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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*

Public

**Public Redacted Version of the 5 November 2012 “Prosecution Application for
delayed disclosure of witness identities” (ICC-01/09-02/11-519-Conf-Exp)**

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Introduction

1. As ordered by the Chamber,¹ the Prosecution hereby submits its application for delayed disclosure of the identities of six provisional witnesses.²

Witness code	Name
KEN-OTP-P-0007	[REDACTED]
KEN-OTP-P-0118	[REDACTED]
KEN-OTP-P-0219	[REDACTED]
KEN-OTP-P-0428	[REDACTED]
KEN-OTP-P-0429	[REDACTED]
KEN-OTP-P-0430	[REDACTED]

2. As explained below, each provisional witness has unique security concerns that require the adoption of special measures to safeguard their well-being. Delayed disclosure of their identities will mitigate the security risks and, in the Prosecution's submission, constitutes an "appropriate measure" under Article 68(1) of the Statute by properly balancing the well-being of the provisional witnesses and the integrity of the case with the Accused's rights under Article 67 of the Statute and Rule 76, as Article 64(2) of the Statute requires.
3. [REDACTED]. For five of the six witnesses, the Prosecution seeks to disclose their identities 30 days before the start of trial.³ For the sixth individual (Witness 118), the Prosecution seeks disclosure 30 days before the witness' anticipated testimony. The Prosecution seeks this relief pursuant to Decision

¹ ICC-01/09-02/11-495-AnxA, para 51.

² [REDACTED].

³ ICC-01/09-02/11-451, para 24.

451, which envisages such measures “on an exceptional basis and where justified by security concerns”.⁴

4. For ease of presentation, the Prosecution has grouped the six provisional witnesses covered by this application based on their security concerns. Each group is addressed in turn below. Annex A contains a brief security profile for each individual. The witness statements/transcripts and related materials, along with the proposed redactions, and accompanying charts outlining the redactions, are attached as Annexes B – G. The transcripts of Witnesses 429 and 430 are being transcribed. Once completed, they will be filed with the Chamber, together with the proposed redactions.

Confidentiality

5. This application and its annexes are submitted on a confidential *ex parte* basis because they contain the names of provisional Prosecution witnesses, their current locations and security situations, the redactions and/or delayed disclosure of which is sought in this application. Revealing this information would undermine the relief sought and create security risks to the individuals concerned. A redacted version of this application will be filed.

Submissions

6. The Prosecution submits that continued redaction of witness identities, like other redaction issues, requires the Chamber to balance the well-being of witnesses against the effect that delayed disclosure may have on the Accuseds’ fair trial rights. The relevant criteria are:
 - (i) the existence of an “objectively justifiable risk” to the safety of the person concerned if the particular information is disclosed to the Accused;⁵

⁴ ICC-01/09-02/11-451, para 13.

- (ii) the infeasibility or insufficiency of less restrictive protective measures;⁶ and
- (iii) 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”.⁷

7. The relief sought by the Prosecution has previously been granted at this Court. In *Katanga*, Trial Chamber II permitted the identities of two Prosecution witnesses to be delayed – one until 45 days before the start of trial, and one until 45 days before the start of testimony.⁸ In granting such relief, Trial Chamber II undertook a two-part analysis that largely encompassed the standard discussed above.⁹
8. It is also instructive to consider the jurisprudence of the *ad hoc* Tribunals, which have long permitted delayed disclosure to mitigate witness security issues. At the ICTY, unredacted witness materials were generally required to be disclosed 30 days before trial,¹⁰ although several Chambers permitted witness identities to be withheld until 30 days before testimony.¹¹ The *Milosevic* Chamber went even further, authorizing delayed disclosure of witness identities to the accused until 10 days before testimony.¹² The ICTY Appeals Chamber upheld such protective measures.¹³ The ICTR also took a

⁵ ICC-01/04-01/07-475, para 71; ICC-01/09-02/11-495, para 11.

