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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. WILLIAM SAMOEI RUTO AND JOSHUA ARAP SANG*

Public

Public Redacted Version of the 5 November 2012 “Prosecution’s application for delayed disclosure of the identities of certain witnesses and authorisation of redactions pursuant to Decision ICC-01/09-01/11-458”

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The Office of the Prosecutor

Fatou Bensouda
Cynthia Tai

Counsel for the Defence

Legal Representatives of Victims

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

Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Prosecution hereby submits its application for authorization to delay disclosure of the identities of nine witnesses included in the Prosecution's Provisional Witness List beyond the 9 January 2013 deadline, and to disclose redacted versions of these witnesses' statements and associated materials (including metadata). This application is made pursuant to Articles 54(3)(f), 64(2) and 68(1) of the Rome Statute ("Statute"), Rule 76 of the Rules of Procedure and Evidence ("Rules"), and the Trial Chamber's 27 September 2012 "Decision on the protocol establishing a redaction regime" ("Decision")¹ and protocol ("Protocol") governing the redaction procedure in this case.²
2. The Prosecutions applies to delay disclosure of the identities of the following witnesses by way of the redaction of the identities of these witnesses as well as any information which would tend to identify the witnesses:

Witness code	Name
KEN-OTP-P-0268	[REDACTED]
KEN-OTP-P-0336	[REDACTED]
KEN-OTP-P-0356	[REDACTED]
KEN-OTP-P-0376	[REDACTED]
KEN-OTP-P-0397	[REDACTED]
KEN-OTP-P-0423	[REDACTED]
KEN-OTP-P-0450	[REDACTED]
KEN-OTP-P-0470	[REDACTED]
KEN-OTP-P-0471	[REDACTED]

3. The Prosecution requests that in the cases of P-0268, P-0336, P-0376, P-0397, P-0423, P-0470 and P-0471 full disclosure be implemented on 12 March 2013, 30 days before commencement of trial, as per the Decision.³ For P-0356 and P-0450 the Prosecution seeks disclosure 30 days before the witness' anticipated

¹ ICC-01/09-01/11-458, paragraph 8

² ICC-01/09-01/11-458-AnxA-Corr, paragraph 51

³ ICC-01/09-01/11-458, paragraph 8; ICC-01/09-01/11-458-AnxA-Corr, paragraph 51

testimony. Such relief is provided for in Decision 440, which envisages the granting “on an exceptional basis and where justified by security concerns”.⁴

4. The Prosecution submits that each of these witnesses has specific security concerns which require the application of the requested delayed disclosure of their identities and redactions in order to protect their safety, physical and psychological well-being, dignity and privacy, as well as the integrity of the case, pursuant to Article 68(1). Further, while there are no less restrictive measures available before the Chamber at this time, the requested relief properly balances the Accuseds’ fair trial rights contained in Article 67 and Rule 76, with the need to ensure the protection of victims and witnesses as required by Article 64(2), and so the Accused would not be unduly prejudiced.
5. In accordance with the procedure specified in paragraphs 7 to 9 of the Protocol, the Prosecution sets out the proposed redactions and their legal bases in sub-Annexes B and C of each witness’ confidential, *ex parte* annex to this application. These contain the redacted materials, with “see through” redactions for the Chamber’s reference, as well as a chart outlining the proposed redactions and their legal bases. Factual justifications specific to each of the witnesses in question and their security situations are also provided in sub-Annex A of each witness’ annex.⁵

Confidentiality

6. This application and annexes are submitted on a confidential *ex parte* basis to be available to the Prosecution and the Victims and Witnesses Unit (“VWU”) only, as they contain information of a confidential nature the disclosure of which would pose a risk to the individuals concerned due to the activities of the Court and defeat the objective of this application.

