

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 7 December 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.* FRANCIS KIRIMI MUTHAURA
AND
UHURU MUIGAI KENYATTA**

Public with Confidential *Ex parte* Annex A, Kenyatta and Muthaura Defence only

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

Sources: Defence for Uhuru Muigai Kenyatta
Defence for Francis Kirimi Muthaura

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

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I. INTRODUCTION

1. The Defence for Uhuru Muigai Kenyatta and Francis Kirimi Muthaura (respectively “Kenyatta Defence” and “Muthaura Defence”, collectively “Defence”) hereby submits the response to the “Prosecution Application for delayed disclosure of witness identities” (“Delayed Disclosure Application”).¹ The Defence opposes the requests in the Delayed Disclosure Application and submits that it is contrary to the interests of justice and the fair trial rights of the Accused for the Trial Chamber (“Chamber”) to authorise either:
 - a. The disclosure of the identities of Witnesses 219, 428, 429 and 430 only *30 days before the start of trial* (“pre-trial delayed disclosure”); or
 - b. The disclosure of Witness 118’s identity only *30 days before his anticipated testimony* (“post-trial commencement delayed disclosure”).
2. The Defence requests that the Chamber order the Prosecution to disclose the identities of all its witnesses no later than the scheduled date of 9 January 2013, pursuant to the order of the Chamber.²
3. The Defence has previously communicated its concerns regarding delayed disclosure, and submits that any further delay in respect of the disclosure of the identity of Prosecution witnesses is contrary to the fair trial rights of the Accused, and causes prejudice to the Defence concerning its ability to prepare as required in order to contest the charges.³ Any further extension of the

¹ ICC-01/09-02/11-519-Red.

² ICC-01/09-02/11-451, para. 19.

³ ICC-01/09-02/11-429, paras 7, 11, 22; for the oral submissions of the defence teams for Mr Muthaura and Mr Kenyatta on the Prosecution’s proposal for delayed disclosure see ICC-01/09-02/11-T-18, page 16, line 10 to page 17, line 1; page 17, lines 13-18; page 18, line 22 to page 20, line 5; page 20, lines 12-13; page 21, lines 5-10; page 22, lines 1-5.

delayed disclosure of the identities of Prosecution witnesses compounds this prejudice and unfairness to the Defence.

4. In support of its application, the Defence also submits an investigation report as Confidential and *ex parte* Annex A (“Annex A”). Annex A contains sensitive and confidential information related to Defence investigations and case theory and is not therefore disclosable to the Prosecution.

II. PROCEDURAL HISTORY

5. On 12 June 2012, the Chamber held a status conference. At the status conference, with reference to written submissions filed previously at the request of the Chamber,⁴ the parties made oral submissions on, *inter alia*, the Prosecution’s proposal for delayed disclosure.⁵
6. On 9 July 2012, the Chamber issued the “Decision on the schedule leading up to trial” (“Scheduling Decision”), ordering the Prosecution, *inter alia*, to:
 - a. Disclose to the Defence the identities of witnesses in the International Criminal Court Protection Programme (“ICCPP”) who have been the subject of an application for delayed disclosure by 11 February 2013;⁶ and

⁴ ICC-01/09-02/11-422; ICC-01/09-02/11-426; ICC-01/09-02/11-427; ICC-01/09-02/11-428; ICC-01/09-02/11-429; ICC-01/09-02/11-430.

⁵ For the oral submissions of the defence teams for Mr Muthaura and Mr Kenyatta on the Prosecution’s proposal for delayed disclosure see ICC-01/09-02/11-T-18, page 16, line 10 to page 17, line 1; page 17, lines 13-18; page 18, line 22 to page 20, line 5; page 20, lines 12-13; page 21, lines 5-10; page 22, lines 1-5.

⁶ ICC-01/09-02/11-451, para. 21.