⁶ ICC-01/04-01/06-568, para 37; ICC-01/04-01/06-773, para 33; ICC-01/09-02/11-495, para 11.

⁷ ICC-01/04-01/06-773, para 34; ICC-01/09-02/11-495, para 11.

⁸ ICC-01/04-01/07-1179-tENG, paras 47-48.

⁹ ICC-01/04-01/07-1179-tENG, para 34.

¹⁰ *Prosecutor v Delic*, Decision on the Prosecution Motion for Protective Measures, IT-04-83-PT, 1 December 2006, p. 6; *Prosecutor v Milutinovic et al.*, Decision on Prosecution’s Motions for Protective Measures, IT-99-37-PT, 17 July 2003, p. 5; *Prosecutor v Seselj*, Decision on Vojislav Seselj’s appeal against the Trial Chamber’s oral decision of 7 November 2007, IT-03-67-AR73.6, 24 January 2008 (“*Seselj Appeals Decision*”), para 15.

¹¹ *Prosecutor v Brdanin and Talic*, Decision on the Prosecution’s Twelfth Motion for Protective Measures for Victims and Witnesses, IT-99-36-PT 12 December 2002, para 13, page 6 (disposition).

¹² *Prosecutor v Milosevic*, First decision on Prosecution Motion for Protective Measures for Sensitive Source Witnesses, IT-02-54-T, 3 May 2002, para 13.

¹³ See *Seselj Appeals Decision*, para 15.

similar approach, permitting the “rolling” disclosure of witness identities with deadlines between 35¹⁴ and 21¹⁵ days before testimony.

9. Finally, if the redactions and continuing non-disclosure of the witness identities is authorized, the Prosecution acknowledges its obligation to provide disclosure as soon as there is a relevant change in circumstances, and also to provide periodic updates to the Chamber, in accordance with whatever schedule the Chamber determines, in order to guarantee that the redactions continue only for as long as circumstances warrant.¹⁶

I. The four Mungiki insiders

10. Witnesses 219, 428, 429 and 430 (together, the “Insiders”) are former Mungiki members who provide substantial linkage evidence regarding the Accuseds’ interactions with the Mungiki during the post-election violence period (“PEV”) and their contributions to the crimes charged. [REDACTED]. Delayed disclosure of their identities satisfies the relevant legal standard for the following reasons.

- (i) There is an objectively justifiable risk to the witnesses’ safety arising from the disclosure of their identities to the Accused.

11. Four factors demonstrate an objective risk to the Insiders’ security should their identities now be disclosed to the Accused.

¹⁴ *Prosecutor v. Bagosora*, Decision and Scheduling Order on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses, ICTR-98-41-I, 5 December 2001 (“*Bagosora*”), paras 23, 25.

¹⁵ *Prosecutor v. Renzaho*, Decision on the Prosecutor’s Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment, ICTR-97-31-I, 17 August 2005, para 16; *Prosecutor v. Kabiligi et al.*, Decision on the Motion by the Office of the Prosecutor for Orders for Protective Measures for Victims and Witnesses, ICTR-97-34-I, 19 May 2000, pages 4-5; *Prosecutor v. Niyitegeka*, Decision on the Prosecutor’s Motion for Protective Measures for Witnesses, ICTR-96-14-I, 12 July 2000, para 16. Measures for Witnesses, ICTR-96-14-I, 12 July 2000, para 16.

¹⁶ ICC-01/04-01/07-475, para 73(c); ICC-01/09-02/11-495, para 11.

12. *First*, the nature of the Insiders' evidence creates a powerful incentive to interfere with them so that they do not testify. Each Insider provides unique evidence that cannot be obtained from other sources, and which has substantial incriminatory value. For example:

- Witness 219 provides evidence regarding the strategic meetings in which the Rift Valley attacks were organized and set in motion, and the instructions, money and materiel provided by the Accused in support.
- Witness 428 was [REDACTED]. He also accepted money, uniforms and guns reportedly sent by the Accused [REDACTED].
- Witness 429 and 430 [REDACTED].

