

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/11

Date: 4 January 2013

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. WILLIAM SAMOEI RUTO and JOSHUA ARAP SANG***

Confidential

**Confidential redacted version of 'Decision on first prosecution application for
delayed disclosure of witness identities'**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms Fatou Bensouda

Counsel for William Samoei Ruto

Mr Kioko Kilukumi Musau

Mr David Hooper

Counsel for Joshua Arap Sang

Mr Joseph Kipchumba Kigen-Katwa

Mr Joel Kimutai Bosek

Legal Representatives of Victims

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

Ms Silvana Arbia

Deputy Registrar

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V ("Chamber") of the International Criminal Court ("Court"), in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, pursuant to Articles 64, 67, 68(1) and 68(5) of the Rome Statute ("Statute") and Rules 76, 77, 81 and 84 of the Rules of Procedure and Evidence of the Court ("Rules"), renders the following Decision on first prosecution application for delayed disclosure of witness identities ("Decision").

I. PROCEDURAL BACKGROUND

1. On 5 November 2012, in accordance with the Chamber's decisions on the schedule for trial¹ and on a redactions regime,² the Office of the Prosecutor ("Prosecution") filed an application requesting the delayed disclosure of the identities of nine witnesses and authorisation for corresponding redactions to their witness statements or transcripts ("First Application").³ The First Application included nine annexes comprising, for each witness, the Prosecution's assessment on the witness's security ("the OTP Security Profile"), the witness's statement or transcript for which redactions are requested, and a chart outlining the proposed redactions.⁴
2. The First Application and its annexes were filed on a confidential *ex parte*, Prosecution and Victims and Witnesses Unit ("VWU") only basis. On 7 November 2012, a public redacted version of the First Application, without the annexes, was filed.⁵ Confidential redacted versions of the redactions charts were filed on 4

¹ Decision on the schedule leading up to trial, 9 July 2012, ICC-01/09-01/11-440 ("Scheduling Order").

² Decision on the protocol establishing a redaction regime, 27 September 2012, ICC-01/09-01/11-458 ("Redaction Decision") and annex containing the protocol ICC-01/09-01/11-458-AnxA-Corr.

³ 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, ICC-01/09-01/11-468-Conf-Exp, notified on 6 November 2012.

⁴ See annexes 1 to 9 to ICC-01/09-01/11-468-Conf-Exp. On 21 November 2012, the Prosecution filed corrigenda to annexes 2 and 8 of the Application. See ICC-01/09-01/11-468-Conf-Exp-Anx2-Corr with ICC-01/09-01/11-468-Conf-Exp-Anx2-Corr-Anx and ICC-01/09-01/11-468-Conf-Exp-Anx8-Corr with ICC-01/09-01/11-468-Conf-Exp-Anx8-Corr-Anx.

⁵ 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", ICC-01/09-01/11-468-Red (notified 8 November 2012).

December 2012.⁶ A confidential redacted version of the First Application has not been filed.

3. On 23 November 2012, the Prosecution withdrew its application in respect of one witness, P-470, noting that it no longer intended to call him as a witness at trial.⁷
4. On 26 November 2012, the Chamber convened an *ex parte*, Prosecution and VWU only, status conference ("Status Conference") in order to obtain further information regarding the security situation of the remaining eight witnesses, namely P-268, P-336, P-356, P-376, P-397, P-423, P-450, and P-471.⁸ In the course of the Status Conference, the Prosecution was requested to provide the Chamber with supporting material for certain assertions made in the First Application regarding the security concerns of six witnesses, namely P-268, P-356, P-376, P-397, P-423 and P-471.⁹ Specifically, it was requested to provide the Chamber with references to the relevant portions of the statements or transcripts of these witnesses or any other materials addressing their security concerns.
5. On 28 November 2012, the Chamber issued an order in which it set the deadline for the Prosecution's submission of the requested materials regarding the six witnesses as 30 November 2012 and further requested the Prosecution to file an update on the general security situation in Kenya.¹⁰ In the order, the Chamber also directed the VWU to file, by 7 December 2012, an update on the security situation

⁶ ICC-01/09-01/11-468-Conf-Anx1-Red; ICC-01/09-01/11-468-Conf-Anx2-Corr-Red; ICC-01/09-01/11-468-Conf-Anx3-Red; ICC-01/09-01/11-468-Conf-Anx4-Red; ICC-01/09-01/11-468-Conf-Anx5-Red; ICC-01/09-01/11-468-Conf-Anx6-Red; ICC-01/09-01/11-468-Conf-Anx7-Red; ICC-01/09-01/11-468-Conf-Anx9-Red.

⁷ See Prosecution's update regarding Prosecution submission ICC-01/09-01/11-468-Conf-Exp, ICC-01/09-01/11-480-Conf-Exp; Public Redacted Version of the 23 November 2012 "Prosecution's update regarding Prosecution submission ICC-01/09-01-468-Conf-Exp", 27 November 2012, ICC-01/09-01/11-480-Red; Prosecution Provision of additional information to the Defence, 29 November 2012, ICC-01/09-01/11-489-Conf.

⁸ ICC-01/09-01/11-T-17-CONF-EXP-ENG.

⁹ ICC-01/09-01/11-T-17-CONF-EXP-ENG ET, page 19, lines 7-24 (P-376); page 20, line 22 to page 21, line 15 (P-397); page 22, lines 9-12 (P-423); page 26, lines 5-10 (P-268 and P-471); and page 27, lines 9-16 (P-356).

¹⁰ Order requesting additional information on witness security, 28 November 2012, ICC-01/09-01/11-485-Conf, paras 2-3.

and current status of any protective measures in place for each of the eight witnesses concerned.¹¹

6. On 28 November 2012, the Prosecution filed further information regarding the security concerns of P-268, P-356, P-376, P-397, P-423, and P-471 as requested by the Chamber.¹² Annex A to the Prosecution's submission includes excerpts from [REDACTED] for witnesses P-268, P-376, P-397, P-423, and P-471. The Prosecution explains that [REDACTED] are internal working documents which record the personal security concerns of the witnesses and which reflect the source material underpinning various assertions made in the First Application about those witnesses.¹³ Annex B to the Prosecution's submission includes excerpts [REDACTED] relating to witness P-356, which the Prosecution states may aid the Chamber in its assessment of the witness's security situation.¹⁴ A confidential redacted version of the filing and its annexes was notified on 29 November 2012.¹⁵
7. On 5 December 2012, the Prosecution submitted its requested update on the general security situation in Kenya.¹⁶ The update was filed as a confidential *ex parte*, Prosecution and VWU only, document. A confidential redacted version was filed on 7 December 2012.¹⁷
8. On 7 December 2012, the VWU filed an *ex parte*, Prosecution and VWU only, update on the security situation of the eight relevant witnesses ("VWU Report").¹⁸

¹¹ ICC-01/09-01/11-485-Conf, para. 3.

¹² Submission of requested materials to the Chamber, ICC-01/09-01/11-487-Conf-Exp and ICC-01/09-01/11-487-Conf-Exp-AnxA and ICC-01/09-01/11-487-Conf-Exp-AnxB.

¹³ ICC-01/09-01/11-487-Conf-Exp, paras 3-4.

¹⁴ ICC-01/09-01/11-487-Conf-Exp, para. 5.

