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TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding Judge
Judge Christine Van den Wyngaert
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

***IN THE CASE OF
THE PROSECUTOR V. FRANCIS KIRIMI MUTHAURA AND UHURU
MUIGAI KENYATTA***

Public document with confidential annex

**Prosecution's Response to the "Defence Request for Specific Relief in Respect
of Prosecution Witnesses 4, 11 and 12"**

Source: The Office of the Prosecutor

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The Office of the Prosecutor

Fatou Bensouda
Adesola Adeboyejo

Counsel for Francis Kirimi Muthaura

Karim A. Khan QC, Essa Faal, Kennedy Ogetto and Shyamala Alagendra

Counsel for Uhuru Muigai Kenyatta

Steven Kay QC and Gillian Higgins

Legal Representatives of Victims

Morris Anyah

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

Silvana Arbia

Defence Support Section

Victims and Witnesses Unit

Maria Luisa Martinod-Jacome

Detention Section

Victims Participation and Reparations Section

Other

Introduction

1. With respect to the specific relief sought in the “Defence Request for Specific Relief in Respect of Prosecution Witnesses 4, 11 and 12” (“Application”),¹ the Prosecution responds as follows:

- **Disclosure of the identities of Witnesses 11 and 12.**² This request should be denied as moot. The Prosecution disclosed the identities of Witness 11 and 12 to the Defence on 1 August 2012, following the finalization of the witness security measures that enabled this information to be disclosed safely. Had the Defence requested this information from the Prosecution before filing the Application, judicial intervention could have been avoided.
- **Request for confirmation that the Prosecution will call Witnesses 4, 11 and 12 at trial.**³ There is no legal basis for this request, which is in effect an unsupported request for reconsideration of Decision 451, which requires that the Prosecution file its final witness list on 9 January 2013. The Defence has failed to demonstrate that it will be prejudiced if Witnesses 4, 11 and 12 are not now confirmed as trial witnesses. Particularly now that the identities of all three witnesses have been disclosed to the Defence,⁴ no such confirmation is needed at this stage.
- **Permission to use confidential identifying information regarding Witnesses 4, 11 and 12 during Defence investigations.**⁵ The Prosecution has no objection to this request, provided that such

¹ Defence Request for Specific Relief in Respect of Prosecution Witnesses 4, 11 and 12, 11 July 2012, ICC-01/09-02/11-452.

² ICC-01/09-02/11-452, para 1.a.

³ ICC-01/09-02/11-452, para 1.a.

⁴ The identity of Witness 4 was disclosed to the Defence before the confirmation hearing.

⁵ ICC-01/09-02/11-452, para 1.b.

information is used only to the extent strictly necessary, in accordance with the proposed protocol on witness contact now before the Chamber.

- **Request for disclosure of all Article 67(2) material related to Witnesses 4, 11 and 12.**⁶ This request should be denied as moot. The Prosecution has informed the Defence that it has no objection to prioritizing the disclosure of materials related to Witnesses 4, 11 and 12 over other Article 67(2) materials. Had the Defence made this request to the Prosecution before filing its Application, judicial intervention could have been avoided.
2. The Prosecution additionally notes that while the Application is styled as a request for disclosure, it is actually an early attempt to impugn the credibility of three potential trial witnesses on the basis of a selective and incomplete presentation of the evidence. As such, those parts of the Defence's submissions, which bear no relation to the limited relief sought in the Application, are both improper and irrelevant.
 3. While the Chamber need not entertain the Defence's witness theories in order to dispose of the Application, the Prosecution wishes to make clear that it categorically disagrees with the Defence assertions. The Pre-Trial Chamber, when presented with the same "evidence" at the confirmation stage, also rejected them and indeed found versions of these same arguments to be "manifestly" unsupported.⁷ For example, relying on a selective reading of the evidence and casting disputed allegations as fact, the Defence accuses Witnesses 11 and 12 of previously engaging in an "extortion attempt" against Mr Kenyatta.⁸ The Pre-Trial Chamber soundly rejected this theory, finding that "the evidence presented manifestly does

⁶ ICC-01/09-02/11-452, para 1.c.

⁷ Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 26 January 2012, ICC-01/09-02/11-382-Red, para 95.

⁸ ICC-01/09-02/11-452, para 27.

not support [the Defence] allegations” and does “not reveal any extortion or extortion attempt”.⁹

4. If these witnesses testify at trial, the Chamber will have ample opportunity to test the Defence’s theories, and to assess the witnesses’ credibility against the full evidentiary record. At this point, however, the one-sided and, in the Prosecution’s view, inaccurate allegations are prematurely presented for improper purposes and ought not to be considered by the Chamber.

