

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/11
Date: 23 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 redacted version of Decision on the second and third Prosecution
requests 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

Legal Representatives of Victims

Counsel for Joshua Arap Sang
Mr Joseph Kipchumba Kigen-Katwa
Mr Joel Kimutai Bosek
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 the second and third Prosecution requests 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 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.⁴
2. On 26 November 2012, the Chamber convened an *ex parte*, Prosecution and Victims and Witnesses Unit ("VWU") only, status conference ("Status Conference") in order to obtain further information regarding the security situation of the remaining eight witnesses.⁵ In the course of the Status Conference,

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 ("Redaction 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. 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. ICC-01/09-01/11-468-Red (notified 8 November 2012). Confidential redacted versions of the redactions charts were filed on 4 December 2012. A confidential redacted version of the application was filed on 14 January 2012, notified on 15 January.

⁴ 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.

⁵ ICC-01/09-01/11-T-17-CONF-EXP-ENG.

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.⁶ 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. On 28 November 2012, pursuant to an order of the Chamber, the Prosecution filed further information regarding the security concerns of these witnesses.⁷

3. On 17 December 2012, the Prosecution filed a second application requesting the delayed disclosure of a further seven witnesses ("Second Application").⁸ The Second Application included seven *ex parte* 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.⁹ The Second Application and its seven annexes were filed on a confidential *ex parte*, Prosecution and VWU only basis. On 20 December 2012, a confidential redacted version of the Second Application, with four of seven annexes, was filed.¹⁰

⁶ 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).

⁷ 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. The submission and its annexes were filed on a confidential *ex parte*, Prosecution and VWU only basis. A confidential redacted version of the filing and its annexes was notified on 29 November 2012. 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.

⁸ 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.

⁹ See annexes A to F to ICC-01/09-01/11-515-Conf-Exp.

¹⁰ Confidential redaction version with Confidential Annexes 4-7 of 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, 20 December 2012, ICC-01/09-01/11-515-Conf-Red. A public redacted version was filed the same day, ICC-01/09-01/11-515-Red2.

4. On 27 December 2012, the Prosecution filed a third application requesting delayed disclosure of the identities of a further five witnesses ("Third Application").¹¹ The Third Application and its five annexes were filed on a confidential *ex parte*, Prosecution and VWU only, basis. Confidential redacted versions of the Third Application and four of its five annexes were filed on 28 December 2012.¹²
5. On 2 January 2013, the Prosecution filed a request for authorisation to apply non-standard redactions to information in materials related to Witness P-15 which would identify Witness P-15 and also "implicate" Witnesses P-16 and P-28.¹³ The Prosecution explains that these redactions were not requested in the Second Application because the relevant materials had not yet been registered.¹⁴
6. On 3 January 2013, the Prosecution filed a request for authorisation to apply non-standard B.1 and A.4 redactions in accordance with the Redaction Protocol¹⁵ to the transcript of a prosecution interview with P-16 in November 2012.¹⁶ The Prosecution explains that these redactions were not requested in the Second Application because the relevant materials had not yet been registered.¹⁷ On 17 January 2013 the Defence for Mr Ruto and for Mr Sang (together "Defence") filed a joint response to this request,¹⁸ contending that the Chamber should dismiss it as untimely.

¹¹ Third application for delayed disclosure of witness identities, ICC-01/09-01/11-521-Conf-Exp. A corrigendum to Annex 5 was filed on 3 January 2012, ICC-01/09-01/11-521-Conf-Exp-Anx5-Corr with ICC-01/09-01/11-521-Conf-Exp-Anx5-Corr-Anx.

¹² Confidential Redacted Version of Third application for delayed disclosure of witness identities, ICC-01/09-01/11-521-Conf-Red and Annexes 1, 2, 4, and 5 thereto.

¹³ ICC-01/09-01/11-523, para. 3.

¹⁴ ICC-01/09-01/11-523, para. 3.

¹⁵ ICC-01/09-01/11-458-AnxA-Corr.

¹⁶ Prosecution application for non-standard redactions in materials related to P-0016, 3 January 2013, (notified on 3 January 2013), ICC-01/09-01/11-529, with confidential *ex parte* annexes 1 and 2 and confidential redacted annex 2.

¹⁷ ICC-01/09-01/11-529, para. 3.

¹⁸ Joint Defence Response to Public with Confidential *Ex Parte* Prosecution and VWU Annexes 1 and 2 Prosecution application for non-standard redactions in materials related to P-0016, 17 January 2013, ICC-01/09-01/11-554-Conf.

7. The Defence filed a joint response to the Second and Third Applications on 3 January 2013, requesting the Chamber to dismiss them as untimely¹⁹ or alternatively, to deny the relief sought in the Applications.²⁰
8. On 3 January 2013, the Chamber issued an Order regarding second and third Prosecution applications for delayed disclosure of witness identities ("Order"),²¹ holding that due to deficiencies in the applications, it was not possible for the Chamber to rule on the merits of the applications prior to the disclosure deadline of 9 January 2013,²² authorising the temporary non-disclosure of the identities of the witnesses concerned and requesting additional information from the Prosecution.²³ Specifically, the Prosecution was requested to provide the Chamber by 11 January 2013 with references to the relevant portions of the statements or transcripts of these witnesses or any other materials addressing their security concerns, in order to allow the Chamber to independently assess the witnesses' security situations.²⁴ The Prosecution was also asked to clarify whether it would be in a position to disclose the witnesses' identities as soon as protective measures are in place.²⁵
9. In the same order, the Chamber also requested the VWU to provide by 11 January 2013 an update on the security situation and current protection status of any witness referred to in the Second and Third Applications, who has been formally

¹⁹ Joint Defence Response to Prosecution's Second and Third Applications for Delayed Disclosure of Witness Identities and Variation of the 5 November 2012 Deadline, 3 January 2013, ICC-01/09-01/11-526-Conf, para. 30.

²⁰ ICC-01/09-01/11-526-Conf, paras 31 – 32.

²¹ ICC-01/09-01/11-528-Conf.

²² ICC-01/09-01/11-528-Conf, para. 4.

²³ ICC-01/09-01/11-528-Conf, paras 5 and 6.

²⁴ ICC-01/09-01/11-528-Conf, paras 6 and 7.

²⁵ ICC-01/09-01/11-528-Conf, para. 6.

referred to the VWU, or been the subject of consultations between the VWU and the Prosecution.²⁶

10. On 4 January 2013, the Defence filed a joint response to the prosecution's request for redactions to materials related to P-15, objecting to the motion as untimely and opposing the requested redactions as overbroad and prejudicial to the accused.²⁷
11. On 9 January 2013, pursuant to the Chamber's order,²⁸ the Prosecution filed a chart providing a list of letter codes for investigators whose identifying information is redacted in any witness statement or transcript.²⁹
12. On 10 January 2013, the Prosecution provided additional materials as requested in the Chamber's Order,³⁰ including the relevant excerpts from [REDACTED] relating to the witnesses who were the subject of the Second and Third Applications ("Additional Materials"). The Prosecution's relevant submissions as to the particular security risks facing each of the witnesses concerned are assessed in further detail in section III below. The Prosecution also clarifies that notwithstanding the length of time sought for delayed disclosure (in each case either 30 days prior to trial or 45 days prior to testimony), it intends to disclose witness identities as soon as protective measures are put in place.³¹

²⁶ ICC-01/09-01/11-528-Conf, para. 8.

