

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 2 May 2013

TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding
Judge Robert Fremr
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

Confidential redacted version of the "Decision on the Prosecution's renewed request for delayed disclosure of identity of Witness 534"

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 Karim A. A. Khan

Mr David Hooper

Mr Kioko Kilukumi Musau

Ms Shyamala Alagendra

Counsel for Joshua Arap Sang

Mr Joseph Kipchumba Kigen-Katwa

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Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
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States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Deputy Registrar

Victims and Witnesses Unit

Mr Patrick Craig

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V ("Chamber") of the International Criminal Court ("Court", "ICC"), in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, pursuant to Articles 64, 67 and 68(1) of the Rome Statute ("Statute") and Rules 76, 77, 81 and 84 of the Rules of Procedure and Evidence of the Court ("Rules"), as well as Regulation 35 of the Regulations of the Court ("Regulations"), renders the following Decision on the Prosecution's renewed request for delayed disclosure of identity of Witness 534.

I. PROCEDURAL BACKGROUND AND SUBMISSIONS

1. On 27 December 2012, the Office of the Prosecutor ("Prosecution") filed a third application requesting delayed disclosure of the identities of five witnesses, including Witness 534 ("Third Application").¹ The Third Application and its five annexes were filed on a confidential *ex parte*, Prosecution and Victims and Witnesses Unit ("VWU") only, basis. Confidential redacted versions of the Third Application and four of its five annexes were filed on 28 December 2012.²
2. On 3 January 2013, the Chamber issued an "Order regarding second and third Prosecution applications for delayed disclosure of witness identities",³ holding that due to deficiencies in the applications, it was not possible for the Chamber to rule on the merits of the applications prior to the disclosure deadline of 9 January 2013,⁴ authorising the temporary non-disclosure of the identities of the witnesses concerned and requesting additional information from the Prosecution.⁵

¹ Third application for delayed disclosure of witness identities, ICC-01/09-01/11-521-Conf-Exp. A corrigendum to Annex 5 was filed on 3 January 2013, ICC-01/09-01/11-521-Conf-Exp-Anx5-Corr with ICC-01/09-01/11-521-Conf-Exp-Anx5-Corr-Anx.

² Confidential Redacted Version of Third application for delayed disclosure of witness identities, ICC-01/09-01/11-521-Conf-Red and Annexes 1, 2, 4, and 5 thereto.

³ ICC-01/09-01/11-528-Conf.

⁴ ICC-01/09-01/11-528-Conf, para. 4.

⁵ ICC-01/09-01/11-528-Conf, paras 5 and 6.

3. On 10 January 2013, the Prosecution submitted the draft transcripts of an interview it held with Witness 534 between 15 and 18 December 2012.⁶
4. On 23 January 2013, the Chamber issued a decision ("Decision on the Third Application")⁷ authorising the Prosecution to temporarily withhold from disclosure to the defence for Mr Ruto and the defence for Mr Sang (collectively the "Defence") the identity of Witness 534, among others, pending the implementation of protective measures. The Decision on the Third Application also authorised the Prosecution to temporarily maintain (i) the B.1 redactions to the draft transcript of an interview with the witness⁸ until such time as the identity of the witness is disclosed and (ii) the B.1 redactions to the dates of the interview.⁹ The Chamber directed the Prosecution to provide to the Defence written summaries of any substantive allegation redacted under the B.1 category in the transcript of Witness 534's interview and to continually assess the B.1 redactions to ensure that they are no more than strictly necessary.¹⁰ The VWU was directed to file an assessment of the security situation and protection status of Witness 534 by 11 February 2013.¹¹ This time limit was subsequently extended until 1 March 2013.¹²

⁶ Prosecution's provision of supplemental material to confidential *ex parte* Prosecution and Victims and Witnesses Unit Only Annex 3 to the "Third application for delayed disclosure of witness identities" (ICC-01/09-01/11-521-Conf-Exp), ICC-01/09-01/11-544-Conf-Exp, and confidential *ex parte* annex A, notified on 11 January 2013. A confidential redacted version was filed the same day, ICC-01/09-01/11-544-Conf-Red and confidential redacted annex, notified on 11 January 2013.