- b. Disclose to the Defence the identities of witnesses not in the ICCPP who have been the subject of an application for delayed disclosure by 12 March 2013.⁷

7. In the Scheduling Decision, the Chamber stated that these deadlines “are without prejudice to the Chamber's authority to authorise disclosure after these dates on an exceptional basis and where justified by security concerns.”⁸
8. On 7 November 2012, the Prosecution filed the Delayed Disclosure Application.
9. On 26 November 2012, the Chamber ordered the Prosecution to disclose the witness statements and transcripts that formed the basis of the Delayed Disclosure Application by no later than 30 December 2012.⁹ The Chamber also extended the deadline for the Defence to respond to 7 December 2012.¹⁰
10. On 30 November 2012, the Prosecution disclosed 78 items to the Defence.¹¹ In respect of the items bearing non-standard justifications, the Prosecution referred the Chamber to the Delayed Disclosure application and the “Fifth Prosecution application for the authorisation of non-standard redactions pursuant to Decision ICC-01/09-02/11-495” (Fifth Redactions Application’).¹²
11. On 3 December 2012, the Chamber dismissed the Fifth Redactions Application and directed the Defence not to submit a response.¹³

⁷ ICC-01/09-02/11-451, para. 24.

⁸ ICC-01/09-02/11-451, para. 13.

⁹ ICC-01/09-02/11-541, para. 7.

¹⁰ ICC-01/09-02/11-541, para. 7.

¹¹ ICC-01/09-02/11-554; ICC-01/09-02/11-554-Conf-AnxA.

¹² ICC-01/09-02/11-544 .

¹³ ICC-01/09-02/11-552.

12. On 7 December 2012, the deadline date for the filing of the Defence's response to the Delayed Disclosure Application, the Defence received the Prosecution's "Lesser Redacted Version of the 5 November 2012 'Prosecution Application for delayed disclosure of witness identities' (ICC-01/09-02/11-519-Conf-Exp; ICC-01/09-02/11-519-Red)" ("Less Redacted Version"), which was filed by the Prosecution on 6 December at 16.23pm.¹⁴ This filing contains unfounded conjecture and unacceptable imputations against the Defence, which will be responded to in due course pursuant to Regulations 33 and 34 of the Regulations of the Court. It is not apparent to the Defence why this information was not provided at an earlier stage so as to provide sufficient time for the Defence to include its submissions on this new information within this response; efficiency and effective use of judicial time militates in favour of such an approach.

III. SUBMISSIONS

(A) The Chamber Should Not Authorise Disclosure of the Identities of Prosecution Witnesses 219, 428, 429 and 430 30 Days Before the Start of Trial

- (i) *Pre-Trial Delayed Disclosure is Inconsistent With the Rights of the Defence to be Afforded Adequate Time and Facilities to Prepare for Trial*

Credibility

13. Pre-trial delayed disclosure disproportionately affects the Defence's ability to prepare adequately for trial in respect of Defence investigations.¹⁵ In the present

¹⁴ ICC-01/09-02/11-519-Conf-Red2.

¹⁵ Article 64(3)(c) of the Rome Statute states: "Upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall... [s]ubject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of

case, the Defence has serious concerns as to the credibility of a number of crucial Prosecution witnesses who claim to be 'Mungiki insiders'.¹⁶ Evidence disclosed by the Prosecution, and discovered as a result of past and present Defence investigations has exhibited a worrying trend in which Prosecution witnesses change or offer to change their testimony to suit their audience.¹⁷ Accordingly, the credibility of all Prosecution witnesses, an issue which cannot be examined in the absence of the witnesses' identities, lies at the very heart of Defence investigations.

14. Given the immediate need for the Defence to conduct investigations into the credibility of those witnesses the Prosecution wishes to call to testify in relation to the acts and conduct of the Accused, the Defence is not persuaded by the Prosecution's statement that pre-trial delayed disclosure would not unduly prejudice the Accused's fair trial rights because "the redacted transcripts provide the Defence with much of the substance of the Insiders' accounts."¹⁸ The extent of the redactions applied to the witness statements and transcripts that are the subject of the Delayed Disclosure Application prevents the Defence from conducting any meaningful investigations into the credibility and the character of these witnesses.¹⁹ Defence investigations into the character and credibility of Prosecution witnesses cannot take place in the absence of

the commencement of the trial to enable adequate preparation for trial." Similarly, see Article 67(b): "In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality...to have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence."