²⁷ Joint Defence Response to Public with Confidential *Ex Parte* Prosecution and VWU Annexes 1 and 2 Prosecution application for non-standard redactions in materials related to P-0015, ICC-01/09-01/11-530-Conf.

²⁸ 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.

²⁹ Prosecution's Submission of Pseudonyms for investigators pursuant to the Decision on prosecution applications to redact investigator's identifying information and to vary the Redaction Protocol (ICC-01/09-01/11-518-Conf) and the Decision on first prosecution's application for delayed disclosure of witness identities (ICC-01/09-01/11-531-Conf-Exp), ICC-01/09-01/11-535-Conf with confidential Annex A.

³⁰ Prosecution's provision of additional material pursuant to "Order regarding second and third Prosecution applications for delayed disclosure of witness identities" (ICC-01/09-01/11-528-Conf-Exp), dated 9 January 2013 but notified on 10 January 2013, ICC-01/09-01/11-541-Conf-Exp and confidential *ex parte* annex. A confidential redacted version was filed the same day, ICC-01/09-01/11-541-Conf-Red.

³¹ ICC-01/09-01/11-541-Conf-Red, para. 4.

13. On 10 January 2013, the Prosecution submitted the draft transcripts of an interview it held with P-534, one of the witnesses included in the Third Application, between 15 and 18 December 2012.³²
14. The same day, the VWU provided information on the current security situation of the witnesses it had been in contact with ("VWU Update"),³³ as instructed in the Order.
15. On 17 January 2013, in a joint response to the lesser redacted version of the First Application filed by the Prosecution on 14 January 2013, the Defence challenged the Prosecution's assertion that if the identities of certain witnesses were to be revealed to the accused, the witnesses would be interfered with.³⁴ The Defence submits that no attempt to identify and interfere with witnesses has or will be made by the accused or persons on their behalf.³⁵ The Defence further submits that if the witnesses are facing real threats, the Prosecution should have liaised with the VWU to put protective measures in place in a timely manner.³⁶
16. 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.

³² Prosecution's provision of supplemental material to confidential *ex parte* Prosecution and Victims and Witnesses Unit Only Annex 3 to the "Third application for delayed disclosure of witness identities" (ICC-01/09-01/11-521-Conf-Exp), ICC-01/09-01/11-544-Conf-Exp, and confidential *ex parte* annex A, notified on 11 January 2013. A confidential redacted version was filed the same day, ICC-01/09-01/11-544-Conf-Red and confidential redacted annex, notified on 11 January 2013.

³³ Victim and Witnesses Unit's provision of information pursuant to the "Order regarding second and third prosecution applications for delayed disclosure of witness identities" (ICC-01/09-01/11-528-Conf), ICC-01/09-01/11-548-Conf-Exp.

³⁴ Joint Defence Response to Confidential Redacted Version of 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-01/09-01/11-555-Conf.

³⁵ ICC-01/09-01/11-555-Conf, para. 6.

³⁶ ICC-01/09-01/11-555-Conf, para. 8.

II. SUBMISSIONS

(i) *Prosecution submissions*

Second Application

17. In its Second Application, the Prosecution requests authorisation to delay disclosure of the identities of seven witnesses. For two of these witnesses, P-15 and P-16, the Prosecution requests authorisation to delay disclosure until 30 days before the commencement of the trial. For the other five witnesses, P-32, P-144, P-481, P-495 and P-524, the Prosecution requests authorisation to delay disclosure until 45 days before the witness's anticipated testimony.³⁷

18. The Prosecution also seeks authorisation to apply B.1 and A.4 redactions to the materials related to witnesses P-495 and P-524.³⁸ For witnesses P-32, P-144 and P-481, the Prosecution requests authorisation to disclose summaries in lieu of redacted versions of full statements.³⁹ It submits that this is the only manner in which the identities of P-32, P-144 and P-481 can be effectively concealed.⁴⁰

19. The Prosecution also seeks variation of the deadline of 5 November 2012 for applications for delayed disclosure, set by the Chamber in its Decision on the protocol establishing a redaction regime,⁴¹ with respect to Witnesses P-15, P-16 and P-32.⁴² The Prosecution submits that it was unable to meet the 5 November 2012 deadline because it only became aware of the circumstances warranting delayed disclosure after this deadline.⁴³

³⁷ ICC-01/09-01/11-515-Conf-Red, para. 1.

³⁸ ICC-01/09-01/11-515-Conf-Red, para. 39.

³⁹ ICC-01/09-01/11-515-Conf-Red, para. 42.

⁴⁰ ICC-01/09-01/11-515-Conf-Red, para. 43.

⁴¹ Decision on the protocol establishing a redactions regime, 27 September 2012, ICC-01/09-01/11-458 and ICC-01/09-01/11-458-AnxA-Corr.

⁴² ICC-01/09-01/11-515-Red2, para. 4.

⁴³ ICC-01/09-01/11-515-Conf-Exp, paras 4 and 11 – 18.

20. The Prosecution incorporates by reference the submissions it made in the First Application, including references to jurisprudence on delayed disclosure.⁴⁴
21. The Prosecution's submissions as to the particular security risks facing each of the witnesses concerned are summarised and assessed in further detail in section III below.

Third Application

22. In its Third Application, the Prosecution requests authorisation to delay disclosure of the identities of five witnesses. For two of these witnesses, P-111 and P-535, the Prosecution requests authorisation to delay disclosure until 30 days before the commencement of the trial. For the three remaining witnesses, P-516, P-534 and P-536, the Prosecution requests authorisation to delay disclosure until 45 days before the witness's anticipated testimony.⁴⁵
23. The Prosecution incorporates by reference the submissions it made in the First Application, including references to jurisprudence on delayed disclosure.⁴⁶
24. The Prosecution's submissions as to the particular security risks facing each of the witnesses concerned are summarised and assessed in further detail in section III below.

(ii) Defence submissions

25. The Defence raises concerns about the timing of the Prosecution's applications, submitting that for four of the witnesses who are the subject of the Second

⁴⁴ ICC-01/09-01/11-515-Red2, para. 10.

⁴⁵ ICC-01/09-01/11-521-Conf-Red, para. 1.

⁴⁶ ICC-01/09-01/11-521-Conf-Red, para. 9.

Application and four of the witnesses who are the subject of the Third Application, the Prosecution has not explained why the delayed disclosure requests were made so long after the 5 November 2012 deadline.⁴⁷ With regard to the Prosecution's request to vary this deadline with regard to Witnesses P-15, P-16 and P-32, the Defence submits that as a result of the redactions applied to the Second Application, it is unable to assess the Prosecution's explanation of why it was unable to meet the deadline.⁴⁸

26. The Defence observes that in total, the Prosecution's three applications requesting delayed disclosure of witness identities concern a large proportion of its witnesses. It submits that contrary to what the Prosecution suggests, 20 witnesses is not a "manageable and reasonable number" and that it will inevitably cause prejudice to the Defence preparation of its case.⁴⁹ The Defence recalls in this connection that the Trial Chamber ordered that all disclosure be provided to the Defence by 9 January 2013, because a minimum of three months was necessary for the Defence to prepare for the start of trial.⁵⁰ The Defence submits that it has received very little new disclosure from the Prosecution thus far and is "increasingly concerned as to whether it can prepare the case in a full and adequate manner" in twelve weeks.⁵¹

27. The Defence reiterates its previous submissions regarding the practical difficulties of delayed disclosure, and emphasises its limited resources.⁵²

28. 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

⁴⁷ ICC-01/09-01/11-526-Conf, para. 29.

