

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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TRIAL CHAMBER V

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

SITUATION IN THE REPUBLIC OF KENYA

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

Public redacted version of

Decision on second Prosecution application for delayed disclosure of witness identities, 8 January 2013, ICC-01/09-02/11-593-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(2), 68(1) and 68(5) of the Rome Statute (“Statute”), Rules 76, 77, 81 and 84 of the Rules of Procedure and Evidence (“Rules”), and Regulation 35(2) of the Regulations of the Court (“Regulations”) issues this Decision on second prosecution application for delayed disclosure of witness identities.

I. BACKGROUND

1. On 5 November 2012, the Office of the Prosecutor (“Prosecution”) filed an application for the delayed disclosure of the identities of five¹ witnesses beyond the final disclosure deadline of 9 January 2013 for all prosecution disclosure (“First Delayed Disclosure Application”).²
2. On 7 December 2012, the Prosecution filed an application for the delayed disclosure of the identities of an additional seven witnesses, authorisation for redactions to corresponding witness statements or transcripts and application for variation of the 5 November 2012 deadline with respect to Witness 334 (“Second Delayed Disclosure Application”).³ The Prosecution’s security assessment of each witness was included as Annex A to the Second Delayed Disclosure Application. Annex B to the Prosecution’s submission includes excerpts from biographic and security questionnaires (“BSQs”) for the witnesses. Various materials related to the witnesses and charts outlining proposed redactions to the witnesses’ statements are appended as Annexes C – I to the Second Delayed Disclosure Application, apart

¹ The Prosecution had originally requested authorisation to delay the disclosure of a sixth witness, but it withdrew this request on 28 November 2012. Withdrawal of request for the delayed disclosure of the identity of Witness 7, ICC-01/09-02/11-543.

² Prosecution application for delayed disclosure of witness identities, ICC-01/09-02/11-519-Conf-Exp. A public redacted version was filed on 7 November 2012, ICC-01/09-02/11-519-Red.

³ 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*, Prosecution and VWU only, Annexes A-I.

from the transcripts for Witnesses 493, 494, 505, 506 and 510, which the Prosecution averred to file as soon as each transcript is completed.⁴

3. The Second Delayed Disclosure Application and its annexes were filed on a confidential *ex parte*, Prosecution and Victims and Witnesses Unit (“VWU”) only, basis. On 10 December 2012, the Prosecution’s public redacted version of the Second Delayed Disclosure Application, without annexes, was notified.⁵ A confidential redacted version of the Second Delayed Disclosure Application was subsequently filed by the Prosecution on 10 December 2012.⁶
4. On 21 December 2012, the Chamber issued its Decision on the First Delayed Disclosure Application.⁷
5. On 21 December 2012, the Prosecution submitted the “First provision of additional information relating to the Prosecution’s second application for delayed disclosure of witness identities (ICC-01/09-02/11-562)”, together with confidential, *ex parte* annexes, containing transcripts of interviews of Witnesses 493, 494 and 510.⁸
6. On 28 December 2012, the Prosecution filed the “Corrigendum of Annex D to Second Prosecution application for delayed disclosure of witness identities and application for variation of the 5 November 2012 deadline with respect to Witness 334”, with an annex.⁹

⁴ Second Delayed Disclosure Application, para. 7.

⁵ Public Redacted Version of the 7 December 2012 ‘Second Prosecution application for delayed disclosure of witness identities and application for variation of the 5 November 2012 deadline with respect to Witness 334’, 10 December 2012, ICC-01/09-02/11-562-Red2.

⁶ Confidential Redacted Version of the 7 December 2012 ‘Second Prosecution application for delayed disclosure of witness identities and application for variation of the 5 November 2012 deadline with respect to Witness 334’, 10 December 2012, ICC-01/09-02/11-562-Conf-Red.

⁷ ICC-01/09-02/11-580-Conf-Exp. A confidential redacted version, ICC-01/09-02/11-580-Conf-Red, was filed on the same day.

⁸ ICC-01/09-02/11-582, with Confidential, *ex parte* Annexes A, B and C.

⁹ ICC-01/09-02/11-562-Conf-Exp-AnxD-Corr, with Annex A.

7. On 2 January 2013, the Defence for Mr Muthaura and the Defence for Mr Kenyatta (jointly "Defence") filed the "Defence Response to the 'Confidential Redacted Version of the 7 December 2012 'Second Prosecution application for delayed disclosure of witness identities and application for variation of the 5 November 2012 deadline with respect to Witness 334'",¹⁰ objecting to the Second Delayed Disclosure Application and to the request for variation of the 5 November 2012 deadline with respect to Witness 334.

