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Date: **27 September 2013**

TRIAL CHAMBER IV

Before: **Judge Joyce Aluoch, Presiding Judge**
Judge Silvia Fernandez de Gurmendi
Judge Chile Eboe-Osuji

SITUATION IN DARFUR, THE SUDAN

IN THE CASE OF THE PROSECUTOR

V.

ABDALLAH BANDA ABAKAER NOURAIN AND SALEH MOHAMMED JERBO JAMUS

Public document
With confidential Annex A, confidential Annexes 1, 4, 5, 6 & 7 and confidential *Ex Parte* only available to OTP Annexes 2 &3

Public redacted version of "Prosecution's Response to the "Defence Request for Termination of Proceedings" (ICC-02/05-03/09-503-Conf)" filed on 24 September 2013

Source: **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
Ms Fatou Bensouda, Prosecutor
Mr James Stewart, Deputy Prosecutor
Mr Ade Omofade, Trial Lawyer

Counsel for the Defence
Mr Karim A.A. Khan QC
Mr Nicholas Koumjian

Legal Representatives of Victims
Ms Hélène Cissé
Mr Jens Dieckmann

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

Deputy Registrar
Mr Didier Preira

Victims and Witnesses Unit

Detention Section

I. Introduction

1. The Defence has requested Trial Chamber IV ("Chamber") to terminate the case against Messrs. Abdallah Banda & Saleh Jerbo ("Defence Request").[1] In this request, the Defence argued that all charges against Mr Banda and Mr Jerbo should be dismissed due to the failure of the Office of the Prosecutor ("OTP" or "Prosecution") to disclose evidence that was highly relevant to the contested issues in this case.

2. The Prosecution opposes the Defence Request.

3. Contrary to the Defence's assertion, the information contained in the statements referred to by the Defence is not exonerating evidence. Moreover, the Prosecution disclosed the statements to the Defence one year in advance of the commencement of the trial and within the disclosure deadline set by the Chamber. This alone demonstrates that the Accused have not suffered prejudice significant enough to impact on their rights - certainly none of the type and magnitude that would justify a termination of proceedings.

4. The Defence Request is replete with unsubstantiated and sensationalist claims. The Defence refers to the "false facts and assertions of the OTP", states that the Prosecution "misled the court", and cites "deception" on the part of the Prosecution. The Prosecution requests the Chamber to impress upon Defence counsel the need to desist from this systematic use of overstatement.

II. Statement of Fact

[1] ICC-02/05-03/09-503-Conf.

5. On 27 August 2009, the Pre-Trial Chamber I issued summonses to appear for Messrs. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus.[2] On 17 June 2010 Mr Banda and Mr Jerbo had their initial appearance before the Court.[3]

6. During a status conference held before the Single Judge of Pre-Trial Chamber I on 26 August 2010, the Prosecution notified the Single Judge and the Defence of several new statements. Among these was the statement of witness P-467[4]. On that occasion the Prosecution informed the Single Judge and the Defence of the non-disclosure of P-467's statement on account of the witness' unwillingness to have his identity divulged and the absence of any potentially exonerating information contained therein.[5]

7. On 7 March 2011, Pre – Trial Chamber I ("PTC") confirmed the charges against Mr Banda and Mr Jerbo and committed the case to a Trial Chamber.[6] On 16 March 2011, the Presidency issued its "Decision constituting Trial Chamber IV and referring to it the case of *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*" constituting Trial Chamber IV ("Chamber"), and transmitted the full record of the proceedings before Pre-Trial Chamber I to Trial Chamber.[7]

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[2] ICC-02/05-03/09-2 and ICC-02/05-03/09-3.

[3] ICC-02/05-03/09-T-4-ENG.

[4] DAR-OTP-P-0467 (" P-467").

