

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 6 March 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 disclosure of the identities of
Witnesses 495, 524, 534 and 536'**

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

The Office of the Prosecutor

Ms Fatou Bensouda

Counsel for William Samoei Ruto

Mr Kioko Kilukumi Musau

Mr David Hooper

Counsel for Joshua Arap Sang

Mr Joseph Kipchumba Kigen-Katwa

Mr Silas Chekera

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Ms Silvana Arbia

Deputy Registrar

Victims and Witnesses Unit

Ms Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V ("Chamber") of the International Criminal Court ("Court"), in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, pursuant to Articles 64(2), 64(6)(e), 67 and 68(1) of the Rome Statute and Rules 76 and 81(4) of the Rules of Procedure and Evidence, renders the following Decision on the disclosure of Witnesses 495, 524, 534 and 536 ("Decision").

I. Procedural History

1. On 23 January 2013, the Chamber issued its Decision on the second and third Prosecution requests for delayed disclosure of witness identities ("Decision on second and third delayed disclosure requests").¹ In the decision, the Chamber authorised the Office of the Prosecutor ("Prosecution") to temporarily withhold disclosure to the defence for Mr Ruto and Mr Sang (together "Defence") the identities of, *inter alia*, Witnesses 495, 534 and 536.² The Victims and Witnesses Unit ("VWU") was directed to file a report to the Chamber on the security situation and protection status of these three witnesses by 11 February 2013. In the same decision the Chamber rejected the request for delayed disclosure with regard to Witness 524.³
2. On 25 January 2013, the Prosecution requested the Chamber to reconsider its decision on delayed disclosure with regard to Witness 524, providing new evidence with regard to the witness's security situation.⁴
3. On 30 January 2013, the Chamber granted the Prosecution's request and authorised the delayed disclosure of Witness 524's identity until the VWU

¹ ICC-01/09-01/11-564-Conf-Exp. A confidential redacted version was filed same day.

² Decision, ICC-01/09-01/11-564-Conf-Red, p. 32.

³ Decision, ICC-01/09-01/11-564-Conf-Red, p. 33.

⁴ Urgent request for reconsideration pursuant to Trial Chamber V's 'Decision on the second and third Prosecution requests for delayed disclosure of witness identities' (ICC-01/09-01/11-564-Conf-Exp), ICC-01/09-01/11569-Conf-Exp. A confidential redacted version was filed on the same day and notified on 28 February 2013.

completed its security assessment and implemented any required protective measures.⁵ The Chamber further instructed the VWU to inform the Chamber and the Prosecution as soon as the witness's identity could be safely disclosed.

4. On 11 February 2013, the VWU filed the requested report on Witnesses 495, 534 and 536, in which it submitted that it was in the process of finalising its protection assessments for these witnesses for the Registrar's review.⁶
5. On 13 February 2013, the Chamber issued an order, giving the VWU until 20 February 2013 to complete its protection assessments and file a corresponding report with the Chamber.⁷ On 20 February 2013, upon request by the VWU,⁸ the Chamber granted an extension of time to submit the requested report until the 1 March 2013.⁹
6. On 1 March 2013, the VWU filed its "Victims and Witnesses Unit's Updated Report on Witnesses KEN-OTP-P-0495, KEN-OTP-P-0534 and KEN-OTP-P-0536" ("Report"),¹⁰ providing an update on the security status of the witnesses.

II. Submissions and analysis

Witness 495

7. With regard to Witness 495, the VWU informed the Chamber that [REDACTED].¹¹
The VWU notes that [REDACTED].

⁵ Decision on prosecution's "Urgent request for reconsideration pursuant to Trial Chamber V's 'Decision on the second and third Prosecution requests for delayed disclosure of witness identities'" ("Decision on Reconsideration"), ICC-01/09-01/11-578-Conf-Exp. A public redacted version was filed on the same day.

⁶ Victims and Witnesses Unit's Assessment of the Security Situation and Protection Status of Witnesses P-495, P-534 and P-536 Pursuant to the "Decision on the second and third Prosecution requests for delayed disclosure of witness identities" (ICC-01/09-01/11-564-Conf-Exp), ICC-01/09-01/11-601-Conf-Exp, paras 2, 4, 6.

⁷ Order regarding the Victims and Witnesses Unit's assessment of the security situation and protection status of Witnesses 495, 534 and 536, ICC-01/09-01/11-604-Conf.

⁸ See email communication to the Trial Chamber on 19 February 2013, at 4.15 pm.