Confidentiality

5. The annex to this submission is designated as “confidential” because it discloses the identities of Witnesses 11 and 12. This information is not in the public domain and publishing it at this stage may place Witnesses 11 and 12 at risk on account of their cooperation with the Court. Both individuals have expressed security concerns to the Prosecution, concerns that have been borne out by threats to their family members. If Witnesses 11 and 12 are called at trial, it may be necessary to seek in-court protective measures for them, and maintaining the confidentiality of their identities at this stage will preserve that option, should the security situation at the time of testimony so dictate.

Submissions

- I. The Defence’s disclosure requests should be denied as moot.
6. Two of the Defence’s requests are moot: (i) the request for the disclosure of the identities of Witnesses 11 and 12; and (ii) the request for all Article 67(2) material related to Witnesses 4, 11 and 12. The Prosecution has provided

⁹ ICC-01/09-02/11-382-Red, paras 95, 97.

this information to the Defence or has agreed to do so. There is no dispute for the Chamber to resolve.¹⁰

7. *First*, the Prosecution informed the Defence of the identities of Witnesses 11 and 12 via letter on 1 August 2012. That letter is attached as confidential annex 1. While the Pre-Trial Chamber authorized the Prosecution to withhold the identities of these witnesses at the confirmation stage due to security concerns, their security situation has changed in the last weeks such that it permits the disclosure of their identities.
8. The Prosecution has taken the position that redactions to the identities of ICCPP witnesses ordinarily should be lifted 60 days before trial and redactions to the identities of non-ICCP witnesses should be lifted 30 days before trial.¹¹ However, the Chamber ruled that the Prosecution “will be required to apply on a case-by-case basis if it wishes to delay disclosure of the identifying information of any witness” and that the deadlines established in Decision 451 “for disclosure of the identities of ICCPP witnesses and non-ICCP witnesses with security concerns are the latest dates by which disclosure must have occurred”.¹² In relation to Witnesses 11 and 12, the Prosecution has decided not to apply for delayed disclosure because the recent change in their security situation has mitigated their security concerns to such a degree that they can now be identified to the Defence.

¹⁰ Under the Court’s jurisprudence, the Chamber should be requested to intervene in disclosure issues only if there is a genuine dispute that the parties cannot resolve, an approach that prevents unnecessary litigation and an inefficient use of judicial resources. *See, e.g.*, Redacted Version of Decision on the “Defence Motion for Disclosure Pursuant to Rule 77”, 29 July 2011, ICC-01/05-01/08-1594-Red, paras 5-6 (Chamber directed the parties to attempt to resolve a disclosure dispute between themselves before seeking judicial intervention).

¹¹ Prosecution’s Submissions on the Agenda for Status Conference, 28 May 2012, ICC-01/09-02/11-428, para 16.

¹² Decision on the schedule leading up to trial, 9 July 2012, ICC-01/09-02/11-451, para 13; *see also* para 21.

9. *Second*, with respect to the disclosure of Article 67(2) material related to Witnesses 4, 11 and 12, there is no dispute to be resolved. The Prosecution has no objection to prioritizing the disclosure of as-yet undisclosed Article 67(2) material related to Witnesses 4, 11 and 12 ahead of other disclosable materials. It informed the Defence of this by letter on 1 August 2012.¹³ The Prosecution also informed the Defence that it would disclose unredacted or lesser redacted versions of the records of Witness 11 and 12's interviews, which were disclosed at the confirmation stage with judicially authorized redactions to shield the individuals' identity.
10. For the above reasons, there is no disclosure dispute for the Chamber to resolve, and the corresponding requests should be dismissed as moot.

II. The Defence's request regarding the Prosecution's intention to call Witnesses 4, 11 and 12 at trial should be denied.

11. The Defence argument that "it is entitled to know as soon as practicable whether or not the Prosecution intends to rely upon OTP-4, OTP-11 and/or OTP-12 at trial"¹⁴ amounts to a request for reconsideration of the Chamber's 9 July 2012 Decision on the schedule leading up to trial ("Decision 451").¹⁵ The Defence has failed to demonstrate that reconsideration is warranted, and the request should be dismissed accordingly.
12. In Decision 451, the Chamber directed the Prosecution to submit its witness list "by **9 January 2013**" (emphasis in original).¹⁶ The Chamber explained that it established this deadline "to ensure the expeditious conduct of the trial pursuant to Article 64(2) of the Statute and to facilitate the preparation

¹³ See confidential annex 1.

¹⁴ ICC-01/09-02/11-452, para 11.

¹⁵ ICC-01/09-02/11-451.

¹⁶ ICC-01/09-02/11-451, para 18.

of the parties and participants”.¹⁷ By requesting confirmation that the three persons will be trial witnesses “as soon as practicable” – which presumably is intended to mean before 9 January 2013 – the Defence effectively seeks reconsideration of Decision 451 with respect to those witnesses.

