



Original: **English**

No.: **ICC-01/09-02/11**

Original Date: **4 April 2013**

Date of public version: **3 February 2017**

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.
*UHURU MUIGAI KENYATTA***

Public redacted version of

**Decision on two Prosecution applications to maintain B.3 redactions to
certain disclosed materials, 4 April 2013, ICC-01/09-02/11-712-Conf**

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

The Office of the Prosecutor

Ms Fatou Bensouda

Ms Adesola Adeboyejo

Counsel for the Defence

Mr Steven Kay

Ms Gillian Higgins

Legal Representatives of Victims

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 (“Chamber”) of the International Criminal Court (“Court”), in the case of *The Prosecutor v. Uhuru Muigai Kenyatta*, having regard to Articles 54(3)(f), 64(2), 64(6)(e), 67 and 68(1) of the Rome Statute (“Statute”), and Rules 76, 77, 81(2) and 81(4) of the Rules of Procedure and Evidence (“Rules”) and Regulations 33, 34 and 37(2) of the Regulations of the Court (“Regulations”) issues the following Decision on two Prosecution applications to maintain B.3 redactions to certain disclosed materials.

I. Procedural Background

1. On 27 September 2012, the Chamber issued its “Decision on the protocol establishing a redaction regime” (“Redaction Decision”) 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 pre-approves certain categories of redactions and sets out a procedure for case-by-case authorisation of redactions that do not fall within such categories (“non-standard redactions”). Non-standard redactions include, relevantly, redactions to identifying and contact information of “other persons at risk as a result of the activities of the Court’ and their family members” (category B.3).² The identifying information of persons covered under category B.3 redactions is to be disclosed 60 days before trial (“60 day deadline”), and the redactions to the contact information of such persons shall be ongoing.³ In the Redaction Decision, the Chamber indicated that it would consider requests to alter disclosure deadlines if justified by “exceptional circumstances”.⁴

¹ ICC-01/09-02/11-495 and AnxA-Corr.

² Redaction Decision, ICC-01/09-02/11-495, para. 13 and Redaction Protocol, ICC-01/09-02/11-495-AnxA-Corr, paras 57-58.

³ Redaction Protocol, ICC-01/09-02/11-495-AnxA-Corr, para. 58.

⁴ Redaction Decision, ICC-01/09-02/11-495, para. 27.

2. On 8 February 2013, the Prosecution filed the “Confidential Redacted version of the 8 February 2013 Prosecution application regarding the disclosure of the identities of five individuals who will not appear as trial witnesses” (“Contacts and Sources Application”).⁵ A confidential *ex parte* version of the Contacts and Sources Application, with eight annexes (seven of them *ex parte*), was filed the same day.⁶
3. On 11 February 2013, the Prosecution filed the “Confidential redacted version of the 11 February 2013 Prosecution application to maintain B.3 redactions to certain disclosed materials” (“Witness Family Application”).⁷ A confidential *ex parte* version of the Witness Family Application, with five *ex parte* annexes, was filed the same day.⁸ 11 February 2013 was also the date by which all category B.3 redactions were to be lifted by the Prosecution prior to the original trial start date of 11 April 2013.⁹
4. On 6 March 2013, the defence teams for Mr Muthaura and Mr Kenyatta (“Defence”) filed a corrigendum to their consolidated response to both the Contacts and Sources Application and the Witness Family Application (“Response”).¹⁰
5. On 7 March 2013, the Chamber delayed the start of trial, setting the new provisional start date as 9 July 2013.¹¹

II. Submissions and analysis

⁵ Contacts and Sources Application, ICC-01/09-02/11-636-Conf-Red.

⁶ Contacts and Sources Application, ICC-01/09-02/11-636-Conf-Exp.

⁷ Witness Family Application, ICC-01/09-02/11-638-Conf-Red.

⁸ Witness Family Application, ICC-01/09-02/11-638-Conf-Exp.