⁷ ICC-01/09-01/11-564-Conf-Exp. A confidential redacted version was filed on the same day, ICC-01/09-01/11-564-Conf-Red.

⁸ ICC-01/09-01/11-544-Conf-Exp-AnxA.

⁹ Decision on the Third Application, ICC-01/09-01/11-564-Conf-Red, pp. 32-33.

¹⁰ Decision on the Third Application, ICC-01/09-01/11-564-Conf-Red, pp. 33-34.

¹¹ Decision on the Third Application, ICC-01/09-01/11-564-Conf-Red, p. 33.

¹² ICC-01/09-01/11-604-Conf, p. 4 extending the time limit until 20 February 2013 and ICC-01/09-01/11-612-Conf, p. 5, extending the time limit until 1 March 2013.

5. On 1 March 2013, the VWU filed its update on the security status of, *inter alia*, Witness 534.¹³
6. On 6 March 2013, the Chamber issued a decision directing the Prosecution to, *inter alia*, disclose the identity of Witness 534 to the Defence by no later than 13 March 2013 or to withdraw the witness ("6 March 2013 Decision").¹⁴
7. On 13 March 2013, the Prosecution filed the "Prosecution's Notification of P-256 and P-534's Security and Interference" ("Prosecution Update"), in which it provides an update on the security situation of Witnesses 256 and 534, and informs the Chamber of its intention to conduct an investigation under Article 70 of the Statute into "the efforts [REDACTED]".¹⁵
8. On the same day, the Prosecution filed the "Prosecution's Urgent Application for Extension of Time to Disclose the Identity of Witness P-0534" ("Delayed Disclosure Application"), requesting the Chamber (i) to authorise the delay of disclosure of the identity of Witness 534 until 45 days prior to his testimony, during which time the Prosecution will explore alternative solutions for the security of the witness and his family, and (ii) to temporarily suspend the 13 March 2013 deadline for disclosure of the witness's identity pending the Chamber's determination of the Delayed Disclosure Application.¹⁶
9. On 28 March 2013, the Prosecution filed the "Prosecution's Notification of P-268 and P-487's Security and Interference and Update on the Situation of P-534", in

¹³ Victims and Witnesses Unit's Updated Report on Witnesses KEN-OTP-P-0495, KEN-OTP-P-0534 and KEN-OTP-P-0536, ICC-01/09-01/11-631-Conf-Exp.

¹⁴ Decision on the disclosure of the identities of Witnesses 495, 524, 534 and 536, ICC-01/09-01/11-638-Conf-Exp. A confidential redacted version was filed simultaneously, ICC-01/09-01/11-638-Conf-Red.

¹⁵ ICC-01/09-01/11-647-Conf-Exp, with Annex A. A confidential redacted version was filed on the following day, ICC-01/09-01/11-647-Conf-Red.

¹⁶ Prosecution's Urgent Application for Extension of Time to Disclose the Identity of Witness P-0534, ICC-01/09-01/11-648-Conf-Exp, with Annex A. A confidential redacted version was filed on the same day and notified on 14 March 2013, ICC-01/09-01/11-648-Conf-Red.

which it *inter alia* provides the most recent information with respect to the situation regarding Witness 534.¹⁷

10. On 3 April 2013, the VWU filed, on a confidential *ex parte* Prosecution and VWU only basis, the "Victims and Witnesses Unit's Observations on the Prosecution's Urgent Application for Extension of Time to Disclose the Identity of Witness P-0534" ("VWU's Observations")¹⁸ in which it outlines its interaction with Witness 534.
11. On 5 April 2013, at 16:45, the Defence filed the "Joint Defence Response to the Confidential Redacted Version of the Prosecution's Urgent Application for Extension of Time to Disclose the Identity of Witness P-0534" ("Response").¹⁹ The Chamber notes that the Response was due to be filed by 16:00 on 5 April 2013. However, the delay is insignificant and the Chamber is aware of recent technical problems, which led to delays in the processing of filings by the Registry. The Chamber will exceptionally consider the Response, even though a formal request for variation of the time limit was not made. In future, such a request should be made.

