

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11

Original Date: 21 December 2012

Date of public version: 3 February 2017

TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding Judge
Judge Christine Van den Wyngaert
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
*THE PROSECUTOR v. FRANCIS KIRIMI MUTHAURA
AND
UHURU MUIGAI KENYATTA***

Public redacted version of

**Decision on prosecution application for delayed disclosure of witness
identities, 21 December 2012, ICC-01/09-02/11-580-Conf-Exp**

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 Francis Kirimi Muthaura

Counsel for Uhuru Muigai Kenyatta

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. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, having regard to Articles 64, 67, 68(1) and 68(5) of the Rome Statute (“Statute”), Rules 76, 77, 81 and 84 of the Rules of Procedure (“Rules”), issues this Decision on prosecution application for delayed disclosure of witness identities.

I. BACKGROUND

1. On 5 November 2012, in accordance with the Chamber’s Decision on the protocol establishing a redaction regime,¹ the Office of the Prosecutor (“Prosecution”) filed an application for the delayed disclosure of the identities of six witnesses and authorisation for redactions to corresponding witness statements or transcripts (“Delayed Disclosure Application”).² The Prosecution’s security assessment of each witness was included as Annex A to the Delayed Disclosure Application. The witness statements and transcripts (“Witness Materials”) containing the proposed redactions together with charts outlining the proposed redactions were included as annexes B – G to the Delayed Disclosure Application.
2. The Delayed Disclosure Application and its annexes were filed on a confidential *ex parte*, Prosecution and Victims and Witnesses Unit (“VWU”) only, basis. On 7 November 2012, the Prosecution’s public redacted version of the Delayed Disclosure Application, without annexes, was notified.³ A confidential lesser

¹ 27 September 2012, ICC-01/09-02/11-495 and Protocol, ICC-01/09-02/11-495-AnxA-Corr.

² Prosecution application for delayed disclosure of witness identities, 5 November 2012, ICC-01/09-02/11-519-Conf-Exp with confidential *ex parte*, Prosecution and VWU only, Annexes A-G.

³ Public Redacted Version of the 5 November 2012 “Prosecution application for delayed disclosure of witness identities” (ICC-01/09-02/11-519-Conf-Exp), 7 November 2012, ICC-01/09-02/11-519-Red.

redacted version of the Delayed Disclosure Application was subsequently filed by the Prosecution on 6 December 2012.⁴

3. On 28 November 2012, the Prosecution withdrew its application for the delayed disclosure of the identity of one witness.⁵
4. On 28 November 2012, the Chamber held an *ex parte* prosecution and VWU only status conference in order to obtain additional information concerning the security situation of the witnesses who are the subject of the Delayed Disclosure Application.⁶ During the course of the status conference, the Prosecution proposed to provide an overview, by way of oral submissions, of the security situation in Kenya. The Chamber directed the Prosecution to submit this information by way of written filing.⁷
5. On 30 November 2012, the Prosecution filed corrected versions of the Witness Materials and redactions charts in Annexes C–G to the Delayed Disclosure Application.⁸ On the same day, pursuant to an order of the Chamber,⁹ the Prosecution disclosed redacted versions of the corrected Witness Materials to the defence.¹⁰ Confidential redacted versions of the corrected redactions charts in Annexes C – G to the Delayed Disclosure Application were filed on 14 December 2012.¹¹

⁴ Lesser Redacted Version of the 5 November 2012 “Prosecution Application for delayed disclosure of witness identities”(ICC-01/09-02/11-519-Conf-Exp, ICC-01/09-02/11-519-Red), 6 December 2012, ICC-01/09-02/11-519-Conf-Red2 (notified 7 December 2012).

⁵ Withdrawal of request for the delayed disclosure of the identity of Witness 7, 28 November 2012, ICC-01/09-02/11-543.

⁶ ICC-01/09-02/11-T-20-CONF-EXP-ENG.

⁷ ICC-01/09-02/11-T-20-CONF-EXP-ENG, page 7, line 1 to page 8, line 3.

⁸ ICC-01/09-02/11-519-Conf-Exp-AnxC-Corr; ICC-01/09-02/11-519-Conf-Exp-AnxD-Corr; ICC-01/09-02/11-519-Conf-Exp-AnxE-Corr; ICC-01/09-02/11-519-Conf-Exp-AnxF-Corr; ICC-01/09-02/11-519-Conf-Exp-AnxG-Corr.

⁹ Order regarding redactions, 26 November 2012, ICC-01/09-02/11-541, para. 7.