II. SUBMISSIONS

Prosecution submissions

8. 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 three witnesses until 45 days prior to their testimony.¹¹ 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",¹² with respect to Witness 334. The Prosecution submits that after 5 November 2012 new information regarding attempts to interfere with provisional Prosecution witnesses has emerged that has necessitated a re-evaluation of its initial position regarding the disclosure of material relating to Witness 334.¹³
9. The four witnesses whose identities the Prosecution seeks to withhold until 30 days before the commencement of trial are Witnesses 493, 494, 506 and 510, all of whom

¹⁰ ICC-01/09-02/11-586-Conf, with Annexes A (ICC-01/09-02/11-586-Conf-Exp-AnxA) and B (ICC-01/09-02/11-586-Conf-Exp-AnxB).

¹¹ ICC-01/09-02/11-562-Red2.

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

¹³ ICC-01/09-02/11-562-Red2, paras 11-15.

are [REDACTED].”¹⁴ The Prosecution alleges that there is an objectively justifiable risk to each of these [REDACTED] witnesses resulting from four factors.

10. Firstly, the Prosecution submits, the nature of their evidence is “unique” and has substantial incriminatory value.¹⁵ In addition, given the [REDACTED], there exists a “powerful incentive” to interfere with these witnesses.¹⁶
11. Secondly, in the submission of the Prosecution, 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.¹⁷ 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.”¹⁸ The Prosecution also alleges that shortly after 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”.¹⁹
12. The Prosecution cites to jurisprudence from the International Criminal Tribunal for Rwanda to support its contention that “the possibility of bribery alone is enough to justify continued redactions and delayed disclosure”.²⁰
13. Thirdly, the Prosecution refers to [REDACTED].²¹

¹⁴ ICC-01/09-02/11-562-Red2, para. 16.

¹⁵ ICC-01/09-02/11-562-Red2, para. 17.

¹⁶ ICC-01/09-02/11-562-Red2, para. 18.

¹⁷ ICC-01/09-02/11-562-Conf-Red, para. 19.

¹⁸ ICC-01/09-02/11-562-Conf-Red, para. 19. See also ICC-01/09-02/11-432-Conf-Red, paras 4-7 and ICC-01/09-02/11-434-Conf-Red.

¹⁹ ICC-01/09-02/11-562-Conf-Exp, para. 19.

²⁰ ICC-01/09-02/11-519-Red2, para. 22.

14. Fourthly, the Prosecution submits that individuals purporting to act on behalf of the Accused have [REDACTED].²² 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 case”.²³
15. With respect to Witness 232, for whom delayed disclosure is requested until 45 days prior to his testimony, the Prosecution submits that he shares the same risk factors as all Prosecution witnesses [REDACTED] and has additional unique security concerns.²⁴ These additional concerns are as follows: [REDACTED]. Further, he is known to [REDACTED]. Finally the perpetrators of the crimes about which Witness 232 will testify [REDACTED]. As Witness 232 is the only crime based witness with such a profile, this supports the protective measures sought.²⁵
16. With respect to Witnesses 334 and 505, for whom delayed disclosure is also requested until 45 days prior to their testimony, the Prosecution submits that they face the same risk factors as [REDACTED]²⁶ and also face individual risks, including that they are known to the Accused as persons with information relevant to the case.²⁷
17. The Prosecution submits that there are no less restrictive protective measures available to meet the security risks of the witnesses.²⁸ 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

²¹ ICC-01/09-02/11-562-Red2, para. 23.

²² ICC-01/09-02/11-562-Red2, para. 24.

²³ ICC-01/09-02/11-562-Conf-Exp, para. 25.

²⁴ ICC-01/09-02/11-562-Conf-Exp, paras 36-37.

²⁵ ICC-01/09-02/11-562-Conf-Red, para. 37.

²⁶ ICC-01/09-02/11-562-Red2, para. 38.

²⁷ ICC-01/09-02/11-562-Conf-Exp, para. 38.

²⁸ ICC-01/09-02/11-562-Red2, paras 26-28, 41-44.

withhold from their clients any materials provided to them”.²⁹ The Prosecution also submits that a number of leaks of confidential information have occurred in this case so far.³⁰

18. 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.³¹

19. With regard to witnesses 232, 334 and 505 the same arguments apply and, in addition, Prosecution contends that their personal circumstances make disclosure 45 days before testimony the least restrictive measure available.³²

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.³³ It asserts that the redacted transcripts, when disclosed, will provide the Defence with much of the substance of the witnesses’ accounts.³⁴ It also submits that delayed disclosure is only being requested for a limited number of witnesses.³⁵ 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.³⁶

21. With regard to witnesses 232, 334, and 505 the same arguments apply and, in addition, the Prosecution contends that the nature of evidence provided by these Witnesses limits any prejudice to the Defence as witness 232 provides straightforward crime base evidence and as witnesses 334 and 505 provide perpetrator-side

²⁹ ICC-01/09-02/11-562-Red2, para. 26.

