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TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding Judge
Judge Robert Fremr
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

***IN THE CASE OF
THE PROSECUTOR V. UHURU MUIGAI KENYATTA***

Public

**Public redacted version of the 19 April 2013 Prosecution response to the
Defence "Submissions Regarding the Prosecution's 11 April 2013 Disclosure
of Material Relating to its Initial Contact with OTP-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
James Stewart
Adesola Adeboyejo

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**

Paolina Massidda

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel
Didier Preira

Defence Support Section

Victims and Witnesses Unit

Patrick Craig

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Prosecution hereby responds to the Defence “Submissions Regarding the Prosecution’s 11 April 2013 Disclosure of Material Relating to its Initial Contact with OTP-4” (“Defence Submission”).¹

2. The relief requested in the Defence Submission – termination of the case – is totally disproportionate to the disclosure issues upon which it is premised. The Prosecution accepts, and has been open and transparent about, mistakes that were made prior to the confirmation hearing with respect to Witness 4’s disclosure. Materials that may have aided the Defence were not disclosed when they should have been. However, the disclosure error addressed in the Defence Submission comes nowhere near the threshold required for proceedings to be terminated. It is not so egregious that termination is the only acceptable remedy. The Appeals Chamber’s jurisprudence has established that such an “exceptional remedy” may be granted only if “strictly . . . necess[ary]”,² and where there are no other options open to cure the alleged prejudice.³ The Defence has failed to meet this threshold.

3. The disclosure error addressed in the Defence Submission concerns a single witness, who will not testify at trial. The Defence Submission fails to explain how confirmation-stage disclosure errors related to that individual – whose testimony will not be relied upon at trial – prevent a fair trial from being held now. There is no argument that would support or justify the drastic relief sought. The confirmation-stage disclosure error does not in any way limit the Defence’s ability to challenge the evidence the Prosecution will present at trial. Further, it does not affect other evidence presented at the

¹ ICC-01/09-02/11-719-Conf. In an email sent at 18:38 on 15 April 2013, the Chamber granted the Defence leave to file the Defence Submission by 10:00 on 18 April 2013. The Chamber ordered that any Prosecution response should not exceed 12 pages and should be filed by 16:00 on 19 April 2013.

² ICC-01/04-01/06-2690-Red2, para 168.

³ ICC-01/04-01/06-2582 OA 18, para 55; ICC-01/04-01/06-2690-Red2, para 168.

confirmation hearing and the Pre-Trial Chamber's ("PTC") findings based upon that evidence. In the circumstances, the disclosure errors related to Witness 4, regrettable though they are, do not prevent this trial from proceeding fairly.

4. The Defence Submission does not lend support to the Defence's application for the confirmation decision to be referred to the PTC ("Application").⁴ Even if one takes the Defence argument at its highest and assumes, for the sake of argument, that the non-disclosed materials would have caused the PTC to reject Witness 4's evidence in its entirety, the result would have been the same: the PTC's findings on the remaining evidence are sufficient for the charges to have been confirmed. As previously explained,⁵ the Trial Chamber need look no further than the four paragraphs of the confirmation decision containing the findings on the alleged meeting at Nairobi State House on or about 30 December 2007 to reach this conclusion.⁶ Those findings – which the PTC reached on the "substantial grounds" standard – were based on evidence other than Witness 4. The disclosure issues related to Witness 4 do not affect those findings. And because Mr Kenyatta's alleged role at that meeting is sufficient for criminal liability to attach, the confirmation decision remains sound and the Application must fail.
5. Over five years since the PEV crimes were committed and fifteen months since the PTC confirmed the charges against Mr Kenyatta, it is time for this case to move forward. At its core, the Defence Submission is yet another attempt to delay or avoid trial altogether by re-litigating the confirmation process.⁷ The Chamber should reject these attempts. Mr Kenyatta has a right

⁴ ICC-01/09-02/11-622.

⁵ ICC-01/09-02/11-708-Red, paras 4, 16-20; ICC-01/09-02/11-714-Red, paras 4, 15-26.

⁶ ICC-01/09-02/11-382-Red, paras 333-336.

⁷ Other efforts include the request for an adjournment of the initial April 2013 trial date on the basis of supposed difficulties in preparing for trial (ICC-01/09-02/11-655-Corr), and the request for Mr Kenyatta to be permitted to attend trial by video link (ICC-01/09-02/11-667).

to a fair trial, but he does not have a right to avoid his trial. The Defence Submission and the Application should be rejected and the case should proceed to trial, as the Defence has failed to demonstrate any unfairness that justifies the case being referred to the PTC or terminated.

Confidentiality

6. In accordance with Regulation 23bis(2), this document is filed confidentially because it responds to a filing with that classification.

