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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 the Second Prosecution Application for Delayed Disclosure of Material
related to Witness 397**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Other

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’) and Rule 81 of the Rules of Procedure and Evidence (‘Rules’), renders this ‘Decision on Second Prosecution Application for Delayed Disclosure of Material related to Witness 397’.

1. On 16 April 2014, the Chamber issued its ‘Decision on Prosecution Application for Delayed Disclosure of Material related to Witness 397’ (the ‘First Decision’) granting the request¹ of the Office of the Prosecutor (‘Prosecution’) to delay disclosure of a Rule 112 interview, [REDACTED] and related material (together ‘the Material’) until no later than 1 May 2014, without prejudice to the possibility of renewing the application if Witness 397’s security situation remained unresolved.² In so doing, it found, *inter alia*, that: (i) there was an objectively justifiable risk to the witness’s safety on account of his alleged abduction; (ii) delayed disclosure could mitigate that risk and no lesser restrictive measures were feasible;³ and (iii) a short delay in disclosure would cause little prejudice to the accused given that the witness would have been unlikely to testify in the imminent future.⁴ The Chamber noted that the witness’s Rule 112 interview, in which matters related to interference with the witness and an Article 70 investigation were discussed, may reveal the extent of his cooperation with the Prosecution, if disclosed.⁵
2. On 17 April 2014, the Chamber issued a summons to appear for Witness 397.⁶

¹ Prosecution’s Provision of Updated Information Concerning Witness P-0397 and Request for Delayed Disclosure, 13 March 2014, ICC-01/09-01/11-1217-Conf-Exp, with confidential *ex parte* Annexes A-E; 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, 8 April 2014, ICC-01/09-01/11-1263-Conf-Exp, with confidential *ex parte* Annexes A-E.

² ICC-01/09-01/11-1273-Conf-Exp, page 7.

³ ICC-01/09-01/11-1273-Conf-Exp, paras 8-9.

⁴ ICC-01/09-01/11-1273-Conf-Exp, para. 10. The Chamber also observed, however, that Witness 397’s recent willingness to cooperate with the Prosecution may result in the witness testifying sooner than anticipated.

⁵ ICC-01/09-01/11-1273-Conf-Exp, para. 8.

⁶ Decision on Prosecutor’s Application for Witness Summonses and resulting Request for State Party Cooperation, 17 April 2014, ICC-01/09-01/11-1274-Corr2, page 77.

3. On 1 May 2014, the Prosecution filed the 'Prosecution's Provision of Updated Information Concerning Witness P-0397 and Request for Delayed Disclosure' (the 'Second Application') in which it updates the Chamber on developments regarding its investigations on the alleged disappearance of Witness 397 and renews its request for delayed disclosure of the Material.⁷
4. The Prosecution submits that [REDACTED].⁸ Moreover, the Prosecution informs the Chamber that [REDACTED].⁹
5. In further support of its belief that Witness 397 cannot be implicated in his own disappearance, the Prosecution submits that [REDACTED].¹⁰
6. The Prosecution requests authorisation of delayed disclosure of the Material to the Defence until the witness's whereabouts can be established and his safety secured or, alternatively, for a period of 60 days. The Prosecution's request is based on its assertion that the high risk of harm to the witness still 'remains unchanged'.¹¹ It argues that the disclosure of information regarding the witness's cooperation with the Prosecution would conflict with 'sound protection strategy' and that any resulting harm could not be undone.¹²
7. The Prosecution further contends that given the improbability of the witness testifying within the foreseeable future, any prejudice to the Defence is minimal. However, the Prosecution submits that when the witness's security and attendance are ensured, it will disclose the Material in advance of the witness's testimony in order to provide the Defence with adequate time to prepare.¹³

⁷ ICC-01/09-01/11-1281-Conf-Exp, with confidential *ex parte* Annex A, para. 4.

⁸ ICC-01/09-01/11-1281-Conf-Exp, para. 7.

⁹ ICC-01/09-01/11-1281-Conf-Exp, para. 10.

¹⁰ ICC-01/09-01/11-1281-Conf-Exp, para. 10.

¹¹ ICC-01/09-01/11-1281-Conf-Exp, para. 12.

¹² ICC-01/09-01/11-1281-Conf-Exp, paras 13-14.

¹³ ICC-01/09-01/11-1281-Conf-Exp, para. 14.

8. 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.¹⁴ 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.¹⁵
9. The detailed information provided to the Chamber in the solemn declaration appended as Annex A, at this stage, sufficiently substantiates the Prosecution's submissions that disclosing information regarding, *inter alia*, the witness's cooperation with the Prosecution poses an objectively justifiable risk to his safety and that no measure less restrictive than disclosure is feasible at this point.
10. The Chamber is satisfied that, on the basis of the information currently before it, the facts relating to the witness's security situation have evolved to the extent there continues to exist an objectively justifiable risk to the witness's safety and that disclosure of the Material may increase that risk. The Chamber agrees that no measure less restrictive than disclosure is feasible at this point.
11. In its First Decision, the Chamber found that given the unlikelihood that Witness 397 would have been able to testify in the imminent future, a short delay in the disclosure of the Material to the Defence would cause little prejudice to the accused's right to have adequate time in which to prepare for the witness's

¹⁴ 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.

¹⁵ 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.

testimony.¹⁶ The Chamber notes that the circumstances giving rise to this finding, particularly the witness's unavailability, remain the same, even with the summons to appear having been issued.¹⁷

12. The Chamber emphasises, however, that the Prosecution is required to disclose exculpatory evidence 'as soon as practicable'¹⁸ and at such a time which does not conflict with the accused's right to a fair and impartial trial.

13. In view of the above, the Chamber is satisfied that further delay is justified. The Chamber finds it necessary, in the circumstances, to periodically review this decision.¹⁹ To that end, the Prosecution should provide periodic updates to the Chamber on the witness's security situation.

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;

ORDERS the Prosecution to provide an update on Witness 397's security situation every 60 days, commencing on 1 June 2014, or at any point in which a new development arises; and

DIRECTS the Prosecution to file a confidential redacted version of filing ICC-01/09-01/11-1281-Conf-Exp with annex as soon as the Material is disclosed.

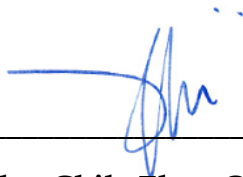
¹⁶ ICC-01/09-01/11-1273-Conf-Exp, para. 10.

¹⁷ ICC-01/09-01/11-1274-Corr2.

¹⁸ Article 67(2) of the Statute.

¹⁹ See, in the context of redactions, Decision on the protocol establishing a redaction regime, 27 September 2012, ICC-01/09-01/11-458, with public Annex A, para. 11 (citing *The Prosecutor v. Germain Katanga*, Appeals Chamber, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 13 May 2008, ICC-01/04-01/07-475, para. 73(c)).

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



Judge Chile Eboe-Osuji
(Presiding)



Judge Olga Herrera Carbuccion



Judge Robert Fremr

Dated 20 May 2014

At The Hague, The Netherlands