



Original: **English**

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

Date: **05 December 2017**

Date of public redacted version: **11 December 2017**

**TRIAL CHAMBER V(A)**

**Before:** Judge Chile Eboe-Osuji, Presiding  
Judge Olga Herrera Carbuccia  
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 Request for Delayed Disclosure related to [REDACTED]**

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

**The Office of the Prosecutor**

**Counsel for William Samoei Ruto**

Ms Fatou Bensouda

Mr James Stewart

Mr Anton Steynberg

**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

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**Registrar**

Mr Herman von Hebel

**Victims and Witnesses Unit**

**Detention Section**

Natacha Schauder ad interim

**Victims Participation and Reparations  
Section**

**Others**

1. 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 67(2) of the Rome Statute (the 'Statute') and Rules 77 and 81(2) of the Rules of Procedure and Evidence (the 'Rules'), issues the following 'Decision on Prosecution Request for Delayed Disclosure related to [REDACTED]'.

## **I. Procedural Background**

2. On Friday 20 June 2014, the Prosecution informed the Chamber via e-mail of an ongoing Article 70 investigation involving a Prosecution witness currently residing in The Netherlands, [REDACTED].<sup>1</sup> Data emanating from this investigation relates to [REDACTED], who [REDACTED]. The Prosecution informed the Chamber that it believes that the information concerning [REDACTED] is disclosable to the defence teams of Mr Ruto and Mr Sang ('Defence') and requested further guidance from the Chamber.
3. On the same day, in the following court session, the Chamber directed the Prosecution to file a request in the official record by the end of the day and ordered that [REDACTED] be kept on stand-by for Monday, 23 June 2014.<sup>2</sup>
4. On the same day, the Prosecution filed the request for delayed disclosure (the 'Request').<sup>3</sup>

## **II. Submissions**

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<sup>1</sup> E-mail to Trial Chamber V-A Communications on 20 June 2014 at 13:57.

<sup>2</sup> [REDACTED].

<sup>3</sup> Prosecution's notification of information regarding [REDACTED] and request for delayed disclosure, ICC-01/09-01/11-1381-Conf-Exp, available to the Prosecution and VWU only, with confidential *ex parte* annexes A-C, available to the Prosecution and VWU only.

5. The Prosecution informs the Chamber that it [REDACTED] attributed to [REDACTED] as part of their Article 70 investigations.<sup>4</sup> The request was granted [REDACTED]. The Prosecution has not yet [REDACTED].<sup>5</sup>
6. However, the Prosecution [REDACTED].<sup>6</sup> [REDACTED].<sup>7</sup>
7. The Prosecution submits that the Identified Data is disclosable to the Defence. It clarifies that the Defence is already aware of [REDACTED] disclosable to the Defence.<sup>8</sup>
8. However, the Prosecution avers that the disclosure of the Identified Data would jeopardise [REDACTED].<sup>9</sup> It argues that [REDACTED].<sup>10</sup>
9. Additionally, the Prosecution submits that the disclosure of the Identified Data would reveal [REDACTED].<sup>11</sup> Further, the Prosecution argues that, [REDACTED]. The Prosecution avers that [REDACTED] or which needs to further be disclosed to the Defence.<sup>12</sup>
10. The Prosecution requests to delay the disclosure of the Identified Data until [REDACTED].<sup>13</sup> In case it is authorised to delay the disclosure, the Prosecution 'undertakes to disclose this information no later than 2 August 2014' or 'alternatively revert to the Chamber request a further extension, on good cause shown.'<sup>14</sup>

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<sup>4</sup> Request, ICC-01/09-01/11-1381-Conf-Exp, para. 5.

<sup>5</sup> Request, ICC-01/09-01/11-1381-Conf-Exp, para. 5.

<sup>6</sup> Request, ICC-01/09-01/11-1381-Conf-Exp, para. 5.

<sup>7</sup> Request, ICC-01/09-01/11-1381-Conf-Exp, para. 6.

<sup>8</sup> Request, ICC-01/09-01/11-1381-Conf-Exp, para. 7.

<sup>9</sup> Request, ICC-01/09-01/11-1381-Conf-Exp, para. 8.

<sup>10</sup> Request, ICC-01/09-01/11-1381-Conf-Exp, para. 8.

<sup>11</sup> Request, ICC-01/09-01/11-1381-Conf-Exp, para. 9.

<sup>12</sup> Request, ICC-01/09-01/11-1381-Conf-Exp, para. 11.

<sup>13</sup> Request, ICC-01/09-01/11-1381-Conf-Exp, para. 11.

