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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 24 April 2013 Prosecution response to the Defence “Submissions Regarding the Prosecution’s 17 April 2013 Disclosure of Material Relating to its Initial Contact with OTP-11”

Source: The Office of the Prosecutor

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

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Introduction

1. The latest Defence submission is its seventh in support of its request for the confirmation decision to be referred back to the PTC (“Seventh Defence Submission”).¹ Like the previous six,² this submission contains nothing that supports the relief sought by the Defence. It fails to identify a disclosure violation by the Prosecution, much less a violation serious enough to support the Defence’s request to “terminate” the case or send it back to the PTC.³

2. The information contained in Witness 11’s screening that allegedly falls under Article 67(2) is replicated in his subsequent Article 55(2) statement, which was disclosed prior to the confirmation hearing. As a result, the non-disclosure of the screening prior to confirmation was consistent with the jurisprudence of this Court, which requires Article 67(2) or Rule 77 information provided during a screening to be disclosed only if it is not captured in the witness’ formal statement.⁴

3. In the circumstances, the Seventh Defence Submission does not meet the “high threshold” the Appeals Chamber has established for the relief sought by the Defence.⁵ Rather, it reflects an apparent strategy to take all measures to delay the beginning of trial. The relief sought by the Defence should be denied, and the case should proceed to trial.

¹ “Submissions Regarding the Prosecution’s 17 April 2013 Disclosure of Material Relating to its Initial Contact with OTP-11”, 23 April 2013, ICC-01/09-02/11-723-Conf. In an email sent at 17:27 on 19 April 2013, the Chamber granted the Defence leave to file the submission by noon on 23 April 2013. The Chamber ordered that any Prosecution response should not exceed 12 pages and should be filed by 16:00 on 24 April 2013.

² The Defence’s other substantive submissions are: ICC-01/09-02/11-622; ICC-01/09-02/11-681-Red; ICC-01/09-02/11-682; ICC-01/09-02/11-706; ICC-01/09-02/11-707-Corr-Red; ICC-01/09-02/11-719-Conf. The Defence has also made three related procedural applications. See ICC-01/09-02/11-669; ICC-01/09-02/11-717-Conf and ICC-01/09-02/11-721-Conf.

³ ICC-01/09-02/11-723-Conf, para 21.

⁴ *Prosecutor v. Bemba*, Decision on the defence request for disclosure of pre-interview assessments and the Consequences of non-disclosure, 9 April 2010, ICC-01/05-01/08-750-Red, para 33.

⁵ *Prosecutor v. Lubanga*, ICC-01/04-01/06-2582 OA 18, para 55.

Confidentiality

4. This document is filed confidentially as a response to a filing so designated.⁶

Submissions

- I. The Seventh Defence Submission constitutes an improper reply to the Prosecution's submission of 19 April 2013.
5. Paragraphs 10-12 of the Seventh Defence Submission constitute an improper reply to the Prosecution's 19 April 2013 response to the 18 April Defence submission regarding Witness 4. They should be disregarded by the Chamber.
6. A party "may only reply to a response with the leave of the Chamber".⁷ The Defence did not seek leave to reply to the Prosecution's 19 April response. Rather, it requested leave to file additional submissions on just one issue: "newly disclosed evidence concerning OTP-11".⁸ "[E]xceptionally", the Chamber granted the Defence leave to make submissions on that particular issue alone.⁹ However, the Seventh Defence Submission goes further and is tailored in part to respond to the Prosecution's 19 April response. If the Defence wanted to file such a reply, it ought to have appropriately sought leave to do so. The Defence should not be permitted to use the Chamber's "exceptional[]" permission to attempt to rehabilitate its earlier submissions. The Prosecution requests that the Chamber disregard paragraphs 10-12.
- II. The Seventh Defence Submission fails to identify a disclosure violation.
7. The Defence has failed to establish that the Prosecution violated its disclosure obligations by not disclosing Witness 11's screening transcripts

⁶ See Regulation 23bis(2) of the Regulations of the Court.