Submissions

- I. The disclosure error related to Witness 4 and the steps taken to minimise the scope for such errors in the future.
7. The Prosecution accepts that the record of Witness 4's [REDACTED] 2010 screening should have been disclosed to the Defence prior to the confirmation hearing. The Prosecution regrets that this did not happen and has taken steps to ensure that such oversights do not occur in the future.
8. A review of the Prosecution's Ringtail records indicates that the audio file of the screening was registered in the Prosecution's evidence database on [REDACTED] 2010, the day after the screening was conducted. The records indicate that metadata for the audio file was entered in Ringtail on [REDACTED] 2010, before the Prosecution filed its summons applications in this case.⁸ There is no record of the audio file being reviewed for disclosure prior to the confirmation hearing, likely because it had not been transcribed at that point. This was an error.
9. The audio file was ultimately transcribed and the transcription was completed on 9 April 2013. It was brought to the attention of senior Prosecution staff that day, and was disclosed two days later, on 11 April

⁸ ICC-01/09-02/11-35-Conf-Exp.

2013, after the Prosecution had located internal OTP documents related to the screening to attempt to determine why it had not been disclosed. The Prosecution disclosed these internal documents with the screening to ensure that the Defence was informed of the context regarding the screening.

10. The Defence is correct that the file note of the [REDACTED] 2010 screening (KEN-OTP-0096-0279) identifies inconsistencies between Witness 4's account in his screening and his non-ICC statements.⁹ In this regard, the Prosecution acknowledges that the Office as a whole was on notice, prior to the confirmation hearing, of the inconsistencies in the account Witness 4 gave during his [REDACTED] 2010 screening. Unfortunately, however, the file note was stored in a different database from the audio file, and does not appear to have been reviewed for disclosure purposes prior to the confirmation hearing. Because of this disconnect, and because the screening was not transcribed prior to confirmation, it was not disclosed.

11. The Prosecution acknowledges and regrets the error. The unfortunate reality is that no disclosure system is perfect and that in complex cases such as those before this Court, disclosable items are sometimes missed, despite the best intentions of all concerned. That is what happened with respect to Witness 4. The Prosecution has taken steps to minimise the chances of such errors occurring in the future, including the use of extremely broad search parameters, additional layers of review, and an internal review process to ensure that when disclosure errors are discovered, the system is adapted to prevent mistakes in the future.

12. While the Prosecution accepts that the screening record should have been disclosed prior to the confirmation hearing, its failure to do so does not justify the drastic relief sought in the Defence Submission or the

⁹ ICC-01/09-02/11-719-Conf, para 25.

Application. As explained below, the disclosure error does not rise to the “extraordinary” level required to warrant the termination of proceedings and does not support the Defence’s request for the case to be referred back to the PTC.

II. The Defence has failed to demonstrate that the disclosure issues related to Witness 4 require the case to be terminated.

13. This Court’s jurisprudence on the termination or permanent stay of proceedings is unequivocal: it is a “drastic” and “exceptional remedy” that “is to be reserved strictly for those cases that necessitate [it]”.¹⁰ The Appeals Chamber has set a high threshold for a Trial Chamber to grant a stay, requiring that it be “impossible to piece together the constituent elements of a fair trial”.¹¹ If a “lesser remedy” is available,¹² a stay cannot be granted.¹³ The Defence has not met its burden under this high threshold.

14. In fact, the Defence Submission contains almost no explanation as to why such a drastic remedy is warranted. The closest it comes is the suggestion that the Prosecution’s disclosure and management of information “has rendered the product of the investigation manifestly unreliable”, such that “any proceedings, eventual trial, or decisions” are “unsound”.¹⁴ This conclusory assertion does not meet the high threshold needed to warrant a stay or termination of proceedings.

¹⁰ ICC-01/04-01/06-2690-Red2, para 168; *see also* *Prosecutor v. Banda and Jerbo*, ICC-02/05-03/09-410, para 78 (holding that a stay may be granted only “when the specific circumstances of the case render a fair trial impossible”).

¹¹ *Prosecutor v. Lubanga*, ICC-01/04-01/06-2582 OA 18, para 55.

¹² *Prosecutor v. Lubanga*, ICC-01/04-01/06-2690-Red2, para 168.

¹³ ICC-01/04-01/06-2582 OA 18, para 55; *see also* ICC-01/04-01/06-2690-Red2, para 168 (“this undoubtedly drastic remedy is to be reserved strictly for those cases that necessitate, on careful analysis, taking the extreme and exceptional step of terminating the proceedings (as opposed to adopting some lesser remedy)”).

¹⁴ ICC-01/09-02/11-719-Conf, para 27.