Confidentiality

12. This decision is issued on a confidential *ex parte*, Prosecution and VWU only, basis as it refers to confidential and sensitive materials relating to witness security issues and protective measures. A confidential redacted version of the decision will be issued simultaneously.

¹⁷ ICC-01/09-01/11-665-Conf-Exp. A confidential redacted version was filed on 3 April 2013, ICC-01/09-01/11-665-Conf-Red.

¹⁸ Victims and Witnesses Unit's Observations on the Prosecution's Urgent Application for Extension of Time to Disclose the Identity of Witness P-0534, ICC-01/09-01/11-667-Conf-Exp.

¹⁹ Joint Defence Response to the Confidential Redacted Version of the Prosecution's Urgent Application for Extension of Time to Disclose the Identity of Witness P-0534, ICC-01/09-01/11-668-Conf.

Prosecution's submissions

13. The Prosecution reiterates that Witness 534 provides valuable [REDACTED] information regarding [REDACTED]. It alleges that [REDACTED].²⁰ The witness's anticipated evidence is that [REDACTED].²¹ The Prosecution submits that [REDACTED] meetings held by Mr Ruto and his associates at which they discussed ways of identifying, bribing and otherwise dissuading potential ICC witnesses, [REDACTED], from testifying.²² The witness told the Prosecution that on [REDACTED].²³
14. The Prosecution submits that [REDACTED] about a meeting of elders convened to discuss how to "deal with the traitors".²⁴
15. In the Delayed Disclosure Application the Prosecution states that it has received new information about a series of incidents concerning Witness 534 and his family members, which indicate that suspicions in his local area are rife that he is a witness for the Prosecution, and that active measures are being taken to threaten him and his family in order to prevent him from cooperating with the Court.²⁵ The Prosecution again reiterates that Witness 534 is critical to the Prosecution's case, and that his evidence is unique and irreplaceable, as [REDACTED] alleged by the Prosecution, and his evidence directly implicates Mr Ruto as the individual bearing overall responsibility for these crimes.²⁶

²⁰ Prosecution Update, ICC-01/09-01/11-647-Conf-Exp, para. 5.

²¹ Prosecution Update, ICC-01/09-01/11-647-Conf-Exp, para. 6.

²² Prosecution Update, ICC-01/09-01/11-647-Conf-Exp, para. 7.

²³ Prosecution Update, ICC-01/09-01/11-647-Conf-Exp, para. 14.

²⁴ Prosecution Update, ICC-01/09-01/11-647-Conf-Exp, para. 15.

²⁵ Delayed Disclosure Application, ICC-01/09-01/11-648-Conf-Red, para. 2.

²⁶ Delayed Disclosure Application, ICC-01/09-01/11-648-Conf-Exp, para. 5.

16. The Prosecution submits that [REDACTED].²⁷ This included [REDACTED];²⁸ [REDACTED];²⁹ [REDACTED];³⁰ [REDACTED].³¹
17. The Prosecution submits that [REDACTED], and that the consequences for these family members would possibly be very serious if these suspicions were to be confirmed.³² The Prosecution further submits that, following the recent elections in Kenya, there is the increased potential for Mr Kenyatta and Mr Ruto to use their political influence to prevent key witnesses from testifying.³³
18. Witness 534 reports a number of leaks of confidential information regarding the identities of Prosecution witnesses.³⁴ The Prosecution submits that the identities of at least three Prosecution witnesses are known [REDACTED], and that these identities were disclosed confidentially to the Defence [REDACTED].³⁵ Witness 534 has expressed the view that [REDACTED].³⁶ Moreover, the Prosecution submits that Witness 534 has been [REDACTED]³⁷ [REDACTED].³⁸

²⁷ Delayed Disclosure Application, ICC-01/09-01/11-648-Conf-Exp, para. 8.

²⁸ Delayed Disclosure Application, ICC-01/09-01/11-648-Conf-Exp, para. 9(i); ICC-01/09-01/11-648-Conf-Exp-AnxA, pp. 2, 4.

²⁹ Delayed Disclosure Application, ICC-01/09-01/11-648-Conf-Exp, para. 9(ii); ICC-01/09-01/11-648-Conf-Exp-AnxA, pp. 2, 4.

