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

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TRIAL CHAMBER V(A)

Before: Judge, Chile Eboe-Osuji, Presiding
Judge Olga Herrera Carbuca
Judge Robert Fremr

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR v. WILLIAM SAMOEI RUTO and JOSHUA ARAP SANG

Public redacted version of
Final Direction on the Prosecution's Request for Guidance on Disclosure
Relating to P-0534

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Anton Steynberg

Counsel for William Samoei Ruto

Mr Karim Khan
Mr David Hooper
Mr Essa Faal
Ms Shyamala Alagendra

Counsel for Joshua Arap Sang

Mr Joseph Kipchumba Kigen-Katwa
Ms Caroline Buisman

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

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

[REDACTED]

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V(A) (the ‘Chamber’) of the International Criminal Court (the ‘Court’), in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, having regard to Articles 54(3)(f), 67(2) and 68 of the Rome Statute (the ‘Statute’) and Rules 77 and 81(4) of the Rules of Procedure and Evidence (the ‘Rules’), issues, by majority, Judge Eboe-Osuji partly dissenting, this ‘Final Direction on the Prosecution’s Request for Guidance on Disclosure Relating to P-0534’.

I. Procedural History

1. On 5 June 2014, the Office of the Prosecutor (‘Prosecution’) filed a request (the ‘Request’) related to former Prosecution Witness 534 (‘Former Witness 534’).¹ The Prosecution submits that Former Witness 534 provided potentially exonerating information, but ultimately refused to consent to the disclosure of his identity to the defence teams for Mr Ruto and Mr Sang (the ‘Defence’) and to be externally relocated, which the Victims and Witnesses Unit (the ‘VWU’) deems necessary to protect his safety and security if his identity is disclosed.² The Prosecution confirms that Former Witness 534 is the source of hearsay evidence to be provided by [REDACTED].³
2. On 10 June 2014, the Chamber, by majority, Judge Eboe-Osuji partly dissenting, proposed a provisional direction as to how the Prosecution should proceed (the ‘Provisional Direction’).⁴ The Provisional Direction set out the following procedure:
 - (i) For Former Witness 534’s two interviews and [REDACTED] statements (the ‘Relevant Materials’), the only redactions allowed are

¹ ICC-01/09-01/11-1343-Conf-Exp (with three confidential ex parte annexes).

² ICC-01/09-01/11-1343-Conf-Exp, para. 2.

³ ICC-01/09-01/11-1343-Conf-Exp, para. 14.

⁴ Provisional Direction on the Prosecution’s Request for Guidance on Disclosure Relating to P-0534, 10 June 2014, ICC-01/09-01/11-1351-Conf-Exp (with partly dissenting opinion at ICC-01/09-01/11-1351-Conf-Exp-Anx).

for pre-approved categories of the Redaction Protocol⁵ and the identity of the subjects of any investigation pursuant to Article 70 of the Statute. The identity of Former Witness 534 must be disclosed to the Defence.

- (ii) The VWU is to immediately inform Former Witness 534 of the pending disclosure and take any appropriate protective measures which the witness agrees can be implemented. The Prosecution is to arrange with the VWU for this consultation to occur prior to the disclosure of Former Witness 534's identity to the Defence.
- (iii) The Prosecution is to identify to the Defence and Chamber: (a) all portions of the Relevant Materials falling under Article 67(2) of the Statute and (b) all portions of the Relevant Materials which constitute the hearsay evidence provided by [REDACTED] for which Former Witness 534 is the only source.⁶

3. The Chamber invited the Prosecution and VWU to present any compelling reason as to why the Provisional Direction should not be implemented.⁷ The Chamber indicated that '[i]f no such submissions are made, or if the Chamber does not consider the submissions made to provide any compelling reason for amending the provisional direction, the Chamber will reissue this provisional direction in final form, notified also to the Defence'.⁸

⁵ Annex of 'Decision on the protocol establishing a redaction regime', 27 September 2012, ICC-01/09-01/11-458-AnxA-Corr.

⁶ Provisional Direction, ICC-01/09-01/11-1351-Conf-Exp, para. 4.

⁷ Provisional Direction, ICC-01/09-01/11-1351-Conf-Exp, para. 5, page 5.

⁸ Provisional Direction, ICC-01/09-01/11-1351-Conf-Exp, para. 5.

4. On 11 June 2014, the VWU presented its observations on the Provisional Direction.⁹ The VWU provides an updated risk assessment for Former Witness 534 and explains that it 'is of the opinion that when disclosing his details to the Defence, it should be considered that confirmation of his involvement with the ICC, possibly through the Defence post disclosure investigative activities within his family and own community, has the potential to lead to serious, and under the present circumstances unmanageable, levels of risk for this witness'.¹⁰
5. On 12 June 2014, the Prosecution presented its observations on the Provisional Direction, indicating that it had no further submissions to make and is prepared to disclose the identity of Former Witness 534 on the Chamber's instruction.¹¹

II. Analysis

6. The Majority will not amend the Provisional Direction. The Majority notes the Prosecution and VWU's concerns over the objective risk to Former Witness 534 should his identity be disclosed. However, the Majority considers this information to be particularly important for the Defence, and indeed the Defence has already made submissions that the redacted information in some of the Relevant Materials is important for their investigation.¹²
7. Pursuant to Article 68(1) of the Statute, the Chamber has to balance its obligation to 'take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses' with its duty to ensure

⁹ Annex 1 of Victims and Witnesses Unit's observations pursuant to the "Provisional Direction on the Prosecution's Request for Guidance on Disclosure Relating to P-0534" (ICC-01/09-01/11-1351-Conf-Exp), 11 June 2014, ICC-01/09-01/11-1357-Conf-Exp-Anx1.