13. In light of the limited pool of senior Mungiki members who are still alive and willing to testify, the Insiders' evidence is irreplaceable. Were they to be tampered with, it would substantially affect the Prosecution's case. This creates a powerful incentive to interfere with the Insiders, which, as discussed below, is a real risk in light of [REDACTED].

14. *Second*, [REDACTED] demonstrates that the Insiders risk being interfered with before their testimony.

15. At confirmation, the Prosecution relied upon five insider witnesses. The identities of three of the five witnesses have already been disclosed to the Defence. [REDACTED].¹⁷ [REDACTED].¹⁸

16. [REDACTED].

17. On this point, it is instructive to consider the experiences of the three insiders whose identities have been disclosed to date. [REDACTED].¹⁹

¹⁷ See [REDACTED].

¹⁸ See [REDACTED].

[REDACTED].²⁰ Their concerns are reasonable, given the Accuseds' considerable influence in Kenya, [REDACTED].

18. [REDACTED], the ICTR approved delayed disclosure based on the risk that the witnesses would "become targets for coercion or other threats which would prevent or at least discourage them from testifying at trial".²¹ [REDACTED].

19. *Third*, several senior Mungiki members disappeared or were murdered—suspected to have been done by members of the Kenyan security apparatus²² — in the immediate aftermath of the PEV. These targeted individuals were instrumental in the Mungiki's participation in the PEV and had direct knowledge of the Accuseds' contributions to the crimes charged. The Insiders view these killings and forced disappearances as part of a post-PEV "clean-up" operation to conceal the involvement of the Accused and other senior officials in the PEV. The individuals concerned include:

- Charles Ndungu Wagacha, acting Mungiki Chairman during the PEV, who attended meetings with senior PNU officials and liaised with them on behalf of Mungiki leader Maina Njenga, who was in prison.²³
- Naftali Irungu, member of the Mungiki top leadership cell, who received money from PNU politicians to organize attacks during the PEV.²⁴

¹⁹ [REDACTED].

²⁰ See [REDACTED].

²¹ See *Bagosora*, para 20.

²² This suspicion is consistent with the findings in 2009, by the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, of "compelling evidence that death squads . . . exist within the police force in Kenya, and that these squads were set up to eliminate the Mungiki and other high-profile suspected criminals, upon the orders of senior police officials" See Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr. Philip Alston, 26 May 2009, KEN-OTP-0001-0910, at 0919. He observed that the death squads were tasked with "eliminating suspected leaders and members of criminal organizations", including the Mungiki, and engaged in "carte blanche killing". KEN-OTP-0001-0910, at 0911.

²³ ICC-01/09-02/11-382-Red, para 194; see also KEN-OTP-0052-1317, at 1322; KEN-OTP-0053-0072; KEN-OTP-0053-0061; KEN-OTP-0053-0062.

²⁴ See KEN-OTP-0052-1317, at 1322; KEN-OTP-0060-0299 at 0314-0318; 0320; KEN-OTP-0060-0112, at 0122-0123; KEN-OTP-0053-0072; KEN-OTP-0053-0061; KEN-OTP-0053-0062.

- Maina Kangethe Dlambo, a senior Mungiki leader present at several meetings with PNU officials and Mungiki members during the PEV.²⁵
- Njuguna Gitau Njuguna, a Mungiki spokesman who played a central role in deploying Mungiki members to Naivasha during the PEV.²⁶
- George Njoroge Wagacha, personal assistant to Mungiki leader Maina Njenga during the PEV.²⁷

20. The past killings of Mungiki members who had apparent first-hand knowledge of the Accuseds' role in the PEV demonstrates the risks that the Insiders face once their cooperation with the Prosecution is disclosed.