³⁰ ICC-01/09-02/11-562-Red2, para. 27.

³¹ ICC-01/09-02/11-562-Red2, para. 28.

³² ICC-01/09-02/11-562-Red2, para. 41. See ICC-01/09-2/11-562-Conf-Exp, paras 41-44.

³³ ICC-01/09-02/11-562-Red2, paras 29-33 and para. 45.

³⁴ ICC-01/09-02/11-562-Red2, para. 30.

³⁵ ICC-01/09-02/11-562-Red2, para. 31.

³⁶ ICC-01/09-02/11-562-Red2, para. 33.

evidence. As such this evidence is “easily digestible” and does not necessitate months of preparation by questioning counsel, limiting any disadvantage caused by delayed disclosure.³⁷

Defence submissions

22. The Defence opposes the Second Delayed Disclosure Application in its entirety and requests that the Chamber order the disclosure of all witness identities by 9 January 2013.³⁸ The Defence contends that the application with respect to Witnesses 493 and 494 was filed too late, as the Redactions Protocol established by the Chamber authorised applications for delayed disclosure after 5 November 2012 only with respect to witnesses identified after that date, whereas these two witnesses had been identified by the Prosecution prior to that date.³⁹

23. As regards the merits of the Second Delayed Disclosure Application, the Defence submits that it has profound concerns as to the credibility of a number of crucial Prosecution witnesses [REDACTED].⁴⁰ The Defence refers to its arguments raised in relation to the Prosecution’s first application for delayed disclosure, including the arguments that the need to investigate the credibility of all prosecution witnesses is crucial to the Defence case⁴¹ and that investigations cannot be carried out in the short timeframes proposed by the Prosecution.⁴²

24. The Defence argues that the delayed disclosure of 12 out of 35 possible Prosecution witnesses is neither manageable nor reasonable, and that even in comparison with the authority on which the Prosecution relies, a decision issued by the International

³⁷ ICC-01/09-02/11-562-Red2, para. 45.

³⁸ ICC-01/09-02/11-586-Conf, paras 1-2.

³⁹ ICC-01/09-02/11-586-Conf, paras 13-18.

⁴⁰ ICC-01/09-02/11-586-Conf, para. 19.

⁴¹ ICC-01/09-02/11-586-Conf, para. 19, citing Defence Response to 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 December 2012, ICC-01/09-02/11-561, paras 13-14.

⁴² ICC-01/09-02/11-561, paras 17-18.

Criminal Tribunal for the Former Yugoslavia in the *Šešelj* case, it is excessive.⁴³ The Defence further refers to its previously made argument that delayed disclosure is unnecessary, because defence investigations into the credibility of prosecution witnesses will not endanger these witnesses.⁴⁴

25. The Defence denies the Prosecution's allegations that any of the individuals allegedly involved in a bribery plan were acting on behalf of either of the Accused and submits that the evidence on which the Prosecution relies in this respect is unreliable.⁴⁵ The Defence argues that the Prosecution fails to demonstrate a credible link between the [REDACTED] and the Accused.⁴⁶

26. The Defence submits that it operates under strict investigating protocols when conducting investigations. It rejects the Prosecution's allegations of witness tampering or intimidation.⁴⁷

27. In relation to the requested disclosure of the identity of Witnesses 232, 334 and 505 45 days before their testimony, the Defence reiterates its argument that the Statute and Rules do not provide for post-trial commencement delayed disclosure.⁴⁸ The Defence contends that the circumstances surrounding 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 are not comparable to the present situation, noting that in *Katanga* Trial Chamber II emphasised that the delayed disclosure was "truly exceptional" and

⁴³ ICC-01/09-02/11-586-Conf, paras 20-22, citing ICTY, *Prosecutor v. Vojislav Šešelj*, Decision on Vojislav Šešelj's Appeal against the Trial Chamber's Oral Decision of 7 November 2008, 24 January 2008, IT-03-67-AR73.6.

⁴⁴ ICC-01/09-02/11-561, para. 19.

⁴⁵ ICC-01/09-02/11-586-Conf, paras 24-26.

⁴⁶ ICC-01/09-02/11-586-Conf, para. 27.

⁴⁷ ICC-01/09-02/11-586-Conf, paras 29-31.

