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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 Redacted Version of the 7 December 2012 “Second Prosecution application for delayed disclosure of witness identities and application for variation of the 5 November 2012 deadline with respect to Witness 334”

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Other

1. The Prosecution hereby requests the delayed disclosure of the identities of seven additional witnesses.¹ The following table details the witnesses and the relief sought:

Witness Code	Name	Requested disclosure timetable
KEN-OTP-P-0232	[REDACTED]	45 days before testimony. ²
KEN-OTP-P-0334	[REDACTED]	45 days before testimony. ³
KEN-OTP-P-0493	[REDACTED]	30 days before trial. ⁴
KEN-OTP-P-0494	[REDACTED]	30 days before trial. ⁵
KEN-OTP-P-0505	[REDACTED]	45 days before testimony. ⁶
KEN-OTP-P-0506	[REDACTED]	30 days before trial. ⁷
KEN-OTP-P-0510	[REDACTED]	30 days before trial. ⁸

2. None of the seven witnesses is currently in the International Criminal Court Protection Programme (“ICCPP”). The Prosecution referred the relevant witnesses to the Victims and Witnesses Unit (“VWU”) for protective measures, such as inclusion in the ICCPP, promptly after their interviews,⁹ and is working with the VWU to implement protection solutions in the shortest possible time. Each witness has 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

¹ ICC-01/09-02/11-495-AnxA-Corr, para 53.

² ICC-01/09-02/11-451, para 13.

³ ICC-01/09-02/11-451, para 13.

⁴ ICC-01/09-02/11-451, para 24.

⁵ ICC-01/09-02/11-451, para 24.

⁶ ICC-01/09-02/11-451, para 13.

⁷ ICC-01/09-02/11-451, para 24.

⁸ ICC-01/09-02/11-451, para 24.

⁹ Witness 493 and 494’s interviews were concluded in [REDACTED] 2012 and the referrals were submitted to the VWU on [REDACTED] 2012. The interviews of Witnesses 232, 505, 506 and 510 were conducted in [REDACTED] 2012 and their referrals were submitted on [REDACTED](232 and 505) and [REDACTED](506 and 510). [REDACTED].

Article 68(1) of the Statute that properly balances the well-being of the witnesses and the integrity of the case with the Accuseds' rights under Article 67 of the Statute and Rule 76, as Article 64(2) of the Statute requires.

Confidentiality

3. This application is designated confidential *ex parte* because (i) it contains the names of witnesses, their locations and security situations, the redactions and/or delayed disclosure of which is sought in this application; and (ii) refers to an exchange at the 28 November 2012 *ex parte* status conference regarding witness security issues, the transcript of which is currently classified as *ex parte*.¹⁰ A redacted version of this application will be filed.

Procedural history

4. In the protocol establishing a redaction regime in this case ("Protocol"),¹¹ the Chamber instructed that:

[A]ny witnesses identified by the Prosecution after 5 November 2012 with regard to whom the Prosecution seeks to temporarily withhold their identities from the defence, the prosecution shall disclose any witness statement or related information to the defence in redacted form and seize the Chamber with an application for redactions . . .¹²

5. At the 28 November 2012 *ex parte* status conference, [REDACTED].¹³
[REDACTED].¹⁴ [REDACTED].¹⁵
6. It was anticipated at the time of the 28 November 2012 status conference that the transcripts for Witnesses and 493 and 494 would be completed before 7 December. However, for logistical reasons, the interview transcripts

¹⁰ ICC-01/09-02/11-T-20-CONF-EXP-ENG. The Prosecution suggests that it would be appropriate to also change the confidentiality designation of relevant pages of that transcript. *See infra* para 46.

¹¹ ICC-01/09-02/11-495-AnxA-Corr.

¹² ICC-01/09-02/11-495-AnxA-Corr, para 53.

¹³ ICC-01/09-02/11-T-20-CONF-EXP-ENG, page 2.

¹⁴ ICC-01/09-02/11-T-20-CONF-EXP-ENG, pages 2-3.

¹⁵ ICC-01/09-02/11-T-20-CONF-EXP-ENG, page 2.

are not yet complete. Mindful of the final deadline for disclosure,¹⁶ the Prosecution is making best efforts to ensure that the transcripts are finalised, filed and disclosed as soon as possible. Related witness materials, however, are annexed to this application and will be disclosed to the Defence in redacted form today.