21. Moreover, the extra-judicial killings of Mungiki members and others has increased the Insiders' subjective security fears. The Insiders have cited the past extra-judicial killings as a key reason why, in their view, they will be at increased risk once their cooperation with the Prosecution is disclosed to the Accused. This fear is so profound that some of the Insiders have been in hiding for several years due in part to concerns that they too will be killed.²⁸

22. *Fourth*, [REDACTED].²⁹ [REDACTED].³⁰ [REDACTED].³¹ [REDACTED],³² [REDACTED].³³ [REDACTED],³⁴ [REDACTED].

(ii) Less restrictive protective measures are infeasible and insufficient.

²⁵ See ICC-01/09-02/11-382-Red, paras 311-312, 322, 342; see also KEN-OTP-0053-0074, at 0116, para 61.

²⁶ See KEN-OTP-0052-1523, at 1535; KEN-OTP-0052-1331, at 1336; KEN-OTP-0052-1523, at 1536-1537; KEN-OTP-0060-0093, at 0105.

²⁷ See KEN-OTP-0060-0150, at 0155; KEN-OTP-0053-0065, at 0066-0067.

²⁸ See Annex A, pages 8, 11, 13.

²⁹ See, e.g. [REDACTED].

³⁰ See [REDACTED].

³¹ As stated above, the interviews of Witness 429 and 430 are currently being transcribed. The above information is taken from the tape.

³² See [REDACTED].

³³ See Annex A, page 6.

³⁴ See, e.g., [REDACTED].

23. Disclosing the Insiders' identities to the Defence under a confidential designation is inadequate because (i) their security concerns stem from the Accused and their supporters; and (ii) counsel for both Accused take the position that they cannot withhold from their clients any materials provided to them.³⁵ Because the Accused are not in custody, their contacts with supporters or potential witnesses cannot be limited and monitored. The ICC has no capacity to control, or even to know about, the conduct of persons in a non-custodial situation thousands of miles from the seat of the Court. In addition, these particular Accused have influential positions within and/or close ties to, the Government of Kenya, which compound both the risks that they pose and the difficulties in mitigating them.

24. There is also the troubling pattern of leaks of confidential information [REDACTED].³⁶ [REDACTED],³⁷ [REDACTED],³⁸ [REDACTED],³⁹ [REDACTED].⁴⁰

25. It is well-established that "the greater the length of time between the disclosure of the identity of a witness and the time when the witness is to give evidence, the greater the potential for interference with that witness".⁴¹ This consideration is particularly apt here given [REDACTED].⁴² The proposed delay in disclosing the Insiders' identities will ensure that they are exposed for a shorter period and will provide the VWU with additional time to implement protective measures. This timing consideration is particularly important for the Insiders. [REDACTED].⁴³ [REDACTED].

³⁵ See ICC-01/09-02/11-T-18-ENG ET WT, page 23, line 14 to page 24, line 9.

³⁶ See [REDACTED].

³⁷ See [REDACTED].

³⁸ [REDACTED].

³⁹ See [REDACTED].

⁴⁰ [REDACTED].

⁴¹ ICTY, *Prosecutor v Brdanin and Talic*, Decision on Motion by Prosecution for Protective Measures, IT-99-36-PT, 3 July 2000, para 24; see also *Bagosora*, para 20.

⁴² See *supra*, paras 14-18, 22.

⁴³ [REDACTED].

- (iii) Delayed disclosure will not unduly prejudice the Accuseds' fair trial rights.

26. Any disadvantage to the Defence stemming from delayed disclosure is limited, can be mitigated and is outweighed by the witness security considerations enshrined in Article 68(1) of the Statute and by the Court's inherent power to protect the integrity of the truth-seeking function.

27. *First*, the redacted transcripts provide the Defence with much of the substance of the Insiders' accounts. Although their identities and identifying information is redacted, the Prosecution has disclosed in this filing that the Insiders are former Mungiki members, which provides the Defence with context against which to evaluate their accounts. Moreover, the disclosure of the Insiders' identities 30 days before trial will enable the Defence to adapt its preparation and cure any interim disadvantage. Finally, depending upon the security and logistical circumstances at the time, the Prosecution will endeavour to avoid calling the witnesses at the beginning of the case, thereby affording more time to the Defence to prepare.