¹⁰ ICC-01/09-01/11-1357-Conf-Exp-Anx1, para. 10.

¹¹ Prosecution's Submissions, as directed in Decision ICC-01/09-01/11-1351-Conf-Exp, ICC-01/09-01/11-1359-Conf-Exp.

¹² Defence response to "Prosecution's request for redactions, non-disclosure and delayed disclosure of documents emanating from the Article 70 investigation", 2 June 2014, ICC-01/09-01/11-1329-Conf, para. 8; Sang Defence Response to Prosecution's Request for Redactions, Non-Disclosure and Delayed Disclosure of Documents Emanating from the Article 70 Investigation, 2 June 2014, ICC-01/09-01/11-1330-Conf.

that measures for protection ‘shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial’.

8. The Majority considers that allowing the Prosecution to lead evidence through [REDACTED] that would be hearsay from Former Witness 534 without identifying him would indeed be unduly prejudicial to the accused. This is particularly the case in this instance given the existence of material falling within Article 67(2) of the Statute. The Majority also notes the alternative possibility of declaring all such hearsay evidence from [REDACTED] to be inadmissible thus obviating the need to reveal Former Witness 534’s identity for a full comprehension of [REDACTED] testimony. However, it considers that this approach: (i) would undermine the premise upon which the Prosecution was permitted to [REDACTED]¹³ and (ii) would not fully mitigate the prejudice to the Defence, because Former Witness 534’s identity may have importance for Defence investigations beyond the scope of [REDACTED] testimony.¹⁴
9. As set out in the Provisional Direction, the Majority considers that the only fair way to proceed in these circumstances is for Former Witness 534’s identity to be disclosed and for the VWU to continue working with him as appropriate to ensure that the potential impact of this disclosure on his safety is mitigated to the extent possible. The Majority therefore considers it appropriate to finalise the Provisional Direction as drafted, with the additional instruction being for the Prosecution, as has been done in the past,¹⁵ to assign pseudonyms and prepare an accompanying code sheet¹⁶ for the names and sources of the Article 70 investigation which remain redacted in the Relevant Materials.

¹³ [REDACTED].

¹⁴ [REDACTED].

¹⁵ Transcript of Hearing, 4 March 2014, ICC-01/09-01/11-T-98-CONF-ENG, page 28 line 3 to page 30 line 9.

¹⁶ See Transcript of Hearing, 5 March 2014, ICC-01/09-01/11-T-99-CONF-ENG, page 44 line 19, page 46 line 13.

10. Finally, mindful of the serious security concerns that have been expressed and the VWU's observations quoted in paragraph 4 above, the Majority orders that the Defence may not, in any manner, directly or indirectly, disclose to the public (as defined in the Witness Contact Protocol)¹⁷ the identity of Former Witness 534 or the fact that he is or has been at any time, directly or indirectly, involved with the activities of the Court. The Majority notes that this prohibition extends to making any enquiries or conducting any investigations amongst Former Witness 534's family, friends and associates, present or past. Should the Defence consider it necessary to conduct investigations which have the potential, in any way, to reveal Former Witness 534's involvement with the Court, even indirectly, it shall request prior authorisation of the Chamber.

FOR THE FOREGOING REASONS, THE CHAMBER, BY MAJORITY, HEREBY

FINALISES the Provisional Direction, incorporating the additional instruction provided in paragraph 9 of the present decision;

ORDERS the Defence, as provided for in paragraph 10 above, not to disclose to the public the identity of Former Witness 534 or the fact that he is or has been at any time, directly or indirectly, involved with the activities of the Court, and to seek the authorisation of the Chamber before taking any investigative steps which might, even indirectly, result in such disclosure; and

UNANIMOUSLY, HEREBY

¹⁷ ICC-01/09-01/11-449-Anx ('Witness Contact Protocol'), para. 3.

DIRECTS the Prosecution to review its previous filings relating to Former Witness 534 and to file lesser redacted versions of them, lifting all redactions related to Former Witness 534 which no longer serve any purpose in view of the present decision; and

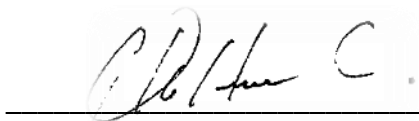
ORDERS the Registry to reclassify the Provisional Direction (ICC-01/09-01/11-1351-Conf-Exp) and its Partly Dissenting Opinion (ICC-01/09-01/11-1351-Conf-Exp-Anx) so that they are available to the Defence.

Judge Eboe-Osuji appends a partly dissenting opinion.

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

A blue ink signature, appearing to be 'Chile Eboe-Osuji', written over a horizontal line.

Judge Chile Eboe-Osuji, Presiding Judge

A black ink signature, appearing to be 'Olga Herrera Carbuccion', written over a horizontal line.

Judge Olga Herrera Carbuccion

A black ink signature, appearing to be 'Robert Fremr', written over a horizontal line.

Judge Robert Fremr

Dated 13 June 2014

At The Hague, The Netherlands