7. To expedite the process, the Prosecution is filing its application now – without the transcripts for Witnesses 493, 494, 505, 506 and 510 – to provide the Chamber and the Defence with as much time as possible to consider this request. As soon as each transcript is completed, it will be filed with the Chamber and a redacted version will be disclosed to the Defence.¹⁷ The Prosecution also proposes to file and disclose draft versions of the relevant transcripts, as and when they are complete, both to assist the Chamber in considering this application, and the Defence in its preparation for trial. The statements for Witnesses 232 and 334 are attached as Annexes C and D.
8. The Prosecution anticipates that the remaining transcripts will be available to file and disclose on the following schedule: Witness 493 (21 December 2012); Witness 494 (3 January 2012); Witness 506 (12 January 2013); Witness 510 (17 January 2013); Witness 505 (25 January 2013). If they are finalized earlier, the Prosecution will file and disclose them immediately.

Timeliness

9. Paragraph 51 of the Protocol provides that applications for delayed disclosure for witnesses included on the 16 October 2012 provisional witness list “are to be filed with the Chamber by 5 November 2012”.¹⁸ Paragraph 53 establishes the procedure for applying for delayed disclosure of witnesses “identified after 5 November” but does not establish a specific

¹⁶ ICC-01/09-02/11-T-20-CONF-EXP-ENG, page 3.

¹⁷ ICC-01/09-02/11-541, paras 1, 7.

¹⁸ ICC-01/09-02/11-495-AnxA-Corr, para 51.

timeline.¹⁹ The Protocol does not establish deadlines or a procedure for witnesses identified between 16 October and 5 November 2012. Witnesses 493 and 494 fall into this category, having been interviewed between [REDACTED] and [REDACTED] 2012, and Witnesses 232, 505, 506, and 510 were identified after 5 November 2012.

10. Given the apparent lacuna in the Protocol – with respect to witnesses identified between 16 October and 5 November -- the Prosecution submits that it is appropriate to apply the procedure in paragraph 53 of the Protocol to the applications for delayed disclosure of Witness 493 and 494's identities. To this end, the Prosecution will disclose today the witness-related materials included in Annexes E and F. As discussed above, the remaining materials will be disclosed to the Defence and provided to the Chamber as soon as they are available. The same proposed procedure would also apply to Witnesses 232, 505, 506 and 510, who were interviewed after 5 November 2012.

11. As regards Witness 334, the Prosecution recognises that he was interviewed prior to the submission of the 16 October provisional witness list.²⁰ When the provisional list was submitted, the Prosecution did not identify a need to delay the disclosure of his identity.²¹ However, since the Prosecution's 5 November 2012 application for delayed disclosure was filed,²² new information regarding attempts to interfere with provisional Prosecution witnesses has emerged that has necessitated a re-evaluation of this position.

12. *First*, [REDACTED],²³ [REDACTED] explained that he had been approached [REDACTED] by a purported [REDACTED] intermediary who (i) offered a

¹⁹ ICC-01/09-02/11-495-AnxA-Corr, para 53.

²⁰ See Annex D.

²¹ ICC-01/09-02/11-495-AnxA-Corr, para 51.

²² ICC-01/09-02/11-519-Red.

²³ [REDACTED].

large sum of money to dissuade him from providing evidence to the Prosecution; and (ii) proposed to [REDACTED].²⁴ [REDACTED].²⁵ The intermediary contacted [REDACTED] again in [REDACTED], reiterating that the money was still available and asserting that [REDACTED] also has a team “taking statements and paying people money”.²⁶

13. *Second*, on 5 November 2012, after it filed the application, the Prosecution learned that [REDACTED].

14. *Third*, on 21 November 2012, [REDACTED] reported that he had recently spoken to [REDACTED], who stated that he knows where [REDACTED] has been relocated.²⁷ [REDACTED].²⁸ [REDACTED].

15. The above-information suggests that attempts to identify, locate and interfere with Prosecution witnesses are escalating, with a concomitant impact on their security. In light of the above, the Prosecution now considers it necessary to seek delayed disclosure for Witness 334, particularly given the fact that [REDACTED], as explained below. To this end, the Prosecution requests the Chamber to (i) vary the 5 November 2012 deadline with respect to Witness 334; and (ii) consider the present application for delayed disclosure of his identity. Such a variation is appropriate under Regulation 35(2) because the need to delay the disclosure of Witness 334’s identity became clear only after 5 November 2012, and is therefore “outside [the Prosecution’s] control”.²⁹

²⁴ See Annex A, page 3.

²⁵ See Annex A, page 3.

²⁶ See Annex A, page 3.

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ Regulation 35(2) of the Regulations of the Court.