¹⁶ In particular, Prosecution Witnesses 4, 11 and 12.

¹⁷ Compare, for example, Witness 4's various accounts, which contain retractions and a number of worrying inconsistencies in respect of key Prosecution allegations, including (a) his admission that he lied to the Prosecution regarding his presence at an alleged meeting between politicians and Mungiki members at the Yaya Centre on 17 November 2007 (KEN-OTP-0067-0604_R01, paras 7-9); (b) his admission that he lied to the Prosecution and the Waki Commission regarding his presence at an alleged meeting between politicians and Mungiki members at State House on 26 November 2007 (KEN-OTP-0067-0604_R01, paras 10-13); and (c) his initial indication that he was not present at the Nairobi Members' Club on 3 January 2008 (KEN-OTP-0043-0083_R01, para. 33.), and his later contradictory assertion that he did attend (KEN-OTP-0043-0002_R01, paras 188-208; KEN-OTP-0051-1045_R01, paras 36, 50-54; KEN-OTP-0067-0604_R01, paras 14-15).

¹⁸ Delayed Disclosure Application, para. 26.

¹⁹ The 78 documents disclosed on 30 November 2012 contain extensive redactions under category B.1.

identifying information. For the Defence to be fully prepared to answer the Prosecution case, it must be able to investigate adequately in advance of trial in respect of the credibility of the witnesses themselves, and not merely the allegations they make.

15. Further, the information that the witnesses “are former Mungiki members” is too vague to provide sufficient context against which to evaluate their accounts.²⁰ Given the nature of the allegations in the present case, the Defence must be provided with sufficient information, prior to the commencement of trial, to enable it to conduct investigations into whether a particular Prosecution witness was at a certain location at a particular time as alleged, and who he or she was allegedly with.
16. Notwithstanding the Defence’s request to the Chamber to deny the Delayed Disclosure Application, as an interim measure, the Defence requests the Chamber to order the Prosecution to provide immediately a written summary of the redacted material in a manner that does not reveal the witnesses’ identities.²¹

Practical Deficiencies of Delayed Disclosure

17. In this case, where the Defence has consistently submitted that the Prosecution is relying upon false and lying witnesses whose stories do not stand up to proper and thorough investigation, the Chamber is referred to Annex A. In Annex A, the Kenyatta Defence informs the Chamber of the investigative steps it has taken and the necessity of having the identities of witnesses disclosed sufficiently in advance of the start of trial proceedings in order to undertake Defence investigations to challenge the Prosecution evidence and case theory.

²⁰ Delayed Disclosure Application, para. 26.

²¹ The Defence makes this request pursuant to paragraph 29 of the Delayed Disclosure Application.

The Chamber is referred to the conditions within Kenya, which make investigations difficult, particularly with respect to locating the whereabouts of individuals and their actual movements five years ago. Such conditions require a great deal of painstaking research and investigation that cannot be conducted in the short timeframes proposed by the Prosecution. Such investigation is necessary in this case in order to establish the truth and test the veracity of the Prosecution's evidence. Further, the extensive scale of the evidence disclosed to the Defence in the months following the confirmation of charges decision, when considered alongside the Prosecution application for pre-trial delayed disclosure regarding the relevant witnesses, all of whom allegedly speak directly to the facts in support of the Prosecution case, imposes an immense and wholly unfair burden upon the Defence in relation to conducting such large-scale and intensive investigations prior to trial.

18. In order to prepare adequately for trial, and to examine effectively the issue of witness credibility, the Defence must employ a range of investigative techniques which are rendered less effective by pre-trial delayed disclosure. In order to identify, interview and draft statements in respect of individuals with relevant knowledge relating to Prosecution witnesses, the Defence must be provided with adequate time, prior to the commencement of trial, in which to carry out these investigations and prepare for cross-examination.