⁴⁸ ICC-01/09-02/11-586-Conf, paras 33-34.

based on factors which were “very specific” to the witness in question.⁴⁹ Further, the Defence submits that, unlike Witness 232 in the present case, the witness at issue in the *Katanga* case sought protective measures due to the risk of social stigmatisation.⁵⁰

28. The Defence contends that the Prosecution considers irrelevant issues in the case of Witness 505 and that the economic considerations of that witness cannot be categorised as “grave endangerment”.⁵¹

III. ANALYSIS

(i) *Preliminary matters*

29. The Chamber notes the Defence’s objection to the inclusion of Witnesses 493 and 494 in the Second Delayed Disclosure Application. The Chamber recalls that pursuant to the Redactions Protocol set out by the Chamber,⁵² the Prosecution, upon notification of its provisional list of witnesses, was to identify the witnesses with regard to whom it requested delayed disclosure of their identities. Applications were to be filed by 5 November 2012.⁵³ In relation to witnesses identified after 5 November 2012, the Prosecution could make such applications at a later time.⁵⁴ While Witnesses 493 and 494 were not included on the provisional list of witnesses, they were identified *before* 5 November 2012⁵⁵ and the 5 November 2012 deadline

⁴⁹ ICC-01/09-02/11-586-Conf, para. 36, citing: 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.

⁵⁰ ICC-01/09-02/11-586-Conf, para. 36.

⁵¹ ICC-01/09-02/11-586-Conf, para. 39.

⁵² Annex A to Decision on the protocol establishing a redaction regime, 5 October 2012, ICC-01/09-02/11-495-AnxA-Corr, paras 51-53.

⁵³ ICC-01/09-02/11-495-AnxA-Corr, para. 51.

⁵⁴ ICC-01/09-02/11-495-AnxA-Corr, para. 53.

⁵⁵ ICC-01/09-02/11-562-Red2, para. 9.

did apply to them. The Prosecution does not identify any reason for not including these two witnesses in its earlier application. Nor did it seek variance of the deadline before 5 November 2012, when it must have become clear to it that it would request authorisation for delayed disclosure with respect to these two witnesses. Having regard to: (i) the seriousness of the submissions regarding the security concerns of these witnesses; (ii) the duty to protect the safety of witnesses under Article 68(1) of the Statute; and (iii) the fact that the Application was filed about a month before the deadline for the disclosure of evidence, which makes it possible to take measures to counterbalance the potential prejudice that may be caused by such delay, the Chamber will exceptionally examine the merits of the Second Delayed Disclosure Application with respect to Witnesses 493 and 494.

30. The Prosecution seeks variation of the 5 November 2012 deadline with respect to Witness 334. The Prosecution refers to evidence, obtained after 5 November 2012, regarding alleged attempts to identify, locate and interfere with Prosecution witnesses.⁵⁶ The Prosecution submits that the need to delay the disclosure of Witness 334's identity only became clear to the Prosecution in light of this evidence and thus after 5 November 2012.⁵⁷ The Prosecution's request appears to be based on similarities between the situation of Witness 334 and the witnesses with respect to whom attempts to interfere were allegedly made. The Chamber accepts that the reasons for seeking delayed disclosure became clear to the Prosecution after the expiry of the relevant time limit for reasons outside the Prosecution's control. Accordingly, pursuant to Regulation 35(2) of the Regulations, the time limit may be extended.

(ii) Delayed disclosure of witness identities

⁵⁶ ICC-01/09-02/11-562-Conf-Red, paras 11-15.

⁵⁷ ICC-01/09-02/11-562-Red2, para. 15.

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.⁵⁸

Witnesses 493, 494, 506 and 510

32. Witness 493, 494, 506 and 510 are said to be [REDACTED].⁵⁹ They all [REDACTED]⁶⁰ and live [REDACTED].⁶¹

33. They are expected to provide evidence regarding, among other issues: the alleged meetings in [REDACTED] for the purpose of organising the Rift Valley attacks (Witnesses 493 and 510),⁶² provision of financial and logistical support for the attacks by the Accused or their agents (Witnesses 493, 494, 506 and 510),⁶³ plans to [REDACTED] (Witnesses 494 and 506),⁶⁴ and crimes committed during the attacks in Naivasha (Witnesses 493, 506 and 510).⁶⁵ The Chamber considers this evidence to be of direct relevance to the issues in the present case, including the alleged role of the Accused in the post-election violence, and that the nature of this evidence creates an incentive to interfere with the witnesses.

34. There is evidence tending to support the alleged attempts to interfere with other witnesses with the same profile as Witnesses 493, 494, 506 and 510. For instance, the evidence shows that a statement [REDACTED], disclosed by the Prosecution in the confirmation proceedings and classified as confidential,⁶⁶ was published.⁶⁷ There is

⁵⁸ ICC-01/09-02/11-580-Conf-Red, paras 28-33.

⁵⁹ ICC-01/09-02/11-562-Red2, para. 16.

⁶⁰ ICC-01/09-02/11-562-Conf-Exp-AnxB, pp. 8, 12, 21, 23.

⁶¹ ICC-01/09-02/11-562-Conf-Exp-AnxB, pp. 8, 12, 21, 23.

