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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

**Prosecution response to the “Defence Application for Disclosure of Evidence
Relating to Prosecution Witness 4”**

Source: The Office of the Prosecutor

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

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

Fergal Gaynor

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

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Silvana Arbia
Didier Preira, Deputy-Registrar

Defence Support Section

Victims and Witnesses Unit

Maria Luisa Martinod-Jacome

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Prosecution hereby responds to the Kenyatta Defence's 18 February 2013 "Defence Application for Disclosure of Evidence Relating to Prosecution Witness 4" ("Application").¹ The Prosecution opposes the Application because the requested materials are not within its "possession or control" and are therefore not subject to disclosure under the Statute or Rules. For this reason, the Prosecution submits that the Application should be denied.

Submissions

2. The Defence seeks to obtain the "contents of email addresses used by Prosecution Witness 4 ("OTP-4") for certain periods relevant to the issues in the proceedings" as well as "the complete parts of a document that forms an exhibit disclosed by the Prosecution which details, *inter alia*, the travel and movements of OTP-4".²
3. The Prosecution does not have this material within its possession or control, and the Defence's assertion that the requested materials are "being withheld by the Prosecution" is simply incorrect.³ The Prosecution retrieved a selected number of e-mails from Witness 4's e-mail accounts during its May 2012 interview of him. The Prosecution conducted keyword searches in his e-mail accounts and retrieved a limited number of e-mails resulting from these searches, the scope of which was limited to the investigation to the apparent scheme to bribe Witness 4. All e-mails collected during the May 2012 interview were disclosed to the Defence on 29 November 2012 in the context of the Prosecution's investigation into the bribery of this witness. No other e-mails were collected by the Prosecution from Witness 4.

¹ ICC-01/09-02/11-648.

² ICC-01/09-02/11-648, para 1.

³ ICC-01/09-02/11-648, para 20(b).

4. Nor, as the Defence asserts in passing, are the requested materials in the Prosecution's "control".⁴ The "email materials" subject to the Defence's "control" argument have never been in the Prosecution's control. When the Prosecution retrieved emails from Witness 4's e-mail accounts during the May 2012 interview, he logged into his email accounts using passwords that he never provided to the Prosecution and logged out once the email extraction was completed. The Prosecution did not then have, and does not now have, the passwords to the accounts, and Witness 4 did not relinquish or share with the Prosecution the ability to access his personal email accounts. As such, Prosecution does not have the requested email materials within its control.
5. The Prosecution also disclosed all parts of Witness 4's asylum application that were in its possession.⁵ The Defence is wrong in its assertion that the requested material "is being held by the Prosecution".⁶ As the Prosecution informed the Defence in previous correspondence,⁷ the annex to the asylum application requested by the Defence is not, and has never been, in the Prosecution's possession. It is also self-evident that the Prosecution cannot disclose that which it does not have.
6. In sum, since none of the requested materials are (or ever have been) within the Prosecution's "possession or control", the Prosecution is unable to disclose the requested materials. The Application should be denied.

⁴ ICC-01/09-02/11-648, para 22(a).

⁵ On 19 October 2012, the Prosecution disclosed the second part of Part B (KEN-OTP-0043-0083) as well as parts F and G (KEN-OTP-0043-0081).

⁶ ICC-01/09-02/11-648, para 23.

⁷ Letter from Adesola Adeboyejo to Steven Kay, dated 14 February 2013 (See ICC-01/09-02/11-648-Conf-AnxA).

Conclusion

7. For the foregoing reasons, the Application should be denied.



Fatou Bensouda,
Prosecutor

Dated this 12th of March, 2013
At The Hague, The Netherlands