(ii) The Delayed Disclosure Application Fails to Establish that Pre-Trial Delayed Disclosure Advances the Protective Interests of the Witnesses in a Manner Proportionate to the Detriment Suffered by the Defence

19. The Defence submits that pre-trial delayed disclosure is not necessary and is disproportionate as a protective measure. In terms of necessity, the Defence refutes the Prosecution's contention that investigations into the credibility and

reliability of a Prosecution witness will necessarily endanger or create a risk in respect of that witness. Under Article 54(1), the Prosecution is under an obligation to investigate incriminating and exonerating circumstances equally. Accordingly, if the Prosecution is able to use methods that permit inquiry into the credibility of its witnesses without endangering the witness in question, the Defence is equally able to utilise the same safety precautions during the course of its investigations. Indeed, the Chamber has issued a protocol governing the handling of confidential information,²² including the use of information related to protected persons during investigations.

20. If, however, the Chamber considers that a risk inevitably emanates from the Defence's investigations into protected Prosecution witnesses, then this risk will exist irrespective of whether the investigations are conducted prior to the start of trial, or following the commencement of proceedings.

(B) The Chamber Should Not Authorise Disclosure of the Identity of Witness 118 30 days Before His Anticipated Testimony

- (i) The Rome Statute, Rules of Procedure and Evidence and the Scheduling Decision do not Provide for Post-Trial Commencement Delayed Disclosure

21. The Defence submits that the relevant provisions of the Rome Statute ("Statute") and the Rules of Procedure and Evidence ("Rules") do not permit or envisage the concept of post-trial commencement delayed disclosure.

Rome Statute

22. The Defence submits that post-trial commencement delayed disclosure contravenes Article 68(1) of the Statute, which states that protective measures

²² ICC-01/09-02/11-469-Anx.

must not be “prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”²³ Under Article 68(5) of the Statute, although the Prosecutor may withhold evidence on the basis of security concerns, this power is relevant only “for the purposes of any proceedings conducted prior to the commencement of the trial”. Therefore, in contravention of Article 68(1), post-trial commencement delayed disclosure would prevent the Defence from exercising its right to receive evidence and information in its original form before the commencement of trial. Further, if the Chamber permitted such delayed disclosure, it would act in contravention of its duty under Article 64(3)(c) to “provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of trial to enable adequate preparation for trial.”

23. In support of its interpretation, the Defence refers to the jurisprudence of the Appeals Chamber, which has previously held that the Defence would not be unduly prejudiced by a decision allowing the Prosecution to continue investigations post-confirmation hearing, as the Chamber was bound by Article 64(3)(c) to ensure that disclosure took place sufficiently in advance of the commencement of trial to enable adequate preparation.²⁴
24. The Defence submits that the intention of the drafters of the Statute would be disregarded if the Chamber were to permit post-trial commencement delayed disclosure. Importantly, Article 64(2) states that “[t]he Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with *full respect* for the rights of the accused and *due regard* for the protection of victims and

²³ Rome Statute, Article 68(1).

²⁴ 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", *The Prosecutor v Thomas Lubanga Dyilo*, 13 October 2006, ICC-01/04-01/06-568, para 55.

witnesses” (emphases added).²⁵ It is clear that the rights of the Accused are to be given primary consideration.²⁶ The Prosecution is therefore under a duty to effect full disclosure, including the identities of Prosecution witnesses, before the commencement of trial.²⁷

Rules of Procedure and Evidence

25. The system of delayed disclosure proposed by the Prosecution is not supported by Rule 81(4), which only authorises “the non-disclosure of [the identities of victims and witnesses] *prior to the commencement of the trial*” (emphasis added). The Appeals Chamber has also defined the clear limitations on the Court’s power to impose protective measures in accordance with Rule 81(4), stating: “The protection of victims and witnesses and that of members of their families may justify the nondisclosure of their identity *prior to the trial*, as provided in rule 81 of the Rules” (emphasis added).²⁸

²⁵ See Judge Stephen’s textual analysis of Article 20(1) of the International Tribunal for the Former Yugoslavia (“ICTY”) Statute, which has been consistently applied in later cases at the Tribunal; Separate Opinion of Judge Stephen on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, *The Prosecutor v Dusho Tadic*, 10 August 1995, ICTY-94-1-T.