[5] Excerpts from transcript ICC-02/05-03/09-T-7-ENG ET:
Page 5 Line 25 to Page 6 line 5 - OTP Mr. Faal
[..]467, which will not be disclosed because the witness has decided that he does not want his identity disclosed to the Defence, so we will not use his statement. So it would be -- it does not contain any PEXO. If it did, we would have an obligation to disclose to the Defence but does not contain any PEXO, so we are not going to use that.
Page 13 Lines 18 -23 Defence Mr. Khan
Yes, indeed, your Honour. I did misspeak. My learned friend did make it clear that there's no PEXO in relation to Witness 467, so the simple -- the only rule is Rule 77 that I'd ask to make sure that the Prosecution turn their mind to that provision and whether or not under that particular head we are entitled to at least a summary.
Page 15 Lines 7- 21 OTP Mr. Faal
Indeed, your Honour, the Prosecution has made its assessment and we did clearly say in Court that we have looked at the statement. It does not contain any PEXO. If it did we would have been under an obligation to disclose it under 67(2), but we looked at it -- 67(2). We looked at it and we realised that there is no PEXO in it, so there is no need to disclose it under 67(2). With regards to Rule 77, it even becomes more redundant. Rule 77 is only for inspection of things that are either material for the preparation of the Defence, or the Prosecution intends to use it. We don't intend to use it. It's not material for the preparation of the Defence. Otherwise, we would have had an obligation to disclose. We have made the assessments, your Honour, and there is no reason to disclose the statement.

[6] ICC-02/05-03/09-121-Corr-Red.

[7] ICC-02/05-03/09-124.

8. [REDACTED]. [REDACTED].[8] [REDACTED].[9] [REDACTED]. [REDACTED].[10]

9. On 22 September 2011, the Chamber issued a decision authorizing the lifting of the redactions that applied to the name and other identifying information of witness DAR-OTP-P-0471 ("P-471") in two other witness statements, pursuant to which the Prosecution disclosed shortly after the material affected by the said decision and order.[11]

10. On 6 January 2012, the Defence filed a Request for a Temporary Stay of Proceedings contending that severe restrictions on investigations have made an effective defence impossible and that restrictions by the Government of Sudan ("GoS") have been absolute.[12] The Chamber subsequently rejected this request.[13]

11. On 4 June 2012, the Prosecution informed the Chamber and the Defence that it had conducted a further review of the material in its possession, [REDACTED], and that it was following up a number of items with third parties and anticipated further disclosure to the Defence pursuant to Article 67 (2) and Rule 77.[14] [REDACTED].[15]

12. On 18 February 2013, a protocol on the handling of confidential information and contact between a party and witnesses of the opposing party ("protocol") was adopted by the Chamber.[16]

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8 [REDACTED].
9 [REDACTED].
10 [REDACTED].
11 ICC-02/05-03/09-222; the Prosecution lifted the relevant redactions relating to witness P-471 in two witnesses' statements and disclosed the material affected by this order on 27 September 2011 through INCRIM package 15.
12 ICC-02/05-03/09-274.
13 ICC-02/05-03/09-410.
14 ICC-02/05-03/09-343 at para 9.
15 [REDACTED].
16 ICC-02/05-03/09-451.

13. On 6 March 2013, the Chamber issued its "Decision concerning the trial commencement date, the date for final prosecution disclosure, and summonses to appear for trial and further hearings" deciding, *inter alia*, that the Prosecution shall disclose all Article 67 (2) evidence and all Rule 77 material for the inspection of the Defence by the 2 May 2013 and setting a trial date of 5 May 2014.[17]

14. On 2 May 2013, pursuant to Rule 77 the Prosecution disclosed, among other evidence, the witness statements of witnesses P-471 and P-467.[18]

15. On 3 September 2013, the Defence submitted the Defence Request for Termination of Proceedings ("Defence Request").[19]

III. Confidentiality

16. Pursuant to Regulation 23*bis,* the Prosecution submits this filing & annexes A, 1,4,5,6 &7 confidentially, since they are in response to a Confidential filing, and [REDACTED]. The Prosecution also submits receipt of annexes 2 & 3 as confidential *Ex Parte* – available only to Prosecution,[REDACTED]. The Prosecution disclosed these statements to the Defence with minimal redactions applied to the names of witnesses' family members and OTP staff.[20]

IV. Submissions

a) The relevant statements have been disclosed within the disclosure deadline for trial

17. The trial date is currently set for 5 May 2014. Crucially, *all* of the material that the Defence refers to in the Defence Request *has already been disclosed* and, at the very latest, was disclosed on 2 May 2013 - a *full year* prior to the trial date. Therefore this

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[17] ICC-02/05-03/09-455 at para 25 (II) and 25 (iv).
[18] In Rule 77 disclosure package 12.
[19] ICC-02/05-03/09-503-Conf.
[20] The Prosecution will file a retroactive application for redactions to the Chamber reflecting these minor redactions.

cannot be a dispute concerning the withholding of information on the part of the Prosecution. Rather, it is a dispute about the *timing* of disclosure.

