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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 redacted version

**Second application for delayed disclosure of witness identities and application
for variation of the 5 November 2012 deadline with respect to
Witnesses 15, 16 and 32**

Source: The Office of the Prosecutor

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Introduction

1. The Prosecution hereby submits its second application for authorization to delay disclosure of the identities of witnesses beyond the 9 January 2013 deadline. The Prosecution further seeks authorization to redact any information in the witnesses' associated material that would tend to identify them until full disclosure occurs; and for certain witnesses, to provide summaries or to withhold disclosure when redactions are insufficient to conceal the witnesses' identities.¹ The following table details the witnesses and the relief sought:

Witnesses	Requested disclosure timetable	Requested Format of disclosure ²
P-0015	30 days before trial	[REDACTED]
P-0016	30 days before trial	[REDACTED]
P-0032	45 days before testimony	[REDACTED]
P-0144	45 days before testimony	[REDACTED]
P-0481	45 days before testimony	[REDACTED]
P-0495	45 days before testimony	[REDACTED]
P-0524	45 days before testimony	[REDACTED]

2. 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"), the Trial Chamber's "Decision on the protocol establishing a redaction regime" ("Redaction Protocol Decision")³ and Regulation 35 of the Regulations of the Court.
3. Each of these witnesses faces security risks that require delayed disclosure of their identities and redactions/summaries/temporary non-disclosure (as

¹ In addition to B.1 redactions to identifying and contact information of witnesses, the categories of redactions sought include standard and A.4 non-standard justifications as defined by the Protocol in ICC-01/09-01/11-458-AnxA-Corr. The Prosecution submitted an application, ICC-01/09-01/11-498, requesting that authorization for A.4 redactions to investigators operating in the field be granted in principle.

² In accordance with the procedure specified in paragraphs 7 to 9 of the Protocol, the Prosecution sets out the proposed highlighted redactions or summaries and their legal bases in sub-Annexes of [REDACTED] 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.

³ ICC-01/09-01/11-458, and ICC-01/09-01/11-458-AnxA-Corr ("Redaction Protocol").

appropriate) 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, with no less restrictive measures available before the Chamber at this time, the requested relief properly balances the Accused's 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).

4. In regards to Prosecution witnesses P-0015, P-0016 and P-0032, pursuant to Regulation 35 (2) the Prosecution requests the Chamber to (i) extend the 5 November 2012 deadline and (ii) consider the present application for delayed disclosure of their identities. The Prosecution submits that it was unable to submit a filing on 5 November because it was only after this date that a change in circumstances occurred warranting the need for requesting the delayed disclosure of the witnesses' identities.

Confidentiality

5. Pursuant to regulation 23 *bis* of the Regulations of the Court, this application and its annexes are submitted on a confidential *ex parte* basis available to the Prosecution and the Victims and Witnesses Unit ("VWU") only, as they contain confidential information regarding prosecution witnesses.⁴ The Prosecution will simultaneously file a confidential redacted version of this Application.

Procedural History

6. On 27 September 2012, in its Redaction Protocol 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

⁴ In accordance with the Chamber's "Order concerning redactions", ICC-01/09-01/11-482, the Prosecution will file a confidential redacted version of this application (including the redaction charts annexed hereto) and will disclose materials to the Defence in redacted form.

applied to identifying information should not exceed that which is strictly necessary to protect the identity of the witness.⁵ In the Redaction Protocol Decision, the deadline for applications for witnesses included on the 16 October 2012 provisional witness list was set for 5 November 2012.⁶

7. After obtaining a one-day extension of the deadline, on 6 November 2012, the Prosecution filed its first application requesting delayed disclosure of the identities of witnesses P-0268, P-0336, P-0356, P-0376, P-0397, P-0423, P-0450 and P-0471.⁷ On 30 November, the Prosecution provided supplementary material⁸ as requested by the Chamber.⁹

Submissions

Legal Basis for redactions

8. Articles 54(3)(f), 64(2) and 68(1) of the Statute, Rule 81(2) and (4), and paragraph 36 of the Redaction Protocol provide the Chamber with the legal basis to authorize the redactions sought in the present application.
9. 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: (i) the existence of an "objectively justifiable risk" to the safety of the person concerned that arises from disclosing the particular information to the Accused;¹⁰ (ii) the infeasibility or insufficiency of less restrictive protective measures;¹¹ and (iii) an assessment as to whether

⁵ ICC-01/09-01/11-458, para 30.

⁶ ICC-01/09-01/11-458-AnxA-Corr, para 51.

⁷ ICC-01/09-01/11-468. The Prosecution subsequently informed the Chamber about the withdrawal of P-0470 from this request: ICC-01/09-01/11-480.

⁸ ICC-01/09-01/11-487.

⁹ ICC-01/09-01/11-485.

¹⁰ ICC-01/04-01/07-475, paras 71 and 97; ICC-01/09-01/11-458, para 11.