²⁶ “The Prosecution asserts that the duty to provide for the protection and privacy of the witnesses is an affirmative one. The measures which are appropriate should be determined after balancing the right of the accused to a fair and public trial and the protection of victims and witnesses. These propositions are uncontroversial. What is clear from the Statute and Rules of the Tribunal is that *the rights of the accused are given primary consideration, with the need to protect victims and witnesses being an important but secondary one*” (emphasis added), Decision on Prosecution Motion for Provisional Protective Measures Pursuant to Rule 69, *The Prosecutor v Slobodan Milosevic*, 19 February 2002, IT-02-54-T, para 23. See also Decision on Protective Measures for Witnesses, *Prosecutor v Radovan Karadzic*, 30 October 2008, IT-95-5/12-PT, para. 20.

²⁷ “The philosophy which imbues the Statute and the Rules of the Tribunal appears clear: the victims and witnesses merit protection, even from the accused, during the preliminary proceedings and continuing until a reasonable time before the start of the trial itself; *from that time forth, however, the right of the accused to an equitable trial must take precedence and require that the veil of anonymity be lifted in his favour*, even if the veil must continue to obstruct the view of the public and the media. How can one conceive of the accused being afforded an equitable trial, adequate time for preparation of his defence, and intelligent cross-examination of the Prosecution witnesses if he does not know from where and by whom he is accused?” (emphasis added), Decision on the Request of the Prosecutor dated 17 October 1997 for Protective Measures for Victims and Witnesses, *The Prosecutor v Tihomir Blaskic*, 5 November 1996, IT-95-14-T, paras 24-25. See also: Decision on Motion by Prosecution for Protective Measures’, *The Prosecutor v Radoslav Brdanin and Momir Talic*, 3 July 2000, IT-99-36-PT, paras 32, 38 and 65.

²⁸ Judgment on Victim Participation in the Investigation Stage of the Proceedings in the Appeal of the OPCD Against the Decision of Pre-Trial Chamber I of 7 December 2007 and in the Appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, *The Situation in The Democratic Republic of Congo*, 19 December 2008, ICC-01/04-556, para. 50.

26. Rule 76 sets out the procedure to be applied regarding pre-trial disclosure relating to Prosecution witnesses. Disclosure after the start of trial is precluded under Rule 76(1), as it is clear the provision envisages that *pre-trial* disclosure take place “sufficiently in advance to enable the adequate preparation of the defence”, and should include the names and copies of previous statements of witnesses whom the Prosecutor intends to call to testify.
27. The Defence submits that it is the clear intention of Rule 76 that full disclosure must take place before the commencement of the trial in order to permit the Defence to have an adequate opportunity to challenge the evidence relied upon in accordance with the right to a fair trial.²⁹

(ii) *The Prosecution Misrepresents the Jurisprudence of the Court and the ad hoc Tribunals in Support of its Arguments Regarding Post-Trial Commencement Delayed Disclosure*

ICC

28. In support of the Delayed Disclosure Application, the Prosecution has mischaracterised the jurisprudence of Trial Chamber II in *Katanga and Ngudjolo*.³⁰ The Defence submits that the circumstances in which Trial Chamber II permitted delayed disclosure 45 days prior to testimony can be wholly distinguished from the case of Witness 118.³¹

²⁹ In *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, the Appeals Chamber held that when interpreting provisions of the Statute or Rules, the Chamber may refer to the Vienna Convention of the Law of Treaties (“VCLT”), and Article 32 of the VCLT states that it is permissible to have recourse to preparatory works in order to confirm the interpretation of the plain text or to clarify ambiguous or inconsistent terms; Judgment on the Appeal Against the Decision on Joinder Rendered on 10 March 2008 by the Pre-Trial Chamber in the Germain Katanga and Mathieu Ngudjolo Chui Cases, 9 June 2008, ICC-01/04-01/07-573, para. 5.

³⁰ Delayed Disclosure Application, para.7.