18. The distinction - between non-disclosure and the timing of disclosure - is crucial. In assessing potential prejudice, the ICC jurisprudence on stay/termination of proceedings draws a distinction between whether the dispute involves continuing non-disclosure[21] or whether the material has already been disclosed. The jurisprudence indicates that there is less likelihood of prejudice when the material in dispute has already been disclosed.[22] In this case, not only has the material in question been disclosed, disclosure has taken place at least one year prior to trial. It would be entirely unreasonable to consider such disclosure as i) being "late" and more so ii) being a violation of such an egregious nature that a termination is of proceedings is justified.

19. Moreover, there were justifiable reasons why the Prosecution was unable to disclose the statements of witnesses P-471 and P-467 earlier. Both witnesses are serving military officers – [REDACTED] [REDACTED].[23] [REDACTED]. [REDACTED].[24]

20. As noted above, on 18 February 2013 the Chamber adopted a protocol on the handling of confidential information and contact between a party and witnesses of the opposing party.[25] With this Protocol in force, the Prosecution considered that adequate safeguards are now in place to govern the manner in which the Defence handles any information relating to the identities of witnesses, including P-471 and P-467. [REDACTED].[26] Both statements were then disclosed to the Defence on 2 May 2013 –as already advanced, over a year before the date set for the commencement of the trial.

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21 ICC-01/04-01/06-2690-Red2, Para. 195; ICC-01/09-02/11-728, Para 77-79, 96.
22 ICC-01/09-02/11-728, Para 96.
23 [REDACTED].
24 [REDACTED].
25 ICC-02/05-03/09-451.
26 See Annex 7.

21. If the Chamber considers that the timing of disclosure did cause any prejudice to the accused, such prejudice is easily rectifiable. The Defence has known the identities of these witnesses for a full year before the trial starts. It is free to contact them, question them and, if deemed necessary, even call them to testify for the Defence. The Defence is also free to question Prosecution trial witness P-419 concerning any aspects of his statement that are considered to contradict the statements of either of these witnesses [REDACTED].[27] Additionally, during the trial, the Defence will also have an opportunity to cross-examine witness P-419 on any aspects of his testimony that it finds contradictory and seek to challenge his credibility. Where the prejudice caused can be rectified at trial in this manner, Chambers of the ICC have found that termination of proceedings is not justified.[28]

22. Moreover, this dispute regarding disclosure is not one that only the Pre-Trial Chamber could have resolved. The Trial Chamber is perfectly competent to rectify any prejudice in this matter. As observed in similar circumstances in the *Kenyatta* case, "the issue came to light during the period when the Chamber was responsible for the conduct of the proceedings and is fully competent to resolve it."[29] Therefore, even if the Chamber finds that the Defence has been prejudiced, the prejudice is not "irreparable" and can be adequately dealt with by the Chamber itself.

b) The Defence completely misrepresents the alleged exculpatory information contained in the Statements of Witness P-467 and P-471.

23. The Defence claims that the Prosecution misled the Chamber by submitting that [REDACTED] when it was actually in possession of statements that "established" that [REDACTED].[30] The Defence then adds that by "making a submission, which the OTP's own interviews established as untrue" the Prosecution "misled the Court about the

27 [REDACTED].
28 ICC-01/09-02/11-728, Para 96.
29 ICC-01/09-02/11-728, Para.97.
30 Defence Request, Para.31.

fundamental results of its own investigations."[31] The Defence characterizes this as "deception" and the "false facts and assertions" of the Prosecution.[32]

24. This allegation is a misrepresentation of the current circumstances. The Prosecution will expand on this in the submissions below.

<u>The Defence's Allegations regarding witness P-467's statement are incorrect and exaggerated.</u>

25. The Defence has quoted selectively from Witnesses P-467's evidence, and this evidence has been misrepresented. [REDACTED].[33] This makes clear that the witness maintains [REDACTED].

26. [REDACTED]:

    [REDACTED].[34]

27. The portion of this paragraph conveniently omitted in the excerpt quoted by the Defence in the Defence Request – makes it clear that witness P-467 [REDACTED]. Moreover, the witness points out that [REDACTED].