⁷ Regulation 24(5) of the Regulations of the Court.

⁸ ICC-01/09-02/11-721-Conf, para 3.

⁹ Email from the Chamber's Legal Officer sent at 17:27 on 19 April 2013.

prior to confirmation. In an attempt to demonstrate a violation of Article 67(2) where none exists, the Defence cites portions of Witness 11's screening that supposedly undermine his credibility,¹⁰ arguing that this information was subject to disclosure under Article 67(2).¹¹ The Defence argument fails both on the law, and on the facts.

8. With respect to the **law**, Trial Chamber III ruled in *Bemba* that where a witness has given a formal Rule 111 or 112 statement and all the Article 67(2) information the witness provided during the screening "has been disclosed within the statement, along with any information that is material to defence preparation", then the screening is not subject to disclosure; if, however, the screening contains Article 67(2) or Rule 77 information not disclosed in the statement, "the prosecution must disclose the screening notes, or the relevant information".¹²
9. The Defence has not demonstrated that the Prosecution departed from the above principles with respect to Witness 11. His screening transcripts contain an account that is in all material respects the same as that contained in his Article 55(2) interview transcripts. Witness 11's account in his initial screening ([REDACTED] 2011), his first substantive Prosecution interview ([REDACTED] 2011), and his re-interview ([REDACTED] 2012) is consistent throughout. The consistency bolsters the veracity of his evidence; it does not undermine it, as the Defence contends.
10. The Seventh Defence Submission ignores the law set out in *Bemba*: that information obtained during a screening is disclosable only if it: (i) falls within Article 67(2) or Rule 77; and (ii) is not contained in the witness'

¹⁰ ICC-01/09-02/11-723-Conf, paras 15-20.

¹¹ ICC-01/09-02/11-723-Conf, para 14. The Defence does not suggest that the screening was subject to disclosure under Rules 76 or 77.

¹² ICC-01/05-01/08-750-Red, para 33.

formal statement.¹³ These conditions are cumulative and not distinct. The issue is not, as the Defence frames it, whether the screening transcripts “contain evidence capable of undermining the Prosecution case”.¹⁴ It is whether such information was captured in Witness 11’s interview transcripts, which were disclosed before confirmation.¹⁵

11. Turning to the **facts**, the Defence’s attempts to identify a violation of Article 67(2) also fail. Each portion of the screening cited in the Seventh Defence Submission – including those portions that are misquoted, selectively edited or taken out of context – was covered in the transcripts of Witness 11’s interview, and his account is consistent between the two.¹⁶ The Defence has therefore failed to demonstrate a disclosure violation. For ease of reference, the Prosecution has attached, as Annex A, a chart comparing the portions of the screening relied on by the Defence against Witness 11’s interview, which demonstrates no inconsistencies.

12. As the chart demonstrates, there are no inconsistencies between Witness 11’s screening and interview that required the screening to be disclosed under the *Bemba* jurisprudence cited above. While the Prosecution disclosed the screening transcripts recently for the sake of completeness and out of an abundance of caution, not doing so prior to confirmation was consistent with the existing case law. As in *Bemba*, there was no disclosure violation because any “exculpatory material in the screening notes has been disclosed within [Witness 11’s] statement, along with any information that is material to defence preparation”.¹⁷ To be clear, the Defence had in its

¹³ ICC-01/05-01/08-750-Red, paras 31-33.

¹⁴ ICC-01/09-02/11-723-Conf, para 9.

¹⁵ ICC-01/05-01/08-750-Red, paras 31-33.

¹⁶ ICC-01/09-02/11-723-Conf, para 19.

¹⁷ ICC-01/05-01/08-750-Red, para 33.

possession, prior to the confirmation hearing, all of the Article 67(2) information contained in the screening transcripts.