¹⁵ ICC-01/09-01/11-487-Conf-Red with ICC-01/09-01/11-487-Conf-AnxA-Red and ICC-01/09-01/11-487-Conf-AnxB-Red.

¹⁶ Prosecution's Submission of Supplementary Information on the Security Situation in Kenya, ICC-01/09-01/11-496-Conf-Exp and ICC-01/09-01/11-496-Conf-Exp-AnxA. On 6 December 2012, a corrigendum to the annex was filed. See ICC-01/09-01/11-496-Conf-Exp-AnxA-Corr.

¹⁷ ICC-01/09-01/11-496-Conf-Red and ICC-01/09-01/11-496-Conf-AnxA-Corr-Red.

¹⁸ Victims and Witnesses Unit's Submission Pursuant to the "Order requesting additional information on witness security" (ICC-01/09-01/11-485-Conf), ICC-01/09-01/11-500-Conf-Exp.

The VWU Report records, for each witness, whether he or she has been referred to the VWU and, where applicable, provides a summary of VWU's security assessment and the current status of protective measures.

9. On 11 December 2012, having sought¹⁹ and obtained²⁰ a short extension of time, the defence for Mr Ruto and for Mr Sang (together the "Defence") filed a joint response to the First Application ("Response").²¹
10. On 17 December 2012, the Prosecution filed a second application requesting the delayed disclosure of a further seven witnesses ("Second Application").²² On 27 December 2012, the Prosecution filed a third application requesting delayed disclosure of a further five witnesses ("Third Application").²³
11. This Decision relates only to the First Application. The Second and Third Applications will be the subject of separate later decision(s) to be issued once the Defence has had an opportunity to respond.
12. This Decision is issued on a confidential *ex parte*, Prosecution and VWU only, basis as it refers to confidential and sensitive materials relating to witness security issues and protective measures. A confidential redacted version of the Decision will be issued simultaneously.

¹⁹ Joint Defence Request for Extension of Time to Respond to Delayed Disclosure Application, 4 December 2012, ICC-01/09-01/11-495.

²⁰ Decision on joint defence request for extension of time, 6 December 2012, ICC-01/09-01/11-497.

²¹ Joint Defence Response to 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", ICC-01/09-01/11-507-Conf.

²² 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, ICC-01/09-01/11-515-Conf-Exp. A confidential redacted version was filed on 20 December 2012, ICC-01/09-01/11-515-Conf-Red.

²³ Third application for delayed disclosure of witness identities, ICC-01/09-01/11-521-Conf-Exp. A confidential redacted version was filed on 28 December 2012, ICC-01/09-01/11-521-Conf-Red.

II. SUBMISSIONS

(i) *Prosecution submissions*

13. The Prosecution requests authorisation to delay disclosure of the identities of eight witnesses. For five of these witnesses, P-268, P-336, P-376, P-397, P-423 and P-471, the Prosecution requests authorisation to delay disclosure until 30 days before the commencement of the trial. For two of the witnesses, P-356 and P-450, the Prosecution requests authorisation to delay disclosure until 30 days before the witness's anticipated testimony.
14. The Prosecution submits that the relief it seeks has previously been granted by the Court and cites a decision of Trial Chamber II in the *Katanga* case wherein the identity of one Prosecution witnesses was withheld until 45 days before the start of trial and another Prosecution witness until 45 days before the start of her testimony.²⁴ The Prosecution also submits that delayed disclosure of witness identities has "long been supported" at the *ad hoc* tribunals, including delays post-commencement of trial.²⁵

²⁴ ICC-01/09-01/11-468-Red, para. 12 citing: *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 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), 28 May 2009, ICC-01/04-01/07-1179-tENG, paras 47-48.

²⁵ ICC-01/09-01/11-468-Red, para. 13, citing: ICTY, *Prosecutor v. Delić*, Decision on the Prosecution Motion for Protective Measures, IT-04-83-PT, 1 December 2006, p. 6; *Prosecutor v. Milutinović et al.*, Decision on Prosecution's Motions for Protective Measures, IT-99-37-PT, 17 July 2003, p. 5; *Prosecutor v. Šešelj*, Decision on Vojislav Šešelj's appeal against the Trial Chamber's oral decision of 7 November 2007, IT-03-67-AR73.6, 24 January 2008, para. 15; *Prosecutor v. Brđanin and Talić*, Decision on the Prosecution's Twelfth Motion for Protective Measures for Victims and Witnesses, IT-99-36-PT, 12 December 2002, para. 13, p. 6 (disposition); *Prosecutor v. Milošević*, First decision on Prosecution Motion for Protective Measures for Sensitive Source Witnesses, IT-02-54-T, 3 May 2002, para. 13; ICTR, *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, paras 23, 25; *Prosecutor v. Renzaho*, Decision on the Prosecutor's Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment, ICTR-97-31-I, 17 August 2005, para. 16; *Prosecutor v. Kabiligi et al.*, Decision on the Motion by the Office of the Prosecutor for Orders for Protective Measures for Victims and Witnesses, ICTR-97-34-I, 19 May 2000, pp. 4-5; *Prosecutor v. Niyitegeka*, Decision on the Prosecutor's Motion for Protective Measures for Witnesses, ICTR-96-14-I, 12 July 2000, para. 16.

15. The Prosecution submits that each of the witnesses faces objective security risks,²⁶ that less restrictive measures would be infeasible and insufficient to protect the witnesses,²⁷ and that the proposed delayed disclosure will not "unduly prejudice" the Defence.²⁸ With regard to witness P-356, the Prosecution acknowledges that the Defence may "experience prejudice greater than that experienced with the other witnesses", but submits that 30 days pre-testimony is sufficient notice for the Defence to prepare.²⁹
16. Finally, for all witnesses, it maintains that the relief is temporary and limited in scope and, as such, the need for periodic review is "less of an imperative than it would be were the Prosecution applying for redactions on a more long-term ongoing basis."³⁰ In any event, it submits, the Chamber retains the ability to review any delays it authorises should conditions change.³¹ During the Status Conference, the Prosecution further stated, in response to a question by the Chamber, that it would be willing to provide the Defence with a summary of redacted material in the case of heavily redacted witness statements or transcripts.³²
17. The Prosecution's submissions as to the particular security risks facing of each of the witnesses concerned are summarised and assessed in further detail in the section III below.

(ii) Defence submissions

²⁶ ICC-01/09-01/11-468-Conf-Exp and ICC-01/09-01/11-468-Red, paras 17-25, 35-44, 54-55.

²⁷ ICC-01/09-01/11-468-Conf-Exp and ICC-01/09-01/11-468-Red, paras 26-28, 50, 56.

²⁸ ICC-01/09-01/11-468-Conf-Exp and ICC-01/09-01/11-468-Red, paras 29-32, 51.

²⁹ ICC-01/09-01/11-468-Red, para. 57.

³⁰ ICC-01/09-01/11-468-Red, paras 33, 52, 58.

³¹ ICC-01/09-01/11-468-Red, paras 33, 52, 58.

³² ICC-01/09-01/11-T-17-CONF-EXP-ENG ET, page 7, lines 11-21.