<sup>14</sup> Request, ICC-01/09-01/11-1381-Conf-Exp, para. 13.

11. Alternatively, it requests that it only be required to disclose the fact that [REDACTED]. Under this proposal, [REDACTED] would not be disclosed.<sup>15</sup>

### III. Analysis

12. The Chamber considers that the Identified Data falls under the Prosecution's disclosure obligations. As noted by the Prosecution, [REDACTED].<sup>16</sup> The Defence for Mr Ruto [REDACTED].<sup>17</sup>

13. Therefore, it is clear that the Defence, particularly the Defence for Mr Ruto, could have benefited from the disclosure of this information prior to their cross-examination of [REDACTED]. This information will also be of use for the Defence in the eventual cross-examination of [REDACTED].

14. The Chamber previously determined that it is for the Prosecution to establish that such non-disclosure is warranted.<sup>18</sup> The Appeals Chamber held that the requirements to authorise the non-disclosure of information pursuant to Rule 81(2) and Rule 81(4) of the Rules are the following: (i) existence of an objectively justifiable risk to the person concerned or which may prejudice further or ongoing investigations; (ii) the risk must arise from disclosing the particular information to the defence; (iii) the infeasibility or insufficiency of less restrictive measures; (iv) an assessment as to whether the non-disclosure sought is prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial; and (v) the obligation to periodically review the decision should circumstances change.<sup>19</sup>

<sup>15</sup> Request, ICC-01/09-01/11-1381-Conf-Exp, para. 14.

<sup>16</sup> Request, ICC-01/09-01/11-1381-Conf-Exp, para. 7.

<sup>17</sup> [REDACTED].

<sup>18</sup> ICC-01/09-01/11-458, paras 11, 27-28.

<sup>19</sup> *Prosecutor v. Germain Katanga*, 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, paras 71, 73 and 97; *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the

15. The Chamber will now turn to the Request to determine whether the aforesaid requirements are met.
16. The Chamber considers that a prejudice to the Prosecution's investigation is highly likely from disclosing the Identified Data to the Defence. Although the Defence has received previous disclosure of [REDACTED].
17. The Chamber notes that the Prosecution proposes, in its alternative, to only disclose the information on [REDACTED]. The Chamber however considers that this alternative may not adequately [REDACTED], and would thus be of little or no assistance to the Defence.<sup>20</sup> Consequently, the Chamber considers that there are no less restrictive measures available.
18. The Chamber considers that the delayed disclosure sought by the Prosecution is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.
19. The Chamber notes that, [REDACTED]. Thus, as submitted by the Prosecution, securing [REDACTED] attendance in the future, [REDACTED], should be possible with a lesser degree of difficulty than might otherwise be the case. The Chamber further notes the Prosecution's observation that [REDACTED], which would also have to be disclosed to the Defence. and therefore the potential necessity of recalling the witness would not be obviated by ordering disclosure at this point. The Chamber also notes the Prosecution's submissions that, since it has a very limited picture as to [REDACTED], it has no way of knowing whether its disclosure may put other persons at risk.<sup>21</sup>

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Prosecution Requests and Amended Requests for Redactions under Rule 81", 14 December 2006, ICC-01/04-01/06-773, paras 33-34.

<sup>20</sup> Request, ICC-01/09-01/11-1381-Conf-Exp, para. 17.

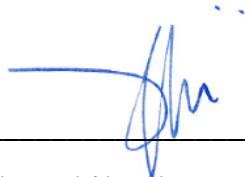
<sup>21</sup> Request, ICC-01/09-01/11-1381-Conf-Exp, para. 17.

20. Furthermore, the Prosecution only requests to delay the disclosure of the Identified Data until 2 August 2014.
21. Consequently, pursuant to Rule 81(2) of the Rules, the Chamber authorises the Prosecution to delay disclosure of the Identified Data until 2 August 2014. However, if circumstances should change before that date, thus enabling earlier disclosure, the Prosecution shall undertake its disclosure obligations without delay.
22. The Chamber also notes the desirability of making the disclosure to the Defence well ahead of any examination of [REDACTED], pursuant to Article 93(1)(b) of the Statute.

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

**GRANTS** the Prosecution Request and authorises delayed disclosure of the Identified Data until 2 August 2014.

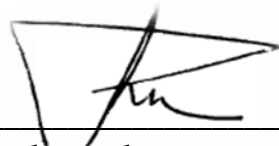
Done in both English and French, the English version being authoritative.



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



**Judge Olga Herrera Carbuccia**



**Judge Robert Fremr**

Dated 05 December 2017

At The Hague, The Netherlands