

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 13 October 2014

Date of public redacted version: 11 December 2017

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

Decision on Prosecution's Request for Partial Variation of Time Limit

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

Counsel for Joshua Arap Sang

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

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 Article 64 of the Rome Statute (the ‘Statute’) and Regulation 35 of the Regulations of the Court (the ‘Regulations’), renders the following ‘Decision on Prosecution’s Request for Partial Variation of Time Limit’.

I. PROCEDURAL HISTORY

1. On 9 July 2012, the Chamber issued its ‘Decision on the schedule leading up to trial’, where it, *inter alia*, ordered the Office of the Prosecutor (the ‘Prosecution’) to submit its witness list and list of evidence by 9 January 2013.¹
2. On 9 January 2013, the Prosecution filed its list of evidence (the ‘List of Evidence’).²
3. On 16 April 2014, the Chamber issued its ‘Decision on Prosecution Application for Delayed Disclosure of Material related to Witness 397’ (‘First Decision’).³
4. On 20 May 2014, the Chamber issued its ‘Decision on the Second Prosecution Application for Delayed Disclosure of Material related to Witness 397’ (‘Second Decision’).⁴
5. On 3, 16, 19 and 26 September 2014, the Chamber granted several Prosecution applications to add a total of 136 items to its List of Evidence.⁵ In its 19 September

¹ ICC-01/09-01/11-440, para. 13.

² Annex C of the Prosecution’s provision of materials pursuant to Decision ICC-01/09-01/11-440, 9 January 2013, ICC-01/09-01/11-540-Conf-AnxC-Red. For the most recent List of Evidence, see Annex 1 to Prosecution’s submission of its further updated List of Evidence, 30 September 2014, ICC-01/09-01/11-1568-Conf-Anx1.

³ ICC-01/09-01/11-1273-Conf-Exp.

⁴ ICC-01/09-01/11-1311-Conf-Exp. See also E-mail Communication from Trial Chamber V-A Communications to the Prosecution on 4 June 2014 at 11:25, in which the Chamber instructed the Prosecution that ‘unless the security situation of [Witness 397] has been resolved, there is no need for the Prosecution to seize the Chamber with new requests and that only updates on the situation are expected’.

⁵ Decision on the Prosecution’s Application for Addition of Documents to Its List of Evidence, 3 September 2014, ICC-01/09-01/11-1485-Conf (‘3 September Decision’); Oral ruling of 16 September 2014, ICC-01/09-01/11-T-137-CONF-ENG ET, page 14, line 1 to page 18, line 4; Decision on the Prosecution’s Ninth Application for Addition of Documents to Its List of Evidence, 19 September 2014, ICC-01/09-01/11-1527-Conf (‘19 September Decision’); Decision on the

Decision, the Chamber directed the Prosecution to submit any application for addition of items to its List of Evidence for 'any other upcoming witness, no later than 15 October 2014' ('Time Limit').⁶

6. On 29 September 2014, the Prosecution filed its latest update on the security situation of Witness 397.⁷
7. On 1 October 2014, the Prosecution filed a confidential, *ex parte*, application for variation of the Time Limit in respect of items related to Witness 397 ('Application').⁸

II. SUBMISSIONS

8. The Prosecution requests a variation of the Time Limit in relation to Witness 397, [REDACTE].⁹ The Prosecution further submits that, pursuant to the Chamber's First and Second Decision, material related to Witness 397 has not been disclosed to the defence team of Mr Ruto or the defence team of Mr Sang (together 'Defence').¹⁰
9. The Prosecution however acknowledges that 'the situation of delayed disclosure cannot continue *ad infinitum*', and consequently it undertakes to 'exhaust all remaining channels to [REDACTE] and or alternatively finalise a strategy' to file an

Prosecution's Tenth Application for Addition of Documents to Its List of Evidence, 26 September 2014, ICC-01/09-01/11-1549-Conf.

⁶ ICC-01/09-01/11-1527-Conf, page 11.

⁷ Prosecution's Fifth Provision of Updated Information Concerning Witness P-0397, ICC-01/09-01/11-1563-Conf-Exp and Conf-Exp-AnxA. See also previous updates: Prosecution's Third Provision of Updated Information Concerning Witness P-0397 and Request for Delayed Disclosure, 2 June 2014, ICC-01/09-01/11-1326-Conf-Exp+Conf-Exp-AnxA; Prosecution's Fourth Provision of Updated Information Concerning Witness P-0397, 29 July 2014, ICC-01/09-01/11-1449-Conf-Exp + AnxA.

⁸ Prosecution's request for partial variation of time limit of 15 October 2014 for the filing of any application for addition of items to its List of Evidence for P-0397, ICC-01/09-01/11-1582-Conf-Exp.

⁹ Application, ICC-01/09-01/11-1582-Conf-Exp, paras 1 and 6.

¹⁰ Application, ICC-01/09-01/11-1582-Conf-Exp, paras 2, 3 and 7.

application to add items to its List of Evidence. The Prosecution expects to do this by 29 November 2014.¹¹

10. The Prosecution informs the Chamber that there is 'no reasonable prospect' that Witness 397 will testify in the next session due to start in November 2014. Accordingly, it submits that the variation of the Time Limit will not materially prejudice the Defence.¹²
11. The Prosecution further submits that it has made progress [REDACTE] and has significantly increased its Kalenjin language capacity.¹³
12. The Prosecution informs the Chamber it expects to receive translated material 'concerning a number of the upcoming witnesses' after the Time Limit. The Prosecution thus advises the Chamber that 'once it has received delivery of and reviewed its content it may seek leave from the Chamber to vary the 15 October deadline'.¹⁴

III. ANALYSIS

13. The Chamber notes that in its 3 September Decision it concluded that: (a) in view of the allegations of interference, the addition of items to the List of Evidence has a contextual or circumstantial bearing, at least, as regards the evidence of witnesses who may have recanted statements previously given to the Prosecution;¹⁵ (b) applications for the addition of items in the List of Evidence should be made as

¹¹ Application, ICC-01/09-01/11-1582-Conf-Exp, para. 8.