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

¹⁰ Corrigendum of Joint Consolidated Defence Response to the: (1) ‘Confidential Redacted version of the 8 February 2013 Prosecution application regarding the disclosure of the identities of five individuals who will not appear as trial witnesses’ (ICC-01/09-02/11-636-Conf-Red) and (2) ‘Confidential redacted version of the 11 February 2013 Prosecution application to maintain B.3 redactions to certain disclosed materials’ (ICC-01/09-02/11-638-Conf-Red) And Application for an extension of the page limit pursuant to Regulation 37(2) of the Regulations of the Court’, 6 March 2013, ICC-01/09-02/11-676-Conf-Corr (originally filed on 5 March 2013 with one confidential annex).

¹¹ Order concerning the start date of trial, 7 March 2013, ICC-01/09-02/11-677.

6. Prior to addressing the substance of both the Contacts and Sources Application and the Witness Family Application, the Chamber notes the Defence's request under Regulation 37(2) of the Regulations to extend the page limit of their Response to twenty-three pages.¹² As the Response addresses two distinct filings, the Defence had forty pages with which to respond and, therefore, the Defence's request to extend the page limit is unnecessary.

A. Contacts and Sources Application

Prosecution submissions

7. In the Contacts and Sources Application, the Prosecution requests authorisation to indefinitely maintain category B.3 redactions in seven documents to the identities of two [REDACTED] with the pseudonyms Individual A and Individual B ("Contacts") and to three public figures with the pseudonyms Individual C, Individual D and Individual E ("Sources").
8. Individual A was previously the subject of an application for redactions ("First Application") which was denied by the Chamber on 13 December 2012 on the basis that the Prosecution had not shown the infeasibility of less restrictive protective measures.¹³ In its decision denying the First Application the Chamber ordered the Prosecution to disclose Individual A's identity 60 days before the start of trial.¹⁴
9. In the Contacts and Sources Application, the Prosecution provides a list of incidents in which "individuals with profiles similar to the Contacts have been threatened and tampered with".¹⁵ The Prosecution emphasises that the

¹² Response, ICC-01/09-02/11-676-Conf-Corr, para. 8.

¹³ Decision on the prosecution's first request for the authorisation of redactions, ICC-01/09-02/11-569-Conf, paras 21 – 22.

¹⁴ ICC-01/09-02/11-569-Conf, para 22.

¹⁵ Contacts and Sources Application, ICC-01/09-02/11-636-Conf-Red, paras 17 – 18.

Contacts have “genuinely held subjective fears”.¹⁶ The Prosecution also argues that disclosure of Individual A’s identity would expose other witnesses and sources, particularly the identity of Witness 118 and Individual L.¹⁷

10. The Prosecution submits that relocation is the only satisfactory measure to ensure the safety of the Contacts in the event of disclosure of their identities to the Defence.¹⁸ However, it argues that such a step is unwarranted given that the two individuals are not witnesses.¹⁹ The Prosecution further submits that non-disclosure of the Contacts’ identities does not prejudice the fair trial rights of the accused because the defence has “much of the substance of the Contacts’ accounts” already and can conduct investigations accordingly²⁰ and because the Contacts have already informed the Prosecution that they are unwilling to speak to the Defence.²¹

11. With regard to the Sources, the Prosecution submits that unlike the situation as regards the Contacts, the physical safety of the Sources would not be put at risk in the event of the disclosure of their identities to the Defence.²² Instead, the Prosecution alleges that disclosure poses risks to their “dignity and privacy”, as each of the three Sources has expressed concern that disclosure to the Defence will result in their cooperation with the Court being made known [REDACTED].²³ The Sources are concerned that were this to occur, their reputations and possibly their livelihoods will be harmed.²⁴

12. The Prosecution submits that disclosure under a “confidential” designation would be inadequate to protect the interests of the Sources.²⁵ It states that

¹⁶ Contacts and Sources Application, ICC-01/09-02/11-636-Conf-Red, paras 19 – 20.