³⁰ Delayed Disclosure Application, ICC-01/09-01/11-648-Conf-Exp, para. 9(iii); ICC-01/09-01/11-648-Conf-Exp-AnxA, pp. 2 – 3.

³¹ Delayed Disclosure Application, ICC-01/09-01/11-648-Conf-Exp, para. 9(iv); ICC-01/09-01/11-648-Conf-Exp-AnxA, p. 2.

³² Delayed Disclosure Application, ICC-01/09-01/11-648-Conf-Exp, para. 10.

³³ Delayed Disclosure Application, ICC-01/09-01/11-648-Conf-Red, para. 12.

³⁴ Delayed Disclosure Application, ICC-01/09-01/11-648-Conf-Red, para. 11.

³⁵ Delayed Disclosure Application, ICC-01/09-01/11-648-Conf-Exp, para. 11; ICC-01/09-01/11-648-Conf-Exp-AnxA, pp. 2 – 3.

³⁶ ICC-01/09-01/11-648-Conf-Exp-AnxA, p. 2.

³⁷ Delayed Disclosure Application, ICC-01/09-01/11-648-Conf-Exp, para. 13.

³⁸ Delayed Disclosure Application, ICC-01/09-01/11-648-Conf-Exp, para. 13; ICC-01/09-01/11-648-Conf-Exp-AnxA, p. 1.

19. The Prosecution contends that, in light of the above, the delayed disclosure is the only measure that will offer sufficient protection to Witness 534,³⁹ and that as it is only one witness out of 40, the prejudice to the Defence will be minimal.⁴⁰
20. In the "Prosecution's Notification of P-268 and P-487's Security and Interference and Update on the Situation of P-534", the Prosecution reiterates that Witness 534 is a key witness whose evidence is unique and irreplaceable, and is critical to the Prosecution's case.⁴¹ The Prosecution submits that Witness 534 has [REDACTED].⁴² Witness 534 has indicated to the Prosecution that [REDACTED]. He has further indicated that [REDACTED].⁴³
21. The Prosecution submits that it [REDACTED].⁴⁴ According to the Prosecution, [REDACTED].⁴⁵ The Prosecution has indicated that it is [REDACTED].⁴⁶

VWU's submissions

22. In the VWU's Observations, the VWU indicates that it conducted an interview with Witness 534 [REDACTED], in which Witness 534 indicated that [REDACTED].⁴⁷ The Registrar, on the recommendation of the VWU, agreed to provide assistance to Witness 534 [REDACTED].⁴⁸ The VWU reiterates that the risks to Witness 534's security [REDACTED] may be difficult to manage once his identity is disclosed to the Defence.⁴⁹ Furthermore, the VWU states that most of the information provided by the Prosecution in its Delayed Disclosure

³⁹ Delayed Disclosure Application, ICC-01/09-01/11-648-Conf-Red, para. 14.

⁴⁰ Delayed Disclosure Application, ICC-01/09-01/11-648-Conf-Red, para. 15.

⁴¹ ICC-01/09-01/11-665-Conf-Red, para. 10.

⁴² ICC-01/09-01/11-665-Conf-Exp, para. 12.

⁴³ ICC-01/09-01/11-665-Conf-Exp, para. 12.

⁴⁴ ICC-01/09-01/11-665-Conf-Exp, para. 13.

⁴⁵ ICC-01/09-01/11-665-Conf-Exp, para. 13.

⁴⁶ ICC-01/09-01/11-665-Conf-Exp, para. 13.

⁴⁷ VWU's Observations, ICC-01/09-01/11-667-Conf-Exp, para. 1.

⁴⁸ VWU's Observations, ICC-01/09-01/11-667-Conf-Exp, paras 2 – 3.

⁴⁹ VWU's Observations, ICC-01/09-01/11-667-Conf-Exp, para. 3.