⁴⁸ ICC-01/09-01/11-526-Conf, para. 28.

⁴⁹ ICC-01/09-01/11-526-Conf, paras 6 and 14.

⁵⁰ ICC-01/09-01/11-526-Conf, para. 6.

⁵¹ ICC-01/09-01/11-526-Conf, para. 12.

⁵² ICC-01/09-01/11-526-Conf, paras 11 and 13.

statutory framework.⁵³ In support, it cites a 2010 ruling of the Appeals Chamber wherein it held that “disclosure by the Prosecution should, in principle, take place prior to the commencement of trial.”⁵⁴ The Defence submits that the Prosecution has failed to address this issue in the Second and Third Applications.⁵⁵ The Defence argues that non-disclosure of witness identities should not be employed past the commencement of trial and that the applications requesting delayed disclosure of identity until 45 days before the testimony of Witnesses P-32, P-144, P-481, P-495, P-516, P-524, P-534, P-535 and P-536 should be denied.⁵⁶

29. The Defence notes that due to the heavy redactions applied to the public redacted versions of the Second and Third Applications, it “necessarily looks to the Chamber to protect the accused’s interests.”⁵⁷ The Defence submits, however, that it is unaware of any targeting of, or interference with, incriminating witnesses.⁵⁸ The Defence further submits that the situation in the Rift Valley at present “does not appear to be volatile” and that the political alliance between Mr. Ruto and Mr. Kenyatta has contributed to “an impression in recent weeks [...] of reconciliation.”⁵⁹ The Defence also submits that the Prosecution has already been afforded adequate time to put in place sufficient protective measures.⁶⁰

30. The Defence objects to being provided only summaries of the anticipated evidence of P-32, P-144 and P-481, and details its specific objections to each of the summaries, which it submits are wholly inadequate.⁶¹ The Defence submits that if

⁵³ ICC-01/09-01/11-526-Conf, para. 16, referring to submissions in paras 16 – 23 of its Response to the First Application, ICC-01/09-01/11-507-Conf.

⁵⁴ *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.

⁵⁵ ICC-01/09-01/11-526-Conf, para. 16.

⁵⁶ ICC-01/09-01/11-526-Conf, para. 16.

⁵⁷ ICC-01/09-01/11-526-Conf, para. 7.

⁵⁸ ICC-01/09-01/11-526-Conf, para. 17.

⁵⁹ ICC-01/09-01/11-526-Conf, para. 17.

⁶⁰ ICC-01/09-01/11-526-Conf, para. 18.

⁶¹ ICC-01/09-01/11-526-Conf, paras 20 – 24.

the Chamber were to grant the Prosecution's request to provide summaries, these must contain "substantial details, expressed in a manner that need not identify the maker".⁶²

III. ANALYSIS

(i) *Legal framework and principles*

31. The Chamber refers to its Decision on the First Delayed Disclosure Application and the criteria for granting requests for delayed disclosure set out in that decision.⁶³

(ii) *General observations on the Second and Third Applications*

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

33. The Prosecution has been aware for half a year, since 9 July 2012, that the deadline for disclosure to the Defence of the identities of its witnesses was 9 January 2013.⁶⁴ Given this fact, it is incomprehensible that for three of the witnesses who are the subject of the Second Application, the Prosecution does not appear to have determined as of 10 January 2013 whether it or the VWU will be responsible for taking the necessary steps to implement protective measures.⁶⁵ Such inaction is incompatible with the Prosecution's obligations to take all necessary measures to ensure the protection of its witnesses and to do so in a timely manner. The

⁶² ICC-01/09-01/11-526-Conf, para. 25.

⁶³ ICC-01/09-01/11-531-Conf-Red, paras 25 – 31.

⁶⁴ Decision on the schedule leading up to trial, 9 July 2012, ICC-01/09-01/11-440.

⁶⁵ ICC-01/09-01/11-541-Conf-Exp, para. 4(v), 4(vi) and 4 (viii).

Chamber considers that it is not appropriate for the Prosecution to seek delayed disclosure, which is a truly exceptional measure, where the need for a delay arises, it seems, as a result of its own failure to take the necessary measures to ensure the protection of its witnesses in due time.

34. The Prosecution also submits in paragraph 20 of its Second Application and in paragraph 11 of its Third Application that “[t]he Accused are not in custody. While the Chamber determined that there was no need to require their detention, it cannot ignore the reality that they are strongly motivated and able to interfere with the investigation without being monitored”.⁶⁶ However, without deliberating on the legal merits of this interjection, it suffices to observe that this Chamber did not make any such determination.

(iii) Individual witness assessments

Witness P-15

35. Witness P-15 is expected to provide incriminating evidence on the participation of both accused in the organisation and execution of the post-election violence.⁶⁷ His evidence is said to be “crucial to the Prosecution case” and the Prosecution claims that this “creates a very high incentive to intimidate or attempt to bribe [him] on the part of the Accused.”⁶⁸ The Prosecution submits that Witness P-15 has expressed strong concerns about his security to the Prosecution [REDACTED].⁶⁹ The Prosecution seeks authorisation to delay disclosure of the identity of this witness until 30 days before the start of trial.⁷⁰

⁶⁶ ICC-01/09-01/11-515-Red-Exp, para. 20 and ICC-01/09-01/11-521-Red-Exp, para. 11.

⁶⁷ ICC-01/09-01/11-515-Conf-Exp-Anx1A, para. 2.

⁶⁸ ICC-01/09-01/11-515-Conf-Red, para. 22.

⁶⁹ ICC-01/09-01/11-515-Conf-Exp-Anx1A, para. 4 and ICC-01/09-01/11-515-Conf-Exp, para. 24.

⁷⁰ ICC-01/09-01/11-515-Conf-Exp-Anx1A, para. 6.

36. P-15 was [REDACTED] The Prosecution submits that it will provide a report "on progress" to the Chamber "in four weeks or sooner, in the event that a solution is secured".⁷¹
37. The Prosecution submits that it did not file an application for delayed disclosure of the identity of P-15 by 5 November 2012 because it did not originally intend to request delayed disclosure. However, since that date, [REDACTED].⁷² According to the Prosecution, [REDACTED].⁷³ The Chamber considers that [REDACTED] is reasonable grounds for the Prosecution's late filing of the application to withhold this witness's identity beyond 9 January 2013.
38. Additionally, [REDACTED].⁷⁴ With regard to this allegation, the Prosecution states in footnote 15 of its Second Application that "[t]his is explained in further detail below and in Annex 1A." However, no such further details are provided.⁷⁵
39. In early December 2012 [REDACTED].⁷⁶ Although the Chamber concluded in its Decision on the prosecution's application pursuant to Article 56 that the witness's security situation "has not become so unmanageable that there would be concerns about the Witness no longer being available for trial",⁷⁷ in light of [REDACTED], the Chamber considers that measures short of a pre-trial deposition are warranted. The Chamber concludes that disclosure of the witness's identity should be temporarily delayed to give the Prosecution an opportunity to ascertain whether P-15's security situation can be addressed, and, if so, to put in place the required measures so that his identity can be disclosed to the Defence.