¹⁷ Contacts and Sources Application, ICC-01/09-02/11-636-Conf-Red, paras 21 – 22.

¹⁸ Contacts and Sources Application, ICC-01/09-02/11-636-Conf-Red, para. 23.

¹⁹ Contacts and Sources Application, ICC-01/09-02/11-636-Conf-Red, para. 23.

²⁰ Contacts and Sources Application, ICC-01/09-02/11-636-Conf-Red, paras 25 – 26.

²¹ Contacts and Sources Application, ICC-01/09-02/11-636-Conf-Red, para. 27.

²² Contacts and Sources Application, ICC-01/09-02/11-636-Conf-Red, para. 29.

²³ Contacts and Sources Application, ICC-01/09-02/11-636-Conf-Red, paras 29 – 38.

²⁴ Contacts and Sources Application, ICC-01/09-02/11-636-Conf-Red, para. 38.

²⁵ Contacts and Sources Application, ICC-01/09-02/11-636-Conf-Red, para. 39.

“confidential information from this case has found its way into the public domain at an alarming rate” and submits that this concern is shared by at least one of the Sources.²⁶

13. According to the Prosecution, the fair trial rights of the accused are not prejudiced by non-disclosure of the Sources’ names, both because the Defence does not require their identities in order to understand the information sourced from them and because the information provided by the Sources is already in the public domain, including material which has already been disclosed to the defence.²⁷ Particularly as regards Individual D the Prosecution submits that “there is no conceivable added benefit to disclosing that this person [REDACTED]”.²⁸ Additionally, the Prosecution argues that the Defence will be able to use the statements of each Source when questioning witnesses, and that therefore no prejudice will result from non-disclosure.²⁹ Finally, the Prosecution submits that the Sources have unequivocally refused to testify at trial.³⁰

Defence submissions

14. The Defence opposes the Contacts and Sources application in its entirety. The Defence submits that no “exceptional circumstances” exist, as required by the Redaction Protocol, for an alteration of the 11 February 2013 deadline for disclosure.³¹ The Defence also recalls the Chamber’s previous statement concerning a Prosecution redaction application filed on the expiry of the relevant disclosure deadline³² and argues that by notifying the Contacts and

²⁶ Contacts and Sources Application, ICC-01/09-02/11-636-Conf-Red, para. 39.

²⁷ Contacts and Sources Application, ICC-01/09-02/11-636-Conf-Red, paras 40 – 41.

²⁸ Contacts and Sources Application, ICC-01/09-02/11-636-Conf-Red, para. 41.

²⁹ Contacts and Sources Application, ICC-01/09-02/11-636-Conf-Red, para. 42.

³⁰ Contacts and Sources Application, ICC-01/09-02/11-636-Conf-Red, para. 44.

³¹ Response, ICC-01/09-02/11-676-Conf, paras 4 and 19.

³² Response, ICC-01/09-02/11-676-Conf, paras 19 – 23.

Sources application on the date disclosure was to have occurred, the Prosecution acted improperly.³³

15. The Defence submits that even if the Chamber decides to consider the Contacts and Sources Application the merits, the relief requested should be denied. According to the Defence, the information provided by the Contacts and Sources is fundamental to the disputed issues in this case.³⁴ The Defence submits that the identities of Individuals A and B are extremely relevant to its investigations and “may provide crucial evidence that will substantiate the Defence theory that there is a conspiracy [...] to provide false testimony for personal reasons unrelated to the post-election violence”.³⁵

16. The Defence further argues that the accounts of the witnesses referenced in confidential Annex 7 of the Contacts and Sources Application are false and that the identity of Individual A is relevant to carrying out investigations concerning this statement.³⁶ It recalls the situation with respect to former Prosecution Witness 4 and reiterates the need for thorough Defence investigations is particularly relevant in the present case, where the Prosecution has not carried out a thorough investigation with respect to its key witnesses.³⁷

17. The Defence submits that the Prosecution has failed to demonstrate any credible connection between the alleged risks to Individuals A and B and the accused person and therefore is unable to demonstrate the existence of an objectively justifiable risk to the safety of these individuals arising out of disclosure of their identities to Mr Kenyatta.³⁸ As support for this contention

³³ Response, ICC-01/09-02/11-676-Conf, paras 19 – 23.