Application was already known to the VWU when it conducted its initial interview with Witness 534.⁵⁰

23. The VWU indicates that since its initial interview with Witness 534, the security of the witness has been [REDACTED], and the VWU's only interaction with Witness 534 has been to implement the Registrar's decision to provide assistance to the witness.⁵¹

Defence's submissions

24. The Defence submits that the Prosecution has not shown good cause for the Chamber to extend the time limit for disclosure, and that the Delayed Disclosure Application is just an attempt by the Prosecution to prejudice the Defence's ability to prepare for trial.⁵² It is submitted further that by filing the Delayed Disclosure Application on the same day as the identity of Witness 534 was to have been disclosed or withdrawn, the Prosecution has frustrated the Chamber's intention to have the matter of Witness 534's participation conclusively determined at this stage.⁵³ Moreover, the Defence submits that, given that the Prosecution has stressed the importance of Witness 534, the Defence cannot be expected to proceed to trial without knowing the identity of the witness, the full extent of his evidence, and how it relates to the other evidence on the record.⁵⁴

25. The Defence notes that it is limited in its ability to comment on the merits of the security concerns due to the redacted filing; however, to the extent that the security concerns in the Delayed Disclosure Application are the same as the allegations put forward in the Prosecution Update, the Defence and the accused

⁵⁰ VWU's Observations, ICC-01/09-01/11-667-Conf-Exp, para. 4.

⁵¹ VWU's Observations, ICC-01/09-01/11-667-Conf-Exp, para. 4.

⁵² Response, ICC-01/09-01/11-668-Conf, para. 4.

⁵³ Response, ICC-01/09-01/11-668-Conf, para. 5.

⁵⁴ Response, ICC-01/09-01/11-668-Conf, para. 5.

deny all participation in and knowledge of the alleged meetings and interference.⁵⁵ The Defence further submits that it is untrue and unfair to blame the Defence and/or the accused for the leaks of information regarding the identities of witnesses.⁵⁶

26. Moreover, the Defence contends that there is nothing exceptional about the current request, and that there are less prejudicial protective measures which are available.⁵⁷ The Defence argues that the Prosecution has failed to show good cause for a variation of the disclosure deadline, and that the Chamber should consider Witness 534 as withdrawn since his name was not disclosed in accordance with the Chamber's order.⁵⁸

II. ANALYSIS

Preliminary matters

27. The Chamber notes at the outset that it previously ruled on the Prosecution's Third Application, containing a request for authorisation to delay the disclosure of Witness 534's identity until 45 days prior to testimony. In its Decision on the Third Application the Chamber did not consider that the witness's security situation necessitated a delay until 45 days prior to testimony⁵⁹ and in the 6 March 2013 Decision it ordered disclosure, or withdrawal of the witness by no later than 13 March 2013.⁶⁰ Neither disclosure, nor withdrawal took place within the time limit set by the Chamber. The Delayed Disclosure Application was filed on the day of the deadline. As indicated earlier, the application contains a request for a

⁵⁵ Response, ICC-01/09-01/11-668-Conf, para. 6.

⁵⁶ Response, ICC-01/09-01/11-668-Conf, para. 7.

⁵⁷ Response, ICC-01/09-01/11-668-Conf, paras 8 – 9.

⁵⁸ Response, ICC-01/09-01/11-668-Conf, para. 12.

⁵⁹ Decision on the Third Application, ICC-01/09-01/11-564-Conf-Red, para. 86.

⁶⁰ 6 March 2013 Decision, ICC-01/09-01/11-638-Conf-Red, p. 7.

suspension of the deadline, pursuant to Regulation 35 of the Regulations, pending the Chamber's determination of the application.⁶¹

28. The consequence of the Prosecution's last minute filing of the Delayed Disclosure Application is that the Prosecution *de facto* failed to observe the 13 March 2013 deadline for disclosure. The Chamber notes that an unjustified delay in filing may be the basis for rejecting an application for extension of deadline.

29. However, the Chamber notes the new information regarding the security situation of Witness 534, which, the Prosecution submits, was only received on 11 and 12 March 2013.⁶² Having regard to the timing of this information, the Chamber will exceptionally examine the Prosecution's request under Regulation 35 together with the merits of the Delayed Disclosure Application.