⁷¹ ICC-01/09-01/11-541-Conf-Exp, para. 4(i).

⁷² ICC-01/09-01/11-515-Conf-Exp, para. 12.

⁷³ ICC-01/09-01/11-515-Conf-Exp-Anx 1A, para. 5.

⁷⁴ ICC-01/09-01/11-515-Conf-Exp, para. 12.

⁷⁵ A transcript of [REDACTED] is attached as confidential *ex parte* annex 1C to ICC-01/09-01/11-515-Conf-Exp but no explanation of the relevance of this transcript is given.

⁷⁶ ICC-01/09-01/11-548-Conf-Exp, para. 1. See also Victims and Witnesses Unit's Assessment of Security Situation of Witness KEN-OTP-P-0015, 7 December 2012, ICC-01/09-01/11-499-Conf-Exp, para. 8.

⁷⁷ Decision on the prosecution's application pursuant to Article 56, 18 January 2013, ICC-01/09-01/11-558-Conf-Exp.

40. To that end, the Chamber authorises an additional delay of four weeks for the disclosure of this witness's identity to the defence, until 25 February 2013, in order to allow the Prosecution put in place the necessary security measures. However, any further delay in the disclosure of the witness's identity may adversely affect the Defence's ability to prepare for trial. Therefore, if the prosecution is unable to implement security measures for P-15 by 25 February 2013, the witness must be withdrawn. If the Prosecution wishes to retain this witness, his identity must be disclosed to the defence by 25 February 2013. In order to mitigate any prejudice to the accused in the interim period, the Prosecution shall provide the Defence with a detailed summary of any substantive assertions redacted from witness P-15's statement under the B.1 category.

Witness P-16

41. P-16 is expected to provide incriminating evidence concerning the preparation and planning of the post-election violence and the involvement of the accused.⁷⁸ [REDACTED].⁷⁹

42. As with P-15, the Prosecution claims that the witness is crucial to its case, which "creates a very high incentive to intimidate or attempt to bribe [him] on the part of the Accused."⁸⁰ [REDACTED].⁸¹ The Prosecution does not, however, provide any updated information suggesting the existence of a current threat to the witness from the accused.⁸²

⁷⁸ ICC-01/09-01/11-515-Conf-Exp-Anx2, para. 2.

⁷⁹ ICC-01/09-01/11-515-Conf-Exp-Anx2, para. 2.

⁸⁰ ICC-01/09-01/11-515-Conf-Exp, para. 22.

⁸¹ ICC-01/09-01/11-515-Conf-Exp-Anx2, para. 3.

⁸² ICC-01/09-01/11-515-Conf-Exp-Anx2, page 3, para. 3. Moreover, in an interview conducted by the Prosecution on 22 November 2012, the witness does not raise any concerns with regard to his safety. ICC-01/09-01/11-529-Conf-Exp-Anx1. Further, the Prosecution met with the witness [REDACTED]. The witness [REDACTED] did not raise security concerns. ICC-01/09-01/11-521-Conf-Exp, para. 52.

43. [REDACTED].⁸³ The Prosecution informed the Chamber in the Second Application that [REDACTED].⁸⁴ In order to protect the witness and his family, the Prosecution seeks delayed disclosure of his identity until 30 days before the start of trial.⁸⁵

44. According to the Prosecution's Additional Materials, [REDACTED].⁸⁶ The Prosecution informs the Chamber that [REDACTED].⁸⁷ The Prosecution submits that it "is currently actively engaged in consultations with VWU [REDACTED]".⁸⁸ [REDACTED]. Alternatively the Prosecution suggests that [REDACTED] his identity could be safely disclosed at that stage.⁸⁹ The Prosecution undertakes to provide the Chamber with a report on "the progress of P-0016 within four weeks".⁹⁰

45. Although the Prosecution requests a delay in the disclosure of P-16's identity until 30 days prior to the start of trial, the Prosecution fails to provide any information as to how it is envisioned that the security situation of the witness would be stabilized by that time. However, given that the VWU submits that it is currently "working in consultation with the Prosecution to find a safe solution for this witness", the Chamber exceptionally grants temporary non-disclosure of the witness's identity for an additional two weeks in order to give the VWU and the Prosecution an opportunity to implement any necessary security measures for this witness. The VWU is directed to provide an update on the protection status of this witness, including an estimation of when any applicable protective measures can be put in place, by 7 February 2013.

⁸³ ICC-01/09-01/11-515-Conf-Exp-Anx2, page para. 1.

⁸⁴ ICC-01/09-01/11-515-Conf-Exp, para. 25.

⁸⁵ ICC-01/09-01/11-515-Conf-Exp-Anx1, page 4, para. 4.

⁸⁶ ICC-01/09-01/11-541-Conf-Exp, para 4(ii).

⁸⁷ ICC-01/09-01/11-541-Conf-Exp, para 4(ii).

⁸⁸ ICC-01/09-01/11-541-Conf-Exp, para 4(ii).

⁸⁹ ICC-01/09-01/11-541-Conf-Exp, para 4(ii).

⁹⁰ ICC-01/09-01/11-541-Conf-Exp, para 4(ii).

46. In order to mitigate any prejudice to the accused in the interim period, the Prosecution shall provide the Defence with a summary of any substantive assertions redacted from witness P-16's statement under the B.1 category.

Witness P-32

47. Witness P-32 is [REDACTED].⁹¹ This witness is expected to provide evidence concerning [REDACTED].⁹²

48. This witness has not been referred to the VWU.⁹³ [REDACTED].⁹⁴ The Prosecution also submits in the Second Application that [REDACTED].⁹⁵ The Prosecution states in the Second Application that P-32 [REDACTED].⁹⁶ The Prosecution submits that delayed disclosure until 45 days before the start of testimony is necessary to protect the witness's security.⁹⁷

49. Notwithstanding these submissions, in its Additional Materials the Prosecution states that "P-0032's delayed disclosure application was grounded on a basis that disclosing his identity at this stage [REDACTED]. While P-0032 has consented in principle for his identity to be disclosed, [REDACTED]. [REDACTED]."⁹⁸

50. In light of the information contained in the Prosecution's Additional Materials, [REDACTED] and that the witness has apparently consented without preconditions to the disclosure of his identity, the Chamber finds that delayed disclosure is unnecessary. [REDACTED] before disclosing the materials related to

⁹¹ ICC-1/09-01/11-515-Conf-Exp, para. 15.

⁹² ICC-01/09-01/11-515-Conf-Exp-Anx3, page 3, para. 2 and ICC-01/09-01/11-515-Conf-Exp, para. 15.

⁹³ ICC-01/09-01/11-548-Conf-Exp, page 5, pt. 3.

⁹⁴ ICC-01/09-01/11-515-Conf-Exp-Anx3, page 3, para. 3 to page 4, para. 6.

⁹⁵ ICC-01/09-01/11-515-Conf-Exp-Anx3, page 3, para. 4.

⁹⁶ ICC-01/09-01/11-515-Conf-Exp-Anx3, page 4, para. 6.

⁹⁷ ICC-01/09-01/11-515-Conf-Exp-Anx3, page 4, para. 7.

⁹⁸ ICC-01/09-01/11-541-Conf-Exp, para. 4(iii).

