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

Date: **16 April 2014**

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**TRIAL CHAMBER V(A)**

**Before:** Judge Chile Eboe-Osuji, Presiding  
Judge Olga Herrera Carbuccion  
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**

**Decision on Prosecution Application for Delayed Disclosure of Material  
related to Witness 397**

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 the Defence**

**Legal Representatives of Applicants**

**Legal Representatives of Victims**

Mr Wilfred Nderitu

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for Victims**

Ms Paolina Massidda

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

**States Representatives**

*Amicus Curiae*

**REGISTRY**

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**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(A)** (the ‘Chamber’) of the International Criminal Court (the ‘Court’), in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, pursuant to Articles 64, 67(1)(b), 67(2) and 68(1) of the Rome Statute (‘Statute’), renders this ‘Decision on Prosecution Application for Delayed Disclosure of Material related to Witness 397’.

1. On 13 March 2014, the Office of the Prosecutor (‘Prosecution’) filed the ‘Prosecution’s Provision of Updated Information Concerning Witness P-0397 and Request for Delayed Disclosure’.<sup>1</sup> In addition to providing information regarding the willingness of Witness 397 to appear voluntarily before the Court and a security incident involving the witness, the Prosecution requests authorisation to delay disclosure to the defence teams of Mr Ruto and Mr Sang (‘Defence’) of information recently obtained from the witness, until his whereabouts are established and his physical safety and well-being are secured.<sup>2</sup>
2. On 8 April 2014, following the Chamber’s direction,<sup>3</sup> the Prosecution provided additional evidence in support of its request for delayed disclosure, including a solemn declaration.<sup>4</sup>
3. The Prosecution submits that in January 2014 Witness 397 expressed his desire to continue cooperation with the Prosecution and in a subsequent interview with representatives of the Prosecution he revealed that he had been the subject of interference.<sup>5</sup> During the interview, matters related to an investigation under Article 70 of the Statute were also discussed.<sup>6</sup> [REDACTED].<sup>7</sup>

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<sup>1</sup> ICC-01/09-01/11-1217-Conf-Exp, with confidential *ex parte* Annexes A-E.

<sup>2</sup> ICC-01/09-01/11-1217-Conf-Exp, para. 3.

<sup>3</sup> Email from Trial Chamber V-A Communications, 1 April 2014, 9:45.

<sup>4</sup> Prosecution’s Provision of Additional evidence in support of its Request for Delayed Disclosure concerning Witness P-0397, ICC-01/09-01/11-1217-Conf-Exp, ICC-01/09-01/11-1263-Conf-Exp, with confidential *ex parte* Annexes A-E.

<sup>5</sup> ICC-01/09-01/11-1217-Conf-Exp, paras 8-10.

<sup>6</sup> ICC-01/09-01/11-1217-Conf-Exp, para. 12.

<sup>7</sup> ICC-01/09-01/11-1217-Conf-Exp-AnxC.

4. The Prosecution submits that the [REDACTED] and related material (together: 'the Material') contain potentially exonerating information under Article 67(2) of the Statute, as Witness 397 admits to accepting a bribe.<sup>8</sup> The Prosecution further submits that it has been processing the Material for the purpose of a redaction request in anticipation of the possible voluntary appearance of the witness.<sup>9</sup> The Prosecution informs the Chamber about a security incident involving Witness 397, whereby he appears to have been abducted and his whereabouts were unknown as of the date of the Prosecution's filings.<sup>10</sup> In support of its submissions, the Prosecution provides a solemn declaration by a Prosecution investigator,<sup>11</sup> an investigator's report,<sup>12</sup> witness statements obtained from [REDACTED],<sup>13</sup> a letter from the Deputy Prosecutor to Cabinet Secretary for Interior and Coordination of National Government, in which the Prosecution reports the incident to the Kenyan authorities,<sup>14</sup> and an individual risk assessment prepared by the Prosecution.<sup>15</sup> The Prosecution allows for the possibilities that the witness was abducted for reasons unconnected to the present case, that he was killed or that he absconded. However, the Prosecution submits that any decisions that may impact upon the witness's safety must be taken on the basis that the witness has indeed been abducted by persons associated with the group responsible for his alleged bribery and associated with Mr Ruto.<sup>16</sup>
5. The Prosecution's request for authorisation to delay disclosure of the Material is based on: (i) the impossibility of securing the testimony of the witness until his security crisis is adequately resolved, and (ii) the substantial risk to which he may be exposed if his decision to voluntarily testify is disclosed in circumstances where