³⁴ Response, ICC-01/09-02/11-676-Conf, paras 5 and 32 – 24.

³⁵ Response, ICC-01/09-02/11-676-Conf, paras 6 – 7 and 31 – 41.

³⁶ Response, ICC-01/09-02/11-676-Conf, para. 33.

³⁷ Response, ICC-01/09-02/11-676-Conf, para. 39, referring to Joint Defence Response to the Confidential redacted version of the Prosecution’s 5 September 2012 application for the authorisation of redactions pursuant to Articles 54(3)(f), 64(2) and 68(1) of the Statute, Rule 81 and Decision ICC-01/09-02/11-495, ICC-01/09-02/11-521-Conf, para. 26.

³⁸ Response, ICC-01/09-02/11-676-Conf, paras 25 – 27.

the Defence refers to the statements of Prosecution witnesses to the effect that they have not been threatened or bribed.³⁹ The Defence further suggests that the risk of witness tampering is particularly low in the present circumstances, because the Contacts will not appear as witnesses for the Prosecution.⁴⁰ Finally, the Defence rejects the Prosecution's allegations concerning the involvement of the accused in witness interference.⁴¹

18. Finally the Defence submits that if the Chamber considers it necessary to evaluate the possibility of protective measures short of ongoing redactions, relocation of the relevant individuals should be considered.⁴²

19. As regards the requested redactions to the identities of the Sources, the Defence contends that this information is necessary for it to be able to assess the credibility of these individuals' statements and/or to seek to request the admission of the statements into evidence.⁴³ The Defence argues that the Statute and the Rules permit non-disclosure on an exceptional basis and solely on the basis of security concerns, which are not at issue as regards the Sources' identities.⁴⁴ The Defence submits that the only appropriate measure that may be taken to protect the dignity and privacy of the Sources is to order that the identities of these individuals and their connection to the Court be kept confidential by all parties and participants.⁴⁵

Analysis

20. The consequence of the Prosecution's last minute filing of both the Contacts and Sources and Witness Family Applications is that it has *de facto* granted itself an extension of the 11 February 2013 deadline for disclosure. The

³⁹ Response, ICC-01/09-02/11-676-Conf, para. 30.

⁴⁰ Response, ICC-01/09-02/11-676-Conf, para. 28.

⁴¹ Response, ICC-01/09-02/11-676-Conf, para. 26.

⁴² Response, ICC-01/09-02/11-676-Conf, para. 41.

⁴³ Response, ICC-01/09-02/11-676-Conf, para. 53.

⁴⁴ Response, ICC-01/09-02/11-676-Conf, paras 46 – 47.

⁴⁵ Response, ICC-01/09-02/11-676-Conf, para. 48.

Chamber cannot accept the Prosecution's lack of diligence in filing these applications so late. However, in the present circumstances, given the delay to the commencement of trial, the Chamber does not consider that the delay in filing has resulted in prejudice to the Defence. Nevertheless, the Chamber notes that under other circumstances an unjustified delay in filing may be the basis for rejecting an application for extension of deadline.