18. The Defence opposes the request in its entirety. It recalls that the Chamber's Scheduling Order anticipates full disclosure on 9 January 2013, with limited exceptions made only for witnesses who were the subject of an application by the Prosecution, to be disclosed on 11 February 2013 in the case of witnesses in the ICC Protection Programme ("ICCPP") and 11 March 2013 in the case of non-ICCPP witnesses.³³ It submits that it does not know whether the witnesses in question are in the ICCPP or otherwise have security concerns and are thus properly the subject of the First Application.³⁴

19. The Defence avers that the greater the role the witnesses play in the overall case, the more prejudicial the delayed disclosure will be to the accused's fair trial rights.³⁵ In any event, the delayed disclosure of such a large number of witnesses will unduly prejudice the Defence's ability to investigate and prepare for the Prosecution's case in several practical ways.³⁶ It would reduce the Defence's preparation time from three months, as anticipated in the Chamber's Scheduling Order, to one month before trial for six core witnesses. It notes that this is particularly problematic given the presidential elections scheduled to take place in Kenya during that time which may limit the Defence's ability to operate and conduct investigations in the field.³⁷ It re-iterates concerns it expressed during the status conference of 11 June 2012 relating to the difficulties in conducting a proper preparation and analysis of evidence until the totality of evidence is available.³⁸

20. With respect to witnesses P-356 and P-450, for whom the Prosecution requests a delay until 30 days pre-testimony, the Defence asserts that it will be "impracticable to analyse and investigate [their] allegations adequately in just 30

³³ ICC-01/09-01/11-507-Conf, para. 8.

³⁴ ICC-01/09-01/11-507-Conf, para. 8.

³⁵ ICC-01/09-01/11-507-Conf, para. 9.

³⁶ ICC-01/09-01/11-507-Conf, paras 10-13.

³⁷ ICC-01/09-01/11-507-Conf, para. 11.

³⁸ ICC-01/09-01/11-507-Conf, para. 12, citing ICC-01/09-01/11-T-15, 11 June 2012, page 7.

days during the course of an ongoing trial.”³⁹ It submits that it is “exceptionally difficult for the defence to deal concurrently with courtroom demands and the oversight and supervision of investigations” and may require an adjournment in order to conduct proper investigations.⁴⁰

21. In addition to these practical difficulties, the Defence maintains that the non-disclosure of identities post-commencement of trial is prohibited by the Court’s statutory framework.⁴¹ In support, it cites a 2010 ruling of the Appeals Chamber in the *Katanga* case, wherein it was held that “disclosure by the Prosecution should, in principle, take place prior to the commencement of trial.”⁴² It submits that Articles 64(3)(c) and 68(5) of the Statute and Rule 76(1) and 81(4) of the Rules clearly envisage full disclosure prior to the commencement of trial and that the need to ensure the protection of witnesses, however important, cannot override the fair trial rights of the accused.⁴³

22. The Defence distinguishes the decision of Trial Chamber II, cited by the Prosecution, to withhold the identity of one witness until 45 days pre-testimony. It notes that the witness in question was “not a primary witness of fact” but “essentially a crime scene witness” and that most of the evidence in that case was disclosed a full ten months before trial started.⁴⁴ It additionally notes that the authorisation for this delayed disclosure was granted prior to the Appeals

³⁹ ICC-01/09-01/11-507-Conf, para. 14.

⁴⁰ ICC-01/09-01/11-507-Conf, para. 13.

⁴¹ ICC-01/09-01/11-507-Conf, paras 16-21.

⁴² *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 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”, 16 July 2010, ICC-01/04-01/07-2288, para. 43.

⁴³ ICC-01/09-01/11-507-Conf, paras 18-20.

⁴⁴ ICC-01/09-01/11-507-Conf, para. 22.

Chamber decision referenced above and that a similar decision now “would contravene the Appeals Chamber’s finding on this issue.”⁴⁵

23. The Defence notes that due to the heavy redactions applied to the public redacted version of the First Application and to the confidential redacted version of the Prosecution’s security update, it “remains blind as to the particular merits of the application and must rely on the Chamber to safeguard its interests.”⁴⁶ It does, however, cast doubt on whether any alleged security risks (which it denies) that may arise from defence investigations would be minimised by the delayed disclosure of witness identities and argues that the “practical advantage gained in terms of witness security is minimal in contrast to the prejudice caused to the defence by the delayed disclosure.”⁴⁷ The Defence proposes, as an alternative to delayed disclosure, that the testimony of any witnesses about whom the Prosecution has security concerns be scheduled at the beginning of trial. In such a way, it argues, the length of time between disclosure of the witness’s identity and his or her testimony of the witness would be minimised but the Defence would still receive the Prosecution case in its entirety in sufficient time to conduct its investigations and preparation for trial.⁴⁸

24. Finally, the Defence requests, in the event the Chamber grants the First Application, that after 9 January 2013 any redactions to the statements and transcripts of the relevant witnesses be applied only to information that directly identifies the witness and not other substantive allegations that, in the Prosecution’s view, may indirectly reveal identity.⁴⁹ It submits that the manner in

⁴⁵ ICC-01/09-01/11-507-Conf, para. 23.

⁴⁶ ICC-01/09-01/11-507-Conf, para. 28.

⁴⁷ ICC-01/09-01/11-507-Conf, para. 29.

⁴⁸ ICC-01/09-01/11-507-Conf, para. 30.

⁴⁹ ICC-01/09-01/11-507-Conf, para. 31.

which the redactions have been applied to date is “an abuse” and goes beyond the intention of the B.1 category in the redaction protocol.⁵⁰

III. ANALYSIS

(i) *Legal framework and principles*

25. Article 64(3)(c) of the Statute states that, “subject to any other relevant provision”, a 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.” This provision is elaborated upon in Rules 76(1) and 77 of the Rules which require the Prosecution to provide the Defence with or permit it to inspect, respectively, the names of its witnesses and copies of any prior statements “sufficiently in advance to enable the adequate preparation of the defence” and access to any documents or other objects which are “material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial.” Article 67(2) of the Statute provides a further affirmative right of the accused to disclosure “as soon as practicable” of any evidence which “shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence.” Also of particular relevance to the question of disclosure is Article 67(1)(b) of the Statute, which guarantees the accused the right to have adequate time and facilities for the preparation of their defence.

26. In keeping with these provisions, in its Scheduling Order the Chamber held that “it is essential for the prosecution to complete its disclosure obligations sufficiently in advance of trial.”⁵¹ It determined that three months between final

⁵⁰ ICC-01/09-01/11-507-Conf, para. 32.

⁵¹ ICC-01/09-01/11-440, para. 7.

disclosure and the commencement of trial would provide the Defence with sufficient time to prepare for trial and accordingly set 9 January 2013 as the final disclosure date.⁵² The Scheduling Order made clear that requests to withhold the identities of any witnesses beyond 9 January 2013 would be determined on a case-by-case basis upon receipt of an application from the Prosecution.⁵³ For witnesses in the ICCPP, the Scheduling Order provided that the final date for any such delayed disclosure would be 11 February 2013 (that is 60 days prior to commencement of trial).⁵⁴ For non-ICCPP witnesses with security concerns, the Chamber held that the final date for any such delayed disclosure would be 12 March 2013 (that is 30 days prior to the commencement of trial).⁵⁵ The Chamber stated that any further delays beyond these deadlines would only be authorised “on an exceptional basis and where justified by security concerns”.⁵⁶

27. In ruling on the First Application, the Chamber must consider whether authorising the Prosecution to delay disclosure of the identities of six witnesses until 30 days prior to trial and two witnesses until 30 days prior to their testimony unduly interferes with the accused persons’ fair trial rights as guaranteed in the above cited provisions. In doing so, the Chamber must balance the interests of the accused with the security interests of witnesses and victims, in line with the requirement in Article 68(1) of the Statute to take appropriate measures to protect the safety, well-being and privacy of witnesses and with the specific exceptions to disclosure provided for in Article 68(5) of the Statute, and Rules 76(4) and 81 of the Rules where necessary to ensure the safety of witnesses.