Submissions

I. Witnesses 493, 494, 506 and 510.

16. The Prosecution seeks authorisation to disclose the identities of Witnesses 493, 494, 506 and 510 (together, the “Insiders”) 30 days before trial.³⁰ They are former Mungiki members who provide substantial evidence regarding the Mungiki’s involvement in the post-election violence period (“PEV”) and the Accuseds’ contributions thereto. 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.

17. *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 and substantially incriminating evidence that cannot be obtained from other sources. For example:

- Witness 493 [REDACTED] provides evidence regarding the crimes committed [REDACTED] and the support the Accused and other government officials provided;
- Witnesses 494 and 506 were [REDACTED];
- Witness 510 was [REDACTED]. He provides evidence on [REDACTED], as well as the support provided by the Accused, [REDACTED].

18. In light of the limited pool of Mungiki members who are willing to testify, the Insiders’ evidence is irreplaceable. Were they to be compromised, it would substantially affect the Prosecution’s case. This creates a powerful

³⁰ ICC-01/09-02/11-451, para 24.

incentive to interfere with the Insiders, which, as discussed below, is a real risk in light of the history of witness tampering in this case to date.

19. *Second*, the tampering that has occurred with respect to the other insider witnesses whose identities have been disclosed demonstrates that the Insiders risk being interfered with before their testimony. At confirmation, the Prosecution relied upon five insider witnesses. The identities of three of the five witnesses have been disclosed to the Defence. [REDACTED].³¹ [REDACTED].³²

20. The Prosecution acknowledges the distinction between bribery and physical harm, but both have the same effect in terms of the presentation of evidence at trial. If a witness refuses to testify because he has been bribed, the integrity of the proceedings is damaged in the same way as if the witness fails to testify because he had been physically harmed. Moreover, any absence of overt physical harm provides little comfort, since each witness nonetheless reasonably feels that he is at risk. The Accused hold considerable influence in Kenya and for the witnesses concerned, a bribe offer by someone acting on the Accuseds' behalf demonstrates an apparent interest by the Accused to interfere with their testimony and carries an implicit threat that refusal may place the witness in danger.

21. Indeed, [REDACTED].³³ When Defence intermediaries attempted in early 2011 to use Witnesses 11 and 12 to secure Mungiki witnesses who would be willing to provide false exculpatory testimony in exchange for money, Witnesses 11 and 12 believed that if they were seen to oppose the scheme,

³¹ [REDACTED].

³² [REDACTED].

³³ KEN-OTP-0067-0604, paras 45, 49.

they would be harmed or even killed.³⁴ Their concerns are reasonable given the Accuseds' considerable influence in Kenya, [REDACTED].

22. In any event, the possibility of bribery alone is enough to justify continued redactions and delayed disclosure. For example, 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".³⁵ Whether the coercion is financial or physical, the threat will damage the integrity of the proceeding and the ability of the Chamber to hear relevant evidence.

23. *Third*, several senior Mungiki members disappeared or were murdered—it is suspected by members of the Kenyan security apparatus³⁶ — in the immediate aftermath of the PEV. These Mungiki members were instrumental in the organization's participation in the PEV and had direct knowledge of the Accuseds' contributions to the crimes charged.³⁷ Surviving Mungiki members 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 past killings of Mungiki members who had apparent first-hand knowledge of the Accuseds' role in the PEV demonstrate the risks that the Insiders face once their cooperation with the Prosecution is disclosed. Moreover, the extra-judicial killings of Mungiki

³⁴ See KEN-OTP-0060-0130, at 0133-0134 (Witness 12 explaining that he feared being killed if he refused to cooperate with the demands of Kenyatta intermediaries); KEN-OTP-0052-1360, at 1363 (Witness 11 explaining his fear that "the Uhuru [Kenyatta] team . . . would come after me" if they discovered he was not cooperating with the intermediaries' scheme).

³⁵ See *Bagosora*, para 20.

³⁶ This suspicion is consistent with the contemporaneous findings 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 specifically 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.

³⁷ See ICC-01/09-02/11-519-Red, para 19.

members have increased the Insiders' subjective security fears. They have cited these killings as a reason why, in their view, they will be at increased risk once their cooperation with the Prosecution is disclosed to the Accused.

24. *Fourth*, individuals purporting to act on behalf of the Accused have demonstrated that they have the capacity to track down Mungiki insiders thought to be cooperating with the Prosecution, including those who have gone into hiding or protection outside Kenya.³⁸ These attempts to identify, locate and tamper with perceived Prosecution witnesses are continuing, as the matters referred to in paragraphs 12-14 demonstrate.