21. The Chamber has previously set out the requirements that have to be met in order to authorise redactions pursuant to Rule 81(4) and its Article 68(1) duty to protect witnesses.⁴⁶
22. Individual A gave a statement to the Prosecution, but will not be called to testify at trial. Although the Prosecution has provided the Chamber with additional information not included in the First Application regarding Individual A's subjective fears, the Chamber is unable to conclude on the basis of these submissions that the Prosecution has demonstrated an objectively justifiable risk to this individual which would justify continued non-disclosure of his identity. Further, unlike the individuals referred to by the Prosecution who have apparently been threatened or tampered with, Individual A will not be called as an incriminatory witness at trial; accordingly the Chamber is unable to conclude that Individual A faces an objective risk of interference.
23. The Prosecution also argues that disclosure of the name of Individual A would expose the identity of Witness 118 and a third party connected to Witness 118. However, given that the Chamber has ordered the Prosecution to disclose the identity of Witness 118 to the Defence by 17 April 2013 at the latest, this information will already be in the possession of the Defence by 10 May 2013 (60 days before trial). In addition, the Prosecution has previously acknowledged that the transcripts of interviews with Individual A contain both Rule 77 and Article 67(2) material, and, as a result, the non-disclosure of

⁴⁶ ICC-01/09-02/11-569, para. 20.

this information has the potential to prejudice the defence's ability to carry out its investigations.⁴⁷

24. As regards Individual B, who is said to have been [REDACTED] during the post-election violence,⁴⁸ the Prosecution submits that when contacted in January 2013 he expressed his fears that he would be killed if his name were disclosed to the Defence.⁴⁹ The Prosecution submits that relocation is "the only satisfactory measure to ensure the safety" of both Individual A and Individual B in the event of disclosure but argues that this measure is "unwarranted" in the circumstances, as neither individual will testify at trial.⁵⁰

25. Although the Prosecution has informed the Chamber of the very serious concerns of the witness regarding the consequences of disclosure, it has not provided the Chamber with any information suggesting that there is a specific, objectively justifiable risk to Individual B should his identity be disclosed. The identity of Individual B is undoubtedly material to the Defence preparation of its case.⁵¹ In the circumstances, the Chamber is unable to conclude, based on the information provided to it, that ongoing nondisclosure of Individual B's identity vis-à-vis the Defence is the least restrictive measure available in the circumstances.

26. For these reasons, the Chamber finds the request for continued redactions to the identities of Individuals A and B to be unduly prejudicial to the fair trial rights of the accused, and orders the Prosecution to disclose the identity of both individuals confidentially to the Defence by no later than 60 days before the start of trial (currently 10 May 2013). Before disclosing the identities of these two individuals, however, the Prosecution is to liaise with the VWU in order to put in place any protective measures that are necessary.

⁴⁷ First Application, ICC-01/09-02/11-500-Conf-Red, para. 12.

⁴⁸ Contacts and Sources Application, ICC-01/09-02/11-636-Conf-Red, para. 15.

⁴⁹ Contacts and Sources Application, ICC-01/09-02/11-636-Conf-Red, para. 20.

⁵⁰ Contacts and Sources Application, ICC-01/09-02/11-636-Conf-Red, para. 23.

⁵¹ See submissions at ICC-01/09-02/11-676-Conf, paras 31 – 41.

27. With regard to the Sources, given the potential relevance of these names to the Defence ability to fully investigate the statements at issue,⁵² the Chamber considers that in the absence of an objectively justifiable risk to the safety of the persons concerned, the concerns of the Sources about “public repute and credibility” cannot be the sole basis of ongoing Rule 81(4) redactions vis-à-vis the Defence. The requested redactions are therefore denied.