⁵² ICC-01/09-01/11-440, para. 14.

⁵³ ICC-01/09-01/11-440, paras 8, 13.

⁵⁴ ICC-01/09-01/11-440, para. 16.

⁵⁵ ICC-01/09-01/11-440, para. 19.

⁵⁶ ICC-01/09-01/11-440, para. 8.

28. The Chamber recalls that, according to the consistent jurisprudence of this Court, in order to justify restrictions on disclosure, the Prosecution must show that: there is an objectively justifiable risk to the safety of the person concerned; the risk arises from disclosing the particular information to the accused; that the risk can be overcome by the proposed delayed disclosure; that no lesser restrictive measures are feasible; and that the delayed disclosure is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.⁵⁷
29. The Chamber emphasises that withholding witness identities beyond 9 January 2013, the date for final disclosure, must be limited as far as possible in order to ensure respect for the rights of the Defence. Further, it follows from the timelines established in the Scheduling Order that, absent exceptional circumstances, the latest dates until which the Chamber will authorise delayed disclosure of witness identities are 60 days before trial for ICCPP witnesses and 30 days before trial for non-ICCP witnesses. The Chamber does not accept the Defence's argument that delaying the disclosure of witness identities beyond the commencement of trial is in all circumstances prohibited by the statutory framework and by the jurisprudence of the Appeals Chamber. The Chamber recalls in this connection Trial Chamber II's decision authorising the delayed disclosure of the identity of one witness beyond the commencement of trial.⁵⁸ Trial Chamber II emphasised that this step was an "exceptional" one, taken after a careful weighing of the competing interests involved.⁵⁹ The Chamber is of the view that such an exceptional step can be taken when the risks to the security of a witness are such that even delaying disclosure until shortly before the commencement of trial would not sufficiently mitigate them. Due regard to the Defence's ability to

⁵⁷ See ICC-01/09-01/11-458, paras 9-11 and jurisprudence cited therein.

⁵⁸ Public redacted version of the *Decision on the Protection of Prosecution Witnesses 267 and 353* of 20 March 2009, ICC-01/04-01/07-1156-Conf-Exp, 31 December 2012, ICC-01/04-01/07-1179-tENG, paras 47-48.

⁵⁹ ICC-01/04-01/07-1179-tENG, para. 53.

effectively prepare its case must be taken when determining whether such a step can be taken.

30. The decision whether or not to authorise delayed disclosure of any given witness's identity depends mainly on circumstances of each individual witness, as opposed to the general security situation alone, and the related impact on the Defence's preparations for trial. In assessing the risks to an individual's safety, the Chamber may consider the risk that the witnesses will be interfered with or intimidated once their identity is disclosed to the accused.⁶⁰ The Chamber may also consider the subjective fear of a witness; but this is not, in itself, determinative of the existence of an objective risk.

31. In assessing the impact on the Defence's preparations, the Chamber may consider the effect of withholding the identity not just of any single witness but also the cumulative effect where delayed disclosure is requested for a number of witnesses. This is particularly relevant in the present case where, in addition to the eight witnesses named in the First Application, the Prosecution has now requested delayed disclosure for a further 12 witnesses by the Second and Third Applications. The Chamber may also consider whether any prejudicial impact on the Defence can be mitigated by certain measures. The Chamber observes that Trial Chamber II, for example, in authorising the delayed disclosure of the identity of one witness until 45 days before the start of trial and a second witness until 45 days before the start of her testimony, specified that its decision was without prejudice to the ability of the Defence to revert to the Chamber "should it

⁶⁰ See in this regard ICTY, *Prosecutor v. Rasim Delić*, Decision on the Prosecution Motion for Protective Measures, IT-04-83-PT, 1 December 2006, page 3; ICTR, *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, para. 20.

become apparent that it requires additional time" in order to complete investigations vis-à-vis these two witnesses.⁶¹

(ii) *General observations on the First Application*

32. Prior to assessing the security situation of each witness, the Chamber wishes to make some general observations on the First Application and the approach taken by the Prosecution to the implementation of protective measures for witnesses with security concerns.

33. First, the Chamber observes that in the First Application, the Prosecution asserts that all concerned 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".⁶² However, it has since become clear, from submissions made during the Status Conference⁶³ and the VWU Report⁶⁴ that in fact the Prosecution had not made referrals for five of the eight witnesses by as late as 7 December 2012. For one of these witnesses, the Prosecution explained during the Status Conference that [REDACTED].⁶⁵ However, for the remaining four witnesses, the non-referral appears to have been the result of processing delays or a desire not to have the protective measures put in place until the latest possible date to minimise disruption to the witness.⁶⁶

34. Quite apart from the seriousness of making inaccurate representations in written filings, the Chamber is concerned by the Prosecution's approach in delaying referrals for these witnesses as it appears to be based on an assumption that the

⁶¹ ICC-01/04-01/07-1179-tENG, para. 49.

⁶² ICC-01/09-01/11-468-Conf-Red, para. 15.

⁶³ ICC-01/09-01/11-T-17-CONF-EXP-ENG ET, page 17, lines 10-18; (P-376, P-423); page 21, line 20 to page 22, line 8 (P-423); page 24, lines 23-24; page 25, lines 17-21 (P-268, P-471).

⁶⁴ ICC-01/09-01/11-500-Conf-Exp, page 3, point 1; page 4, points 4, 6, 7; page 5, point 8.

⁶⁵ ICC-01/09-01/11-T-17-CONF-EXP-ENG ET, page 22 line 21 to page 23 line 14, page 24, lines 21-24 (P-450).

⁶⁶ ICC-01/09-01/11-T-17-CONF-EXP-ENG ET, page 16, line 10 to page 17, line 24.

Chamber will authorise the withholding, past 9 January 2013, of their identities as long as an application is made. Furthermore, the non-referral has meant that the Chamber does not have the benefit of the VWU's independent assessment in determining whether an objectively justifiable risk to the safety of the witness exists nor can the Chamber be satisfied that no less restrictive protective measures than non-disclosure are available to address any such risk.

35. Second, the Chamber observes that the Prosecution did not provide references to source materials underpinning the assertions made in the First Application as to the security situation of each witness. This made the process of assessing the assertions unnecessarily complex and time consuming for the Chamber. Additionally, when specifically directed to provide references to the relevant portions of witness statements and transcripts or any other materials, substantiating assertions made by the Prosecution as to subjective concerns expressed by six witnesses about their security,⁶⁷ the materials provided were inadequate in respect of a number of witnesses. As a result, the Chamber has been unable to independently assess the subjective concerns purportedly expressed by these witnesses in determining the existence of an objectively justifiable risk.