28. *Second*, the Prosecution is seeking delayed disclosure for a limited number of individuals. Although the vast majority of Prosecution witnesses have well-grounded security concerns, the Prosecution recognizes the potential impact of delayed disclosure on Defence preparation and has applied for delayed disclosure only for individuals for whom such relief is strictly necessary. The result is a pool of six proposed witnesses, a carefully circumscribed group that minimizes any disadvantage to the Defence.⁴⁴

29. *Third*, any interim disadvantage to the Defence can be mitigated. The Prosecution acknowledges due to the identifying nature of some of the

⁴⁴ See ICC-01/04-01/07-1179-tENG, para 48; see also *Seselj Appeals Decision*, para 16 (holding that delayed disclosure for eight out of 100 witnesses did not infringe the accused's fair trial rights).

Insiders' testimony, the redactions required to protect their identities are at times broad. Witness 428, for example, discusses [REDACTED]. This information is redacted because Witness 428 was the only person to have held this position at that time, so disclosing the information would identify him immediately. Similar issues exist for the other Insiders. If, after reviewing the redacted transcripts, the Defence demonstrates that it would be materially prejudiced by the scope of the redactions, the Prosecution is willing to provide a written summary of the redacted material in a manner that does not reveal the Insiders' identities. This approach has previously been employed in the *Katanga* case.⁴⁵

30. *Fourth*, delayed disclosure strikes an appropriate balance between the Accuseds' rights and the Court's duty to take appropriate measures to protect witnesses. As explained above, the risks to the Insiders are significant and require a vigilant response. Any disadvantage caused by delayed disclosure will be temporary in nature and limited in scope.

II. [REDACTED] -- Witness 118

31. The security situation regarding Witness 118 is a particularly acute. He is [REDACTED] has unique knowledge regarding the organisation's operations in the PEV and the Accuseds' roles therein. Thus, unlike its request for the prior witnesses, the Prosecution seeks disclosure of Witness 118's identity *30 days before his anticipated testimony*.

- (i) There is an objectively justifiable risk to the witness' safety arising from the disclosure of his identity to the Accused.

⁴⁵ ICC-01/04-01/07-1179-tENG, para 51.

32. Witness 118 shares the same risk factors discussed above in paras 11-22. He also has unique security concerns. As explained in greater detail in Annex A, [REDACTED]⁴⁶ – [REDACTED].⁴⁷ [REDACTED].⁴⁸ [REDACTED].⁴⁹

33. Witness 118's [REDACTED] increases his risk profile. [REDACTED].⁵⁰ [REDACTED].

34. In [REDACTED] 2012, Prosecution representatives met with Witness 118 to discuss, among other matters, his willingness to testify. He requested that his identity and cooperation with the Prosecution not be disclosed until [REDACTED]. He views the Kenyan state security apparatus as the most significant threat to his security, which he understands to be under the influence of the Accused, current and former senior government officials. Witness 118 explained that if the government changes in the March 2013 elections, his security situation will improve, because the state security apparatus will no longer be available to the Accused. In addition, Witness 118 explained the tensions surrounding the upcoming elections and expressed concern that [REDACTED]. Witness 118's security concerns are bolstered by (i) the extra-judicial killings of the individuals identified above in paragraph 19; (ii) [REDACTED];⁵¹ and (iii) [REDACTED].⁵²

(ii) Less restrictive protective measures are infeasible and insufficient.

35. The submissions in paragraphs 23-25 apply equally to Witness 118. Further, disclosing Witness 118's identity a month before trial – as proposed with the four Insiders – would be an insufficient measure because [REDACTED],

⁴⁶ See [REDACTED].

⁴⁷ See Annex A, page 4.

⁴⁸ See Annex A, page 4.

⁴⁹ See [REDACTED].

⁵⁰ See, e.g., [REDACTED].

⁵¹ See [REDACTED].