25. [REDACTED].³⁹ [REDACTED].⁴⁰ [REDACTED].⁴¹ [REDACTED].⁴²

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

26. 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 assert that they cannot withhold from their clients any materials provided to them.⁴³ 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.

³⁸ See, e.g., [REDACTED].

³⁹ See, e.g., [REDACTED].

⁴⁰ See Annex A, pages 16-17.

⁴¹ See Annex A, page 9.

⁴² See Annex A, page 9.

⁴³ See ICC-01/09-02/11-T-18-ENG ET WT, page 23, line 14 to page 24, line 9.

27. There is also the troubling pattern of leaks of confidential information to apparent supporters of the Accused. Examples include [REDACTED].⁴⁴ [REDACTED],⁴⁵ [REDACTED],⁴⁶ [REDACTED],⁴⁷ [REDACTED].⁴⁸

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”.⁴⁹ This consideration is apt here given the history of interference with the Prosecution’s insider witnesses.⁵⁰ 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].

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

29. 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.

30. *First*, the redacted statements and transcripts, when disclosed, will provide the Defence with much of the substance of the Insiders’ accounts. Although their identities and identifying information will be redacted, the Prosecution’s disclosure in this filing that the Insiders are former Mungiki

⁴⁴ See [REDACTED].

⁴⁵ See [REDACTED].

⁴⁶ [REDACTED].

⁴⁷ See [REDACTED].

⁴⁸ [REDCATED].

⁴⁹ ICTY, *Prosecutor v Brdanin and Talic*, Decision on Motion by Prosecution for Protective Measures, IT-99-36-PT, 3 July 2000 (“*Brdanin*”), para 24; see also *Bagosora*, para 20.

⁵⁰ See *supra*, paras 14-18, 22.

members 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. Depending on the security and logistical situation at the time, the Prosecution will endeavour to avoid calling the Insiders at the beginning of the case, thereby affording more time for the Defence to prepare.

31. *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. When the seven individuals covered by this application are added to the five covered by the 5 November application,⁵¹ the Prosecution is seeking delayed disclosure for a total of 12 witnesses out of a possible pool of approximately 35 trial witnesses⁵² -- a manageable and reasonable number given the unprecedented security challenges in this case.⁵³

32. *Third*, any interim disadvantage to the Defence can be mitigated. The Prosecution acknowledges that due to the identifying nature of some of the Insiders' testimony, the redactions required to protect their identities are at times broad. 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.⁵⁴

⁵¹ See ICC-01/09-02/11-519-Conf-Exp, para 1; ICC-01/09-02/11-543 (withdrawing application for delayed disclosure of Witness 7's identity).

⁵² See ICC-01/09-02/11-T-18-ENG CT, page 9.

⁵³ See, e.g., 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).

⁵⁴ This approach has previously been employed in *Katanga*. ICC-01/04-01/07-1179-tENG, para 51.

33. *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. Finally, while the Prosecution seeks authorization to disclose the Insiders' identities 30 days before trial (envisaged in Decision 451),⁵⁵ it will disclose earlier if the [REDACTED] security situation makes it safe to do so.

II. Witnesses 232, 334 and 505.

34. The Prosecution seeks authorisation to disclose the identities of Witness 232, 334 and 505 45 days before their anticipated testimony.⁵⁶ As explained below, there are "exceptional" circumstances warranting such a disclosure schedule for these individuals.⁵⁷

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

35. **Witness 232** is [REDACTED]. Disclosure of this particular eye-witness evidence is likely to identify him because [REDACTED].⁵⁸ There are two principal risks to Witness 232.

36. *First*, he is exposed to the same risks as all Prosecution witnesses [REDACTED]. As explained above, attempts to identify, locate and interfere with perceived Prosecution witnesses are continuing apace. The Prosecution anticipates that these attempts will intensify as trial nears.

⁵⁵ ICC-01/09-02/11-451, para 24.

⁵⁶ See *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 (granting application for rolling disclosure of 80 Prosecution witnesses such that their identities were disclosed 35 days before testimony).

⁵⁷ See ICC-01/09-02/11-451, para 13; ICC-01/04-01/07-1179-tENG, para 48.

⁵⁸ Witness 232 [REDACTED]. See Annex A, page 3.

37. *Second*, Witness 232 is exposed to unique risks stemming from his personal circumstances: (i) he resides in [REDACTED] where the Accused enjoy broad support;⁵⁹ (ii) [REDACTED];⁶⁰ and (iii) [REDACTED] about which Witness 232 will testify know who he is and have threatened him.⁶¹ Witness 232 is the [REDACTED] with such a profile, which supports the protective measures sought.