³¹ The example cited by the Prosecution relates to Witness 353; Public Redacted Version of the “Decision on the Protection of Prosecution Witnesses 267 and 353 of 20 May 2009 (ICC-01/04-01/07-1156-Conf-Exp)”, *Katanga and Ngudjolo*, 28 May 2009; ICC-01/04-01/07-1179-tENG.

29. In *Katanga and Ngudjolo*, the Trial Chamber authorised disclosure after the start of the trial in respect of one witness only, Witness 353, emphasising that her case was “truly exceptional” and based on factors which were “very specific” to the witness in question.³² Unlike Witness 118, who the Prosecution alleges has “unique knowledge regarding the organisation’s operations in the PEV and the Accused’s role therein”, Witness 353 did not testify as to the acts and conduct of the defendant.³³ Importantly, in *Katanga*, the defence did not object to the application for delayed disclosure,³⁴ and counsel for Mr Ngudjolo chose not to examine Witness 353.³⁵
30. As with other alleged witnesses that speak to the acts and conduct of the Accused, as opposed to crime base evidence, in order to ensure adequate preparations for trial, the Defence will have to undertake substantial and detailed investigations into, *inter alia*, the veracity of the allegations made, and the background and credibility of each witness. Accordingly, any argument that seeks to rely on Trial Chamber II’s treatment of Witness 353 to support the

³²The Chamber also stated: “only one victim out of all those whom the Prosecutor intends to call during the hearings on the merits is affected by this exceptional measure. In any event, the Chamber must stress that, *at the commencement of the hearings on the merits, the Defence will know the identity of all the prosecution witnesses, with only the exception of Witness 353*” (emphasis added); Public Redacted version of the “Decision on the Protection of Prosecution Witnesses 267 and 353 of 20 May 2009 (ICC-01/04-01/07-1156-Conf-Exp)”, *Katanga and Ngudjolo*, 28 May 2009; ICC-01/04-01/07-1179-tENG, para. 48.

³³ From the witness summaries of Witness 353’s evidence, it is clear that she gave evidence only in relation to the crime base; http://www.iccnw.org/documents/Katanga-Ngudjolo_Weekly_Summary_1-5_November_2010.pdf; http://www.iccnw.org/documents/Katanga-Ngudjolo_Weekly_Summary_8-12_November_2010.pdf.

³⁴ Note, however, the opinion of the Appeals Chamber in a later decision in *Katanga and Ngudjolo* concerning victim participation: “The Appeals Chamber underscores that the Statute and the Rules of Procedure and Evidence provide that disclosure by the Prosecutor should, in principle, *take place prior to the commencement of trial*. Pursuant to article 61(3) of the Statute and rules 121(3) and (5) of the Rules of Procedure and Evidence, the Prosecutor must disclose all of the evidence intended for use at the confirmation hearing prior to that hearing. After the confirmation hearing, pursuant to article 64 (3) (c) of the Statute, the *Trial Chamber shall ‘provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial’*. The Statute, Rules of Procedure and Evidence and Regulations of the Court also emphasise the duty of the Chamber to ensure that the *Prosecutor discloses, prior to the commencement of trial, any evidence not previously disclosed during the pre-trial phase of the case*” (emphases added); Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled “Decision on the Modalities of Victim Participation at Trial”, *Katanga and Ngudjolo*, 16 July 2010, ICC-01/04-01/07-2288, para 43.

³⁵ http://www.iccnw.org/documents/Katanga-Ngudjolo_Weekly_Summary_8-12_November_2010.pdf.

delayed disclosure of key Prosecution witnesses in the present case is unfounded and without merit.