36. Finally, the Chamber notes that the Prosecution did not file a confidential redacted version of the First Application. As a result the Defence had access only to the heavily redacted public version of the First Application, which concealed all details of the role to be played and the type of evidence to be provided by each witness. In the Chamber's view, this unnecessarily limited the ability of the Defence to make meaningful submissions as to the impact of withholding the identity of any particular witness and consequently the usefulness of the

⁶⁷ ICC-01/09-01/11-T-17-CONF-EXP-ENG ET, page 19, lines 7-24 (P-376); page 20, line 22 to page 21, line 15 (P-397); page 22, lines 9-12 (P-423); page 26, lines 5-10 (P-268 and P-471); and page 27, lines 9-16 (P-356); ICC-01/09-01/11-485-Conf, para. 2.

Response to the Chamber's determination. In keeping with the rights of the Defence to maximum information about the Prosecution's case, in the redacted version of this Decision, the Chamber will not conceal certain information that was redacted in the public version of the First Application where it sees no basis to keep this information from the Defence. The Prosecution is similarly directed to file a confidential redacted version of the First Application containing no more redactions than strictly necessary to conceal the identity of the witnesses.

(iii) Individual witness assessments

Witness P-268

37. Witness P-268 is a member of a civil society organisation in Kenya. The Prosecution seeks to delay disclosure of his identity until 30 days before trial.

38. The OTP Security Profile notes that the witness [REDACTED].⁶⁸ [REDACTED].⁶⁹

39. The OTP Security Profile for this witness also asserts [REDACTED].⁷⁰

40. The Chamber has not been able to identify any statements to this effect in the witness's statement annexed to the First Application. The [REDACTED] provided by the Prosecution for this witness does record that the witness [REDACTED].⁷¹ However, from the information provided, [REDACTED] appear to be related more to the witness's role as a [REDACTED] rather than as a potential witness in the case.

41. At the Status Conference, the Prosecution stated that [REDACTED].⁷² However, the VWU Report records that, as of 7 December 2012, the witness had not yet been

⁶⁸ ICC-01/09-01/11-468-Conf-Exp-Anx 1, at Annex 1A, para. 1.

⁶⁹ ICC-01/09-01/11-468-Conf-Exp-Anx 1, at Annex 1A, paras 2-3.

⁷⁰ ICC-01/09-01/11-468-Conf-Exp-Anx 1, at Annex 1A, paras 2-3.

⁷¹ ICC-01/09-01/11-487-Conf-Exp-Anx A, page 2.

⁷² ICC-01/09-01/11-T-17-CONF-EXP-ENG ET, page 22, lines 16-19; page 24, lines 12-15.

referred to the VWU.⁷³ The Prosecution has not provided any supplementary information to the Chamber about this witness subsequent to the filing of the VWU Report. The latest information available to the Chamber, therefore, is that the witness has not been the subject of a security assessment by the VWU nor have any protective measures been recommended.

42. In the absence of an assessment by the VWU or other materials to substantiate the Prosecution's submissions, the Chamber cannot find that disclosure to the accused of the witness's security would present an objectively justifiable risk to his safety. Furthermore, the Chamber cannot be satisfied that the delayed disclosure is the least restrictive measure possible, given that the Prosecution has indicated [REDACTED].⁷⁴ The Chamber reminds the Prosecution that, as the party calling the witness, it bears the pivotal responsibility for taking all necessary steps to ensure the witness's security. This includes making appropriate requests to the Chamber and the VWU in the most timely and most efficient manner. The Prosecution's failure to do so does not justify the non-disclosure of a witness's identity past the disclosure date of 9 January 2013. Accordingly, the Chamber rejects the Prosecution's request with respect to this witness and directs the Prosecution to take all necessary steps to ensure the witness's security upon disclosure of his identity. This is without prejudice to the Prosecution's freedom to renew its request in relation to this aspect of the decision within five days of this decision, if it is able to supply the information indicated above as missing.

Witness P-336

43. Witness P-336 is a member of a non-governmental organisation, [REDACTED].
The Prosecution seeks to delay disclosure of his identity until 30 days before trial.

⁷³ ICC-01/09-01/11-500-Conf-Exp, page 3, point 1.

⁷⁴ ICC-01/09-01/11-T-17-CONF-EXP-ENG ET, page 25, lines 17-21.

44. The OTP Security Profile asserts that the witness: [REDACTED].⁷⁵ The OTP Security Profile also refers [REDACTED].⁷⁶ The witness's statement provides further details regarding [REDACTED].⁷⁷
45. The First Application notes that the witness [REDACTED], his identity could be disclosed 60 days prior to trial.⁷⁸ At the status conference, the VWU [REDACTED].⁷⁹ The VWU Report further notes [REDACTED].⁸⁰
46. The Chamber is satisfied that there is an objectively justifiable risk to the safety of this witness should his identity be disclosed on 9 January 2013. In reaching this view, the Chamber has considered the submissions of the Prosecution, as substantiated by the witness's statement, [REDACTED]. The Chamber concludes that the temporary non-disclosure of the identity of witness P-336, until such time as the VWU can fully implement adequate protective measures, is necessary to protect the safety of this witness, which may be at risk on account of his involvement with the Prosecution.
47. However, given that the Prosecution has stated that disclosure could be effected 60 days prior to trial [REDACTED], the Chamber is not prepared at this stage to grant the Prosecution's request to withhold the witness's identity until 30 days prior to trial. In order to enable the Chamber to rule on the precise date of disclosure of the identity of this witness vis-à-vis the Defence, the Chamber requests an assessment from the VWU regarding the witness's security situation and protection status by no later than 18 January 2013.

⁷⁵ ICC-01/09-01/11-468-Conf-Exp-Anx 2, at Annex 2A, paras 5-7.

⁷⁶ ICC-01/09-01/11-468-Conf-Exp-Anx 2, at Annex 2A, paras 8-11.

⁷⁷ KEN-OTP-0082-0215 to 0216 in ICC-01/09-01/11-468-Conf-Exp-Anx 2-Corr at Annex 2B.

⁷⁸ ICC-01/09-01/11-468-Conf-Exp, para.15 and accompanying footnote 20.

⁷⁹ ICC-01/09-01/11-T-17-CONF-EXP-ENG ET, page 25, lines 10-15.

⁸⁰ ICC-01/09-01/11-500-Conf-Exp, page 3, point 2.

48. The Chamber finds that non-disclosure of the identity of witness P-336 beyond 9 January 2013 pending the implementation of protective measures, strikes an appropriate balance between the need to ensure full disclosure to the Defence as early as possible and the concomitant need to ensure the safety of this witness. Any further decision of the Chamber with regard to continued non-disclosure will be taken with full regard to the Defence entitlement to sufficient time and facilities to prepare its case. In order to mitigate any prejudice to the accused arising from the temporary non-disclosure, the Prosecution shall provide the Defence with a summary of any substantive assertions redacted from witness P-336's statement under the B.1 category.

Witness P-356

49. Witness P-356 is an insider witness, [REDACTED]. [REDACTED].⁸¹ The Prosecution seeks to delay disclosure of his identity until 30 days before his testimony.