⁵² See [REDACTED].

which, for the witness-specific reasons explained above, exposes Witness 118 to heightened risk.

36. It is also appropriate to consider the implications for the case as a whole. [REDACTED]. In sum, “the situation of [Witness 118] is truly exceptional”, warranting full disclosure only 30 days before his anticipated testimony.⁵³

(iii) Delayed disclosure will not unduly prejudice the Accuseds’ fair trial rights.

37. The submissions in paragraphs 26-30 are incorporated by reference.

III. Witness 7

(i) There is an objectively justifiable risk to the witness’ safety arising from the disclosure of her identity to the Accused.

38. Witness 7 is [REDACTED]. She provides evidence regarding [REDACTED] makes alternative protective measures infeasible. The Prosecution will expend its best efforts to identify additional or alternative protection options that suit her particular profile, but if unsuccessful it will assess whether it is appropriate to call her in light of the objective protection concerns.

39. In light of [REDACTED], the Prosecution considers there to be an objective risk to Witness 7’s safety. [REDACTED],⁵⁴ [REDACTED]. The risks extend beyond the Accused and those under their immediate control. There is a pattern in this case of confidential information leaking and appearing in the public domain. Examples include [REDACTED]⁵⁵ [REDACTED],⁵⁶

⁵³ ICC-01/04-01/07-1179-tENG, para 48.

⁵⁴ See, e.g., [REDACTED].

⁵⁵ See [REDACTED].

⁵⁶ See [REDACTED].

[REDACTED].⁵⁷ There is an objective risk that Witness 7's identity will find its way into the public domain once disclosed. This is a particular concern due to the opposition to the ICC within certain segments of Kenyan society, which may expose Witness 7 to retaliation from individuals acting independently and outside the Accused's control, once her cooperation with the Prosecution is revealed.

(ii) Less restrictive protective measures are infeasible and insufficient.

40. The arguments in paragraphs 23-25 apply equally to Witness 7. In addition, her personal circumstances limit the protection options available and her greatest protective measure is that her cooperation with the Prosecution is not yet known. The longer she remains in that posture, the lower her security risks.⁵⁸ And, because the available measures may prove to be insufficient to mitigate the risk, she may ultimately withdraw as a witness. In this circumstance, it is therefore essential that she not be placed in jeopardy until there is some certainty that she will agree to testify.

(iii) Delayed disclosure will not unduly prejudice the Accused's fair trial rights.

41. The Prosecution incorporates its submissions in paragraphs 26-30. In addition, the nature of Witness 7's evidence limits any prejudice to the Defence. She provides evidence regarding the victims of the PEV, not the individual contributions of the Accused. As a result, the preparation for her testimony is likely to be circumscribed and therefore less time-consuming, which limits any disadvantage caused by delayed disclosure.⁵⁹

⁵⁷ See, e.g., [REDACTED].

⁵⁸ See ICTY, *Prosecutor v Brdanin and Talic*, Decision on Motion by Prosecution for Protective Measures, IT-99-36-PT, 3 July 2000, para 24.

⁵⁹ *Prosecutor v Brdanin and Talic*, Decision on the Prosecution's Twelfth Motion for Protective Measures for Victims and Witnesses, IT-99-36-PT 12 December 2002, para 35.

Conclusion

42. For the foregoing reasons, the Prosecution respectfully requests the Chamber to authorize (i) the disclosure of the identities of Witnesses 7, 219, 428, 429 and 430 until 30 days before the start of trial; (ii) the disclosure of Witness 118's identity until 30 days before his anticipated testimony; and (iii) the interim disclosure of the records of the interviews of Witnesses 7, 118, 219, 428 and 429 with the redactions included in Annexes B – G. The Prosecution also respectfully requests the Chamber to convene an *ex parte* status conference, with the presence of the VWU, so that the above-mentioned protection and relocation issues can be efficiently addressed.



Fatou Bensouda,
Prosecutor

Dated this 7th of November 2012
At The Hague, The Netherlands