

Date: 10 June 2014

Date of public redacted version: 11 December 2017

PARTLY DISSENTING OPINION OF JUDGE EBOE-OSUJI

1. My opinion to the ‘Final Direction on the Prosecution’s Request for Guidance on Disclosure Relating to P-0534’ is ‘partly’ dissenting because I concur in the following regards: (i) I concur with the Chamber’s directive to reclassify, in any event, the Provisional Direction and the Partly Dissenting Opinion to it for purposes of making them available to the parties and participants; and, (ii) as a necessary consequence of the Majority’s directive to disclose the identity of 534, it is right to (also) direct the Prosecution to review all its previous filings, in order to lift all other unnecessary redactions concerning 534—in particular, there should now be lesser redacted disclosure to the Defence of all the previous filings made by the Prosecution (with specific reference to filing ICC-01/09-01/11-837-Conf-Exp, and filing ICC-01/09-01/11-866-Conf-Red2) for purposes of the application to replace 534 with new witnesses.

2. But, I do wholly dissent from the decision of my highly esteemed colleagues in their confirmation of their provisional directive to disclose the identity of 534 in the prevailing circumstances. In the particular circumstances of this matter, I also dissent from the Majority’s directive to place especial constraints upon the Defence (as a necessary consequence of the disclosure directive) as regards the manner in which the Defence are now to conduct their investigations in relation to 534. It is my view, as will be seen later, that the need to engage in such a compensatory measure was one of the signals that militated against the disclosure order in the first place.

3. I reiterate the views previously expressed in my Partly Dissenting Opinion to the Provisional Direction.¹

4. I note, in particular, that the report² provided by the Victims and Witnesses Unit (pursuant to the Provisional Direction) contains information that is apparently substantive and objective and which, in my view, seriously militates against disclosure of 534’s identity at this time. Notably, the VWU report clearly shows the following: (a) it is the VWU’s own assessment that determined that ‘the risk to his safety and security is *sufficiently high* to warrant a *high level* of security measures being implemented ...’ (emphasis added); (b) the VWU continues to assess the risk as high. According to the report, ‘The VWU is assessing his risk level as high ...’ (emphasis added); and (c) the events described by the VWU as informing such a

¹ *Prosecutor v William Samoei Ruto and Joshua Arap Sang (Provisional Direction on the Prosecution's Request for Guidance on Disclosure Relating to P-0534)* 10 June 2014, [Trial Chamber V(A)], ICC-01/09-01/11-1351-Conf-Exp-Anx, Partly Dissenting Opinion of Judge Eboe-Osuji.

² 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 and ICC-01/09-01/11-1357-Conf-Exp-Anx1.

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high level of risk assessment include incidents that are not readily dismissed as ‘subjective fear’ on the part of 534.

5. The VWU report indicates ‘compelling reasons’ to vary the directive to disclose the identity of 534. It is to be noted that in their filed observation, following the receipt of the VWU report, the Prosecution no longer asserts that the VWU has not provided ‘compelling reasons’ to vary the disclosure directive; although they had initially made such an assertion in an email to the Chamber sent earlier.³

6. It may be observed that to insist that the disclosure should not be made to the Defence before the VWU has put into place the necessary measures of protection is an insistence that need not be given an aspersive interpretation against the Defence. To the contrary, as a result of the Majority decision of my distinguished colleagues, the Defence are now put in the difficult position of being expected to investigate the allegations attributed to 534 at the [REDACTED], but to do so without unduly exacerbating the safety and security concerns surrounding 534 in the circumstances clearly set out in the VWU assessment.

7. I must note that article 68(1) of the Rome Statute requires the Court to ‘take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. ... These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.’ As indicated in my earlier dissenting opinion, I take a different view of how to strike the needed balance.

8. I admire that my colleagues’ disclosure decision is primarily motivated by the desire to ensure full respect for the rights of the accused. Regrettably, however, I am constrained to view the disclosure decision as having precisely the opposite effect. This is in the sense that the best protection for the rights of the accused is to avoid receiving hearsay testimony of what [REDACTED] supposedly heard from 534, in the circumstances where Defence counsel

³ In an email sent on 11 June 2014 at 15:43, the lead prosecution counsel had written as follows:

‘Dear Trial Chamber V(A),

The Prosecution has taken note of the observations filed by the VWU as per ICC-01/09-01/11-1357-Conf-Exp +Anx1, which largely mirror, albeit in greater detail, the facts set out in the Prosecution Request of 5 June. *The Prosecution notes further that the VWU has not alleged any compelling reasons for amending the provisional direction given by the Chamber.*

In the circumstances, I can advise that the Prosecution does not intend to make any further submissions on the issue and rests on those contained in its Request.