50. The OTP Security Profile for this witness records [REDACTED].⁸² The additional materials provided by the Prosecution substantiate some of these assertions.⁸³ The Chamber has also independently identified certain relevant portions of the witness's transcripts [REDACTED].⁸⁴

51. In the First Application, the Prosecution notes [REDACTED].⁸⁵ At the Status Conference, the Prosecution asserted that it [REDACTED].⁸⁶ The VWU Report indicates that P-356 [REDACTED].⁸⁷

⁸¹ ICC-01/09-01/11-468-Conf-Exp-Anx 3, at Annex 3A, paras 1-2.

⁸² ICC-01/09-01/11-468-Conf-Exp-Anx 3, at Annex 3A, paras 4-13.

⁸³ ICC-01/09-01/11-487-Conf-Exp-Anx B, pages 2-4.

⁸⁴ KEN-OTP-0081-0556 to 0583 in ICC-01/09-01/11-468-Conf-Exp-Anx 3, at Annex 3B.

⁸⁵ ICC-01/09-01/11-468-Conf-Exp, para.15 and accompanying footnote 20.

⁸⁶ ICC-01/09-01/11-T-17-CONF-EXP-ENG ET, page 27, lines 4-8.

52. The Chamber is satisfied that there is an objectively justifiable risk to the safety of this witness. In reaching this view, the Chamber has considered the submissions of the Prosecution, as substantiated by the additional materials provided, [REDACTED]; [REDACTED]. The Chamber concludes that the temporary non-disclosure of the identity of witness P-356, pending confirmation that protective measures have been fully implemented, is necessary to protect his safety, which may be at risk on account of his involvement with the Prosecution.
53. However, given that [REDACTED] and given the Prosecution's submission that disclosure could be effected once [REDACTED],⁸⁸ the Chamber is not prepared at this stage to grant the Prosecution's request to withhold the P-356's identity until 30 days prior to his testimony. In order to enable the Chamber to rule on the precise date of disclosure of the identity of this witness vis-à-vis the Defence, the Chamber requests an assessment from the VWU regarding the witness's security situation and protection status by no later than 18 January 2013.
54. The Chamber finds that non-disclosure of the identity of witness P-356 pending confirmation that protective measures have been fully implemented, strikes an appropriate balance between the need to ensure full disclosure to the Defence as early as possible and the concomitant need to ensure the safety of this witness. Any further decision of the Chamber with regard to continued non-disclosure will be taken with full regard to the Defence entitlement to sufficient time and facilities to prepare its case. In order to mitigate any prejudice to the accused arising from the temporary non-disclosure, the Prosecution shall provide the Defence with a

⁸⁷ ICC-01/09-01/11-500-Conf-Exp, page 4, point 3.

⁸⁸ ICC-01/09-01/11-T-17-CONF-EXP-ENG ET, page 27, lines 4-8.

summary of any substantive allegations redacted from witness P-356's transcripts of interviews under the B.1 category.⁸⁹

Witness P-376

55. Witness P-376 is a crime base witness who [REDACTED].⁹⁰ The Prosecution seeks to withhold his identity until 30 days prior to the commencement of trial.

56. The OTP Security Profile notes that the witness [REDACTED].⁹¹ [REDACTED].⁹²

57. The Prosecution asserts that the witness, like other crime base and contextual witnesses, has [REDACTED].⁹³ The Chamber has not been able to identify any statements to this effect in the witness's statement annexed to the First Application. The [REDACTED] provided by the Prosecution for this witness does record [REDACTED].⁹⁴ However, [REDACTED]. Indeed, [REDACTED] records that [REDACTED].⁹⁵

58. At the Status Conference, the Prosecution stated [REDACTED].⁹⁶ However, the VWU Report records that, as of 7 December 2012, the witness had not yet been referred to the VWU.⁹⁷ The Prosecution has not provided any supplementary information to the Chamber about this witness subsequent to the filing of the VWU Report. The latest information available to the Chamber, therefore, is that the witness has not been the subject of a security assessment by the VWU nor have any protective measures been recommended.

⁸⁹ ICC-01/09-01/11-468-Conf-Exp, para. 56.

⁹⁰ ICC-01/09-01/11-468-Conf-Exp-Anx 4, at Annex 4A, paras 2-3.

⁹¹ ICC-01/09-01/11-468-Conf-Exp-Anx 4, at Annex 4A, para. 1.

⁹² ICC-01/09-01/11-468-Conf-Exp-Anx 4, at Annex 4A, para. 4.

⁹³ ICC-01/09-01/11-468-Conf-Exp, para. 27.

⁹⁴ ICC-01/09-01/11-487-Conf-Exp-Anx A, page 3.

⁹⁵ ICC-01/09-01/11-487-Conf-Exp-Anx A, page 3.

⁹⁶ ICC-01/09-01/11-T-17-CONF-EXP-ENG ET, page 16, lines 16-24; page 17, lines 15-17.

⁹⁷ ICC-01/09-01/11-500-Conf-Exp, page 4, point 4.

59. In the absence of an assessment by the VWU or other materials to substantiate the Prosecution's submissions, the Chamber cannot find that disclosure to the accused of the witness's security would present an objectively justifiable risk to his safety. Furthermore, the Chamber cannot be satisfied that the delayed disclosure is the least restrictive measure possible, given that the Prosecution [REDACTED].⁹⁸ The Chamber reminds the Prosecution that, as the party calling the witness, it bears the pivotal responsibility for taking all necessary steps to ensure the witness's security. This includes making appropriate requests to the Chamber and the VWU in the most timely and most efficient manner. The Prosecution's failure to do so does not justify the non-disclosure of a witness's identity past 9 January 2013. Accordingly, the Chamber rejects the Prosecution's request with respect to this witness and directs the Prosecution to take all necessary steps to ensure the witness's security upon disclosure of his identity. This is without prejudice to the Prosecution's freedom to renew its request in relation to this aspect of the decision within five days of this decision, if it is able to supply the information indicated above as missing.

Witness P-397

60. Witness P-397 is a crime base witness [REDACTED].⁹⁹ The Prosecution seeks to withhold his identity until 30 days prior to the commencement of trial.

61. The OTP Security Profile for this witness states [REDACTED].¹⁰⁰ It also states [REDACTED].¹⁰¹ The Chamber has not been able to identify any statements to this

⁹⁸ ICC-01/09-01/11-T-17-CONF-EXP-ENG ET, page 17, lines 7-9.

⁹⁹ ICC-01/09-01/11-468-Conf-Exp-Anx 5, at Annex 5A, para. 2.

¹⁰⁰ ICC-01/09-01/11-468-Conf-Exp-Anx 5, at Annex 5A, para. 3.

¹⁰¹ ICC-01/09-01/11-468-Conf-Exp-Anx 5, at Annex 5A, paras 5-6.

effect in the witness's statement annexed to the First Application. However, [REDACTED] provided by the Prosecution for this witness [REDACTED].¹⁰²

62. The VWU Report notes [REDACTED]. It is anticipated that [REDACTED].¹⁰³

63. The Chamber is satisfied that there is an objectively justifiable risk to the safety of this witness. In reaching this view, the Chamber has considered: the submissions of the Prosecution, as substantiated by the additional materials provided, [REDACTED]. The Chamber concludes that the temporary non-disclosure of the identity of witness P-397, pending confirmation that protective measures have been fully implemented, is necessary to protect his safety, which may be at risk on account of his involvement with the Prosecution.