P-32, the Prosecution is directed to apply discrete redactions to any information which would reveal the identity of a witness for whom temporary delayed disclosure has been authorised. Accordingly, the Chamber rejects the Prosecution's request with respect to witness P-32.

Witness P-111

51. Witness P-111 is expected to testify about the planning of the post-election violence [REDACTED].⁹⁹ The Prosecution seeks to delay the disclosure of his identity until 30 days before the commencement of the trial.
52. The witness [REDACTED].¹⁰⁰ The witness has apparently expressed "serious concerns" regarding his personal safety, and [REDACTED].¹⁰¹ The Prosecution submits that [REDACTED]. [REDACTED].¹⁰² However, [REDACTED]¹⁰³
53. With regard to [REDACTED] this witness the Chamber notes that the [REDACTED].¹⁰⁴ The materials provided by the Prosecution do not indicate that the threats to witness's security came directly from the accused or their supporters or were related to the witness's suspected cooperation with the Prosecution or the Court. Additionally, the witness states that he has not received any threats in 2010 or 2011;¹⁰⁵ for 2012 the Prosecution does not provide any information.
54. [REDACTED] also asserts that the Prosecution is unaware of any efforts to corruptly influence P-111, although the Prosecution considers it "likely" that the "Accused and their associates" will target P-111 when his identity is disclosed to the Defence.¹⁰⁶

⁹⁹ ICC-01/09-01/11-521-Conf-Exp, para. 15.

¹⁰⁰ ICC-01/09-01/11-521-Conf-Exp-Anx1, page 3 para. 6.

¹⁰¹ ICC-01/09-01/11-521-Conf-Exp, para. 16.

¹⁰² ICC-01/09-01/11-521-Conf-Exp-Anx1, page 3 para. 7.

¹⁰³ ICC-01/09-01/11-521-Conf-Exp-Anx1; page 16, para. 65 and page 21, para. 8.

¹⁰⁴ ICC-01/09-01/11-541-Conf-Exp-AnxA, page 8.

¹⁰⁵ ICC-01/09-01/11-541-Conf-Exp-AnxA, page 8.

¹⁰⁶ ICC-01/09-01/11-521-Conf-Exp-Anx1, page 4, para. 9.

55. The Prosecution submits that "P-0111 has not been referred to the [...] ICCPP but is in the process of being referred to the VWU for consultations as to the most appropriate protective measures which can be applied".¹⁰⁷
56. The VWU Update asserts that the Prosecution has not referred this witness to the VWU and that therefore the witness has not been subject of a security assessment.¹⁰⁸
57. In the absence of any information that protective measures have been requested or are being implemented, the Chamber is unable to conclude that no less restrictive measures are available. The Chamber considers that it is not appropriate for the Prosecution to seek delayed disclosure, which is a truly exceptional measure, where the need for a delay arises as a result of its own failure to take the necessary measures to ensure the protection of its witnesses in due time. The Chamber recalls that the Prosecution must take all the necessary steps to ensure the witness's security, including referring the necessary applications to the VWU. It is the Prosecution's responsibility to ensure that such referrals are made sufficiently in advance to enable the Prosecution to comply with its disclosure obligations. With regard to P-111, as of 11 January 2013 the Prosecution had not referred this witness to the VWU for protective measures of any kind. Accordingly, the Chamber rejects the Prosecution's request for delayed disclosure with regard to this witness.

¹⁰⁷ ICC-01/09-01/11-521-Conf-Exp-Anx1, page 4, para. 8.

¹⁰⁸ ICC-01/09-01/11-548-Conf-Exp, page 6, pt. 8.

Witness P-144

58. P-144 is [REDACTED]. [REDACTED].¹⁰⁹ The Prosecution requests that the identity of this witness is withheld from the Defence until 45 days prior to his testimony.¹¹⁰
59. This witness has not been referred to the VWU.¹¹¹ The Prosecution submits that [REDACTED].¹¹² [REDACTED].¹¹³ The Prosecution submits that [REDACTED].¹¹⁴
60. In the Additional Materials, it is submitted that [REDACTED].¹¹⁵ However, the Chamber is unable to find this assertion anywhere in the Second Application.
61. The Prosecution further submits in the Additional Materials that “as such, the Prosecution considers it necessary to [REDACTED].¹¹⁶ The Prosecution asserts that [REDACTED].¹¹⁷ However, at the same time the Prosecution submits that it “has commenced the process of consultation with the VWU [REDACTED]. The Prosecution undertakes to provide a report on progress to the Chamber in two weeks”.¹¹⁸
62. The deadline for final disclosure to the Defence has already expired and yet the Prosecution submits only that it intends [REDACTED] – and apparently discussions with the VWU concerning which organ will carry out [REDACTED] are not yet complete.¹¹⁹ Moreover, the Prosecution has given no explanation for the delay. As observed in relation to P-111, the Chamber considers that it is not appropriate for the Prosecution to seek delayed disclosure, which is a truly

¹⁰⁹ ICC-01/09-01/11-515-Conf-Exp-Anx4, page 3, paras 2 – 3.

¹¹⁰ ICC-01/09-01/11-515-Conf-Exp-Anx4, page 3, para. 5.

¹¹¹ ICC-01/09-01/11-548-Conf-Exp, page 5, pt. 4.

¹¹² ICC-01/09-01/11-515-Conf-Exp-Anx4, page 3, para. 3.

¹¹³ ICC-01/09-01/11-515-Conf-Exp-Anx4, page 3, para. 4.

¹¹⁴ ICC-01/09-01/11-515-Conf-Exp, para. 30.

¹¹⁵ ICC-01/09-01/11-541-Conf-Exp, para. 4(iv).

¹¹⁶ ICC-01/09-01/11-541-Conf-Exp, para. 4(iv).

¹¹⁷ ICC-01/09-01/11-541-Conf-Exp, para. 4(v).

¹¹⁸ ICC-01/09-01/11-541-Conf-Exp, para. 4(v).

¹¹⁹ ICC-01/09-01/11-541-Conf-Exp, para. 4(v).

exceptional measure, where the need for a delay arises as a result of its own failure to take the necessary measures to ensure the protection of its witnesses in due time. [REDACTED] before disclosing the materials related to P-144, the Prosecution is directed to apply discrete redactions to any information which would reveal the identity of a witness for whom temporary delayed disclosure has been authorised. Accordingly, the Chamber rejects the Prosecution's request with respect to this witness.

Witness P-481

63. Witness P-481 [REDACTED].¹²⁰ He is expected to provide evidence on [REDACTED]. The Prosecution seeks to withhold his identity from the Defence until 45 days prior to his testimony.¹²¹

64. This witness has not been referred to the VWU.¹²² The Prosecution submits that the witness has not reported any security concerns to it.¹²³ The Prosecution states the witness [REDACTED].¹²⁴ With regard to the protective measures it has implemented, or will seek to implement, for this witness, the Prosecution submits only that "[REDACTED], the Prosecution undertakes to provide a report on progress to the Chamber in two weeks".¹²⁵

65. The Chamber notes that the witness has not expressed any security concerns, and in the absence of an assessment by the VWU the Chamber is not satisfied that delayed disclosure is the least restrictive measure possible in the circumstances. The deadline for final disclosure to the Defence has already expired and yet the Prosecution submits only that it intends [REDACTED] and apparently discussions

¹²⁰ ICC-01/09-01/11-515-Conf-Exp-Anx5, page 3, para. 3.