⁴ ICC-01/09-01/11-440, paragraph 8

⁵ These individual-specific factual justifications are produced pursuant to information received by the Prosecution from the witnesses and other sources, and assessed by the Protection Strategies Unit (“PSU”). [REDACTED]

7. The Prosecution submits that the information contained within this application, including the names of witnesses, their current locations and security situations, must be treated confidentially and cannot be disclosed to the Defence before the implementation of appropriate protective measures.

Background

8. In its Decision the Chamber held, *inter alia*, (i) that any request for a delay in disclosure of witness identities must be addressed on a case-by-case basis, and (ii) the scope of any redactions applied to identifying information should not exceed that which is strictly necessary to protect the identity of the witness.⁶
9. On 16 October 2012 the Prosecution filed its Provisional Witness List and Provisional List of Evidence,⁷ in which it indicated the witnesses for whom it would be requesting delayed disclosure,⁸ namely: KEN-OTP-P-0268 ([REDACTED]); KEN-OTP-P-0356 ([REDACTED]); KEN-OTP-P-0376 ([REDACTED]); KEN-OTP-P-0397 ([REDACTED]); KEN-OTP-P-0423 ([REDACTED]); KEN-OTP-P-0450 ([REDACTED]); and KEN-OTP-P-0471 ([REDACTED]).
10. In addition, two witnesses identified in the present application were not included in the Provisional List of Witnesses [REDACTED]; KEN-OTP-P-0336 ([REDACTED]); and KEN-OTP-P-0470 ([REDACTED]).

Submissions

11. The Prosecution submits that continued redaction of witness identities, like other redaction issues, requires the Chamber to balance the well-being of the witnesses against the effect that delayed disclosure may have on the Accuseds' fair trial rights. The relevant criteria are:

⁶ ICC-01/09-01/11-458, paragraph 30

⁷ ICC-01/09-01/11-461-Conf-Exp

⁸ [REDACTED]

- (i) the existence of an "objectively justifiable risk" to the safety of the person concerned which arises from disclosing the particular information to the Accused;⁹
- (ii) the infeasibility or insufficiency of less restrictive protective measures;¹⁰ 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".¹¹

12. 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.¹² In granting such relief, Trial Chamber II undertook a two part analysis that largely encompassed the standard discussed above.¹³

13. The use of delayed disclosure has also long been supported by the jurisprudence of the *ad hoc* Tribunals pursuant to witness security issues. At the ICTY, unredacted witness materials were generally required to be disclosed 30 days before trial,¹⁴ although several Chambers have permitted witness identities to be withheld until 30 days before testimony.¹⁵ The *Milosevic* Chamber went even further, authorizing delayed disclosure to the Accused of

⁹ ICC-01/04-01/07-475, paragraphs 71 and 97 ; ICC-01/09-01/11-458, paragraph 11

¹⁰ ICC-01/04-01/06-568, paragraph 37; ICC-01/04-01/06-773, paragraph 33 ; ICC-01/09-01/11-458, paragraph 11

¹¹ ICC-01/04-01/06-773, paragraph 34 ; ICC-01/09-01/11-458, paragraph 11

¹² ICC-01/04-01/07-1179-tENG, paragraphs 47-48.

¹³ ICC-01/04-01/07-1179-tENG, paragraph 34.

¹⁴ *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*"), paragraph 15.

¹⁵ *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, paragraph 13, page 6 (disposition).

witness identities until 10 days before testimony.¹⁶ The ICTY Appeals Chamber has upheld such protective measures.¹⁷ The ICTR also took a similar approach, permitting the “rolling” disclosure of witness identities with deadlines between 35¹⁸ and 21¹⁹ days before testimony.

14. Finally, if the redactions and continuing non-disclosure of the witness identities are authorized, the Prosecution acknowledges its obligation to undertake to provide disclosure as soon as there is a 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.