15. There is no logical connection between the manner in which an investigation is conducted and the manner in which disclosure takes place. Disclosure errors have occurred in other well-investigated major international criminal cases, and have not led to those cases being terminated.¹⁵ This is because courts recognise that in complex cases with large documentary records, items sometimes slip through the cracks, no matter how much effort is dedicated to getting disclosure right, and despite the best intentions of all concerned. The drastic step of terminating proceedings is contemplated only when there are no other options available to cure the alleged prejudice and where a fair trial has been rendered “impossible”.¹⁶ In this case, the disclosure mistakes identified by the Defence do not reach this threshold.
16. The disclosure errors relate to a single witness who will not be called to give testimony at trial. While they concededly restricted the Defence’s ability to challenge that witness’s evidence at confirmation, the remaining evidence was sufficient for the PTC to confirm the charges against Mr Kenyatta. Put differently, even if the Defence had possessed the undisclosed documents at the time of the confirmation hearing and succeeded in persuading the PTC to discard Witness 4’s evidence, the charges still would have been confirmed on the basis of the remaining evidence. For this reason, and because the disclosure errors identified do not affect other Prosecution

¹⁵ See, e.g., ICTY, *Prosecutor v. Karadzic*, Case No. IT-95-5/18, 3 September 2012, Decision on Accused’s motion for new trial for disclosure violations, paras 14-17 (holding that despite the “Prosecution’s poor disclosure practices” resulting in a “stream of disclosure violations”, remedial measures put in place by the Chamber limited any prejudice to the accused, and meant that there was “no basis to order the exceptional measure of a new trial”); ICTY, *Prosecutor v. Mladic*, Case No. IT-09-92, 17 May 2012 transcript, page 524 (adjourning the start of trial in light of “significant disclosure errors” by the Prosecution (trial recommenced two months later, on 9 July 2012)); ICTR, *Prosecutor v. Bizimungu et al.*, Case No. ICTR-99-50-T, 30 September 2011, Trial Judgment, paras 170, 174-175 (holding that the Prosecution’s failure to disclose “highly relevant, highly probative and clearly exculpatory material to the Defence . . . materially prejudiced the Accused”, but that a stay of proceedings was “unnecessary and too extreme” a remedy for the disclosure violation).

¹⁶ ICC-01/04-01/06-2582 OA 18, para 55.

evidence or limit the Defence's ability to challenge that evidence at trial, it cannot be said that a fair trial has been rendered "impossible".¹⁷

17. In *Lubanga*, the Trial Chamber denied an application to stay proceedings based on arguments similar to those advanced by the Defence here, including the Prosecution's "failure to discharge [its] disclosure and inspection obligations" and supposed "negligence in failing properly to investigate the evidence".¹⁸ Observing that the Prosecution had, albeit belatedly, disclosed "all relevant materials", the Chamber concluded that the accused had not been prevented "from properly defending himself".¹⁹ The Chamber therefore refused to stay the proceedings, finding that the impugned conduct, "even taken at its highest, would not justify staying the case".²⁰ The same is true here. "[E]ven taken at its highest", the Defence argument does not justify staying or terminating the case because the disclosure error: (i) relates to an individual who will not give evidence at trial; and (ii) does not limit the Defence's ability to challenge the Prosecution's trial evidence.

III. The Defence has failed to demonstrate that the disclosure issues related to Witness 4 require the case to be referred to the PTC for reconsideration.

18. Nothing in the Defence Submission alters the position with respect to the Application. Despite the additional disclosure issue identified with respect to Witness 4, the fact remains that the PTC's findings that were not based on Witness 4's evidence were sufficient to confirm the charges. In these

¹⁷ ICC-01/04-01/06-2582 OA 18, para 55.

¹⁸ ICC-01/04-01/06-2690-Red2, para 23.

¹⁹ ICC-01/04-01/06-2690-Red2, para 188.

²⁰ ICC-01/04-01/06-2690-Red2, para 197.

circumstances, there is no need to take the extraordinary step of sending the confirmation decision back to the PTC for reconsideration.

19. In analysing the Application, the narrow question for the Trial Chamber is whether the PTC reasonably could have confirmed the charges against Mr Kenyatta absent the factual findings based on Witness 4's evidence.²¹ The answer to this question is "yes". The confirmation decision contains several important findings that the PTC reached on the basis of evidence other than that of Witness 4, which are detailed in the Prosecution's previous submissions.²²

20. To dispose of the Application, the Chamber need only consider the four paragraphs of the confirmation decision containing the PTC's findings regarding the alleged meeting at Nairobi State House on or about 30 December 2007.²³ The PTC's findings regarding that meeting – which reached the "substantial grounds" standard – are sufficient for the Trial Chamber to dispose of the Application because Mr Kenyatta's alleged role at that meeting is sufficient for criminal liability to attach. On the basis of evidence other than Witness 4, the PTC found that at the meeting, Mr Kenyatta:

- Articulated the common plan;²⁴

²¹ As previously explained, it would not normally be appropriate for the Trial Chamber to consider post-confirmation changes in the evidence when deciding whether to refer a case back to the PTC. See ICC-01/09-02/11-664-Red2, paras 4, 15 and ICC-01/09-02/11-714-Red, paras 8-14. The issue in this case is concededly different because rather than changes in the witness's evidence after confirmation or the Prosecution's decision not to call him at trial, the issue is the Prosecution's failure to disclose prior statements of the witness that could have impacted on his credibility. Nevertheless, the Chamber should consider referring the case back to the PTC only if it finds that the non-disclosed material *necessarily* would have changed the PTC's decision to confirm the charges. On the facts of this case, that analysis can be conducted by taking the Defence argument at its highest and assuming, for the sake of argument, that the non-disclosed material would have caused the PTC to reject Witness 4's evidence. If the Chamber concludes that a reasonable PTC could have confirmed the charges without the findings based on Witness 4's evidence, then the Application fails and must be dismissed.

²² See ICC-01/09-02/11-664-Red2, para 23.

²³ ICC-01/09-02/11-382-Red, paras 333-336.

²⁴ ICC-01/09-02/11-382, paras 334-335.

- Instructed his agents to organise and mobilise;²⁵ and
- Provided his agents with cash to mobilise men and purchase materiel used in the attacks.²⁶

21. These findings are, on their own, sufficient to support the existence of the common plan and Mr Kenyatta's alleged contribution to it, and are therefore sufficient for a reasonable PTC to have confirmed the charges. The non-disclosed materials cannot alter this analysis unless it can be said that the failure to disclose them necessarily would have changed the PTC's decision to confirm the charges. This threshold cannot be met because: (i) Mr Kenyatta's alleged role at the 30 December 2007 State House meeting is sufficient for criminal liability to attach; and (ii) the PTC did not base its findings regarding the 30 December meeting on Witness 4's evidence. For these reasons, the Defence Submission's disclosure-based arguments relating to Witness 4 do not bolster the Application.²⁷ At most, the non-disclosed materials may have caused the PTC to reject Witness 4's evidence.²⁸ But even then, the PTC's findings not based on Witness 4's evidence are sufficient to confirm the charges. The integrity of the confirmation decision thus remains sound, which requires the Application to be denied.

²⁵ ICC-01/09-02/11-382, paras 334-335.

²⁶ ICC-01/09-02/11-382, paras 334-335.

²⁷ The arguments are also factually flawed. The Defence states the PTC "relied upon" Witness 4's statements to [REDACTED] and CIPEV in the confirmation decision (ICC-01/09-02/11-719-Conf, para 9). This is wrong. The confirmation decision does not mention the [REDACTED] statement at all and the PTC's references to the CIPEV statement were in response to Defence arguments; the PTC did not "rely upon" the CIPEV statements in reaching any of its factual findings. *See, e.g.* ICC-01/09-02/11-382, paras 217, 316, 346, 347.

²⁸ While this can be assumed for the sake of argument, it is far from clear that the screening would have caused the PTC to reject all of Witness 4's evidence. Two of the alleged inconsistencies identified in the Submission concern events the PTC did not address in its confirmation decision – the alleged meetings at the Yaya Centre and Blue Springs Hotel. *See* ICC-01/09-02/11-719-Conf, paras 13-15, 22-24. It is speculative to assert that Witness 4's allegedly inconsistent accounts regarding these events would have caused the PTC to reject his testimony on other matters.

Conclusion

22. It is unnecessary to re-litigate the confirmation process, and the trial should not be further delayed. It is five years since the PEV crimes were committed, over three years since the PTC authorised an investigation into those crimes,²⁹ over two years since the Prosecution filed its summons application,³⁰ and over a year since the PTC committed Mr Kenyatta to trial.³¹ The victims of the PEV, the affected communities, and the international community as a whole have an interest in this case being dealt with on the merits. There is no need for further delay. In the two-and-a-half months since the Application was filed, the parties have submitted hundreds of pages of written arguments, which they have supplemented with oral submissions. The parties' arguments are neatly framed and the issues are crystallised. In the final analysis, the Defence has failed to identify flaws in the confirmation process sufficient to warrant the exceptional relief of terminating the case or referring it back to the PTC. In these circumstances, there is nothing unfair about Mr Kenyatta standing trial. The Defence Submission and the Application should be dismissed and the trial should proceed.



Fatou Bensouda,
Prosecutor

Dated this 1st of May 2013
At The Hague, The Netherlands

²⁹ ICC-01/09-19.

³⁰ ICC-01/09-31.

³¹ ICC-01/09-02/11-382-Red.