31. Given the inapplicability of the *Katanga and Ngudjolo* jurisprudence to the Delayed Disclosure Application, the Defence submits that the Chamber cannot afford any weight to the Prosecution's submission that "the relief sought by the Prosecution has previously been granted at this Court."³⁶ Indeed, post-trial delayed disclosure has been denied in the cases of *Bemba* and *Lubanga*, in which full disclosure of the Prosecution case was ordered to take place three months prior to the commencement of trial to allow the Defence to conduct investigations.³⁷ In a later decision in *Bemba*, the Trial Chamber exceptionally permitted the Prosecution to submit additional evidence (which was not in its control prior to this date) after the three-month deadline. However, it rejected a Prosecution request to delay the disclosure of the identity of two witnesses until thirty days prior to the commencement of the trial, finding that the "proposed procedure [was] likely to lead to significant preparation difficulties for the defence if they are only able to commence substantive research into his evidence so close to the trial date."³⁸ The Chamber therefore ruled that the Prosecution would be permitted to rely upon the two witnesses in question only if they disclosed the statements, including their identities, in non-redacted form by 20 May 2010, the earliest practicable opportunity following the date of the decision.³⁹ Given that the trial was scheduled to start on 5 July 2010, the

³⁶ Delayed Disclosure Application, para. 7.

³⁷ Decision Regarding the Timing and Manner of Disclosure and the Date of Trial, *The Prosecutor v Thomas Lubanga Dyilo*, 9 November 2007, ICC-01/04-01/06-1019, para. 21; Order on Disclosure of Evidence by the Office of the Prosecutor, *The Prosecutor v Jean-Pierre Bemba Gombo*, 4 November 2009, ICC-01/05-01/08-590.

³⁸ Decision on the Prosecution's Second Application for Disclosure of Additional Evidence ICC-01/05-01/08-767-Conf-Exp)", *The Prosecutor v Jean-Pierre Bemba Gombo*, 7 May 2010, ICC-01/05-01/08-767-Red2, para. 27.

³⁹ Decision on the Prosecution's Second Application for Disclosure of Additional Evidence ICC-01/05-01/08-767-Conf-Exp)", *The Prosecutor v Jean-Pierre Bemba Gombo*, 7 May 2010, ICC-01/05-01/08-767-Red2, paras 27-28.

decision of the Trial Chamber equates to an order to disclose at least 56 days prior to the commencement of the trial.

32. Finally, the Defence draws the attention of the Chamber to the case of *Banda and Jerbo*, in which, notwithstanding the absence of a trial date, the Prosecution has disclosed the identities of all witnesses to the Defence.⁴⁰

ICTY

33. In *Brdanin*, although limited disclosure after the start of the trial was permitted (the trial commenced on 23 January 2002 and the Prosecution filed a protective measures request on 6 November 2002), the Prosecution had obtained the witness statement *after* the commencement of the trial, and the Defence did not oppose the protective measures sought.⁴¹ *Brdanin* can therefore be distinguished from the present case, as, in the former, it was not possible for the Prosecution to disclose the name of the witness before trial.
34. The *Milosevic* case was also exceptional in that after the trial commenced, the Appeals Chamber overturned the Trial Chamber's decision to have separate trials for Kosovo, Bosnia and Croatia.⁴² Since pre-trial disclosure had only taken place in respect of the Kosovo case prior to the commencement of the trial, the Prosecution had to start disclosing materials relating to Bosnia and Croatia after the commencement of the trial.⁴³

⁴⁰ Prosecution's Submissions on the Possible Date for Commencement of the Trial, *The Prosecutor v Banda & Jerbo*, 19 November 2012, ICC-02/05-03/09-421-Red, para. 1.

⁴¹ For the Prosecution's submissions on this point see paragraph 8 of the Delayed Disclosure Application; see also: Decision on the Prosecution's Twelfth Motion for Protective Measures for Victims and Witnesses, *The Prosecutor v Radoslav Brdanin*, 12 December 2002, IT-99-36-PT, para 13.

⁴² Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, *The Prosecutor v Slobadan Milosevic*, 1 February 2002, IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73; Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, , *The Prosecutor v Slobadan Milosevic*, 18 April 2002, IT-99-37-AR73, IT-01-50-AR73, IT-01-51-AR73.

⁴³ For the Prosecution's submissions on this point see paragraph 8 of the Delayed Disclosure Application; see also: First Decision on Prosecution Motion for Protective Measures for Sensitive Source Witnesses, *The Prosecutor v Milosevic*, 3 May 2002, IT-02-54-T, para 13.