Submissions

15. All nine witnesses were referred to the VWU – to assess security and necessary protective measures – as soon as the Prosecution determined that it would seek to call them as witnesses at trial. [REDACTED]. However, once a determination is made by VWU regarding protective measures, additional time will be required for implementation.
16. For ease of presentation, the Prosecution has grouped the nine witnesses based on their prevailing security concerns: [REDACTED]. They will be addressed in turn below. Further individual-specific information regarding the security situation for each of these witnesses is provided in sub-Annex A of each witness’ annex.

¹⁶ *Prosecutor v. Milosevic*, First decision on Prosecution Motion for Protective Measures for Sensitive Source Witnesses, IT-02-54-T, 3 May 2002, paragraph 13.

¹⁷ See *Seselj Appeals Decision*, paragraph 15.

¹⁸ *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*”), paragraphs 23, 25.

¹⁹ *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, paragraph 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, paragraph 16.

I. [REDACTED]

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

17. Witnesses [REDACTED] provide [REDACTED] evidence [REDACTED] as charged by the Prosecution. [REDACTED].²⁰

18. [REDACTED] Further individual-specific information regarding the security situation for each of these witnesses is provided in sub-Annex A of each witness' annex.

19. [REDACTED]

20. [REDACTED].

21. [REDACTED]

22. [REDACTED]

23. [REDACTED] Further individual-specific information regarding the security situation for each of these witnesses is provided in sub-Annex A of each witness' annex.

24. [REDACTED]

25. [REDACTED] In the absence of appropriate protective measures, the disclosure of the identities of the witnesses in question unacceptably heightens the risk that they would be targeted and approached for interference by the Accused and their supporters.²¹

- ii) Less restrictive protective measures are infeasible and insufficient

26. Given the objective risks to the individuals as a result of their status as Prosecution witnesses, the individuals in question would not enjoy meaningful protection were the disclosure of their identities not delayed.

27. [REDACTED] witnesses in question has expressed strong concerns for their personal safety and that of their families should their identities be disclosed to the Accused prior to the implementation of protective measures. [REDACTED]

[REDACTED]

²¹ [REDACTED]

Disclosure of the identities of the witnesses without the requested delay would put these individuals at risk of interference, [REDACTED]

28. 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”.²² [REDACTED] The proposed delay in disclosing the witnesses’ identities will ensure VWU has sufficient time to put in place the appropriate protective measures before the full disclosure of their identities[REDACTED]

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

29. The Prosecution submits that any prejudice the Defence may experience from delayed disclosure is temporary, limited in scope, and not outweighed by the necessary considerations of Article 68(1) and by the Court’s inherent power to protect the integrity of the truth-seeking function. Though delayed, the Defence will nonetheless receive full disclosure sufficiently in advance to enable them to adequately prepare for the appearance of these witnesses before the Chamber at trial.

30. The substance or coherence of the statements and related materials will be largely unaffected by the proposed redactions. To the extent that redactions do not reveal the identity of the witness in question, they do not remove the value of the substantive content, including any information which may be exculpatory or relevant to the preparation of the Defence. The Defence will still be in a position to begin to assess the materials and prepare its case. Any difficulty in preparation caused as a result of not knowing the identity of the witness will be cured by the removal of the redactions 30 days prior to commencement of the trial. Disclosure 30 days prior to trial will enable the Defence to complement its preparation and cure any temporary prejudice

²² ICTY, *Prosecutor v Brdanin and Talic*, Decision on Motion by Prosecution for Protective Measures, IT-99-36-PT, 3 July 2000, paragraph 24; *see also Bagosora*, paragraph 20.

experienced from not knowing the identity of the witness until that point. Given this minimal prejudice and the fact that based on their security profiles there is no other option for the protection of these witnesses in the meantime, these redactions are therefore the least intrusive measures available.

31. [REDACTED] Full disclosure of the identities of the remaining Prosecution witnesses will occur at the stipulated time. As such, the Prosecution is only applying for the delayed disclosure of the identities of the witnesses for whom it is considered strictly necessary; this further minimizes any prejudice the Defence may experience.