B. Witness Family Application

Prosecution submissions

28. In the Witness Family Application, the Prosecution requests authorisation to indefinitely maintain category B.3 redactions on twenty documents so as to protect family members of Witnesses 152, 219, 505 and (since withdrawn) Witness 4.⁵³ The Prosecution argues that disclosure of information identifying these witnesses’ family members may result in them being targeted as a means to dissuade the witnesses from testifying or to retaliate against them for doing so.⁵⁴ The Prosecution references a series of other alleged incidents of attempts to tamper with other Prosecution witnesses to demonstrate the existence of an objectively justifiable risk to the safety of these witnesses and their families.⁵⁵ The Prosecution argues that it is infeasible to implement protective measures for the family members concerned and that designating the documents in question as “confidential” is insufficient because there is a pattern of such information leaking into the public domain.⁵⁶

29. The Prosecution argues that no undue prejudice would result from maintaining these redactions because: (i) all of the information covered by the proposed redactions is incidental to these witnesses’ accounts and would

⁵² Response, ICC-01/09-02/11-676-Conf, para. 53.

⁵³ Witness Family Application, ICC-01/09-02/11-638-Conf-Red, paras 1-3.

⁵⁴ Witness Family Application, ICC-01/09-02/11-638-Conf-Red, para. 2.

⁵⁵ Witness Family Application, ICC-01/09-02/11-638-Conf-Red, para. 8.

⁵⁶ Witness Family Application, ICC-01/09-02/11-638-Conf-Red, paras 10-11.

provide the Defence with little, if any, useful information, (ii) to the extent the materials relate to [REDACTED] Witness 4, this witness has since been withdrawn by the Prosecution and (iii) even if [REDACTED] former Witness 4 becomes a relevant issue at trial, the Prosecution proposes to create an annotated witness statement in which the redacted family members are assigned a pseudonym so that the Defence can understand [REDACTED].⁵⁷ The Prosecution submits that the proposed redactions would be subject to periodic review and that the Prosecution will disclose the information at issue as soon as it can be safely done.⁵⁸

Defence submissions

30. As regards the timing of the Witness Family Application, the Defence repeats its arguments that: (i) the application is untimely, (ii) it should be rejected for that reason alone and (iii) the Prosecution should be sanctioned for a “wilful violation of a decision of the Chamber”.⁵⁹
31. As to the merits of the Witness Family Application, the Defence adopt their previous submissions which reject the Prosecution’s allegations that the Accused or members of the Defence have been involved with tampering with witnesses.⁶⁰ The Defence argues that, because these allegations are insufficiently substantiated, “no objective risk exists to the safety of the family members of any OTP witness or former witness in this case arising from the Accused [...]”.⁶¹
32. With respect to the document detailing family members of former Witness 4 [REDACTED], the Defence also argues that withholding their identities is prejudicial to the Accused because the Prosecution continues to rely on

⁵⁷ Witness Family Application, ICC-01/09-02/11-638-Conf-Red, paras 13-14.

⁵⁸ Witness Family Application, ICC-01/09-02/11-638-Conf-Red, para. 15.

⁵⁹ Response, ICC-01/09-02/11-676-Conf-Corr, para. 3.

⁶⁰ Response, ICC-01/09-02/11-676-Conf-Corr, paras 26, 43.

⁶¹ Response, ICC-01/09-02/11-676-Conf-Corr, para. 43.

[REDACTED] in its Pre-Trial Brief.⁶² The Defence submits that it would be antithetical to the fair trial rights of the Accused to “permit the Prosecution to rely upon evidence at trial of [REDACTED] Witness 4 without disclosing to the Defence all information relevant to this allegation, including [REDACTED]”.⁶³

Analysis

33. The redactions at issue involve: (i) former Witness 4 referencing a family member in a manner incidental to the remainder of the witness statement’s subject matter,⁶⁴ (ii) Witness 152 identifying a number of members of his family and where they are located,⁶⁵ (iii) Witness 219 referencing a family member who helped the witness [REDACTED],⁶⁶ (iv) a member of Witness 4’s family articulating in great detail [REDACTED]⁶⁷ and (v) Witness 505 referencing a family member in a manner incidental to the remainder of the witness statement’s subject matter.⁶⁸ The Chamber understands the Prosecution to be seeking indefinite redactions only to the identifying information of the witnesses’ family members in the annexes provided, as the contact information of such persons is already subject to ongoing redaction under the Redaction Protocol.⁶⁹

34. The Chamber fails to see why disclosing the identifying information of these family members only to the Defence, and not the public at large, 60 days before trial is insufficient to protect the witnesses’ family members. The Prosecution’s allegations of witness intimidation and leaking of confidential information are not specifically linked to any of the individuals for whom

⁶² Response, ICC-01/09-02/11-676-Conf-Corr, para. 44.