¹⁰ Prosecution’s Communication of the Disclosure of Evidence, 4 December 2012, ICC-01/09-02/11-554 and ICC-01/09-02/11-554-Conf-AnxA.

¹¹ ICC-01/09-02/11-519-Conf-AnxC-Corr-Red; ICC-01/09-02/11-519-Conf-AnxD-Corr-Red; ICC-01/09-02/11-519-Conf-AnxE-Corr-Red; ICC-01/09-02/11-519-Conf-AnxF-Corr-Red; ICC-01/09-02/11-519-Conf-AnxG-Corr-Red.

6. On 5 December 2012, the Prosecution filed an *ex parte*, Prosecution and VWU only, submission on the security situation in Kenya.¹² A confidential redacted version was filed on 7 December 2012.¹³
7. The defence for Mr Muthaura and Mr Kenyatta (together the “Defence”) responded to the Delayed Disclosure Application on 7 December 2012, opposing the request in its entirety.¹⁴
8. On 13 December 2012, the Prosecution filed a confidential *ex parte*, Prosecution and VWU only, supplement to the corrected Annex D to the Delayed Disclosure Application.¹⁵ The supplement included, as Annex A, the transcript of a re-interview with Witness 219, photographs provided by the witness during the interview and a chart outlining proposed redactions to the transcript. On 17 December 2012, the Prosecution filed a confidential redacted version of this supplementary filing.¹⁶
9. Since the filing of the Delayed Disclosure Application, the Prosecution has filed a second application requesting the delayed disclosure of a further seven witnesses.¹⁷ This second application will be the subject of a separate later decision to be issued once the Defence has had an opportunity to respond.

¹² Prosecution’s Submission of Supplementary Information on the Security Situation in Kenya, 5 December 2012, ICC-01/09-02/11-556-Conf-Exp. A corrigendum was filed on 6 December 2012, ICC-01/09-02/11-556-Conf-Exp-AnxA-Corr.

¹³ ICC-01/09-02/11-556-Conf-AnxA-Corr-Red.

¹⁴ Defence Response to the Public Redacted Version of the 5 November 2012 “Prosecution Application for delayed disclosure of witness identities” (ICC-01/09-02/11-519-Conf-Exp), ICC-01/09-02/11-561.

¹⁵ Prosecution’s provision of supplemental material to the corrigendum of confidential *ex parte* Prosecution and Victims and Witnesses Unit Only Annex D to the “Prosecution Application for delayed disclosure of witness identities” (ICC-01/09-02/11-519-Conf-Exp), 13 December 2012, ICC-01/09-02/11-571-Conf-Exp with confidential *ex parte* Annex A (notified 14 December 2012)

¹⁶ Confidential Redacted Version of Annex A to Prosecution’s provision of supplemental material to the corrigendum of confidential *ex parte* Prosecution and Victims and Witnesses Unit Only Annex D to the “Prosecution Application for delayed disclosure of witness identities” (ICC-01/09-02/11-519-Conf-Exp), ICC-01/09-02/11-571-Conf-AnxA-Red.

¹⁷ Second Prosecution application for delayed disclosure of witness identities and application for variation of the 5 November 2012 deadline with respect to Witness 334, 7 December 2012, ICC-01/09-02/11-562-Conf-Exp with confidential *ex parte* Annexes A – I. A confidential redacted version was filed on 10 December 2012.

II. SUBMISSIONS

Prosecution submissions

10. The Prosecution requests authorisation to delay disclosure of the identities of four witnesses until 30 days prior to the start of trial and to delay disclosure of the identity of one witness until 30 days prior to his testimony.¹⁸
11. The four witnesses whose identities the Prosecution seeks to withhold until 30 days before the commencement of trial are Witnesses 219, 428, 429 and 430, all of whom are said to provide [REDACTED].”¹⁹ The Prosecution alleges that there is an objectively justifiable risk to each of these [REDACTED] witnesses resulting from four factors.²⁰
12. First, the Prosecution submits that the nature of their evidence is “unique” and has substantial incriminatory value.²¹ In addition, given the [REDACTED], there exists a “powerful incentive” to interfere with these witnesses.²²
13. Second, the Prosecution submits that the risk of witness tampering in this case is high. In this regard, the Prosecution alleges that three of the insider witnesses whose names have already been disclosed confidentially to the Defence have been interfered with in some way.²³ The Prosecution alleges that during the pre-trial stage [REDACTED] “was the target of a pre-disclosure bribery campaign by intermediaries purportedly acting on behalf of the Accused, which aimed to persuade the witness to withdraw his testimony regarding the PEV and to agree not to testify for the Prosecution”.²⁴ The Prosecution also alleges that shortly after

¹⁸ ICC-01/09-02/11-519-Conf-Red2.