⁹ Order regarding the Victims and Witnesses Unit's request for an extension of time to submit a report on the security situation and protection status of Witnesses 495, 534 and 536; ICC-01/09-01/11-612-Conf

¹⁰ ICC-01/09-01/11-631-Conf-Exp.

¹¹ ICC-01/09-01/11-631-Conf-Exp, para.1.

8. However, the VWU notified the Chamber that the witness [REDACTED]. This was done without informing the VWU and the witness [REDACTED].¹² The VWU submits that it will update the Chamber on the security situation of this witness as soon as practicable.
9. The Chamber recalls that in the Decision on second and third delayed disclosure requests it concluded that it was unable to make a determination as to the risks a disclosure might pose to the witness in absence of the VWU's finalised security assessment. It authorised the Prosecution to delay the disclosure of Witness 495 until the final determination of the Chamber. Taking into consideration the Report, the Chamber is of the view that, in respect of Witness 495, all possible avenues to ensure the security of the witness [REDACTED] appear to have been have been exhausted. [REDACTED]. Therefore, the Chamber orders the Prosecution to consult with the witness and obtain consent in order to effectuate the disclosure of his identity to the Defence by 13 March 2013 or to withdraw the witness.

Witness 534

10. With regard to Witness 534, the VWU informed the Chamber that [REDACTED]. The VWU submits that the witness, [REDACTED].
11. The VWU further notes that [REDACTED].¹³
12. The Chamber recalls that in the Decision on second and third delayed disclosure requests it authorised the Prosecution to withhold the identity of Witness 534 until the security assessment of the VWU has taken place. Having regard to the Report the Chamber considers that, in respect of Witness 534, all possible avenues to ensure the security of the witness [REDACTED] appear to have been have been

¹² ICC-01/09-01/11-631-Conf-Exp, para.4.

¹³ ICC-01/09-01/11-631-Conf-Exp, para.9.

exhausted. [REDACTED]. Therefore, the Chamber orders the Prosecution to consult with the witness and obtain consent in order to effectuate disclosure of his identity to the Defence by 13 March 2013 or to withdraw the witness.

Witness 536

13. With regard to Witness 536 the VWU informed the Chamber that [REDACTED]. The VWU submits that this measure sufficiently mitigates the security risks of the witness.¹⁴
14. The Chamber recalls that in the Decision on second and third delayed disclosure requests it authorised the Prosecution to withhold the identity of Witness 536 until the security assessment of the VWU has taken place. The Chamber notes that interim protection measures have now been implemented and that the VWU considers these measures to be adequate in mitigating the security risks. Accordingly, the Chamber is satisfied that there is no need for the continuing non-disclosure and orders the Prosecution to disclose the witness's identity to the Defence by no later than 13 March 2013.

Witness 524

15. With regard to Witness 524 the Chamber notes that to date the VWU has not submitted a report on the witness's security assessment. In order to enable the Chamber to monitor the implementation of its decision regarding the disclosure of Witness 524's identity to the Defence,¹⁵ the VWU is directed to provide an update on the witness's security assessment. The update should provide: (i) the status of any interim or final security measures that have been granted to the witness; (ii) if final protection measures have not been implemented, estimates as to when final protection measures will be implemented and (iii) an assessment as

¹⁴ ICC-01/09-01/11-631-Conf-Exp, paras 10-12.

¹⁵ ICC-01/09-01/11-578-Conf-Exp.

to whether the risks to this witness have been sufficiently mitigated by interim or final protection measures.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

DIRECTS the Prosecution to disclose the identities of Witnesses 495 and 534 to the Defence by no later than 13 March 2013 or to withdraw the witnesses;

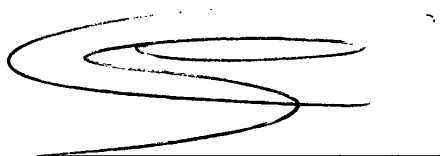
DIRECTS the Prosecution to disclose the identity of Witness 536 by no later than 13 March 2013; and

INSTRUCTS the VWU to provide an updated report on Witness 524 in accordance with paragraph 15 of this Decision by no later than 13 March 2013.

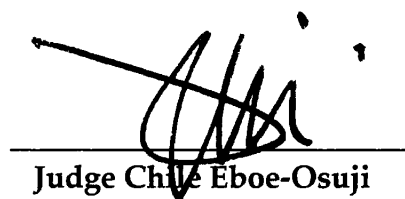
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding Judge



Judge Christine Van den Wyngaert



Judge Chile Eboe-Osuji

Dated 6 March 2013

At The Hague, The Netherlands

No. ICC-01/09-01/11

6 March 2013