¹¹ ICC-01/04-01/06-568, para 37; ICC-01/04-01/06-773, para 33; ICC-01/09-01/11-458, para 11.

the redactions sought are "prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial".¹²

10. The Prosecution hereby incorporates its previous submissions and references to this Court's and other Tribunals' jurisprudence allowing delayed disclosure in view of witness security issues.¹³

Variation of time limit to request redactions and delayed disclosure for witnesses P-0015, P-0016 and P-0032

Regulation 35 (2)

11. The Prosecution did not file an application for delayed disclosure regarding witnesses P-0015, P-0016 and P-0032 by 6 November 2012 as the reasons for warranting delayed disclosure materialized after the deadline set by the Chamber.

P-0015

12. [REDACTED].¹⁴

13. [REDACTED].¹⁵

P-0016

14. [REDACTED]¹⁶ [REDACTED].

P-0032

15. [REDACTED].

16. [REDACTED].

¹² ICC-01/04-01/06-773, para 34; ICC-01/09-01/11-458, para 11.

¹³ ICC-01/09-01/11-468, paras 12-13.

¹⁴ This is explained in further detail below and in Annex 1A.

¹⁵ [REDACTED].

¹⁶ P-0016 [REDACTED].

17. [REDACTED].

18. [REDACTED].

Factual basis for delayed disclosure and redactions to identifying information of witnesses

The existence of an "objectively justifiable risk" to the safety of the person concerned which arises from disclosing the particular information to the Accused.

19. [REDACTED]¹⁷ [REDACTED].¹⁸

20. [REDACTED].

21. [REDACTED].¹⁹ [REDACTED].²⁰ [REDACTED]²¹ [REDACTED].²²

22. [REDACTED].

P-0015 and P-0016²³

23. P-0015²⁴ [REDACTED].

24. P-0015's.²⁵ [REDACTED].

25. [REDACTED].²⁶ [REDACTED].

26. [REDACTED].²⁷ [REDACTED].

27. [REDACTED].

¹⁷ [REDACTED]

¹⁸ [REDACTED]

¹⁹ See [REDACTED].

²⁰ See especially [REDACTED].

²¹ [REDACTED].

²² [REDACTED].

²³ The Prosecution reminds the Chamber that it disclosed the majority of materials associated with P-0015 and P-0016 in redacted form at the pre-trial stage, as authorized by the Pre-Trial Chamber. The Defence has therefore had access to the substance of their anticipated testimony for a considerable period of time. Only a limited number of additional items are concerned by this application.

²⁴ For P-0015's detailed security information: see Annex 1A.

²⁵ [REDACTED].

²⁶ For P-0016's detailed security information: see Annex 2A.

²⁷ [REDACTED].

P-0032, P-0144 and P-0481

28. P-0032²⁸ [REDACTED].

29. [REDACTED], P-0144²⁹ and P-0481³⁰, [REDACTED].

30. [REDACTED].

P-0495 and P-0524

31. P-0495's³¹ [REDACTED].

32. P-0524,³² [REDACTED].

33. In sum, each of the witnesses in question faces serious risks to his safety in Kenya if the Prosecution confirms his suspected cooperation with the Court. In the absence of appropriate protective measures, the disclosure of the identities of the witnesses in question unacceptably heightens the risk that they will be targeted for interference by the Accused [REDACTED].³³

Less restrictive protective measures are infeasible and insufficient

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

35. 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".³⁴ [REDACTED].³⁵

²⁸ For P-0032's detailed security information: see Annex 3A.

²⁹ For P-0144's detailed security information: see Annex 4A.

³⁰ For P-0481's detailed security information: see Annex 5A.

³¹ For P-0495's detailed security information: see Annex 6A.

³² For P-0524's detailed security information: see Annex 7A.

³³ See [REDACTED].

³⁴ 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.

³⁵ See *supra*, paragraphs 21-22.

The proposed delay in disclosing the witnesses' identities will ensure sufficient time to put in place appropriate protective measures [REDACTED].

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

36. 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). Though delayed, the Defence will nonetheless receive full disclosure 30 days prior to trial or 45 days prior to testimony which will enable it to complement its preparation and cure any temporary prejudice experienced from not knowing the identity of the witness until that point.

37. [REDACTED].

38. In so noting, the Prosecution agrees that evidence [REDACTED] is disclosable, in any event, as information material to the preparation of the defence under rule 77. The proposed disclosure of the substance of the evidence, in summary form, adequately will put the Accused on notice as to the substance of the Prosecution's information contradicting these public accusations.

Material for which the Prosecution seeks redactions

39. The materials for [REDACTED] with highlights indicating the proposed redactions, and explanatory charts, are attached in Annexes [REDACTED]. The substance and coherence of the statements and related materials, including any information which may be exculpatory or relevant to the preparation of the Defence, will be largely unaffected by the proposed redactions. The Defence will still be in a position to assess the information contained therein and prepare its case. Any difficulty in preparation as a result of not knowing the identity of the witness will be cured by the lifting of the redactions 45 days prior to their testimony.