¹⁹ ICC-01/09-02/11-519-Conf-Red2, para. 10.

²⁰ ICC-01/09-02/11-519-Conf-Red2, para. 11.

²¹ ICC-01/09-02/11-519-Conf-Red2, para. 12.

²² ICC-01/09-02/11-519-Conf-Red2, para. 13.

²³ ICC-01/09-02/11-519-Conf-Exp, para. 15.

²⁴ ICC-01/09-02/11-519-Conf-Red2, para. 15.

disclosure of the identities of Witnesses 11 and 12 confidentially to the defence, they were contacted by purported intermediaries of Mr Kenyatta “to offer a ‘deal’ for them to agree not to testify.”²⁵

14. The Prosecution contends that the five witnesses who are the subject of the Delayed Disclosure Application each consider themselves to be at risk if they were to be offered, and refused, a bribe.²⁶ The Prosecution cites jurisprudence from the International Criminal Tribunal for Rwanda to support its contention that “the possibility of bribery is enough to justify continued redactions and delayed disclosure”.²⁷

15. Third, the Prosecution refers to [REDACTED],²⁸ [REDACTED]²⁹ [REDACTED].³⁰

16. Fourth, the Prosecution submits that individuals purporting to act on behalf of the accused have [REDACTED].³¹ The Prosecution further notes that the witnesses at issue are already known to the accused, not as prosecution witnesses but as “persons with information relevant to the pending criminal case”.³²

17. With respect to Witness 118, for whom delayed disclosure is requested until 30 days prior to his testimony, the Prosecution submits that he shares the same risk factors [REDACTED] and has additional unique security concerns.³³ These additional concerns are addressed in the following section.

²⁵ ICC-01/09-02/11-519-Conf-Exp, para. 15.

²⁶ ICC-01/09-02/11-519-Conf-Red2, paras 16 - 18.

²⁷ ICC-01/09-02/11-519-Conf-Red2, para. 18.

²⁸ ICC-01/09-02/11-519-Conf-Red2, para. 19.

²⁹ ICC-01/09-02/11-519-Conf-Red2, para. 20.

³⁰ ICC-01/09-02/11-519-Conf-Red2, para. 21.

³¹ ICC-01/09-02/11-519-Conf-Red2, para. 22.

³² ICC-01/09-2/11-519-Conf-Exp, para. 22.

³³ ICC-01/09-2/11-519-Conf-Red2, para. 32

18. The Prosecution submits that there are no less restrictive protective measures available to meet the security risks of the witnesses.³⁴ It asserts that disclosing the identities of these witnesses confidentially to the Defence is insufficient as a safeguard because “their security concerns stem from the Accused and their supporters; and (...) counsel for both Accused take the position that they cannot withhold from their clients any materials provided to them”.³⁵ The Prosecution also submits that a number of leaks of confidential information have occurred in this case so far.³⁶
19. The Prosecution submits that the proposed delay in disclosing the witnesses’ identities will reduce the potential for witness interference and provide the VWU with additional time to implement protective measures.³⁷
20. The Prosecution contends that delayed disclosure will not unduly prejudice the rights of the accused as any disadvantage can be mitigated and is outweighed by witness security concerns.³⁸ It asserts that the redacted transcripts provide the Defence with much of the substance of the witnesses’ accounts.³⁹ It also emphasises that delayed disclosure is only being requested for a small number of witnesses.⁴⁰ Finally, the Prosecution suggests that any prejudice to the Defence can be mitigated by disclosure of written summaries of the material in a manner which does not reveal the witnesses’ identities.⁴¹

Defence submissions

³⁴ ICC-01/09-2/11-519-Conf-Red2, paras 23 – 25, 35.

³⁵ ICC-01/09-2/11-519-Conf-Red2, para. 23.

³⁶ ICC-01/09-2/11-519-Conf-Red2, para. 24.

³⁷ ICC-01/09-2/11-519-Conf-Red2, para. 25.

³⁸ ICC-01/09-2/11-519-Conf-Red2, para. 26.

³⁹ ICC-01/09-2/11-519-Conf-Red2, para. 27.

⁴⁰ ICC-01/09-2/11-519-Conf-Red2, para. 28. As noted above, however, the Prosecution has since filed a second application for delayed disclosure requesting to withhold the identities of four additional witnesses until 30 days before the commencement of trial and the identities of three additional witnesses until 45 days before their anticipated testimony. See ICC-01/09-02/11-562-Conf-Red.