(iii) Post-Trial Commencement Delayed Disclosure is Inconsistent With the Right of the Defence to be Afforded Adequate Time and Facilities to Prepare for Trial

35. In the event that disclosure is provided after the start of the trial, the Defence is disadvantaged *vis-à-vis* the Prosecution with respect to preparation by reason of the fact it will be engaged in conducting a trial at the same time as carrying out investigations. Further, most of the investigative work will have to take place in Kenya, whereas counsel and other members of the Defence will be at the seat of the Court in The Hague,⁴⁴ and will have the majority of their attention focused on trial preparation. Important investigative work – which often requires significant planning and organisation and the direct involvement of counsel – would therefore have to be carried out during the trial. This situation would unfairly and unnecessarily stretch the resources of the Defence. Similarly, the Accused will have limited time to review relevant materials and provide instructions to counsel on newly disclosed information.
36. Furthermore, disclosure after the start of trial prevents the Defence from putting crucial information to witnesses in cross-examination, which is necessary to test fully the Prosecution case, and to address directly the allegations of Prosecution witnesses. In the event that Prosecution Witness B's identity was to be withheld until after the start of trial, the Defence would be unable to question previously-called Prosecution Witness A (unless Witness A is willing and able to be recalled) as to Witness B's presence or conduct at a given time or place. Similarly, when cross-examining Witness B, the Defence would have been deprived of the benefit of Witness A's answers (unless Witness B is willing and able to be recalled). In addition to breaching the

⁴⁴ The Defence notes the pending application of the Muthaura Defence before the Presidency to change the venue for the trial to Kenya or Tanzania (ICC-01/09-02/11-551).

Defence's right to adequate time and facilities in which to prepare, the late service of disclosure deprives the Defence of its right to explore fully the contours of the Prosecution's case.

37. The Defence refers the Chamber to its previous arguments at paragraphs 13 to 18, which support, *mutatis mutandis*, the current submission.

(iv) The Delayed Disclosure Application Fails to Establish That Post-Trial Commencement Delayed Disclosure Advances the Protective Interests of the Witnesses in a Manner Proportionate to the Detriment Suffered by the Defence

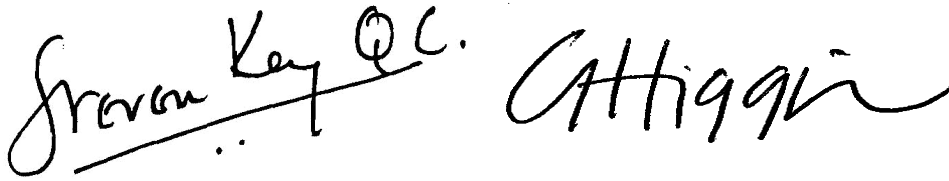
38. The Defence refers the Chamber to its previous arguments at paragraphs 19 to 20, which support, *mutatis mutandis*, the current submission.

IV. RELIEF REQUESTED

39. The Defence respectfully requests that the Chamber:

- a. Deny the Prosecution's request to disclose the identities of Witnesses 219, 428, 429 and 430, just 30 days before the start of trial;
- b. Deny the Prosecution's request to disclose Witness 118's identity only 30 days before his anticipated testimony;
- c. Order the Prosecution to disclose to the Defence the identities of all witnesses no later than 9 January 2012; and
- d. As an interim measure, order the Prosecution immediately to provide written summaries of the redacted material concerning Witnesses 219, 428, 429, 430 and 118 to the Defence in a manner that does not reveal their identities.

Respectfully Submitted,

Handwritten signatures of Steven Kay QC and Gillian Higgins. The signature of Steven Kay QC is on the left, and the signature of Gillian Higgins is on the right.

Steven Kay QC and Gillian Higgins
On behalf of Uhuru Muigai Kenyatta
At London, England

Handwritten signature of Karim A.A. Khan QC.

Karim A.A. Khan QC
Lead Counsel, Muthaura Defence
At The Hague, the Netherlands

Dated this 7th Day of December 2012