<sup>8</sup> ICC-01/09-01/11-1217-Conf-Exp, para. 13.

<sup>9</sup> ICC-01/09-01/11-1217-Conf-Exp, para. 13.

<sup>10</sup> ICC-01/09-01/11-1217-Conf-Exp, paras 14-15; ICC-01/09-01/11-1263-Conf-Exp, paras 6-7.

<sup>11</sup> ICC-01/09-01/11-1263-Conf-Exp-AnxA.

<sup>12</sup> ICC-01/09-01/11-1217-Conf-Exp-AnxD.

<sup>13</sup> ICC-01/09-01/11-1263-Conf-Exp-AnxB-D.

<sup>14</sup> ICC-01/09-01/11-1217-Conf-Exp-AnxE.

<sup>15</sup> ICC-01/09-01/11-1263-Conf-Exp-AnxE.

<sup>16</sup> ICC-01/09-01/11-1263-Conf-Exp, para. 7.

he may be in the hands of persons who may wish him harm.<sup>17</sup> In addition, the Prosecution argues that the disclosure of the investigation-specific information contained in [REDACTED] may prejudice further and on-going investigations, which are currently under consideration by another Chamber.<sup>18</sup> The Prosecution submits that when the witness's security and attendance are ensured, it will disclose the Material sufficiently in advance of the witness's testimony in order to provide the Defence with adequate time to prepare.<sup>19</sup>

6. The Prosecution acknowledges that the Material, especially concerning the alleged acceptance by Witness 397 of a bribe, constitutes evidence which the Prosecution must disclose pursuant to Article 67(2) of the Statute. The Prosecution is required to disclose such evidence 'as soon as practicable'.<sup>20</sup>
7. The Chamber recalls that in order to authorise a delay in the obligatory disclosure of evidence by the Prosecution, the Chamber must balance the fair trial rights of the accused, guaranteed by Article 67(2) and 67(1)(b) of the Statute, with the security interests of witnesses and victims, in accordance with Article 68(1) of the Statute.<sup>21</sup> In order to justify restrictions on disclosure, the Prosecution must show that: there is an objectively justifiable risk to the safety of the person concerned; the risk arises from disclosing the particular information to the accused; that the risk can be overcome by the proposed delayed disclosure; that no lesser restrictive measures are feasible; and that the delayed disclosure is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.<sup>22</sup>
8. The Chamber finds the Prosecution's submissions regarding the alleged abduction of Witness 397 reliable, especially in view of the material provided in support of the

<sup>17</sup> ICC-01/09-01/11-1217-Conf-Exp, para. 18.

<sup>18</sup> ICC-01/09-01/11-1217-Conf-Exp, para. 18.

<sup>19</sup> ICC-01/09-01/11-1217-Conf-Exp, para. 19.

<sup>20</sup> Article 67(2) of the Statute.

<sup>21</sup> 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 ('First Delayed Disclosure Decision'), paras 25 and 27.