⁴¹ ICC-01/09-02/11-519-Conf-Red2, para. 29.

21. The Defence opposes the Delayed Disclosure Application in its entirety and requests that the Chamber order the disclosure of all witness identities by 9 January 2013.⁴² The Defence submits that it “has serious concerns as to the credibility of a number of crucial Prosecution witnesses [REDACTED]”.⁴³ The Defence refers to a “worrying trend in which Prosecution witnesses change or offer to change their testimony” and submits that the need to investigate the credibility of all prosecution witnesses is crucial to the Defence case.⁴⁴ It submits that redacted versions of the witness transcripts and transcripts are insufficient for these purposes as, in the absence of the witnesses’ identities, meaningful investigations into their credibility and character cannot take place.⁴⁵
22. The Defence also provides the Chamber with a confidential *ex parte*, Defence only, annex containing a report by the lead investigation counsel for Mr Kenyatta, highlighting the challenges of investigating the credibility of prosecution witnesses and emphasising the need for full disclosure of witness identities as far in advance of trial as possible.⁴⁶
23. The Defence submits that conditions in Kenya make investigations difficult and that this work cannot be carried out in the short timeframes proposed by the Prosecution.⁴⁷ The Defence also submits that delayed disclosure is unnecessary because defence investigations into the credibility of prosecution witnesses will not endanger these witnesses.⁴⁸

⁴² ICC-01/09-02/11-561, paras 1 – 2.

⁴³ ICC-01/09-02/11-561, para. 13.

⁴⁴ ICC-01/09-02/11-561, paras 13 – 14.

⁴⁵ ICC-01/09-02/11-561, paras 14 – 15.

⁴⁶ ICC-01/09-02/11-561-Conf-Exp-AnxA.

⁴⁷ ICC-01/09-02/11-561, paras 16 – 18.

⁴⁸ ICC-01/09-02/11-561, para. 19.

24. The Defence notes that full disclosure of the identities of prosecution witnesses was ordered 3 months prior to trial in the cases of *The Prosecutor v. Jean-Pierre Bemba Gombo* and *The Prosecutor v. Thomas Lubanga Dyilo*.⁴⁹
25. In relation to the requested disclosure of the identity of Witness 118 thirty days before his testimony, the Defence submits that the Statute and Rules do not permit post-commencement of trial disclosure and cites a decision of the Appeals Chamber in support of its interpretation.⁵⁰ The Defence contends that post-commencement of trial disclosure prejudices the accused because, once trial commences, the defence will lack the time and resources to carry out necessary investigations in Kenya.⁵¹ The Defence also points out that disclosure after the start of trial means that the Defence will be unable to put crucial information to witnesses in cross-examination unless witnesses are recalled.⁵²
26. The Defence submits that the Prosecution mischaracterises the decision of Trial Chamber II in the case of the *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (“*Katanga* case”) to authorise delayed disclosure of one witness 45 days prior to testimony. It contends that the circumstances surrounding that decision are not comparable to the present situation,⁵³ noting that in *Katanga* Trial Chamber II emphasised that the delayed disclosure was “truly exceptional” and based on factors which were “very specific” to the witness in question.⁵⁴ Further, the Defence submits that the witness at issue in the *Katanga* case did not testify regarding the

⁴⁹ ICC-01/09-02/11-561, para. 31.

⁵⁰ ICC-01/09-02/11-561, paras 21 – 27 citing, at footnote 24, *The Prosecutor v. Thomas Lubanga Dyilo*, 13 October 2006, ICC-01/04-01/06-568, para.55. The defence also cites, at footnote 34, a later decision of the Appeals Chamber in the *Katanga* case: 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.

⁵¹ ICC-01/09-02/11-561, para. 35.

⁵² ICC-01/09-02/11-561, para. 36.

⁵³ ICC-01/09-02/11-561, paras 29 – 30.

⁵⁴ ICC-01/09-02/11-561, para. 29, citing: *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.

acts and conduct of the accused and that the defence in that case did not challenge the application for delayed disclosure.⁵⁵

27. Notwithstanding its objections to the Delayed Disclosure Application, the Defence requests, as an interim measure, to be provided with a summary of the redacted material in a manner which does not reveal the witnesses' identities.⁵⁶