¹²¹ ICC-01/09-01/11-515-Conf-Exp-Anx5, page 3, para 4r.

¹²² ICC-01/09-01/11-548-Conf-Exp, page 5, pt. 5.

¹²³ ICC-01/09-01/11-515-Conf-Exp-Anx5, page 3, para 3.

¹²⁴ ICC-01/09-01/11-515-Conf-Exp-Anx5, page 3, para 3.

¹²⁵ ICC-01/09-01/11-541-Conf-Exp, para. 4(vi).

with the VWU concerning which organ will carry out [REDACTED] are not yet complete.¹²⁶ Moreover, no explanation has been provided for the delay. As observed above in relation to witnesses P-111 and P-144, the Chamber considers that it is not appropriate for the Prosecution to seek delayed disclosure, which is a truly exceptional measure, where the need for a delay arises as a result its own failure to take the necessary measures to ensure the protection of its witnesses in due time. Before disclosing the materials related to P-481, the Prosecution is directed to apply discrete redactions to any information which would reveal the identity of a witness for whom temporary delayed disclosure has been authorised. Accordingly, the Chamber rejects the Prosecution's request with respect to this witness.

Witness P-495

66. Witness P-495 [REDACTED].¹²⁷ The Prosecution seeks to withhold his identity from the Defence until 45 days prior to his testimony.¹²⁸

67. The VWU Update states that [REDACTED].¹²⁹ The witness [REDACTED].¹³⁰ The VWU submits that its assessment of his security situation is not yet finalised.¹³¹

68. [REDACTED] this witness states that he has expressed "very strong [security] concerns" [REDACTED].¹³² The Prosecution submits that [REDACTED].¹³³

69. In the absence of a finalised VWU security assessment, the Chamber is unable to make a determination as to the risks disclosure may pose to this witness.

¹²⁶ ICC-01/09-01/11-541-Conf-Exp, para. 4(iv) and (v).

¹²⁷ ICC-01/09-01/11-515-Conf-Exp, para. 31.

¹²⁸ ICC-01/09-01/11-515-Conf-Exp-Anx6, page 3, para.7.

¹²⁹ ICC-01/09-01/11-548-Conf-Exp, page 5, pt. 6.

¹³⁰ ICC-01/09-01/11-548-Conf-Exp, page 5, pt. 6.

¹³¹ ICC-01/09-01/11-548-Conf-Exp, page 5, pt. 6.

¹³² ICC-01/09-01/11-515-Conf-Exp-Anx6, page 3, para. 4.

¹³³ ICC-01/09-01/11-515-Conf-Exp-Anx6, page 3, para. 5.

However, 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 11 February 2013. The Prosecution is authorised to delay disclosure of P-495's identity until the final determination of the Chamber.

70. In order to mitigate any prejudice to the accused in the interim period, the Prosecution shall provide the Defence with a summary of any substantive assertions redacted from witness P-495's statement under the B.1 category.

Witness P-516

71. Witness P-516 is an insider and crime base witness who is expected to testify concerning the planning of the post-election violence and the [REDACTED] as well as the alleged contribution of Mr Sang to the crimes charged through the broadcasting of coded messages intended to incite violence.¹³⁴ The Prosecution requests the delay of disclosure of his identity until 45 days prior to his testimony.

72. The Prosecution submits that this witness has expressed serious concerns regarding his personal security.¹³⁵ [REDACTED].¹³⁶ [REDACTED].¹³⁷ [REDACTED] substantiates these assertions.¹³⁸

73. [REDACTED].¹³⁹ The VWU informs the Chamber that [REDACTED].¹⁴⁰

¹³⁴ ICC-01/09-01/11-521-Con-Exp, para. 19.

¹³⁵ ICC-01/09-01/11-521-Con-Exp, para. 20.

¹³⁶ ICC-01/09-01/11-521-Con-Exp-Anx2, page 3, para. 5.

¹³⁷ ICC-01/09-01/11-521-Con-Exp-Anx2, page 4, paras 7 and 8.

¹³⁸ ICC-01/09-01/11-541-Con-Exp-AnxA, page 15 to 16.

¹³⁹ ICC-01/09-01/11-521-Conf-Exp-Anx2, page 4, para. 11.

¹⁴⁰ ICC-01/09-01/11-548-Conf-Exp, page 6, point 9.

74. On the basis of the information provided by the Prosecution, including the Additional Materials and the assessment provided by the VWU, regarding [REDACTED] and in particular given the fact that the VWU [REDACTED], the Chamber is satisfied that there is an objectively justifiable risk to the witness's security. The temporary non-disclosure of his identity until the implementation of the intended protection measure is necessary for the safety of the witness, who may be at risk on account of his cooperation with the Prosecution in the current case. The Chamber considers that until protective measures have been implemented there is no less restrictive measure available.
75. However, given that the VWU [REDACTED], the Chamber does not consider the security situation of the witness to justify the delay of disclosure of his identity until 45 days prior to his testimony at trial. The Chamber is of the view that the witness's identity should be disclosed as soon as protective measures have been implemented.
76. In view of the fact that the VWU [REDACTED]. If for any reason the Prosecution is unable to meet this deadline it is to revert to the Chamber by 14 February 2013 providing specific reasons why the protective measures cannot be implemented by the deadline. In order to mitigate any prejudice to the accused arising from the temporary non-disclosure, the Prosecution is to provide the Defence with a summary of any substantive allegations redacted from P-516's witness statement under the B.1 category.

Witness P-524

77. P-524 is [REDACTED].¹⁴¹ This witness is expected to provide incriminatory evidence concerning the involvement of the accused in the incitement and coordination of the post-election violence.¹⁴² The Prosecution seeks to delay disclosure of the identity of this witness until 45 days prior to his testimony.¹⁴³

78. [REDACTED]¹⁴⁴ [REDACTED].¹⁴⁵ The witness is said to have security concerns and allegedly [REDACTED].¹⁴⁶

79. This witness has not been referred to the VWU.¹⁴⁷ In its Additional Materials the Prosecution [REDACTED].¹⁴⁸ Notwithstanding this conclusion, the Prosecution has apparently not yet taken any concrete steps in this direction.¹⁴⁹ The Prosecution submits only that [REDACTED] it has “commenced the process of consultation with the VWU to determine the most appropriate body (Prosecution or VWU) to [REDACTED].¹⁵⁰ Moreover, the Prosecution has given no explanation for the delay.

80. The Chamber is thus not satisfied that delayed disclosure is the least restrictive measure possible in the current circumstances. As observed above in relation to witnesses P-111, P-144 and P-481, the Chamber considers that it is not appropriate for the Prosecution to seek delayed disclosure, which is a truly exceptional measure, where the need for a delay arises as a result of its own failure to take the necessary measures to ensure the protection of its witnesses in due time.

¹⁴¹ ICC-01/09-01/11-515-Conf-Exp, para. 32.

¹⁴² ICC-01/09-01/11-515-Conf-Exp, para. 32.

¹⁴³ ICC-01/09-01/11-515-Conf-Exp-Anx7, page 3, para. 6.

¹⁴⁴ ICC-01/09-01/11-515-Conf-Exp-Anx7, page 3, para. 4.

¹⁴⁵ ICC-01/09-01/11-515-Conf-Exp, para. 32.