⁶² ICC-01/09-02/11-562-Conf-Exp-AnxA, pp. 5, 16.

⁶³ ICC-01/09-02/11-562-Conf-Exp-AnxA, pp. 5, 8, 14, 16.

⁶⁴ ICC-01/09-02/11-562-Conf-Exp-AnxA, pp. 8, 14.

⁶⁵ ICC-01/09-02/11-562-Conf-Exp-AnxA, pp. 5, 14, 16.

⁶⁶ ICC-01/09-02/11-280-Conf-AnxB, p. 1, no. 28.

⁶⁷ [REDACTED].

also evidence tending to support the allegation of attempts to bribe the witness.⁶⁸ The Prosecution also alleges that intermediaries purportedly working on behalf of Mr Kenyatta contacted Witnesses 11 and 12 and their families to offer a deal for them to agree not to testify.⁶⁹ In relation to earlier alleged attempts to induce these two witnesses to provide exculpatory evidence in exchange for money, the witnesses allegedly feared that they would be harmed or killed if they opposed the scheme or if their cooperation with the Prosecution were discovered.⁷⁰

35. The Prosecution also relies on evidence of [REDACTED].⁷¹ In particular, [REDACTED].⁷²

36. As regards the individual security situation of Witnesses 493, 494 and 506, the Chamber notes that the only relevant information comes from the BSQ, on which almost the entire OTP Security Profiles are based. The transcripts of the witnesses' interviews, provided only on 21 December 2012,⁷³ are barely referenced in the OTP Security Profiles and, where they are, no page numbers are provided, which makes it difficult for the Chamber to ascertain which, if any, parts are relevant to the witnesses' security situations.

37. The BSQ provided by the Prosecution for Witness 493 records that the witness is worried about his security [REDACTED]. According to the BSQ, Witness 493 stated that [REDACTED].⁷⁴ The information provided alleges that the [REDACTED].⁷⁵ He was also [REDACTED].⁷⁶ According to the BSQ, the witness said that in

⁶⁸ ICC-01/09-02/11-434-Conf and confidential *ex parte* Annexes 1-3.

⁶⁹ ICC-01/09-02/11-562-Conf-Exp, para. 19. See also ICC-01/09-02/11-492-Conf-Exp, ICC-01/09-02/11-494-Conf-Exp.

⁷⁰ ICC-01/09-20/11-562-Conf-Red, para. 21; KEN-OTP-0052-1360, at 1363; KEN-OTP-0060-0130, at 0133-0134.

⁷¹ ICC-01/09-20/11-562-Conf-Exp, para. 23.

⁷² KEN-OTP-0001-0910, at 0911 and 0919. See also KEN-OTP-0060-0130, at 0131.

⁷³ ICC-01/09-02/11-582-Conf-Exp.

⁷⁴ ICC-01/09-02/11-562-Conf-Exp-AnxB, p. 9.

⁷⁵ ICC-01/09-02/11-562-Conf-Exp-AnxB, p. 9.

⁷⁶ ICC-01/09-02/11-562-Conf-Exp-AnxB, p. 9.

[REDACTED].⁷⁷ Witness 493 believes he is [REDACTED].⁷⁸ The BSQ also records that Witness 493 [REDACTED].⁷⁹

38. As regards Witness 494, according to the BSQ the witness believes that [REDACTED].⁸⁰ The BSQ states that [REDACTED]. The BSQ asserts that the witness was [REDACTED]. After that incident, Witness 494 “stayed underground” for months.⁸¹ According to the BSQ, [REDACTED]. Another individual told the witness that he would have to [REDACTED].⁸² It is also significant that the witness was allegedly a member of the group [REDACTED].⁸³ The group was apparently small⁸⁴ and the Prosecution alleges that the disclosure of the witness’s evidence would make it easy to identify him.⁸⁵ The BSQ records that the witness believes that his contacts with [REDACTED].⁸⁶

39. The BSQ provided for Witness 506 asserts that in [REDACTED].⁸⁷ The Chamber notes that this incident has not been demonstrably linked to his status as a witness in the present case or to his involvement in post-election violence. According to the BSQ, the witness [REDACTED], because of his security concerns.⁸⁸ His fears are based on his knowledge that [REDACTED]. The witness is, however, concerned that [REDACTED] would seek to harm him if his cooperation with the Court is revealed.⁸⁹

⁷⁷ ICC-01/09-02/11-562-Conf-Exp-AnxB, p. 10.

⁷⁸ ICC-01/09-02/11-562-Conf-Exp-AnxB, p. 10.

⁷⁹ ICC-01/09-02/11-562-Conf-Exp-AnxB, p. 10.

⁸⁰ ICC-01/09-02/11-562-Conf-Exp-AnxB, p. 13.

⁸¹ ICC-01/09-02/11-562-Conf-Exp-AnxB, p. 14.