III. The Seventh Defence Submission does not support the relief sought.

13. Because the Seventh Defence Submission fails to demonstrate a disclosure violation, it does not support the Defence's request for the case to be terminated. As previously explained,¹⁸ termination or a permanent stay is a "drastic" and "exceptional remedy" that may be granted only if it becomes "impossible to piece together the constituent elements of a fair trial" and there is no "lesser remedy" available.¹⁹ The "high threshold" established for such relief to be granted is based in part on the interest of "the victims and of the international community as a whole" to see cases of serious international concern adjudicated on the merits.²⁰ In this case, where the crimes were committed over five years ago, the victims and their communities have a particular interest in seeing a trial without further delay. As discussed above, the Defence has failed to demonstrate a disclosure violation, much less a violation so grave that the case must be terminated.

14. Similarly, the Seventh Defence Submission does not support the Defence application for the confirmation decision to be referred back to the PTC.²¹ As previously explained,²² even taking the Defence argument as its highest, the PTC reasonably could have confirmed the charges against Mr Kenyatta absent the factual findings based on Witness 4's evidence. To reach this conclusion, the Chamber need look no further than the four paragraphs of

¹⁸ See ICC-01/09-02/11-708-Red, para 30; ICC-01/09-02/11-722, para 13.

¹⁹ *Prosecutor v. Lubanga*, ICC-01/04-01/06-2582 OA 18, para 55; ICC-01/04-01/06-2690-Red2, para 168.

²⁰ ICC-01/04-01/06-2582 OA 18, paras 55, 60.

²¹ ICC-01/09-02/11-622.

²² See ICC-01/09-02/11-664-Red2, paras 23-24; ICC-01/09-02/11-708-Red, paras 17-20; ICC-01/09-02/11-714-Red, paras 15-18; ICC-01/09-02/11-722-Conf, paras 18-21.

the confirmation decision regarding the alleged meeting at Nairobi State House on or about 30 December 2007, which contain findings not based on Witness 4's evidence.²³

15. The Defence is incorrect in its assertion that Witness 11's "evidence in respect of the 30 December allegation . . . is significantly weakened" by the screening.²⁴ While it is correct that Witness 11 was one of the sources the PTC relied upon with respect to the 30 December 2007 State House meeting,²⁵ the consistency between the accounts contained in his screening and interview bolster his evidence and the PTC's findings based upon it. Simply put, the screening supports the Prosecution's case.

16. The Defence's challenges to Witness 11's evidence are inapposite because there was no violation of Article 67(2). The Defence simply advances the same arguments regarding Witness 11's evidence that it made at the confirmation hearing. This is the same approach employed in the Defence's 3 April 2013 submissions,²⁶ which invited the Trial Chamber to sit as an appellate court and overturn the PTC's unequivocal findings that "[t]he evidence placed before the Chamber" established the 30 December 2007 State House meeting and Mr Kenyatta's role therein to the "requisite threshold" of "substantial grounds".²⁷ As previously explained, this appellate function is not a role the Trial Chamber can perform.²⁸ The non-disclosure of the screening does not undermine the integrity of the PTC's findings because the account contained in Witness 11's screening – including his description of the 30 December 2007 meeting – is consistent with that contained in his substantive interview. In the circumstances, it

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

²⁴ ICC-01/09-02/11-723-Conf, para 15.

²⁵ ICC-01/09-02/11-382-Red, para 334.

²⁶ ICC-01/09-02/11-707-Corr-Red.

²⁷ ICC-01/09-02/11-382-Red, para 333.

²⁸ See ICC-01/09-02/11-714-Red, paras 2, 7.

cannot be said that the PTC was deprived of information that could have caused it to evaluate Witness 11's evidence differently. The integrity of the PTC's findings thus remains intact.

Conclusion

17. Like the six previous submissions, the Seventh Defence Submission fails to identify any grounds for the case to be referred back to the PTC or terminated. The Defence's requests for such relief should therefore be rejected and the case should proceed to trial.



Fatou Bensouda,
Prosecutor

Dated this 2nd day of May 2013
At The Hague, The Netherlands