Please advise whether in these circumstances the Prosecution may proceed with the disclosure as per the Chamber’s decision -1351-Conf-Exp.’ [Emphasis added.]

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are unable to cross-examine 534 (or even [REDACTED]) about the veracity of the hearsay. That, ordinarily, is the difficulty with hearsay testimonies. But, concerns about fairness to the Defence are made worse in the present circumstances, where (a) the Defence may not have had enough time to conduct full investigation of the hearsay attributed to 534; and, (b) the Defence are also put in the straight-jacket of the additional constraint of conducting their investigation in a manner that does not compound the concerns for the safety and security of 534.

9. In the circumstances, the disclosure decision, I regret to say with respect, cuts the baby in half. For, it serves neither the fair trial interests of the accused nor the safety-and-security interest of 534.

10. So it is that I reiterate my position in the following regard. Taking into account how late the Prosecution raised this issue, the interests of justice, in my view, require striking the needed balance in this way: (a) by directing the Prosecution to disclose the entire statements of 534 to the Defence, while masking the identifying information; and (b) by forbidding the Prosecution from eliciting from [REDACTED] any hearsay testimony that is derived directly or indirectly from 534.

11. My colleagues consider that the approach of forbidding the Prosecution from eliciting the 534 hearsay from [REDACTED] ‘would undermine the premise upon which the Prosecution was permitted to call [REDACTED] “in order to replace the evidence that would have been given by former Witness 534”’. I most respectfully disagree. First, it does not follow that the only way that [REDACTED] could be seen as replacing 534 is by receiving from [REDACTED] the hearsay of what was heard from 534. Indeed, a careful look at both the decision replacing 534 with two new witnesses and the motivating filings from the Prosecution do not fully bear out the concerns of my colleagues that the replacement decision would be undermined if the hearsay from 534 is prohibited in the testimony of [REDACTED].⁴ But, second, even assuming that receiving the hearsay is the correct view of

⁴ To begin with, it helps to recall, in this connection, that the Prosecution’s application for replacement was made to replace 534 with two new witnesses [REDACTED]. And according to the Prosecution, ‘The evidence of the two new witnesses, [REDACTED] *in combination*, will help to replace the evidence previously proffered by P-0534.’ [See, for instance, filing ICC-01/09-01/11-837-Conf-Exp, para 1, emphasis added.] It is not clear that the only way that these two witnesses will ‘in combination ... help to replace the evidence’ of 534 is by the hearsay testimony of what he might have told any or both of them. Indeed, such a suggestion is not supported by the following further considerations. First, one notes the following submission of the Prosecution: ‘[REDACTED] is unable to replace P-0534’s evidence regarding the actual attack on Turbo itself. Therefore, the Prosecution submits that it is necessary to supplement his evidence with that of another witness who can speak to these events.’ [*Ibid*, para 16.] It goes to show that the other witness—specifically [REDACTED] - was being called to replace 534 for purposes of testifying to the attack on Turbo. This is something that appears to be a first-hand account on the part of [REDACTED]. Secondly, apart from the Turbo town attack to which [REDACTED] might give a first-hand account in replacement of the would be testimony of 534, there are also other aspects of [REDACTED] first-hand account that appear to cover the same evidential matter as the

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what was contemplated in the circumstances of that replacement, it does not at all follow that the Prosecution was free to engage the question of disclosure of 534's identity within a space in time so constrained as to require the sudden disclosure of 534's identity in the current circumstances, in order that [REDACTED] may give the hearsay testimony. Finally, there was nothing at all in the decision permitting [REDACTED] to replace 534 that carried with it any promise to the effect that everything must be done to receive the hearsay from [REDACTED] even if it means disclosure of the identity of 534 in circumstances in which serious concerns registered on the record by the VWU are ignored. Has justice become a vertical steel pipe with a smooth bore? According to the logic of the steel pipe, every object dropped into the upper end must come out at the lower end: there is no turning back, regardless of the circumstances. In the world of the computer, there is a colourful maxim that describes the same phenomenon. If that is to be an accepted way of justice, what then is the purpose of the idea of reconsideration of judicial decisions upon the revelation of new material facts? The VWU report contains items of information that were not in the Chamber's contemplation when the replacement decision was made.

12. For these reasons, I would not confirm the decision directing the disclosure of the identifying information of 534.

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



Chile Eboe-Osuji
(Presiding Judge)

Dated 13 June 2014

At The Hague, The Netherlands

indicated testimony of 534, with particular regard to alleged meetings. It is thus not the case that the replacement decision was only about receiving from [REDACTED] hearsay information from 534.