40. The Prosecution also seeks to disclose perfected copies of five transcripts of a recorded interview with [REDACTED]. [REDACTED], the Prosecution disclosed all transcripts within its possession to the Defence. Redactions to the transcripts were authorized at the time by the Pre-Trial Chamber.³⁶ Since that time the Prosecution's Data Processing Unit within the Language Services Unit has quality-controlled these five transcripts and produced perfected versions.

41. Now, the Prosecution is in a position to disclose and seeks authorization for the non-standard redactions that have been applied,³⁷ which largely correspond to those previously approved by the Pre-Trial Chamber.³⁸ For clarity, the Prosecution also appends "track change" versions in [REDACTED] demonstrating that the corrections implemented in the perfected versions do not affect the substance of the statement, nor are they material alterations. The Prosecution submits therefore the Defence has not been prejudiced by the later provision of these transcripts.

Material for which the Prosecution seeks to disclose a summary of the statements

42. At this time, the Prosecution requests authorization to disclose summaries of the statements of [REDACTED] *in lieu* of redacted versions of full statements, which will be disclosed 45 days prior to their testimonies. In the alternative, the Prosecution seeks permission to delay the disclosure of their associated material until disclosure of their identity.³⁹

43. The Prosecution submits that – because of the extent of the redactions necessary to conceal their identities – applying redactions to identifying witness information in the statements of these witnesses would result in an

³⁶ ICC-01/09-01/11-152-Conf-Exp-Anx2.

³⁷ The redactions are identified in accordance with the pre-approved and non-standard categories established by this Chamber's protocol.

³⁸ Subject to some minor additions or deletions that have resulted from corrections to the text as a result of the quality control process. A number of redactions to investigators' name have also been removed considering the individuals no longer work at the Court.

³⁹ The summaries of the statements [REDACTED] are attached as, respectively Annexes [REDACTED].

unintelligible, almost wholly blackened document. Therefore, in order to provide the Defence with a meaningful outline of the witnesses' proposed evidence, the Prosecution has prepared summaries of the statements containing the information that can be safely disclosed at this time. The Prosecution submits this is the only manner to effectively conceal the identities of [REDACTED].

44. As noted previously, the prejudice to the Defence flowing from the provision of summaries is limited. [REDACTED].

Material for which the Prosecution seeks delayed disclosure until the identity of the witnesses can be safely disclosed

45. Finally, the Prosecution seeks temporary delayed disclosure of some materials inextricably related to the identities [REDACTED]⁴⁰ until their identities can be safely revealed.⁴¹ Redaction of their content would result in a wholly blackened document rendering it unintelligible. Nor would it suffice to provide summaries, since the entirety of the information contained in the materials are identifying for the witnesses and, indeed, [REDACTED].⁴² The Prosecution notes that Pre-Trial Chamber II previously authorized the non-disclosure of the [REDACTED] on the ground that [REDACTED].⁴³

46. The Prosecution submits that non-disclosure of this specific material is necessary, given the high risk to [REDACTED] security, and justifiable because of the limited prejudicial effect it will have on the Defence. The number of affected items is extremely limited, the bulk of the materials [REDACTED] have already been disclosed pre-confirmation, and most of the materials concerned

⁴⁰ i.e. [REDACTED] which has thus far not been disclosed to the Defence as to do so would immediately reveal the identity of the witness (and [REDACTED]). Material relating to [REDACTED].

⁴¹ Material associated [REDACTED].

⁴² i.e. [REDACTED].

⁴³ See for example [REDACTED].

address subjects that are not relevant to the facts in dispute at trial but rather to [REDACTED].

Conclusion

47. 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, [REDACTED].⁴⁴ Full disclosure of the identities of the remaining Prosecution witnesses will occur at the stipulated time.

48. Finally, if the continuing non-disclosure of the witness identities is authorized, the Prosecution will provide disclosure as soon as there is a change in circumstances, and also will provide periodic updates to the Chamber, in accordance with any schedule set by the Chamber, in order to guarantee that the redactions continue only for as long as they are warranted. The Chamber, also, of course, can proprio motu review its delayed disclosure rulings at any time, should conditions change.

Relief Requested

49. For the foregoing reasons, the Prosecution respectfully requests that the Chamber authorize (i) variation of the time limit of 5 November 2012 to request delayed disclosure of P-0015, P-0016 and P-0032 pursuant to Regulation 35(2); (ii) disclosure of the identities of P-0015 and P-0016 30 days prior to the start of the trial; (iii) disclosure of the identities of P-0032, P-0144, P-0481, P-0495 and P-0524, 45 days prior to their anticipated testimony; (iv) interim disclosure of statements and associated material of the witnesses in redacted or summary versions as presented in each witness' confidential, *ex parte* annex to this application; and (v) delayed disclosure of the material identified in Annexes 1B-1D and 2B until the identities of [REDACTED] are revealed.

⁴⁴ See, e.g., ICC-01/04-01/07-1179-tENG, para 48.



Fatou Bensouda,
Prosecutor

Dated this 20th of December 2012
At The Hague, The Netherlands