III. ANALYSIS

(i) Delayed disclosure of witness identities

28. In the Decision on the schedule leading up to trial, the Chamber held that prosecution disclosure should be completed by 9 January 2013.⁵⁷ In the same decision, the Chamber made clear that any requests to withhold the identities of witnesses in the ICC Protection Programme ("ICCP") until 60 days prior to the commencement of trial⁵⁸ or to delay the disclosure of the identities of other witnesses with security concerns until 30 days prior to the commencement of trial⁵⁹ would be determined on a case-by-case basis upon receipt of an application from the Prosecution.⁶⁰ The Chamber also held that these deadlines were without prejudice to its authority to authorise disclosure at a later date if necessary, "on an exceptional basis and where justified by security concerns".⁶¹
29. In ruling on the present request, the Chamber must consider whether authorising the Prosecution to delay disclosure of the identities of certain witnesses beyond 9 January 2013 unduly interferes with the rights of the accused under Article 67(1) of the Statute, particularly the right to have adequate time and facilities for the

⁵⁵ ICC-01/09-02/11-561, para. 29.

⁵⁶ ICC-01/09-02/11-561, para. 16 referring to Delayed Disclosure Application, para. 29.

⁵⁷ 9 July 2012, ICC-01/09-02/11-451, para. 19.

⁵⁸ ICC-01/09-02/11-451, para. 21.

⁵⁹ ICC-01/09-02/11-451, para. 24.

⁶⁰ ICC-01/09-02/11-451, para. 13.

⁶¹ ICC-01/09-02/11-451, para. 13.

preparation of their defence. The Chamber must also closely examine the risks to the safety of the witnesses concerned, in line with the requirement in Article 68(1) for the Court to take appropriate measures to protect the safety, well-being and privacy of witnesses.

30. Also relevant to the Chamber's consideration are various provisions of the Rules which seek to balance the interests of the accused in receiving disclosure with the security interests of witnesses and victims. Specifically, Rule 76(1) of the Rules requires the Prosecution to provide the Defence with the names of its witnesses and copies of any prior statements "sufficiently in advance to enable the adequate preparation of the defence". As noted in Rule 76(4), however, provision of this material is subject to the protection of privacy of victims and witnesses as provided for in the Statute and in Rules 81 and 82. Rule 81(4) allows the Chamber to take steps to ensure the safety of witnesses, "including by authorizing the non-disclosure of their identity prior to the commencement of the trial".
31. The Chamber recalls that, according to the consistent jurisprudence of this Court, in order to justify its request for delayed 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.⁶² In weighing the danger posed to the witness against the Defence right to timely disclosure, the Chamber may consider the risk that the witnesses will be interfered with or intimidated once

⁶² See Decision on the prosecution's application to authorise redactions to a statement of Witness 4 and to withhold documents from disclosure, 16 August 2012 (notified 17 August 2012), ICC-01/09-02/11-464-Conf, para. 7 and jurisprudence cited therein.

their identity is disclosed to the accused.⁶³ The subjective fear of a witness is of relevance to the Chamber in considering whether an objectively justifiable risk exists but is not, in itself, determinative.

32. The Chamber observes that Trial Chamber II, 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,⁶⁴ emphasised that this step was an “exceptional” one taken after a careful weighing of the competing interests involved.⁶⁵ The Chamber notes that, contrary to the submissions of the defence, the defence in the *Katanga* case did object to the delay of disclosure until 30-45 days before the start of the witness’s testimony.⁶⁶ In its decision authorising delayed disclosure, Trial Chamber II also specified that its decision was without prejudice to the ability of the Defence to revert to the Chamber “should it become apparent that it requires additional time” in order to complete investigations vis-à-vis these two witnesses.⁶⁷
33. The Chamber emphasises that withholding disclosure beyond the date for final prosecution disclosure, 9 January 2013, must be limited as far as possible in order to ensure full respect for the rights of the Defence. The decision whether or not to authorise delayed disclosure of any given witness’s identity depends entirely on circumstances of each individual witness and the related impact on the Defence’s preparations for trial. In order to determine whether delayed disclosure is strictly necessary and whether it would prejudice the Defence, the Chamber considers the situation of each witness in greater detail below.

⁶³ See in this regard ICTY, *Prosecutor v. Rasim Delić*, Decision on the Prosecution Motion for Protective Measures, 1 December 2006, Case No. IT-04-83-PT, 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.

⁶⁴ ICC-01/04-01/07-1179-tENG, paras 47 – 48.

⁶⁵ ICC-01/04-01/07-1179-tENG, para. 53.

⁶⁶ ICC-01/04-01/07-1179-tENG, paras 21 and 24.

⁶⁷ ICC-01/04-01/07-1179-tENG, para. 49.