The law

30. The Chamber recalls that it has previously rejected as a matter of principle, the Defence's argument, made in relation to a previous application for delayed disclosure, that delaying the disclosure of witness identities beyond the commencement of trial is in all circumstances prohibited by the statutory framework of the Court and by the jurisprudence of the Appeals Chamber.⁶³ The Chamber recalls a decision of Trial Chamber II authorising a delay in disclosure of the identity of a witness beyond the commencement of trial.⁶⁴ The Chamber also

⁶¹ Delayed Disclosure Application, ICC-01/09-01/11-648-Conf-Red, paras 3, 16.

⁶² Delayed Disclosure Application, ICC-01/09-01/11-648-Conf-Red, para. 8; ICC-01/09-01/11-648-Conf-Exp-AnxA, p. 2.

⁶³ Confidential redacted version of 'Decision on first prosecution application for delayed disclosure of witness identities', 4 January 2013, ICC-01/09-01/11-531-Conf-Red, para. 29.

⁶⁴ *The 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 March 2009, ICC-01/04-01/07-1156-Conf-Exp, 31 December 2009, ICC-01/04-01/07-1179-tENG ("Katanga Trial Decision"), para. 48.

notes the Appeals Chamber's ruling that disclosure by the Prosecution "should, *in principle*, take place prior to the commencement of trial".⁶⁵ While emphasising disclosure of evidence by the Prosecution before the commencement of the trial, the Appeals Chamber did not rule out the possibility of a later disclosure.

31. This Chamber held that "such an exceptional step can be taken when the risks to the security of a witness are such that even delaying disclosure until shortly before the commencement of trial would not sufficiently mitigate them. Due regard to the Defence's ability to effectively prepare its case must be taken when determining whether such a step can be taken".⁶⁶ In determining whether to authorise disclosure beyond the commencement of trial, the Chamber thus needs to strike a balance between the right of the accused to have adequate time and facilities for the preparation of the defence, set out in Article 67(1)(b) of the Statute, and the safety of witnesses, which the Chamber has a duty to protect pursuant to Article 68(1) of the Statute.

32. As regards the accused's right to have adequate time for the preparation of the defence, the Chamber notes that the Statute and the Rules emphasise disclosure prior to the commencement of trial.⁶⁷ Article 64(3)(c) of the Statute stipulates that the Trial Chamber shall provide for disclosure "sufficiently in advance of the commencement of the trial to enable adequate preparation for trial". Rule 76 of the Rules, imposing corresponding duties on the Prosecution, requires it to provide the defence with the names of witnesses whom the Prosecution intends to call to testify and copies of any prior statements made by those witnesses "sufficiently in advance to enable the adequate preparation of the defence".

⁶⁵ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 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 ("Katanga Appeal Judgment"), para. 43, emphasis added.

⁶⁶ Confidential redacted version of 'Decision on first prosecution application for delayed disclosure of witness identities', 4 January 2013, ICC-01/09-01/11-531-Conf-Red, para. 29.

⁶⁷ *Katanga Appeal Judgment*, ICC-01/04-01/07-2288, para. 45.

Furthermore, Rule 81(4) of the Rules, which provides for the possibility of non-disclosure of the identities of witnesses as a measure to protect their safety, refers to such non-disclosure "prior to the commencement of the trial".

33. In view of the foregoing considerations and in accordance with the standard set out in its previous decisions, the Chamber will examine whether the alleged risk to the safety of Witness 534 is objective and make the delay in disclosure of his identity until 45 days before his testimony strictly necessary.⁶⁸ If satisfied that such delay is strictly necessary, the Chamber will determine whether there are measures which sufficiently counterbalance the resulting prejudice to the rights of the accused.⁶⁹

Discussion

Risk to the safety of Witness 534

34. In the Decision on the Third Application the Chamber examined information regarding Witness 534's security situation at the time. As it is of relevance to the present decision, the Chamber recalls that it considered the nature of the evidence to be given by the witness and, in particular, that he [REDACTED] is said to have [REDACTED] knowledge of the accused's planning and preparations for the post-election violence and the commission of crimes.⁷⁰ The information available to the Chamber at the time was that Witness 534 [REDACTED].⁷¹ There was also information that Witness 534 [REDACTED].⁷²

⁶⁸ See *Katanga* Trial Decision, ICC-01/04-01/07-1179-tENG, para. 34(a).