⁸² ICC-01/09-02/11-562-Conf-Exp-AnxB, p. 15.

⁸³ ICC-01/09-02/11-562-Conf-Exp-AnxB, p. 16.

⁸⁴ ICC-01/09-02/11-562-Conf-Exp-AnxA, p. 8. See ICC-01/09-02/11-582-Conf-Exp-AnxB, p. 51.

⁸⁵ ICC-01/09-02/11-562-Conf-Exp-AnxB, p. 16.

⁸⁶ ICC-01/09-02/11-562-Conf-Exp-AnxB, p. 15.

⁸⁷ ICC-01/09-02/11-562-Conf-Exp-AnxB, p. 22.

⁸⁸ ICC-01/09-02/11-562-Conf-Exp-AnxB, p. 21-22.

⁸⁹ ICC-01/09-02/11-562-Conf-Exp-AnxB, p. 22.

40. As regards Witness 510, he stated in his interview that [REDACTED]⁹⁰ offered money to the witness to [REDACTED].⁹¹ [REDACTED].⁹² Apart from this, the link has not been demonstrated between the alleged money offer and the proceedings in the present case. In his interview, Witness 510 stated that when offering money the individual did not mention either of the Accused.⁹³ The BSQ records that the witness is concerned about his security.⁹⁴

41. The Prosecution submits that as of the time of filing of the Second Delayed Disclosure Application none of these witnesses were in the ICCPP programme. The Prosecution referred them to the VWU for protective measures, such as inclusion in the ICCPP.⁹⁵ At the status conference held on 28 November 2012, the VWU informed the Chamber that its representatives were about to finalise arrangements for [REDACTED] of Witness 510, as well as [REDACTED].⁹⁶

42. The Chamber is satisfied that there is an objectively justifiable risk to the safety of Witnesses 493, 494, 506 and 510 should their identities be disclosed on 9 January 2013. In reaching this view, the Chamber has considered the submissions of the Prosecution, as substantiated by the BSQs and, as regards the nature of the evidence of these witnesses, their statements. The Chamber has also taken note of the fact that the witnesses were referred to the VWU, which, according to the information provided at the end of November 2012, [REDACTED]. The Chamber concludes that the temporary non-disclosure of the identities of these witnesses, until such time as the VWU can fully implement adequate protective measures, is necessary to protect

⁹⁰ ICC-01/09-02/11-562-Conf-Exp-AnxA, p. 16.

⁹¹ ICC-01/09-02/11-582-Conf-Exp-AnxC, pp. 27-32.

⁹² KEN-OTP-0060-0112, at 0117.

⁹³ ICC-01/09-02/11-582-Conf-Exp-AnxC, p. 30.

⁹⁴ ICC-01/09-02/11-562-Conf-Exp-AnxB, p. 24.

⁹⁵ ICC-01/09-02/11-562-Red2, para. 2.

⁹⁶ ICC-01/09-02/11-T-20-CONF-EXP-ENG, p. 12, lines 17-24.

the safety of these witnesses, which may be at risk on account of their involvement with the Prosecution.

43. The Chamber also notes the Prosecution's undertaking that it will "disclose [the identities of these witnesses] earlier if [REDACTED] their security situation makes it safe to do so".⁹⁷ Having regard to the VWU's assertion that in November 2012 [REDACTED], the Chamber considers that in order for it to be able to rule on the precise date of disclosure of the identity of these witnesses vis-à-vis the Defence, the Chamber will require an assessment from the VWU regarding the witness's security situation and protection status. The Chamber requests the VWU to provide such an assessment by no later than 28 January 2013.

44. The Chamber finds that non-disclosure of the identities of Witnesses 493, 494, 506 and 510 beyond 9 January 2013 pending the implementation of protective measures, strikes an appropriate balance between the need to ensure full disclosure to the Defence as early as possible and the concomitant need to ensure the safety of these witnesses. Any further decision of the Chamber with regard to continued non-disclosure will be taken with full regard to the Defence entitlement to sufficient time and facilities to prepare its case. In order to mitigate any prejudice to the accused arising from the temporary non-disclosure, the Prosecution shall provide the Defence with a summary of any substantive assertions redacted from these witnesses' statements statement under the B.1 category.⁹⁸

Witnesses 232, 334 and 505

⁹⁷ ICC-01/09-02/11-562-Conf-Exp, para. 33.

⁹⁸ The Chamber takes note of the Prosecution's assurance of readiness to provide such summaries; ICC-01/09-02/11-562-Red2, para. 32.