13. Other Trial Chambers have held that requests for reconsideration are to be denied unless the moving party demonstrates “new facts or circumstances that may influence th[e] decision” for which reconsideration is sought,¹⁸ or that the impugned decision is “manifestly unsound and [its] consequences are manifestly unsatisfactory”.¹⁹ The Defence does not rely on new facts and circumstances here, nor does it argue that Decision 452 is “manifestly unsound”. For this reason alone, the Defence request should be denied.
14. Nor does the Defence cite any jurisprudence from this Court in which the Prosecution has been required to preview its witness list before filing it. To the Prosecution’s knowledge, there is none. Instead, the Defence relies on Article 64 of the Statute and suggests that advance notice would “ensure adequate preparation by the Defence for trial and the efficient organisation of future Defence investigations”.²⁰ That argument has no traction. In terms of trial preparation, the Prosecution has disclosed the identities of the three witnesses, enabling the Defence to “institute immediately thorough

¹⁷ ICC-01/09-02/11-451, para 14.

¹⁸ Public Redacted Version of the Decision on the “Demande de mise en liberté provisoire de M. Jean-Pierre Bemba Gombo afin d’accomplir ses devoirs civiques en République Démocratique du Congo,” 2 September 2011, ICC-01/05-01/08-1691-Red, para.17; *see also* Decision on the “Requête de la Défense aux fins d’obtenir de la Chambre de Première Instance III des décisions appropriées avant l’ouverture du Procès prévue pour le 22 Novembre 2010”, 16 November 2010, ICC-01/05-01/08-1010, paragraphs 9-10.

¹⁹ *See, e.g.* Order refusing a request for reconsideration, 27 March 2012, ICC-01/04-01/06-2846, para 2; *c.f.* Decision on the Defence Request to Reconsider the “Order on Numbering of Evidence” of 12 May 2010, 30 March 2011, ICC-01/04-01/06-2705, para 13. The Pre-Trial Chambers have taken a more restrictive approach, often dismissing requests for reconsideration *in limine*. *See, e.g.*, Decision on the Defence for Mathieu Ngudjolo Chui’s Request concerning translation of documents, 15 May 2008, ICC-01/04-01/07-477; Decision on the Prosecution Motion for Reconsideration and, in the alternative, Leave to Appeal, 23 June 2006, ICC-01/04-01/06-166, paras 8-12 (. . . a remedy not provided for in the Court’s legal framework - namely the review of a decision which not otherwise allowed by specific circumstances . . . cannot be entertained by the Chamber) (internal citation omitted).

²⁰ ICC-01/09-02/11-452, paras 11-12.

investigations” with respect to their evidence.²¹ In terms of efficiency, the Defence cannot reasonably argue that it is unduly burdened by the prospect that one or more of the Prosecution’s pre-trial witnesses may not testify at trial. At confirmation, the Prosecution opted to rely on only 12 witnesses, a carefully circumscribed number that can readily be investigated by the Defence.

III. The Defence’s use of confidential information should comply with the proposed protocol on witness contact.

15. The Prosecution has no objection to the Defence’s application for authorization to use confidential identifying information regarding Witnesses 4, 11 and 12 during Defence investigations, provided that such information is used in accordance with the proposed protocol on witness contact currently before the Chamber.²² Paragraphs 20-22 of the proposed protocol lay out the circumstances in which a party may use confidential identifying information relating to a witness. Under those proposed provisions, the party may use confidential identifying information “in a careful and focused manner and only when necessary for the purposes of their investigation”.²³ Further:

. . . the party or participant shall under no circumstances disclose (i) that the person is involved, directly or indirectly, with the activities of the Court; or (ii) the nature of such involvement.²⁴

16. Because Witnesses 4, 11 and 12 provide substantial linkage evidence tying the accused to the crimes charged, the Prosecution understands the Defence’s desire to use confidential identifying information relating to them during Defence investigations. For this reason, and assuming that the

²¹ ICC-01/09-02/11-452, para 12.

²² Submission of the draft protocol on contacts with the witnesses of opposing parties and on communication of non-public information to the public in the course of the parties and participants’ investigations, 22 June 2012, ICC-01/09-02/11-440 and annex: ICC-01/09-02/11-440-Anx1.

²³ ICC-01/09-02/11-440-Anx1, para 21.

²⁴ ICC-01/09-02/11-440-Anx1, para 22.

Chamber approves the safeguards included in proposed protocol, the Prosecution has no objection to the Defence's request, as long as the safeguards are complied with.

Conclusion

17. The Prosecution respectfully requests that the Chamber deny the Application, with the exception of the Defence request for permission to use confidential identifying information related to Witnesses 4, 11 and 12.



Fatou Bensouda,
Prosecutor

Dated this 2nd day of August, 2012
At The Hague, The Netherlands