Witness 219

34. Witness 219, [REDACTED].⁶⁸ In a statement to the Prosecution in April 2012, he asserted that he did not [REDACTED].⁶⁹ He also expressed concerns about being identified as a Prosecution witness.⁷⁰ On 28 November 2012, the VWU informed the Chamber that the Prosecution had referred Witness 219 for protective measures in September 2012 and that the VWU was currently in the process of completing a security assessment for this witness and his family.⁷¹

35. 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, the subjective concerns expressed by the witness, the fact that the witness is known to the accused [REDACTED], and the fact that a VWU assessment for the witness is still pending. The Chamber concludes that the temporary non-disclosure of the identity of Witness 219 is necessary to protect his safety, which may be at risk on account of his involvement with the Prosecution, and that no lesser measures are feasible at this point in time.

36. However, given that the Prosecution has stated that disclosure could be effected 60 days prior to trial in line with the final deadline established by the Chamber⁷² for disclosure of ICCPP witnesses if the witness is admitted into the ICCPP, 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 no later than 28 January 2013.

⁶⁸ ICC-01/09-02/11-Conf-Exp-AnxA, page 6, paras 1 and 5.

⁶⁹ KEN-OTP-0080-0618 and KEN-OTP-0080-0626 to KEN-OTP-0080-0627.

⁷⁰ KEN-OTP-0080-0626 to KEN-OTP-0080-0632.

⁷¹ ICC-01/09-02/11-T-20-CONF-EXP-ENG ET, page 4, lines 21 – 23 and page 11, lines 6 – 10.

⁷² ICC-01/09-02/11-451.

37. The Chamber finds that non-disclosure of the identity of Witness 219 beyond 9 January 2013 pending a final evaluation by the VWU as to what protective measures, if any, may be appropriate for the witness, 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.

38. 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 the redacted material contained in Witness 219's transcripts of interviews.

Witnesses 428, 429 and 430

39. Witness 428, [REDACTED].⁷³ During an interview with the prosecution, Witness 428 expressed concerns about his security.⁷⁴ The witness alleges that [REDACTED].⁷⁵ Since then, P-428 has not been contacted by anyone claiming to represent the accused.⁷⁶

40. Witness 429 [REDACTED].⁷⁷ His evidence concerns the role of the accused and their associates in [REDACTED].⁷⁸ Witness 429 believes that he is [REDACTED].⁷⁹ The Prosecution submits that, in June 2010, Witness 429 was [REDACTED].⁸⁰ In addition, Witness 429 is concerned that he is known to the accused.⁸¹ In February

⁷³ ICC-01/09-02/11-519-Conf-Exp-AnxA, page 8, paras 1 and 3.

⁷⁴ KEN-OTP-0081-0930.

⁷⁵ KEN-OTP-0081-0923 to KEN-OTP-0081-0933.

⁷⁶ KEN-OTP-0081-0930.

⁷⁷ ICC-01/09-02/11-519-Conf-Exp-AnxA, page 11, para. 3.

⁷⁸ ICC-01/09-02/11-519-Conf-Exp-AnxA, page 11, para. 3.

⁷⁹ ICC-01/09-02/11-519-Conf-Exp-AnxA, page 11, paras 1 and 6.

⁸⁰ ICC-01/09-02/11-519-Conf-Exp-AnxA, page 12, para. 8.

⁸¹ ICC-01/09-02/11-519-Conf-Exp-AnxA, page 12, para. 9.

2012, [REDACTED].⁸² The Prosecution asserts that during his interview he repeatedly stated that if his cooperation with the Prosecution becomes known he will “disappear without a trace”.⁸³ The Chamber does not, however, appear to have been provided with the transcripts of the relevant interview during which these statements were made.

41. Witness 430 [REDACTED].⁸⁴ This witness [REDACTED].⁸⁵ In February 2012, [REDACTED].⁸⁶ Thereafter, Witness 430 was contacted [REDACTED].⁸⁷ During his interview with the Prosecution Witness 430 stated that he would be in danger if [REDACTED] the accused became aware of his cooperation with the prosecution.⁸⁸

42. The Chamber has been informed that the VWU assessments of Witnesses 428, 429 and 430 for purposes of the determination as to their inclusion into the ICCPP protection programme are scheduled to take place between 21 and 26 January 2013.⁸⁹ In addition, the VWU has indicated to the Chamber that these witnesses will be interviewed [REDACTED].⁹⁰

43. It therefore appears to the Chamber that sufficient protective measures should be in place by the end of January 2013 to enable the disclosure of the identities of Witnesses 428, 429 and 430 to the Defence at that time. The Chamber requests an assessment from the VWU regarding the security situation and protection status of these three witnesses, no later than 28 January 2013, in order to enable the Chamber to make a final determination as to the timing of disclosure of these witnesses' identities to the Defence.