45. Witnesses 232, 334 and 505 [REDACTED].⁹⁹ Witness 232 [REDACTED].¹⁰⁰ Witnesses 334 and 505 also [REDACTED].¹⁰¹

46. Witness 232 is expected to give evidence of the crimes alleged in this case and in particular the killing of [REDACTED].¹⁰² The OTP Security Profile of Witness 334 asserts that he was [REDACTED] and is expected to provide evidence regarding [REDACTED].¹⁰³ Witness 505 was a [REDACTED], as well as about his experience in the recruitment of youth.¹⁰⁴

47. With respect to Witness 232, the BSQ asserts that he [REDACTED].¹⁰⁵ According to the BSQ, [REDACTED].¹⁰⁶ A person who Witness 232 believes is [REDACTED] allegedly offered him a large sum of money to dissuade him from providing evidence in the present case.¹⁰⁷ The witness did not confirm to the person that he was going to give evidence for the Prosecution in this case. He was then warned that [REDACTED].¹⁰⁸ The BSQ further asserts that in [REDACTED].¹⁰⁹ The Chamber notes that all this information comes from the BSQ and no other source has been provided.

48. Witness 334 did not voice any security concerns and did not object to the disclosure of his identity to the Accused.¹¹⁰ However, the Prosecution submits that the witness is a [REDACTED], who has allegedly tried to persuade Prosecution witnesses to provide evidence for the Defence, with promises of money and security

⁹⁹ ICC-01/09-02/11-562-Conf-Exp-AnxB, pp. 2, 6, 17.

¹⁰⁰ ICC-01/09-02/11-562-Conf-Exp-AnxA, p. 2; ICC-01/09-02/11-562-Conf-Exp-AnxB, p. 2.

¹⁰¹ ICC-01/09-02/11-562-Conf-Exp-AnxB, pp. 6, 17.

¹⁰² ICC-01/09-02/11-562-Conf-Exp-AnxA, p. 3; ICC-01/09-02/11-562-Conf-Exp-AnxC.

¹⁰³ ICC-01/09-02/11-562-Conf-Exp-AnxA, p. 4; ICC-01/09-02/11-562-Conf-Exp-AnxD-Corr.

¹⁰⁴ ICC-01/09-02/11-562-Conf-Exp-AnxA, p. 11.

¹⁰⁵ ICC-01/09-02/11-562-Conf-Exp-AnxB, p. 3.

¹⁰⁶ ICC-01/09-02/11-562-Conf-Exp-AnxB, p. 3.

¹⁰⁷ ICC-01/09-02/11-562-Conf-Exp-AnxB, pp. 4-5.

¹⁰⁸ ICC-01/09-02/11-562-Conf-Exp-AnxB, p. 5.

¹⁰⁹ ICC-01/09-02/11-562-Conf-Exp-AnxB, p. 5.

¹¹⁰ ICC-01/09-02/11-562-Red2, para. 40.

guarantees.¹¹¹ In addition, Witness 334 works [REDACTED].¹¹² The Prosecution submits that for this reason it did not refer the witness to the VWU.¹¹³

49. The BSQ for Witness 505 asserts that he feels unsafe in his place of residence, as most people know him and know about his participation in [REDACTED]. The BSQ states that the witness believes that if it is revealed that he testifies for the Prosecution, he may be harmed or even killed, as many people support the Accused.¹¹⁴ According to the BSQ, on a number of occasions, the witness has been warned of “dire consequences” of giving evidence. [REDACTED] publicly expressed dissatisfaction with anyone testifying against the Accused.¹¹⁵ This information is partially based on an interview, which appears to be among those which the Prosecution has not yet finalised and is thus unavailable to the Chamber.¹¹⁶ At the status conference held on 28 November 2012, the VWU informed the Chamber that its representatives were about to [REDACTED].¹¹⁷

50. With respect to Witnesses 334 and 505, the Prosecution also reiterates its submissions regarding the risk factors pertaining to [REDACTED].¹¹⁸

51. The Chamber is satisfied that there is an objectively justifiable risk to the safety of Witnesses 232, 334 and 505 should their identities be disclosed to the Defence on 9 January 2013. In reaching this view, the Chamber has considered the submissions of the Prosecution, as substantiated by the BSQs and, as regards the nature of the evidence of these witnesses, their statements. The Chamber has also taken note of the fact that Witnesses 232 and 505 were referred to the VWU, which, according to

¹¹¹ ICC-01/09-02/11-562-Conf-Exp, para. 40; ICC-01/09-02/11-519-Conf-Exp-AnxA, p. 12, para. 9; p. 14, paras 7-8.

¹¹² ICC-01/09-02/11-562-Conf-Exp, paras 40, 43.

¹¹³ ICC-01/09-02/11-562-Conf-Exp, para. 2, fn. 9.

¹¹⁴ ICC-01/09-02/11-562-Conf-Exp-AnxB, p. 18.

¹¹⁵ ICC-01/09-02/11-562-Conf-Exp-AnxB, p. 19.