64. However, given that [REDACTED], the Chamber is not prepared at this stage to grant the Prosecution's request to withhold the witness's identity until 30 days prior to his testimony. In order to enable the Chamber to rule on the precise date of disclosure of the identity of this witness vis-à-vis the Defence, the Chamber requests an assessment from the VWU regarding the witness's security situation and protection status by no later than 18 January 2013.

65. The Chamber finds that non-disclosure of the identity of witness P-397 pending confirmation that protective measures have been fully implemented, strikes an appropriate balance between the need to ensure full disclosure to the Defence as early as possible and the concomitant need to ensure the safety of this witness. Any further decision of the Chamber with regard to continued non-disclosure will be taken with full regard to the Defence entitlement to sufficient time and facilities to prepare its case. In order to mitigate any prejudice to the accused arising from the temporary non-disclosure, the Prosecution shall provide the Defence with a

¹⁰² ICC-01/09-01/11-487-Conf-Exp-Anx A, page 4.

¹⁰³ ICC-01/09-01/11-500-Conf-Exp, page 4, point 5.

summary of any substantive allegations redacted from P-397's witness statement under the B.1 category.

Witness P-423

66. Witness P-423 is a crime base witness.¹⁰⁴ The Prosecution seeks to withhold his identity until 30 days prior to the commencement of trial.

67. The OTP Security Profile notes that the witness [REDACTED].¹⁰⁵ [REDACTED].¹⁰⁶

68. The OTP Security Profile also asserts that the witness has [REDACTED].¹⁰⁷ [REDACTED] provided by the Prosecution for this witness does record [REDACTED].¹⁰⁸ However, the Chamber is not satisfied, on the basis of the information provided, that these security concerns are specifically related to [REDACTED].

69. At the Status Conference, the Prosecution stated that [REDACTED].¹⁰⁹ However, the VWU Report records that, as of 7 December 2012, the witness had not yet been referred to the VWU.¹¹⁰ The Prosecution has not provided any supplementary information to the Chamber about this witness subsequent to the filing of the VWU Report. The latest information available to the Chamber, therefore, is that the witness has not been the subject of a security assessment nor have any protective measures been recommended.

70. In the absence of an assessment by the VWU or other materials to substantiate the Prosecution's submissions, the Chamber cannot find that disclosure to the accused

¹⁰⁴ ICC-01/09-01/11-468-Conf-Exp-Anx 6, at Annex 6A, para. 2.

¹⁰⁵ ICC-01/09-01/11-468-Conf-Exp-Anx 6, at Annex 6A, para. 1.

¹⁰⁶ ICC-01/09-01/11-468-Conf-Exp-Anx 6, at Annex 6A, para. 5.

¹⁰⁷ ICC-01/09-01/11-468-Conf-Exp-Anx 6, at Annex 6A, paras 3-4.

¹⁰⁸ ICC-01/09-01/11-487-Conf-Exp-Anx A, page 5.

¹⁰⁹ ICC-01/09-01/11-T-17-CONF-EXP-ENG ET, page 16, lines 16-24; page 17, lines 15-17.

¹¹⁰ ICC-01/09-01/11-500-Conf-Exp, page 3, point 6.

of the witness's security would present an objectively justifiable risk to his safety. Furthermore, the Chamber cannot be satisfied that the delayed disclosure is the least restrictive measure possible, given that the Prosecution has [REDACTED].¹¹¹ The Chamber reminds the Prosecution that, as the party calling the witness, it bears the pivotal responsibility for taking all necessary steps to ensure the witness's security. This includes making appropriate requests to the Chamber and the VWU in the most timely and most efficient manner. The Prosecution's failure to do so does not justify the non-disclosure of a witness's identity past 9 January 2013. Accordingly, the Chamber rejects the Prosecution's request with respect to this witness and directs the Prosecution to take all necessary steps to ensure the witness's security upon disclosure of his identity. This is without prejudice to the Prosecution's freedom to renew its request in relation to this aspect of the decision within five days of this decision, if it is able to supply the information indicated above as missing.

Witness P-450

71. Witness P-450 is [REDACTED] of the non-governmental organisation [REDACTED].¹¹² The Prosecution seeks to withhold his identity until 30 days prior to his testimony.

72. [REDACTED].¹¹³ [REDACTED].¹¹⁴

73. The witness has not been referred to VWU [REDACTED]. At the Status Conference, the Prosecution explained that the witness [REDACTED].¹¹⁵

¹¹¹ ICC-01/09-01/11-T-17-CONF-EXP-ENG ET, page 17, lines 7-9.

¹¹² ICC-01/09-01/11-468-Conf-Exp-Anx 7, at Annex 7A, para. 1.

¹¹³ ICC-01/09-01/11-468-Conf-Exp-Anx 7, at Annex 7A, paras 7-13.

¹¹⁴ KEN-OTP-0080-0704 to 0709; in ICC-01/09-01/11-468-Conf-Exp-Anx 7, at Annex 7B.

¹¹⁵ ICC-01/09-01/11-T-17-CONF-EXP-ENG ET, page 22, line 21 to page 23, line 14.

74. The Chamber is satisfied that there is an objectively justifiable risk to the safety of this witness. In reaching this view, the Chamber has considered: the submissions of the Prosecution, as substantiated by the additional materials provided, [REDACTED]. The Chamber considers that the temporarily delayed disclosure of P-450's identity, until such time as adequate protective measures can be put in place, is the least restrictive measure available to protect his safety.
75. The Chamber is not, however, prepared to grant the Prosecution's request for non-disclosure until 30 days prior to the witness's testimony. On the basis of the information it has been provided, the Chamber does not accept that such an exceptional measure is warranted considering that [REDACTED]. In order to enable the Chamber to rule on the precise date of disclosure of the identity of this witness the Prosecution is requested to provide the Chamber with an update on his security situation and protection status by 28 January 2013. In the meantime, the Prosecution should continue to take all necessary steps to secure the implementation of protective measures for this witness as soon as possible, [REDACTED].
76. The Chamber finds that non-disclosure of the identity of witness P-450 pending the implementation of adequate protective measures, strikes an appropriate balance between the need to ensure full disclosure to the Defence as early as possible and the concomitant need to ensure the safety of this witness. Any further decision of the Chamber with regard to continued non-disclosure will be taken with full regard to the Defence entitlement to sufficient time and facilities to prepare its case. In order to mitigate any prejudice to the accused arising from the temporary non-disclosure, the Prosecution shall provide the Defence with a summary of any substantive allegations redacted from P-450's witness statement under the B.1 category.

Witness P-471

77. Witness P-471 is [REDACTED] for the non-governmental organisation, [REDACTED].¹¹⁶ The Prosecution seeks to withhold his identity until 30 days prior to the commencement of trial.

78. The OTP Security Profile notes that the witness [REDACTED]¹¹⁷ [REDACTED].¹¹⁸ [REDACTED].¹¹⁹

79. The OTP Security Profile for this witness states that [REDACTED].¹²⁰ The Chamber has not been able to identify any statements to this effect in the witness's statement annexed to the First Application. The [REDACTED] provided by the Prosecution records that the witness [REDACTED] but provides no detail other than [REDACTED].¹²¹

80. At the Status Conference, the Prosecution stated that [REDACTED].¹²² However, the VWU Report records that, as of 7 December 2012, the witness had not yet been referred to the VWU.¹²³ The Prosecution has not provided any supplementary information to the Chamber about this witness subsequent to the filing of the VWU Report. The latest information available to the Chamber, therefore, is that the witness has not been the subject of a security assessment by the VWU nor have any protective measures been recommended.