⁸² KEN-OTP-0085-1169 to KEN-OTP-0085-1171 and KEN-OTP-0085-1193.

⁸³ ICC-01/09-02/11-519-Conf-Exp-AnxA, page 12, para. 10.

⁸⁴ ICC-01/09-02/11-519-Conf-Exp-AnxA, page 13, para. 3.

⁸⁵ ICC-01/09-02/11-519-Conf-Exp-AnxA, page 13, para. 1.

⁸⁶ ICC-01/09-02/11-519-Conf-Exp-AnxA, page 14, para. 7 and KEN-OTP-0083-0271 to KEN-OTP-0083-0287.

⁸⁷ ICC-01/09-02/11-519-Conf-Exp-AnxA, page 14, para. 8 and KEN-OTP-0081-0291.

⁸⁸ KEN-OTP-0083-00293.

⁸⁹ ICC-01/09-02/11-T-20-CONF-EXP-ENG ET, page 11, line 12 to page 12, line 24.

⁹⁰ ICC-01/09-02/11-T-20-CONF-EXP-ENG ET, page 11, line 23 to page 12, line 24.

44. Given that the VWU's security assessment has not yet been completed and that temporary protective measures have not yet been implemented, the Chamber concludes that the non-disclosure of the identities of Witnesses 428, 429 and 430 for a limited time beyond 9 January 2013 is the least restrictive measure available to ensure their protection.
45. The Chamber considers that the temporary non-disclosure of the identities of Witnesses 428, 429 and 430 will not unduly prejudice the ability of the Defence to prepare for trial, particularly given that disclosure may be possible by the end of January 2013. In such a case, the impact of the delay is likely to be minimal and may be mitigated by the provision to the Defence of a summary of the redacted material in the witnesses' transcripts of interview.
46. However, the Chamber emphasises that the identities of these witnesses must be provided to the Defence sufficiently in advance of trial to enable the effective preparation of its case. The need for full disclosure to the Defence is particularly critical given that Witnesses 429 and 430 [REDACTED]. The Defence will need sufficient time to conduct investigations into, *inter alia*, the credibility of these witnesses.⁹¹

W-118

47. Witness 118, [REDACTED].⁹² This witness is known to the accused.⁹³ He was allegedly approached by [REDACTED], who requested that Witness 118 provide testimony exonerating Mr Kenyatta.⁹⁴ According to Witness 118, [REDACTED].⁹⁵

⁹¹ The Chamber notes in this regard the submissions of the defence on the exigencies of this type of investigation, ICC-01/09-02/11-561-Conf-Exp-AnxA.

⁹² ICC-01/09-02/11-519-Conf-Exp, paras 31 – 36.

⁹³ ICC-01/09-02/11-519-Conf-Exp, para. 32.

⁹⁴ ICC-01/09-02/11-519-Conf-Exp, para. 32.

⁹⁵ KEN-OTP-0067-0316, KEN-OTP-0067-0337 and KEN-OTP-0067-0338.

This witness has also [REDACTED].⁹⁶ [REDACTED].⁹⁷ The witness has stated that he [REDACTED],⁹⁸ though the Chamber has not been provided with any evidence to this effect.

48. Witness 118 is said to be [REDACTED].⁹⁹ The Prosecution submits that “[h]is cooperation with the Prosecution is likely to be seen as [REDACTED]”.¹⁰⁰ The Prosecution additionally submits that in October 2012, Witness 118 requested that his identity and cooperation with the Prosecution not be disclosed until after [REDACTED].¹⁰¹ The Prosecution submits that Witness 118 views [REDACTED].¹⁰²

49. The Prosecution submits that the existence of a risk to Witness 118’s security is evidenced by [REDACTED].¹⁰³

50. On the basis of the information provided by the Prosecution, including the Prosecution’s report on the current security situation in Kenya¹⁰⁴ and the statements of Witness 118, the Chamber considers that Witness 118 appears indeed to be in a unique position, and that objectively justifiable risks to his security would arise from the disclosure of his identity to the Defence on 9 January 2013. The Chamber is also satisfied that the Prosecution has demonstrated that there is a real risk that the witness will be interfered with once his identity is made known to the Defence. The Chamber accepts that disclosing the identity of Witness 118 prior to trial would be an insufficient protective measure to ensure his safety, given that [REDACTED].

⁹⁶ ICC-01/09-02/11-519-Conf-Exp, para. 32.

⁹⁷ ICC-01/09-02/11-519-Conf-Exp-AnxA, page 4, para. 12 and KEN-OTP-0067-0317.

