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

Date: 14 August 2014

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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 Extension of the Disclosure Deadline
related to [REDACTED]

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

Mr Nigel Verrill

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*, having regard 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’) and Regulation 35(2) of the Regulations of the Court (the ‘Regulations’), issues this ‘Decision on Prosecution’s Request for Extension of the Disclosure Deadline related to [REDACTED]’.

I. Procedural history

1. On 23 June 2014, the Chamber issued its ‘Decision on Prosecution Request for Delayed Disclosure related to [REDACTED]’ (the ‘Previous Decision’),¹ in which it authorised delayed disclosure of data related to [REDACTED] until 2 August 2014.
2. On 25 July 2014, the Prosecution filed the ‘Prosecution’s request for extension of the disclosure deadline related to [REDACTED]’ (the ‘Request’).²
3. On 31 July 2014, the Chamber suspended the deadline for disclosure set in its Previous Decision.³

II. Submissions

4. The Prosecution requests, pursuant to Regulation 35(2) of the Regulations, an extension of deadline to disclose [REDACTED] (the ‘Identified Data’). The Prosecution submits that the deadline of 2 August 2014 set in the Previous Decision is no longer feasible, since the [REDACTED] indicated that it could only provide the Prosecution with the Identified Data after 29 July 2014.⁴ Moreover, the

¹ ICC-01/09-01/11-1390-Conf-Exp. A confidential redacted version of the decision was filed that same day.

² ICC-01/09-01/11-1448-Conf-Exp.

³ E-mail communication from Trial Chamber V(A) Communications to the Prosecution at 11:06.

⁴ Request, ICC-01/09-01/11-1448-Conf-Exp, para. 9.

Prosecution submits that the Identified Data, which is voluminous and ‘raw’, once received from the [REDACTED], has to be converted into a format capable of being analysed. It then has to be [REDACTED], and then reviewed for disclosure.⁵

5. Furthermore, the Prosecution informs the Chamber that it has submitted an application [REDACTED]. The Prosecution submits that for this second batch of data, they expect to receive the material [REDACTED].⁶ The Prosecution submits that disclosure [REDACTED].⁷
6. The Prosecution states that it has ‘demonstrated good cause justifying an extension of the disclosure deadline’, since the Prosecution was not yet in possession of the Identified Data which was subject of the Previous Decision.⁸ Additionally, the Prosecution submits that the Defence is not prejudiced by the delayed disclosure since [REDACTED] may be recalled and [REDACTED] is unlikely to testify until later this year.⁹
7. The Prosecution ‘undertakes to start disclosing the Identified Data and [REDACTED] on a rolling basis as soon as [REDACTED] has run its course, and in any event to complete the disclosure at least 30 days prior to the commencement of [REDACTED] testimony (or any other witness who the information may relate to)’. The Prosecution further undertakes to disclose the Identified Data earlier when possible.¹⁰

⁵ Request, ICC-01/09-01/11-1448-Conf-Exp, paras 8-10.

⁶ Request, ICC-01/09-01/11-1448-Conf-Exp, para. 11.

⁷ Request, ICC-01/09-01/11-1448-Conf-Exp, para. 11.

⁸ Request, ICC-01/09-01/11-1448-Conf-Exp, para. 13.

⁹ Request, ICC-01/09-01/11-1448-Conf-Exp, para. 14.

¹⁰ Request, ICC-01/09-01/11-1448-Conf-Exp, para. 15.

III. Analysis

8. The Chamber reiterates the findings of its Previous Decision:

- a. the Identified Data potentially falls under the Prosecution's disclosure obligations;¹¹
- b. a 'prejudice to the Prosecution's investigation is highly likely from disclosing the Identified Data to the Defence' and could jeopardise the [REDACTED];¹²
- c. Disclosure of the information on the recent contact between [REDACTED] (as an alternative to delayed disclosure) may not adequately protect [REDACTED] and may be of little or no assistance to the Defence;¹³ and
- d. Recalling [REDACTED], if there is a need, should be possible with a lesser degree of difficulty than might otherwise be the case, as [REDACTED].¹⁴

9. In the light of the Prosecution's submissions, the Chamber considers these findings to be applicable to the present Request, subject to modification discussed later in this decision.

10. The Chamber notes, however, that the Previous Decision had taken into consideration that the request to delay the disclosure was only until 2 August 2014,¹⁵ whereas the Prosecution has now informed the Chamber that, upon its request, [REDACTED].¹⁶ There is no indication from the Prosecution that

¹¹ Previous Decision, ICC-01/09-01/11-1390-Conf-Exp, para. 12.

¹² Previous Decision, ICC-01/09-01/11-1390-Conf-Exp, para. 16.

¹³ Previous Decision, ICC-01/09-01/11-1390-Conf-Exp, para. 17.

¹⁴ Previous Decision, ICC-01/09-01/11-1390-Conf-Exp, para. 19.

¹⁵ Previous Decision, ICC-01/09-01/11-1390-Conf-Exp, para. 21.

¹⁶ Request, ICC-01/09-01/11-1448-Conf-Exp, para. 11.

[REDACTED] and thus the disclosure on a 'rolling basis' that the Prosecution proposes in its current Request may in fact be further delayed if the Prosecution requests that [REDACTED].

11. Although delayed disclosure may be warranted in order to protect ongoing investigations in an auxiliary Article 70 case, the Chamber remains mindful of its duty to protect the rights of the accused persons in the main case.
12. The Chamber considers that, in view of the delay in provision of the Identified Data by the [REDACTED], outside of the Prosecution's control, the deadline to disclose the Identified Data received by the Prosecution on 29 July 2014, should be extended. However, this extension must only be of a limited, fixed duration. Having regard to (i) the prejudice such disclosure may cause to the ongoing investigations, (ii) the limited period of time until the completion of [REDACTED], and (iii) the fact that [REDACTED] is not going to testify in the near future, the Chamber considers it appropriate to extend the deadline for disclosure until 22 August 2014, when the [REDACTED] is due to end.
13. As to data other than the Identified Data, [REDACTED], the Chamber considers that the Previous Decision was rendered in the understanding that there was a suspicion of wrongdoing that may have already taken place at that time. The Chamber was thus satisfied that there was a sufficiently identified and reasonable competing interest justifying a temporary exception to the duty of disclosure. The delayed disclosure was not granted for the purposes of obtaining information on the basis of unsubstantiated recurring suspicion of the possibility of future wrongdoing. Thus, the Previous Decision does not apply to [REDACTED], done after the period reasonably contemplated in the Previous Decision, as extended in this decision. Given the lack of specificity of the Prosecution's Request with regard to [REDACTED] and in view of the duration of that process, the Chamber

is concerned about possible further delays in disclosure and any resulting undue effect on the rights of the accused. The new delayed disclosure deadline of 22 August 2014 will therefore remain in force, even if the Prosecution were to request, [REDACTED] beyond 22 August 2014.

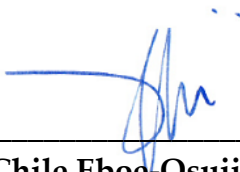
14. Any discloseable data obtained after the Identified Data shall, in principle, be disclosed to the Defence following the regular disclosure regime.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the Prosecution's Request in part;

DIRECTS the Prosecution to disclose to the Defence the Identified Data received on 29 July 2014 no later than 22 August 2014;


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



Judge Chile Eboe-Osuji, Presiding



Judge Olga Herrera Carbuccion



Judge Robert Fremr

Dated 14 August 2014
At The Hague, The Netherlands