¹⁴⁶ ICC-01/09-01/11-515-Conf-Exp, para. 32, ICC-01/09-01/11-515-Conf-Exp-Anx7, para. 5 and ICC-01/09-01/11-541-Conf-AnxA, page 18.

¹⁴⁷ ICC-01/09-01/11-548-Conf-Exp, page 5, pt. 7.

¹⁴⁸ ICC-01/09-01/11-541-Conf-Exp, para. 4(viii).

¹⁴⁹ ICC-01/09-01/11-541-Conf-Exp, para. 4(viii).

¹⁵⁰ ICC-01/09-01/11-541-Conf-Exp, para. 4(viii).

Accordingly, the Chamber rejects the Prosecution's request with regard to this witness.

Witness P-534

81. Witness P-534 is [REDACTED] who is said to have "detailed [REDACTED] knowledge of the accused's planning and preparations for the post-election violence and the commission of the crimes".¹⁵¹ The Prosecution asserts that this witness [REDACTED].¹⁵² The Prosecution seeks delayed disclosure of this identity until 45 days prior of his testimony.

82. The Security Profile for witness P-534 states that he has expressed "serious concerns for his security" [REDACTED].¹⁵³ According to the Third Application and the supporting material provided by the Prosecution [REDACTED]. The witness [REDACTED].¹⁵⁴ According to the witness, [REDACTED].¹⁵⁵ According to [REDACTED]. [REDACTED],¹⁵⁶ [REDACTED].¹⁵⁷

83. [REDACTED] additional information in regard to [REDACTED]. [REDACTED].¹⁵⁸ [REDACTED].¹⁵⁹

84. The Chamber notes that the Prosecution submitted on 27 December 2012 that the witness had already been referred to the VWU for inclusion in the ICCPP,¹⁶⁰ while

¹⁵¹ ICC-01/09-01/11-521-Conf-Exp, para. 25.

¹⁵² ICC-01/09-01/11-521-Conf-Exp, paras 25 – 26.

¹⁵³ ICC-01/09-01/11-521-Conf-Exp-Anx3, para. 6 and ICC-01/09-01/11-541-Conf-Exp-AnxA, page 21.

¹⁵⁴ ICC-01/09-01/11-521-Conf-Exp, para. 28 to 30, ICC-01/09-01/11-Conf-Exp-Anx3, para. 9 to 10.

¹⁵⁵ ICC-01/09-01/11-521-Conf-Exp, para. 28 and ICC-01/09-01/11-541-Conf-Exp-AnxA, page 21.

¹⁵⁶ ICC-01/09-01/11-541-AnxA, page 21. The Chamber notes the in the 3rd Application, ICC-01/09-01/11-521-Conf-Exp, para. 28, and the security information in the corresponding annex, ICC-01/09-01/11-521-Conf-Exp-AnxA, page 4, para. 9, the Prosecution asserts that the accused tried to bribe the aunt of the witness. The Chamber considers that this discrepancy is due to an oversight by the Prosecution and has considered the assertions despite this inconsistency.

¹⁵⁷ ICC-01/09-01/11-541-AnxA, page 21.

¹⁵⁸ ICC-01/09-01/11-541-Conf-Exp-AnxA, page 21.

¹⁵⁹ ICC-01/09-01/11-541-Conf-Exp-AnxA, page 22.

¹⁶⁰ ICC-01/09-01/11-521-Conf-Exp, para. 34.

the VWU states that “[t]his witness was referred to the VWU on 9th January 2013”.¹⁶¹

85. The VWU in its Update notifies the Chamber that [REDACTED].¹⁶² Further, the VWU informs the Chamber that a protection assessment is planned during “weeks 3 to 5 dependant on when the Prosecution makes this witness available”.¹⁶³

86. Given that [REDACTED] does not consider that the witness’s security situation necessitates the exceptional measure of delaying disclosure until 45 days prior to testimony. The Chamber notes that a protection assessment is planned to take place in the very near future and accordingly directs the VWU to provide an update on the protection status of this witness, including whether sufficient protective measures are in place to allow disclosure of his identity, by 11 February 2013. The Prosecution is authorised to delay disclosure of P-534’s identity until this assessment has taken place.

87. In order to mitigate any prejudice to the accused in the interim period, the Prosecution shall provide the Defence with a summary of any substantive assertions redacted from witness P-534’s statement under the B.1 category.

Witness P-535

¹⁶¹ ICC-01/09-01/11-548-Conf-Exp, page 6, pt. 10.

¹⁶² ICC-01/09-01/11-548-Conf-Exp, pages 6, pt. 10.

¹⁶³ ICC-01/09-01/11-548-Conf-Exp, page 7, pt. 10.

88. Witness P-535 is expected to provide evidence regarding the planning of the post-election violence and the attack on Humura.¹⁶⁴ The Prosecution seeks the delay of disclosure of his identity until 30 days prior to the start of the trial.
89. The Prosecution states that [REDACTED].¹⁶⁵ No other information concerning threats against the witness's security have been provided to the Chamber, nor has the witness raised any concerns as to his personal security.¹⁶⁶ Further, the Prosecution submits that the witness has not been referred to the VWU and [REDACTED].¹⁶⁷ According to the Prosecution the witness [REDACTED]¹⁶⁸
90. In the absence of a security assessment from the VWU or a referral of the witness to the VWU, and given that no explanation has been provided as to why no referral was made, the Chamber is unable to conclude that continued non-disclosure is the least restrictive measure possible.
91. In this respect, the Chamber notes that the Prosecution argues that "[because of the absence of a referral and [REDACTED] it is particularly necessary that the disclosure of his identity be delayed".¹⁶⁹ Again,¹⁷⁰ the Chamber reminds the Prosecution of its obligation to take all necessary steps to ensure the witness's security, including requests regarding protective measures to the Chamber and the VWU, as well as the timely referral of witnesses to the VWU where necessary. As observed above in relation to witnesses P-111, P-144, P-481 and P-524, the Chamber considers that it is not appropriate for the Prosecution to seek delayed disclosure, which is a truly exceptional measure, where the need for a delay arises as a result of its own failure to take the necessary measures to ensure the

¹⁶⁴ ICC-01/09-01/11-521-Conf-Exp, para. 33.

¹⁶⁵ ICC-01/09-01/11-521-Conf-Exp-Anx4, page 3, para. 4.

¹⁶⁶ ICC-01/09-01/11-541-Conf-Exp-AnxA, pages 23 to 24, ICC-01/09-01/11-521-Conf-Exp-Anx4, page 3, para. 6.

¹⁶⁷ ICC-01/09-01/11-521-Conf-Exp-Anx4, page 3, para. 3.

¹⁶⁸ ICC-01/09-01/11-521-Conf-Exp-Anx4, page 3, para. 3.

¹⁶⁹ ICC-01/09-01/11-521-Conf-Exp-Anx4, page 4, para. 7.

¹⁷⁰ ICC-01/09-01/11-531-Conf-Red, para. 42.

protection of its witnesses in due time. Accordingly, the Prosecution rejects the Prosecution's request with regard to this witness.

Witness P-536

92. Witness P-536 is said to be [REDACTED].¹⁷¹ This witness is expected to testify concerning "a series of meetings at the farm of local businessman and RUTO's associate Mark TOO [REDACTED].¹⁷² The Prosecution seeks delayed disclosure of P-536's identity until 45 days prior to testimony.