⁹⁸ KEN-OTP-0067-0317.

⁹⁹ ICC-01/09-02/11-519-Conf-Exp, para. 33.

¹⁰⁰ ICC-01/09-02/11-519-Conf-Exp, para. 33.

¹⁰¹ ICC-01/09-02/11-519-Conf-Exp, para. 34.

¹⁰² ICC-01/09-02/11-519-Conf-Red2, para. 34.

¹⁰³ ICC-01/09-02/11-519-Conf-Exp, para. 34.

¹⁰⁴ ICC-01/09-02/11-556-Conf-Exp-AnxA-Corr.

51. However, the Chamber is not persuaded that disclosure needs to be delayed until 30 days prior to the witness's testimony, particularly as the witness himself has requested only that his identity and cooperation with the Prosecution be withheld until after [REDACTED].¹⁰⁵ Accordingly, the Chamber finds that delaying the disclosure of Witness 118's identity until after [REDACTED] should be sufficient to protect his safety and to ensure that he is not interfered with. Although the timing of the commencement of trial in relation to [REDACTED] means that disclosure is likely to take place at or shortly after the commencement of trial, the Chamber considers that this exceptional delay is permitted by the Court's statutory framework and is satisfied that it will not prevent the Defence from effectively preparing its case. In the event that [REDACTED] by 17 April 2013, the Prosecution shall be required to submit a further application requesting any continued non-disclosure of the witness's identity after this date.

52. In order to mitigate the potential prejudice to the accused, the Prosecution shall provide the Defence with a summary of the redacted material in the witness's transcripts of interview. The Chamber will also ensure that the Defence is given ample time to prepare for the testimony of this witness and of any other witnesses providing testimony on related issues.

(ii) Redactions

53. In accordance with the above findings, the Chamber authorises the Prosecution to temporarily maintain its proposed category B.1 redactions to the relevant witnesses' identifying information in their transcripts and statements. In keeping with its ongoing disclosure obligations,¹⁰⁶ the Prosecution should continually review the

¹⁰⁵ ICC-01/09-02/11-519-Conf-Exp, para. 34.

¹⁰⁶ See ICC-01/09-02/11-495-AnxA-Corr, paras 18 and 50 – 54.

redactions to ensure that they are no more than strictly necessary to conceal the identity of the witnesses.

54. 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 decisions on disclosure of investigators' names to the defence,¹⁰⁷ 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.

55. 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.¹⁰⁸

¹⁰⁷ Decision on the prosecution's first request for the authorisation of redactions, 13 December 2012, ICC-01/09-02/11-569-Conf, paras 28 – 31; Decision on second, third and fourth applications for the authorization of redactions, 17 December 2012, ICC-01/09-02/11-574-Conf, paras 18 - 21.

¹⁰⁸ ICC-01/09-02/11-569-Conf, para 30; ICC-01/09-02/11-574-Conf, para. 20.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY:

AUTHORISES the Prosecution to temporarily withhold from disclosure to the Defence the identities of Witnesses 219, 428, 429 and 430 beyond 9 January 2013, pending the VWU's assessment of these witnesses;

ORDERS the VWU to file a report on the security situation and protection status of Witnesses 219, 428, 429 and 430 no later than 28 January 2013 in order for the Chamber to make a final determination on any continued non-disclosure of their identities;

AUTHORISES the Prosecution to withhold from disclosure to the Defence the identity of Witness 118 until after [REDACTED] or, at the latest, 17 April 2013;

AUTHORISES the Prosecution to temporarily maintain the redactions to the witness statements and transcripts contained in the corrected Annexes C – G to ICC-01/09-02/11-519-Conf-Exp and in the supplementary filing ICC-01/09-02/11-571-Conf-Exp-AnxA;

ORDERS the Prosecution to provide written summaries to the Defence of the redacted material in the witness statements or transcripts of Witnesses 118, 219, 428, 429 and 430 by 11 January 2013; and

ORDERS 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 of Witnesses 118, 219, 428, 429 and 430.

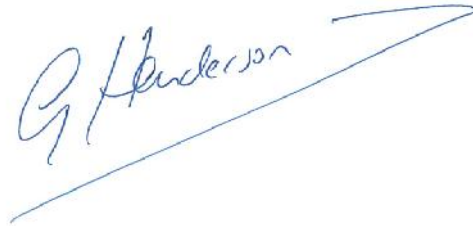
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding Judge



Judge Robert Fremr



Judge Geoffrey Henderson

Dated 3 February 2017

At The Hague, The Netherlands