¹¹⁶ ICC-01/09-02/11-562-Red2, para. 8.

¹¹⁷ ICC-01/09-02/11-T-20-CONF-EXP-ENG, p. 12, lines 17-24.

¹¹⁸ ICC-01/06-02/11-562-Red2, para. 38.

the information provided at the end of November 2012, [REDACTED]. The Chamber concludes that the temporary non-disclosure of the identities of these two witnesses, until such time as the VWU can fully implement adequate protective measures, is necessary to protect the safety of these witnesses, which may be at risk on account of their involvement with the Prosecution.

52. The Chamber also notes the Prosecution's undertaking that it will "disclose [the identities [REDACTED]] earlier if [REDACTED] their security situation makes it safe to do so".¹¹⁹ Having regard to the VWU's assertion that in November 2012 [REDACTED] and that the security situation of Witness 334 has not been referred to the VWU, the Chamber considers that it is not prepared at this stage to grant the Prosecution's request to withhold Witnesses 232's, 334's and 505's identities until 45 days prior to their testimony. In order for the Chamber to be able to rule on the precise date of disclosure of the identity of these witnesses vis-à-vis the Defence, the Chamber requests an assessment from the VWU regarding Witnesses 232's and 505's security situation and protection status by no later than 28 January 2013. The Chamber also instructs the Prosecution to refer Witness 334 to the VWU as soon as possible. While the submissions of the Prosecution regarding this particular witness and the allegations of witness interference by an individual who knows the witness and is likely to attempt interference if he learns about the witness's involvement with the Prosecution persuade the Chamber that a temporarily delayed disclosure is warranted, the Chamber is unable to authorise a longer delay without an assessment by the VWU. The Chamber requests the VWU to provide such assessment or a report on steps taken in this connection by no later than 28 January 2013.

¹¹⁹ ICC-01/09-02/11-562-Conf-Exp, para. 33.

53. The Chamber finds that non-disclosure of the identities of Witnesses 232, 334 and 505 pending confirmation that protective measures have been fully implemented, strikes an appropriate balance between the need to ensure full disclosure to the Defence as early as possible and the concomitant need to ensure the safety of this witness. Any further decision of the Chamber with regard to continued non-disclosure will be taken with full regard to the Defence entitlement to sufficient time and facilities to prepare its case. In order to mitigate any prejudice to the accused arising from the temporary non-disclosure, the Prosecution shall provide the Defence with a summary of any substantive allegations redacted from Witnesses 232's, 334's and 505's transcripts of interviews under the B.1 category.

(iii) Redactions

54. 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,¹²⁰ the Prosecution should periodically review the redactions to ensure that they are no more than strictly necessary to conceal the identity of the witnesses.

55. Apart from B.1 category redactions, the only other non-standard redactions contained in the interview transcripts and witness statements of the seven 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,¹²¹ the Chamber authorises the Prosecution to maintain the requested

¹²⁰ See ICC-01/09-02/11-495, para. 18.

¹²¹ 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, ICC-01/09-02/11-574-Conf, paras 18-21.

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.

56. 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.¹²²

¹²² 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:

GRANTS the request for extension of the 5 November 2012 deadline with respect to the application for delayed disclosure of the identity of Witness 334;

AUTHORISES the Prosecution to temporarily withhold from disclosure to the Defence the identities of Witnesses 232, 334, 493, 494, 505, 506 and 510 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 232, 493, 494, 505, 506 and 510 no later than 28 January 2013 in order for the Chamber to make a final determination on any continued non-disclosure of their identities;

ORDERS the Prosecution to refer the security situation of Witness 334 for the VWU for assessment as soon as possible and the VWU to file a report on the security situation and protection status of that witness or a report on steps taken in this connection no later than 28 January 2013;

AUTHORISES the Prosecution to temporarily maintain the redactions to the witness statements and transcripts contained in: Annex C and the corrected Annex D to the Second Delayed Disclosure Application, as well as Annexes A-C to the supplementary filing ICC-01/09-02/11-582;

ORDERS the Prosecution to provide written summaries to the Defence of the redacted material in the witness statements or transcripts of Witnesses 232, 334, 493, 494, 505, 506 and 510 by 16 January 2012; 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 232, 334, 493, 494, 505, 506 and 510.

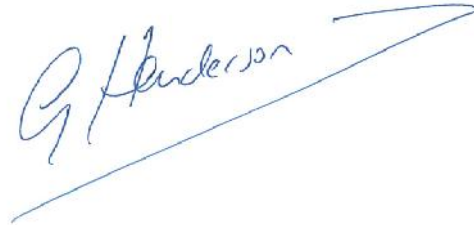
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding Judge



Judge Robert Fremr



Judge Geoffrey Henderson

Dated 3 February 2017

At The Hague, The Netherlands