the expiry of the relevant disclosure deadline to raise these arguments, the Chamber can not accept the approach taken by the prosecution in the Application. The Chamber recalls that the Redaction Protocol was established by way of a reasoned decision of the Chamber, further to a proposal by the prosecution¹³ and following *inter-partes* consultations.¹⁴ Whilst the prosecution may legitimately consider that the procedure set out in the Redaction Protocol for this particular category of non-standard redactions is inappropriate or may encounter legitimate difficulties in the implementation of that procedure, it can not unilaterally decide, on the expiry of the deadline to disclose these materials to the defence, to set it aside and adopt an alternative procedure.
6. Further it is not for the prosecution to determine, on the expiry of the deadline, that disclosure to the defence of redacted versions of documents, prior to the final deadline of 9 January 2013, would be “inefficient”. The purpose of the Redaction Protocol is to facilitate disclosure of relevant materials to the defence at the earliest opportunity, even if those documents are disclosed with redactions in place that will be lifted at a later date. The Redaction Protocol should not be interpreted as requiring disclosure of entire documents to the defence only at the expiry of the latest deadline set out for disclosure for certain information contained in those documents.
7. To the extent that the prosecution believed that the procedure established in paragraphs 7 and 8 of the Redaction Protocol is “unnecessary” or poses difficulties

¹² ICC-01/09-02/11-544, para 8.

¹³ Prosecution’s Submissions on the Agenda for Status Conference, 28 May 2012, ICC-01/09-02/11-428, paras. 19 – 23.

¹⁴ Joint Prosecution/Defence Submissions on Redactions, 3 July 2012, ICC-01/09-02/11-447 with confidential Annex 1 and confidential *ex parte* Annex 2.

in implementation, the appropriate course would have been to seek a modification to the procedure or an additional extension of time beyond the one-day extension that was already requested and granted.¹⁵

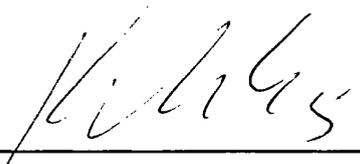
8. Considering the procedural irregularities with the Application, the Chamber will not address the merits of the request for authorisation of the non-standard redactions. This is without prejudice to the prosecution's right to take further steps to obtain the Chamber's authorisation for these redactions.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

DISMISSES the prosecution's Application.

DIRECTS the defence not to respond to the Application.

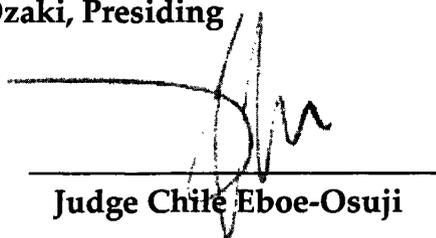
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding



Judge Christine Van den Wyngaert



Judge Chile Eboe-Osuji

Dated 3 December 2012

At The Hague, The Netherlands

¹⁵ Email from prosecution to Trial Chamber V Communications, 23 November 2012 at 15:44. The Chamber granted the extension on 26 November 2012, Order Regarding Redactions, ICC-01/09-02/11-541.