¹² Application, ICC-01/09-01/11-1582-Conf-Exp, para. 9.

¹³ Application, ICC-01/09-01/11-1582-Conf-Exp, paras 10-11. The Prosecution refers to its filing 'Prosecution's request for clarification of Decision ICC-01/09-01/11-1459-Conf-Exp and request for partial variation of deadline pursuant to Regulation 35(2)', 21 August 2014, ICC-01/09-01/11-1462-Conf-Exp. See also related to this issue: Decision on the Prosecution's Request for Clarification of Decision ICC-01/09-01/11-1459-Conf-Exp, 2 October 2014, ICC-01/09-01/11-1584-Conf.

¹⁴ Application, ICC-01/09-01/11-1582-Conf-Exp, para. 12.

¹⁵ 3 September Decision, ICC-01/09-01/11-1485-Conf, para. 30.

early as possible in order to enable the Defence to adequately prepare;¹⁶ and (c) these applications may be made at a later stage if there are good reasons to do so (these may include when the Prosecution has received information about interference or recantation at a later stage in the proceedings, or when there are risks to ongoing Article 70 investigations if material is disclosed to the Defence at an earlier stage).¹⁷

14. Moreover, the Chamber is cognisant that in its Second Decision, it had determined that non-disclosure was necessary in light of the witness's security situation,¹⁸ and that non-disclosure would cause little prejudice to the Defence, particularly given the witness's unavailability.¹⁹
15. Notwithstanding the conclusions above, the Chamber set a final deadline when it established the Time Limit for disclosure of material related to all upcoming witnesses in the present case. Pursuant to Article 64(2) of the Statute, the Chamber considered it necessary to set the Time Limit, given that the original deadline was set for 9 January 2013.²⁰ The Chamber was also mindful of the exceptional nature of the relief granted in the 3 September Decision and in the Chamber's First and Second Decisions, and that the resulting uncertainty as to the evidence on which the Prosecution intends to rely on might affect the right of the accused persons to a fair and expeditious trial, if such uncertainty were to continue.
16. The Chamber acknowledges that the Prosecution has a legitimate interest to safeguard its ongoing Article 70 investigations and that disclosure of some of the material related to this witness may impact these ancillary proceedings. However, the Chamber has emphasised that the delayed disclosure should not conflict with

¹⁶ 3 September Decision, ICC-01/09-01/11-1485-Conf, para. 31.

¹⁷ 3 September Decision, ICC-01/09-01/11-1485-Conf, para. 33.

¹⁸ Second Decision ICC-01/09-01/11-1311-Conf-Exp, para. 10.

¹⁹ Second Decision ICC-01/09-01/11-1311-Conf-Exp, para. 11.

²⁰ ICC-01/09-01/11-440, para. 13.

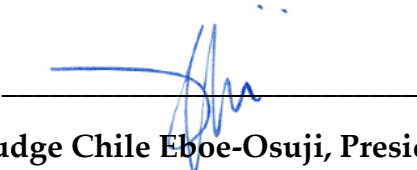
the accused's rights to a fair and impartial trial. Given the advanced stage of the trial proceedings, which commenced on 10 September 2013, the Chamber is of the view that the Prosecution List of Evidence cannot continue to evolve. The Chamber further notes, in this connection, that in the past month, the Chamber has already granted the Prosecution's applications to add a significant amount of supplementary items to the Prosecution List of Evidence. Any modification to the List of Evidence would have to be justified by exceptional circumstances. The Chamber considers that such circumstances do not exist here. The Chamber will not allow for the continued addition of items that do not directly address the charges under consideration by this Trial Chamber, as finality is here in order, for the sake of fair trial. Accordingly, the Prosecution must balance its interests in the related Article 70 case, vis-à-vis the rights of the defence in this main case against Mr Ruto and Mr Sang. If necessary, the Prosecution may need to reconsider its list of witnesses and the evidence it intends to tender through witnesses in this main case.

17. Moreover, in relation to Witness 397, the Chamber notes that his security situation remained unchanged since the Chamber issued its First and Second Decision authorising delayed disclosure of material related to this witness. In its Application, the Prosecution does not assert that the security situation of Witness 397 would change anytime soon.
18. Accordingly, the Chamber does not consider that the Prosecution has shown good cause pursuant to Regulation 35 of the Regulations.

FOR THE FOREGOING REASONS THE CHAMBER HEREBY

REJECTS the relief sought in the Application.

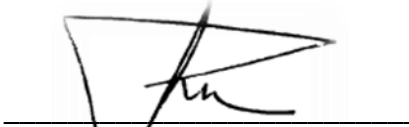
Done in both English and French, the English version being authoritative.



Judge Chile Eboe-Osuji, Presiding



Judge Olga Herrera Carbuccion



Judge Robert Fremr

Dated 13 October 2014

At The Hague, The Netherlands