<sup>22</sup> First Delayed Disclosure Decision, ICC-01/09-01/11-531-Conf-Red, para. 28. See also Decision on the protocol establishing a redaction regime, 27 September 2012, ICC-01/09-01/11-458, para. 11.

allegations. The timing of the occurrence of the alleged abduction, shortly after the witness resumed contact with the Prosecution, is consistent with the Prosecution's suggestion that the witness may be detained by persons who 'may wish him harm'. It is conceivable in the circumstances that the alleged abduction relates to his cooperation with the Prosecution. As indicated earlier, the Prosecution's additional submissions include the allegation that the witness has been abducted by persons associated (directly or indirectly) with Mr Ruto.<sup>23</sup> The Chamber, however, notes that this additional allegation goes beyond the Chamber's direction to provide a solemn declaration and is not supported by the material provided. The Chamber will disregard the allegation in its entirety. The Chamber is nonetheless satisfied that there is an objectively justifiable risk to the safety of Witness 397. The Chamber agrees with the Prosecution's assertion that the disclosure of the Material (or the Prosecution's application for delayed disclosure)<sup>24</sup> to the accused and their defence teams may increase the risk to the witness's safety. The information about the witness's cooperation with the Prosecution may become apparent, for instance, from Defence's investigations into the matters discussed in the Material, if disclosed.

9. In the circumstances and, in particular, having regard to the alleged abduction of Witness 397, the Chamber is satisfied that a delay in the disclosure of the Material can overcome the risk to the witness's security and that no less restrictive measures are feasible at this point.
10. The Chamber notes that Witness 397 is one of the witnesses with respect to whom the Prosecution requests assistance in compelling appearance at the Court to testify

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<sup>23</sup> ICC-01/09-01/11-1263-Conf-Exp, para. 7.

<sup>24</sup> It is noted that established practice is for the Defence to be given an opportunity to respond to delayed disclosure requests; see First Delayed Disclosure Decision, ICC-01/09-01/11-531-Conf-Red, paras 1-9; Confidential redacted version of Second decision on prosecution request for delayed disclosure of witnesses P-336, P-356, and P-397, 6 February 2013, ICC-01/09-01/11-589-Conf-Red, paras 1-2. The Prosecution has indicated that it will file a confidential redacted version of the delayed disclosure application '[a]s soon as the risk of exposure to the witness and his family as well as to the present OTP investigations is sufficiently mitigated'; ICC-01/09-01/11-1217-Conf-Exp, para. 5.

and that in support of its request the Prosecution submits that those witnesses ‘will not attend to give evidence unless compelled to do so’.<sup>25</sup> Therefore, irrespective of the Chamber’s decision with regard to that request, Witness 397 would have been unlikely to testify in the imminent future.<sup>26</sup> It follows that a short delay in the disclosure of the Material to the accused and their defence teams would cause little prejudice to the accused’s right to have adequate time for preparation of the defence.

11. The Chamber, however, observes that Witness 397’s recent willingness to cooperate with the Prosecution may result in the witness testifying sooner than anticipated. It is therefore of vital importance that disclosure of the Material is not delayed for too long and that the Defence receives disclosure in such time that it is able to adequately prepare for the testimony of the witness.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

**AUTHORISES** the Prosecution to withhold the Material from disclosure to the Defence until Witness 397’s present security situation has been resolved, but no later than 1 May 2014, without prejudice to the possibility of renewing the application if the security situation remains unresolved; and

**DIRECTS** the Prosecution to file confidential redacted versions of filings ICC-01/09-01/11-1217-Conf-Exp and ICC-01/09-01/11-1263-Conf-Exp with annexes as soon as the Material is disclosed.

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

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<sup>25</sup> Prosecution’s request under article 64(6)(b) and article 93 to summon witnesses, 29 November 2013, ICC-01/09-01/11-1120-Red2, para. 98.

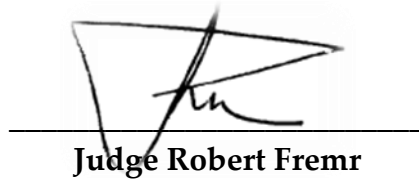
<sup>26</sup> ICC-01/09-01/11-1263-Conf-Exp, para. 9.



**Judge Chile Eboe-Osuji**  
(Presiding)



**Judge Olga Herrera Carbuccia**



**Judge Robert Fremr**

Dated 16 April 2014

At The Hague, The Netherlands