⁶⁹ *Ibid.*, para. 34(b); Confidential redacted version of 'Decision on first prosecution application for delayed disclosure of witness identities', 4 January 2013, ICC-01/09-01/11-531-Conf-Red, para. 29.

⁷⁰ Decision on the Third Application, ICC-01/09-01/11-564-Conf-Exp, para. 81.

⁷¹ Decision on the Third Application, ICC-01/09-01/11-564-Conf-Exp, para. 82.

⁷² Decision on the Third Application, ICC-01/09-01/11-564-Conf-Exp, para. 83.

35. Having regard to the information previously provided to the Chamber and the new information contained in the Prosecution Update, the Delayed Disclosure Application and the VWU's Observations, the Chamber finds the following facts to be indicative of the existence of an objective risk to the safety of Witness 534:

- [REDACTED] suspicion that Witness 534 is involved with the Court and [REDACTED] attempts, [REDACTED], to dissuade him from cooperation and to threaten him;⁷³
- [REDACTED];⁷⁴
- [REDACTED];⁷⁵
- [REDACTED] knowledge of the accused's alleged participation in the commission of the crimes.⁷⁶

36. As regards the availability of measures, short of delayed disclosure beyond the commencement of trial, to protect the safety of Witness 534 and members of his family, the Chamber notes that the witness [REDACTED].⁷⁷ However, [REDACTED] the suspicions about his involvement with the Court, [REDACTED], and given that members of his family are being threatened in relation to that involvement. [REDACTED].

⁷³ Prosecution Update, ICC-01/09-01/11-647-Conf-Exp, paras 14-15; Delayed Disclosure Application, ICC-01/09-01/11-648-Conf-Exp, paras 2, 8-9; ICC-01/09-01/11-648-Conf-Exp-AnxA, pp. 2-4.

⁷⁴ ICC-01/09-01/11-665-Conf-Exp, para. 13.

⁷⁵ Delayed Disclosure Application, ICC-01/09-01/11-648-Conf-Exp, para. 9(ii), (iii); ICC-01/09-01/11-648-Conf-Exp-AnxA, pp. 2-4.

⁷⁶ Decision on the Third Application, ICC-01/09-01/11-564-Conf-Exp, para. 81; ICC-01/09-01/11-665-Conf-Exp, para. 10.

⁷⁷ Delayed Disclosure Application, ICC-01/09-01/11-648-Conf-Exp, para. 13; ICC-01/09-01/11-648-Conf-Exp-AnxA, p. 1.

37. The Chamber further takes note of the fact of [REDACTED].⁷⁸ [REDACTED].⁷⁹

There is thus a risk that the witness [REDACTED].

38. In view of the foregoing considerations, the Chamber is satisfied that there is an objective risk to the safety of Witness 534 and his family. [REDACTED] the suspicions of the witness's involvement with the Court [REDACTED]. [REDACTED] no other measures appear to be available in the present circumstances.

39. In view of the most recent updates on the security situation of the witness, the Chamber considers disclosure at this point to be particularly risky. As indicated earlier, not only are there suspicions of the witness's involvement with the Court, [REDACTED]. For these reasons, the Chamber is satisfied that, despite the trial being scheduled to commence on 28 May 2013,⁸⁰ a further temporary delay in the disclosure of Witness 534's identity is the least restrictive measure available to address the security risks.

40. However, having regard to the seriousness of the measure sought by the Prosecution and its consequences for the rights of the accused, the Chamber is of the view that delaying disclosure beyond the commencement of trial is not strictly necessary.

⁷⁸ ICC-01/09-01/11-648-Conf-Exp-AnxA, p. 2.

⁷⁹ *Ibid.*

⁸⁰ Decision concerning the start date of trial, 8 March 2013, ICC-01/09-01/11-642. The Chamber takes note of a request by the Defence for Mr Ruto to vacate the trial date (Second Defence Request to Vacate the Trial Commencement Date, 22 April 2013, ICC-01/09-01/11-692-Conf) and an indication from the Defence for Mr Sang that it intends to make a similar request (Sang Defence Request for Status Conference pursuant to Rule 132(2), 18 April 2013, ICC-01/09-01/11-687-Conf).