38. **Witnesses 334 and 505** are former Mungiki members who [REDACTED]. They face the same risk factors discussed above in paragraphs 17-28. They also face individual risks, including that they [REDACTED].

39. Witness 505 [REDACTED].⁶² [REDACTED] contacted Witness 505 in [REDACTED] and threatened “dire consequences” if “any members of the Kikuyu community volunteered information” against the Accused.⁶³ Witness 505 has also received warnings from [REDACTED] that [REDACTED] would “not tolerate any [REDACTED] testifying against Kenyatta”.⁶⁴ As a result of these and other concerns, [REDACTED].⁶⁵

40. Witness 334 did not voice any immediate security concerns at his interview and did not object to the disclosure of his identity to the Accused. However, his [REDACTED] make him particularly susceptible to tampering. [REDACTED]⁶⁶ [REDACTED].⁶⁷ [REDACTED].⁶⁸ As explained below (para. 43), [REDACTED]. Both these factors, along with the recent information cited above related to the attempted interference with Prosecution witnesses, create a real prospect that Witness 334 would be tampered with

⁵⁹ Annex A, page 2.

⁶⁰ Annex A, page 3.

⁶¹ Annex A, pages 2-3.

⁶² *See, e.g.*, [REDACTED].

⁶³ *See* Annex A, page 12.

⁶⁴ *See* Annex A, pages 11-12.

⁶⁵ *See* Annex A, page 12.

⁶⁶ [REDACTED].

⁶⁷ *See* [REDACTED].

⁶⁸ [REDACTED].

once his identity is disclosed. The less time there is between disclosure of his identity and testimony, the greater the protection.

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

41. The arguments in paragraphs 26-28 apply equally to Witnesses 232, 334 and 505. In addition, their personal circumstances make disclosure 45 days before testimony the least restrictive measures available.

42. **Witness 232** [REDACTED] where the Accused enjoy broad support and where his [REDACTED] is known. [REDACTED]. Delaying the disclosure until 45 days before his testimony will reduce the disruption to his life and that of his family members.⁶⁹ Further, the longer his cooperation with the Prosecution is kept confidential, the shorter the period for him to be interfered with, and the lower the risks to his security.⁷⁰

43. **Witness 334** [REDACTED].⁷¹ His main protective measure is that his cooperation with the Prosecution is not yet known; the longer he stays in this posture, the lower his risk profile.

44. **Witness 505** runs a business upon which he, his immediate family and his dependents depend for their income. The nature of the business precludes its management from a distance. The current protection plan for Witness 505 [REDACTED] will require him to leave his business, adversely affecting those dependents who rely on its income to survive. He also [REDACTED] and wishes to minimize the disruption to [REDACTED] resulting from his cooperation with the Court. For these reasons, Witness 505 has asked that the protection measures for him be the least intrusive possible, and that

⁶⁹ [REDACTED].

⁷⁰ See ICTY, *Prosecutor v Brdanin and Talic*, Decision on Motion by Prosecution for Protective Measures, IT-99-36-PT, 3 July 2000, para 24.

⁷¹ Annex A, para 4.

efforts be made to [REDACTED]. His continued willingness to testify thus is premised in part on delaying the disclosure of his identity.

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

45. The Prosecution incorporates its submissions in paragraphs 29-33. Further, the nature of the evidence provided by Witness 232, 334 and 505 limits any prejudice to the Defence. Witness 232 provides [REDACTED] evidence, and Witnesses 334 and 505 provide perpetrator-side evidence that focuses on a handful of subjects. The evidence of these witnesses is easily digestible and does not necessitate months of preparation by questioning counsel, thus limiting any disadvantage caused by delayed disclosure.⁷²

Conclusion

46. The Prosecution respectfully requests the Chamber to (i) vary the 5 November 2012 deadline with respect to Witness 334 and consider the present application for delayed disclosure of his identity; (ii) authorize the disclosure of the identities of Witnesses 232, 334, 493, 494, 505, 506 and 510 on the schedule listed on page 1; (iii) authorize the redactions included in Annexes C – I; and (iv) reclassify as “confidential” pages 2-3 of transcript ICC-01/09-02/11-T-20-CONF-EXP-ENG, so that references to it may be provided to the Defence in the redacted version of this application.



Fatou Bensouda,
Prosecutor

Dated this 10th of December 2012
At The Hague, The Netherlands

⁷² *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.