32. Given the temporary and limited nature of the prejudice potentially experienced by the Defence, the delayed disclosure of the identities of these witnesses pending implementation of protective measures strikes the appropriate balance between the rights of the Accused under Article 67 and Rule 76, and the duty to take appropriate measures pursuant to Article 68(1) to protect the safety and well-being of the witnesses.

iv) The protective measures will be open to periodic review

33. The relief requested is temporary and limited in scope. Based on the current trial schedule delayed disclosure of the witnesses in question would delay the disclosure of the identities of these [REDACTED] witnesses by only two months. The need for periodic review is therefore less of an imperative than it would be were the Prosecution applying for redactions on a more long-term ongoing basis. In any event, the Chamber of course retains the ability to review its delayed disclosure rulings at any time, should conditions change.

II. [REDACTED]

34. Witnesses [REDACTED] are subject to the same risks as the [REDACTED] witnesses described in paragraphs 17 to 25 above and these submissions are incorporated by reference. In addition, there are further specific security considerations applicable [REDACTED]. Further individual-specific

information regarding the security situation for each of these witnesses is provided in sub-Annex A of each witness' annex.

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

35. Recent information received by the Prosecution [REDACTED]

36. [REDACTED]

37. [REDACTED]

38. [REDACTED]

39. [REDACTED]

40. [REDACTED]

41. [REDACTED]

42. [REDACTED]

43. [REDACTED]

44. [REDACTED]

45. [REDACTED]

46. [REDACTED]

47. [REDACTED]

48. [REDACTED]

49. [REDACTED]

- ii) Less restrictive protective measures are infeasible and insufficient

50. The submissions in paragraphs 26 to 28 above are equally applicable to these [REDACTED] witnesses and are incorporated by reference. [REDACTED], disclosure of his identity 30 days prior to trial would be insufficient [REDACTED] renders [REDACTED] situation exceptional and justifies further delayed disclosure of his identity.

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

51. The submissions in paragraphs 29 to 32 above are equally applicable to these [REDACTED] witnesses and are incorporated by reference.

iv) The protective measures will be open to periodic review

52. The submissions in paragraph 33 above are equally applicable to these [REDACTED] witnesses and are incorporated by reference.

III. [REDACTED]

53. [REDACTED]

i) There is an objectively justifiable risk to the witnesses' safety arising from the disclosure of their identities to the Accused

54. [REDACTED]

55. [REDACTED]

ii) Less restrictive protective measures are infeasible and insufficient

56. [REDACTED]

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

57. While the Prosecution acknowledges that the Defence may experience prejudice greater than that experienced with the other witnesses contained in this application, it submits that 30 days notice prior to testifying of the identity of this witness is nonetheless sufficient for the Defence witness to prepare. [REDACTED]

iv) The protective measures will be open to periodic review

58. The submissions in paragraph 33 above are equally applicable [REDACTED] and are incorporated by reference.

Proposed redactions

59. In order to protect the safety of the witnesses, as well as their families, victims or any other person identified in their statements and related materials, the Prosecution seeks to redact the names and any other information which tends to identify the witnesses or the above said persons.

Relief Requested

60. For the foregoing reasons, the Prosecution respectfully requests that the Chamber authorize, (i) the disclosure of the identities of Witnesses

[REDACTED] until 30 days prior to the start of the trial; (ii) the disclosure of the identity of Witnesses [REDACTED] until 30 days prior to their anticipated testimony; and (iii) the interim disclosure of the records of the interviews of the witnesses with the redactions included in sub-Annexes B and C of each witness' confidential, *ex parte* annex to this application.

61. Lastly, the Prosecution respectfully requests the Chamber to convene an *ex parte* Status Conference, with the presence of the VWU, so that the above-mentioned protection issues and the wider potential problem of witness relocation can be efficiently addressed.



Fatou Bensouda,
Prosecutor

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