Measures to counterbalance prejudice to the accused

41. Having concluded that a further delay in the disclosure of Witness 534's identity is necessary, the Chamber needs to determine whether there are measures which sufficiently counterbalance the prejudice to the rights of the accused which may result from such a delay.⁸¹ Considering that the trial is scheduled to start on 28 May 2013, the disclosure of the witness's identity has already been *de facto* delayed until shortly before the trial date. In view of the provisions of the Statute and the Rules quoted above, such delay may affect the accused's right to have adequate time and facilities for the preparation of the defence.
42. The Chamber recalls that in its Decision on the Third Application it authorised the Prosecution to temporarily maintain certain redactions to the draft transcript of an interview with Witness 534.⁸² The transcript has been disclosed with redactions.⁸³ Despite redactions, the document provides ample information regarding the witness's evidence on the crimes alleged in this case and the accused's alleged involvement in the preparations for the post-election violence.⁸⁴ The Chamber is thus satisfied that although the identity of Witness 534 remains withheld, the Defence is able to conduct some preliminary enquiries into the critical allegations in the present case on the basis of the material provided by the Prosecution.
43. The Chamber also recalls that in its Decision on the Third Application it directed the Prosecution to provide to the Defence written summaries of any substantive allegation redacted under the B.1 category in the transcript of Witness 534's

⁸¹ See *supra*, para. 33.

⁸² Decision on the Third Application, ICC-01/09-01/11-564-Conf-Red, pp. 32-33.

⁸³ ICC-01/09-01/11-544-Conf-Exp-AnxA.

⁸⁴ See, for example, KEN-OTP-0091-0023, KEN-OTP-0091-0051, KEN-OTP-0091-0083, KEN-OTP-0091-0097.

interview and to continually assess the B.1 redactions to ensure that they are no more than strictly necessary.⁸⁵

44. The Chamber further notes that Witness 534 is the only witness on the current Prosecution's list whose identity has not yet been disclosed.⁸⁶ The Defence is thus able to carry out its preparation for trial in relation to almost all incriminating material. The Chamber is therefore satisfied that the Prosecution has adopted measures to, at least partially, counterbalance the prejudice that may result from the continuing non-disclosure of Witness 534's identity to the Defence.

Conclusion

45. Having considered the security situation of Witness 534 and the risk of prejudice to the accused's right to have adequate time for the preparation of their defence, the Chamber is of the view that a further temporary delay of the witness's disclosure is necessary. However, the Chamber is not persuaded that the disclosure should be delayed until 45 days before the witness's testimony, unless the witness is called to testify as early in trial as possible so that such delayed disclosure is effected before the commencement of trial.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

VARIES the deadline set in the 6 March 2013 Decision for disclosure of the identity of Witness 534 or his withdrawal;

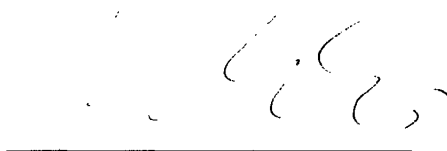
AUTHORISES the Prosecution to delay the disclosure of the identity of Witness 534 until 45 days before his testimony, but no later than the commencement of trial; and

⁸⁵ Decision on the Third Application, ICC-01/09-01/11-564-Conf-Red, pp. 33-34.

⁸⁶ Delayed Disclosure Application, ICC-01/09-01/11-648-Conf-Exp, para. 15.

DIRECTS the Prosecution to submit, jointly with the VWU, updates on the security situation of Witness 534, every second week starting within two weeks of the present decision and until the disclosure is effected or the witness withdrawn.

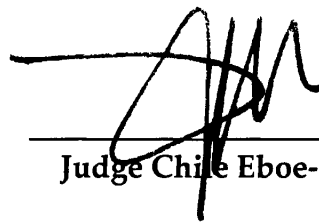
Done in both English and French, the English version being authoritative.



Judge Kuniko Ozaki, Presiding Judge



Judge Robert Fremr



Judge Chile Eboe-Osuji

Dated 2 May 2013

At The Hague, The Netherlands