93. The Prosecution asserts that P-536 [REDACTED].¹⁷³

94. On 27 December 2012 the Prosecution asserted that witness P-536 had already been referred to the VWU for inclusion in the ICCPP.¹⁷⁴ However, the VWU submits that "[t]his witness was referred to the VWU on 9 January 2013"¹⁷⁵ and that a protection assessment is planned "dependent on when the Prosecution makes the witness available".¹⁷⁶

95. Despite the fact that the Prosecution failed to provide a valid justification for the lateness of its referral of P-536 to the VWU, given that a VWU security assessment is currently pending, the Chamber exceptionally grants temporary non-disclosure of the witness's identity in order to give the VWU an opportunity to carry out its assessment. However, the Chamber does not consider that the witness's security situation necessitates the exceptional measure of delaying the disclosure of the witness's identity 45 days prior to testimony. The Chamber is of the view that the witness's identity should be disclosed as soon as protective measures have been

¹⁷¹ ICC-01/09-01/11-521-Conf-Exp, para. 37.

¹⁷² ICC-01/09-01/11-521-Conf-Exp, para.

¹⁷³ ICC-01/09-01/11-521-Conf-Exp-Anx5, page 5, para. 4; ICC-01/09-01/11-541-Conf-Exp-AnxA, page 26.

¹⁷⁴ ICC-01/09-01/11-521-Conf-Exp, para. 42.

¹⁷⁵ ICC-01/09-01/11-548-Conf-Exp, page 7 pt. 12.

¹⁷⁶ ICC-01/09-01/11-548-Conf-Exp, page 7 pt. 12.

implemented, on the condition that this can be achieved sufficiently in advance of the start of the trial. The VWU is directed to provide an update on the protection status of this witness, including an estimation of when any applicable protective measures can be put in place, by 11 February 2013.

96. In order to mitigate any prejudice to the accused arising from the temporary non-disclosure, the Prosecution is to provide the Defence with a summary of any substantive allegations redacted from P-536's witness statement under the B.1 category.

Requested redactions

97. 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-15, P-16, P-495, P-516, P-534 and P-536.

98. 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."¹⁷⁷ The Prosecution should continually review the redactions to ensure that they comply with this principle. In this regard, the Chamber reiterates that the dates of interview should not, as a general matter, be redacted as identifying information.¹⁷⁸ For this reason, the Chamber denies the Prosecution's request to redact the dates of interview with P-495, P-516 and P-536,¹⁷⁹ as the Prosecution has not explained why these redactions are necessary.

¹⁷⁷ ICC-01/09-01/11-458, para. 30

¹⁷⁸ See para. 83 of ICC-01/09-01/11-531-Conf-Red, para. 83.

¹⁷⁹ ICC-01/09-01/11-515-Conf-Exp-Anx6, ICC-01/09-01/11-11-521-Conf-Exp-Anx2 and ICC-01/09-01/11-11-521-Conf-Exp-Anx5.

99. However, with regard to the redactions requested by the Prosecution to the dates contained in the materials related to P-15 and the most recent interview with P-534, the Chamber is persuaded, on the basis of the justifications provided by the Prosecution,¹⁸⁰ that temporary non-disclosure of the interview dates is justified.
100. Apart from the abovementioned redactions, the only other non-standard redactions contained in the materials related to P-16, P-495 and P-536 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,¹⁸¹ 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.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

AUTHORISES the Prosecution to temporarily withhold from disclosure to the Defence the identities of witnesses P-15, P-16, P-495, P-516, P-534 and P-536 in accordance with the deadlines set out in this Decision;

AUTHORISES the Prosecution to temporarily maintain the B.1 redactions to the witness statements and transcripts contained in Annex 6 to ICC-01/09-01/11-515-Conf-Exp, Annex

¹⁸⁰ ICC-01/09-01/11-523-Conf-Exp-Anx2. ICC-01/09-01/11-544-Conf-Exp, footnote 2.

¹⁸¹ 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.

1 to ICC-01/09-01/11-529-Conf-Exp, Annexes 2 and 5 to ICC-01/09-01/11-521-Conf-Exp, Annex A to ICC-01/09-01/11-544-Conf-Exp and Annex 1 to ICC-01/09-01/11-523-Conf-Exp until such time as the identities of witnesses P-15, P-16, P-495, P-516, P-534 and P-536 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 Annex 6 to ICC-01/09-01/11-515-Conf-Exp and Annexes 2 and 5 to ICC-01/09-01/11-521-Conf-Exp until the disclosure of the identity of the last witness interviewed or contacted by one of the investigators at issue;

AUTHORISES the Prosecution to temporarily maintain the B1 redactions to the dates of the interview in the materials contained in ICC-01/09-01/11-523-Conf-Exp-Anx1 and ICC-01/09-01/11-544-Conf-Exp-AnxA;

REJECTS the Prosecution's request to continue to withhold disclosure of the identity of witnesses P-32, P-111, P-144, P-481, P-524 and P-535 from the Defence and **DIRECTS** the Prosecution to disclose the identities of these witnesses to the Defence by 30 January 2013;

REJECTS the Prosecution's request for authorisation of proposed B.1 category redactions to the witness statements of P-32, P-111, P-144, P-481, P-524, and P-535 contained in Annexes to 3, 4, 5 and 7 to ICC-01/09-01/11-515-Conf-Exp and in Annexes 1 and 4 to ICC-01/09-01/11-521-Conf-Exp.

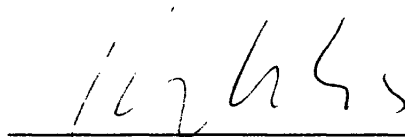
DIRECTS the VWU to file an assessment of the security situation and protection status of P-16 by no later than 7 February 2013 and witnesses P-495, P-534 and P-536 by no later than 11 February 2013 in order for the Chamber to make a determination on any continued non-disclosure of witness identities;

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

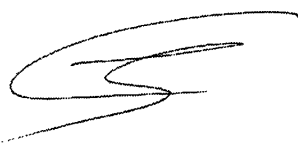
contained in Annex 6 to ICC-01/09-01/11-515-Conf-Exp, Annexes 2 and 5 to ICC-01/09-01/11-521-Conf-Exp, ICC-01/09-01/11-529-Conf-Exp-Anx1, ICC-01/09-01/11-544-Conf-Exp-AnxA and ICC-01/09-01/11-523-Conf-Exp-Anx1.

DIRECTS the Prosecution to continually assess the B.1 redactions to the witness statements or transcripts contained in Annex 6 to ICC-01/09-01/11-515-Conf-Exp, Annexes 2 and 5 to ICC-01/09-01/11-521-Conf-Exp, ICC-01/09-01/11-544-Conf-Exp-AnxA and ICC-01/09-01/11-523-Conf-Exp-Anx1 to ensure that they are no more than strictly necessary.

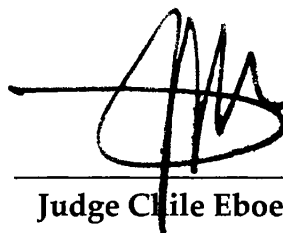
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding Judge



Judge Christine Van den Wyngaert



Judge Chile Eboe-Osuji

Dated 23 January 2013

At The Hague, The Netherlands