81. In the absence of an assessment by the VWU or other materials to substantiate the Prosecution's submissions, the Chamber cannot find that disclosure to the accused

¹¹⁶ ICC-01/09-01/11-468-Conf-Exp-Anx 9, at Annex 9A, para. 1.

¹¹⁷ ICC-01/09-01/11-468-Conf-Exp-Anx 9, at Annex 9A, para. 1.

¹¹⁸ ICC-01/09-01/11-468-Conf-Exp-Anx 9, at Annex 9A, para. 5.

¹¹⁹ ICC-01/09-01/11-468-Conf-Exp-Anx 9, at Annex 9A, para. 7.

¹²⁰ ICC-01/09-01/11-468-Conf-Exp-Anx 9, at Annex 9A, para. 6.

¹²¹ ICC-01/09-01/11-487-Conf-Exp-Anx A, page 6.

¹²² ICC-01/09-01/11-T-17-CONF-EXP-ENG ET, page 22, lines 16-19; page 24, lines 12-15.

¹²³ ICC-01/09-01/11-500-Conf-Exp, page 4, point 8.

of the witness's security would present an objectively justifiable risk to his safety. Furthermore, the Chamber cannot be satisfied that the delayed disclosure is the least restrictive measure possible, given that the Prosecution [REDACTED].¹²⁴ The Chamber reminds the Prosecution that, as the party calling the witness, it bears the pivotal responsibility for taking all necessary steps to ensure the witness's security. This includes making appropriate requests to the Chamber and the VWU in the most timely and most efficient manner. The Prosecution's failure to do so does not justify the non-disclosure of a witness's identity past 9 January 2013. Accordingly, the Chamber rejects the Prosecution's request with respect to P-471 and directs the Prosecution to take all necessary steps to ensure the witness's security upon disclosure of his identity. This is without prejudice to the Prosecution's freedom to renew its request in relation to this aspect of the decision within five days of this decision, if it is able to supply the information indicated above as missing.

(iv) Requested redactions

82. In accordance with the above findings, the Chamber authorises the Prosecution to temporarily maintain category B.1 redactions to the identifying information in the transcripts and statements of witnesses P-336, P-356, P-397 and P-450 until such time as their identities are disclosed.

83. As provided in its Redaction Decision, such redactions should "not exceed that which is strictly necessary to protect the identity of the individual in question".¹²⁵ The Prosecution should continually review the redactions to ensure that they comply with this principle. In this regard, the Chamber observes that the dates of interview should not, as a general matter, be redacted as identifying information.

¹²⁴ ICC-01/09-01/11-T-17-CONF-EXP-ENG ET, page 25, lines 17-21.

¹²⁵ ICC-01/09-01/11-458, para. 30

84. Apart from B.1 category redactions, the only other non-standard redactions contained in the interview transcripts and witness statements of the five witnesses discussed herein are A.4 redactions to the names of investigators. In line with the Chamber's previous decision on disclosure of investigators' names to the defence,¹²⁶ the Chamber authorises the Prosecution to maintain the requested redactions to the names of the investigators at issue until the disclosure of the identity of the last witness interviewed or contacted by that investigator. Prior to that stage, the Defence may in exceptional circumstances raise objections to any specific instance of redaction which it considers to be unduly prejudicial or overbroad. Similarly, after that stage, the prosecution can re-apply for continued non-disclosure to maintain the redactions if there is a specific justification for the continued non-disclosure of the name of the investigator.

85. In order to mitigate any potential prejudice arising from the temporary non-disclosure, the Prosecution is to provide the Defence with the pseudonyms or letter codes of the investigators concerned, linking them to the relevant witness interview.¹²⁷

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

AUTHORISES the Prosecution to temporarily withhold from disclosure to the Defence the identities of P-336, P-356, P-397 and P-450 beyond 9 January 2013, pending the implementation of protective measures for these witnesses;

¹²⁶ Decision on prosecution applications to redact investigators' identifying information and to vary the Redaction Protocol, 21 December 2012, ICC-01/09-01/11-518-Conf.

¹²⁷ ICC-01/09-01/11-518-Conf, para. 23 and page 12.

AUTHORISES the Prosecution to temporarily maintain the B.1 redactions to the witness statements and transcripts of P-336, P-356, P-397 and P-450 contained in Annexes 2, 3, 5, and 7 to ICC-01/09-01/11-468-Conf-Exp until such time as the identities of the relevant witnesses are disclosed;

AUTHORISES the Prosecution to temporarily maintain the A.4 redactions to the identities of investigators in the witness statements and transcripts contained in Annexes 1 to 7 and Annex 9 to ICC-01/09-01/11-468-Conf-Exp until the disclosure of the identity of the last witness interviewed or contacted by one of the investigators at issue;

REJECTS the Prosecution's request to delay the disclosure of the identity of witnesses P-268, P-376, P-423, and P-471 beyond 9 January 2013;

REJECTS the Prosecution's request for authorisation of proposed B.1 category redactions to the witness statements of P-268, P-376, P-423 and P-471 contained in Annexes 1, 4, 6, and 9 to ICC-01/09-01/11-468-Conf-Exp;

DIRECTS the VWU to file an updated report on the security situation and protection status of witnesses P-336, P-356 and P-397 by no later than 18 January 2013 in order for the Chamber to make a determination on any continued non-disclosure of their identities;

DIRECTS the Prosecution to file an updated report on the security situation and protection status of witnesses P-450 by no later than 28 January 2013 in order for the Chamber to make a determination on any continued non-disclosure of his identity;

DIRECTS the Prosecution to provide written summaries to the Defence of any substantive allegation redacted, under the B.1 category, in the witness statements or transcripts contained in Annexes 2, 3, 5 and 7 to ICC-01/09-01/11-468-Conf-Exp by 11 January 2013;

DIRECTS the Prosecution to continually assess the B.1 redactions to the witness statements or transcripts contained in Annexes 2, 3, 5 and 7 to ICC-01/09-01/11-468-Conf-Exp to ensure that they are no more than strictly necessary;

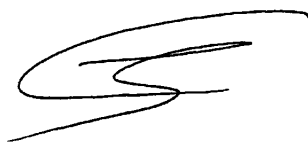
DIRECTS the Prosecution to provide the Defence with a list of pseudonyms or letter codes for the investigators whose names have been redacted from the witness statements or transcripts contained in Annexes 1 to 7 and Annex 9 to ICC-01/09-01/11-468-Conf-Exp; and

DIRECTS the Prosecution to file a confidential, lesser redacted, version of the First Application.

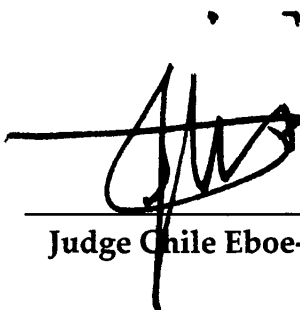
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding Judge



Judge Christine Van den Wyngaert



Judge Chile Eboe-Osuji

Dated 4 January 2013

At The Hague, The Netherlands