⁶³ Response, ICC-01/09-02/11-676-Conf-Corr, para. 45.

⁶⁴ Witness Family Application, ICC-01/09-02/11-638-Conf-Exp-Anx1.

⁶⁵ Witness Family Application, ICC-01/09-02/11-638-Conf-Exp-Anx2.

⁶⁶ Witness Family Application, ICC-01/09-02/11-638-Conf-Exp-Anx3.

⁶⁷ Witness Family Application, ICC-01/09-02/11-638-Conf-Exp-Anx4.

⁶⁸ Witness Family Application, ICC-01/09-02/11-638-Conf-Exp-Anx5.

⁶⁹ Redaction Protocol, ICC-01/09-02/11-495-AnxA-Corr, para. 58.

indefinite redaction is sought. The Prosecution also concedes, in the context of explaining why protective measures for these family members have never been sought, that “[m]any of the family members mentioned by the witnesses are relatively distant relatives, with no connection to the Court’s work or the substantive evidence in this case”.⁷⁰ The Chamber considers the security risks identified by the Prosecution to be too generalised to qualify as an “objectively justifiable risk” to the safety of the concerned persons. Put another way, if the Prosecution’s general assertions of witness tampering and information leakage were to be accepted as grounds for maintaining indefinite redactions, then the inevitable result would be that the identities of witnesses’ family members could never be disclosed. Such a result would run counter to the general rule articulated in the Redaction Protocol.

35. Further, to the extent that former Witness 4’s family members [REDACTED] which the Prosecution is relying upon in its Pre-Trial Brief,⁷¹ the prejudice to the Defence in granting indefinite redactions to these individuals would be significant.

36. In sum, the Chamber fails to see how the Prosecution’s arguments establish exceptional circumstances in the present instance.

III. Conclusion

37. Despite its findings above, the Chamber nevertheless notes that the present decision must be viewed in light of the decision taken subsequent to the Contacts and Sources and Witness Family Applications to postpone the start date of trial until 9 July 2013.⁷² Due to the provisional start date, the 60 day deadline for lifting all category B.3 redactions has likewise tentatively moved from 11 February 2013 to 10 May 2013. The Chamber considers that, despite

⁷⁰ Witness Family Application, ICC-01/09-02/11-638-Conf-Red, para. 11.

⁷¹ Prosecution’s Pre-Trial Brief, ICC-01/09-02/11-596-Conf-AnxD-Red, paras 93-94.

⁷² ICC-01/09-02/11-677.

this delay, the reasons for originally adopting the 60 day-prior-to-trial deadline are unchanged. As such, although they may not be maintained indefinitely, the Prosecution has until 60 days before the start of trial to ensure that the redactions at issue can be safely lifted.

For the foregoing reasons, the Chamber hereby:

DISMISSES the Defence's request to extend the page limit of the Response as moot;

REJECTS the relief requested in the Contacts and Sources and Witness Family Application; and

ORDERS the Prosecution to disclose versions of Annexes 1 – 7 to application ICC-01/09-02/11-636-Conf-Exp and Annexes 1 – 5 of ICC-01/09-02/11-638-Conf-Exp to the Defence with B.3 identifying information redactions lifted no later than 60 days before the start of trial.

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



Judge Kuniko Ozaki, Presiding Judge



Judge Robert Fremr



Judge Geoffrey Henderson

Dated 3 February 2017

At The Hague, The Netherlands