28. The above is made even clearer when one examines the rest of Witness P-467's statement.

    [REDACTED][35]

    [REDACTED][36]

29. Again, the Defence carefully avoided quoting this portion of the statement to the Chamber.

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[31] Defence Request, Para.31.
[32] Defence Request, Para.31.
[33] [REDACTED].
[34] Statement of Witness P-467, DAR-OTP-0176-0057 at page 0066, Para 56. (Emphasis added).
[35] Statement of Witness P-467, Para.58.
[36] Id, Para.59.

30. From the above excerpts that were not quoted by the Defence, it is patently obvious that the Prosecution ***was not*** in possession of statements that "established" that "[REDACTED].[37] The Defence suggestions of the Prosecution's "deception" and "false facts and assertions" alleged by the Defence[38] are therefore completely unsubstantiated.

31. [REDACTED]:

    [REDACTED]

32. [REDACTED].[REDACTED].[39] His statement was disclosed to the Defence as far back as September 2011.[40]

33. The Prosecution submits that the above analysis demonstrates a misrepresentation by the Defence of the current circumstances. Where the Defence has engaged in similar overstatement regarding the content of disputed documents, Chambers of this Court have taken this into account when assessing prejudice.[41]

The Defence's Allegations regarding P-471's statement[42] are incorrect and exaggerated.

34. The Defence states that, *inter alia*, the statement of P-471 "established" that [REDACTED] [43] and that this is "patently exculpatory".[44]

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37 Defence Request, Para.31.
38 Defence Request, Para.31.
39 See DAR-OTP-0165-0489 at page 0499 Para 46.
40 INCRIM disclosure package 13 disclosed on 5 September 2011.
41 ICC-01/09-02/11-728, Para 102.
42 [REDACTED].
43 Defence Request, Para.31.
44 Defence Request, Para.28.

35. Having made this categorical assertion, the Defence does not provide any reasoning in support of how this witness's statement is "patently exculpatory" or how it establishes [REDACTED]. In fact, the only information provided by witness P-471 regarding the removal of any GoS Representative is as follows:

> [REDACTED] [45]

36. The above makes it clear that witness P-471 [REDACTED]. The witness [REDACTED]. [REDACTED].

37. Importantly, while the Defence chose to quote the above paragraph, the text underlined in the above quote - i.e [REDACTED]- was deliberately omitted from the excerpt quoted in the Defence Request.[46] To characterize this as establishing that [REDACTED] is simply wrong.

<u>The Defence's Allegations regarding the Prosecution "misleading" Pre-Trial Chamber are incorrect and exaggerated.</u>

38. The Defence claims that the Prosecution misled the Chamber when it submitted that [REDACTED]while in possession of statements that "established" that "[REDACTED].[47]

39. As is evident from the discussion above regarding the statements of witness P-467 and P-471, this allegation is completely untrue. Moreover, the Prosecution made the statement [REDACTED].[48]

40. The statements of P-467 and P-471 provide no information to contradict this. As such, there is no indication whatsoever that the timing of the disclosure of these statements

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45 Statement of witness P-471, Para.56.

46 Defence Request, Para.13(b).

47 Defence Request, Para.31.

48 See for example: the statement of witness P-417 at DAR-OTP-0165-0424, page 0431 Para 29-30; the statement of witness P-446 at DAR-OTP-0169-0808, page 816-818 Paras. 67,70-72; the statement of witness of P-419 at DAR-OTP-0168-0168, page 0171 Paras 14 and page 0172-0173 Para 20.

materially impacted the confirmation process. Chambers of this Court have made similar findings of lack of material impact on the confirmation process in analogous, and perhaps even more serious, circumstances.[49]

41. In any case, even if the Chamber finds that there is a contradiction, the Defence is now in possession of the witness statements, and as already advanced, is perfectly free to call them as witnesses or otherwise utilize the information they provide in the preparation of the Defence case. In the Prosecution's submission, the significant period of a whole year should be sufficient for the Defence to determine whether or not to call these persons as witnesses for the Defence, if necessary.

c) The Prosecution did not fail in its investigative duties.

42. The Defence alleges that witness P-419 was not properly interviewed, and that this is indicative of a systematic failure of the Prosecution's investigations.[50] At the outset, it is far from clear how this attack on the Prosecution's investigative procedures could support the extraordinary remedy sought by the Defence. The Prosecution further submits that P-419, and other witnesses interviewed by the Prosecution were appropriately and comprehensively interviewed. Indeed, witness P-419 was interviewed on two separate occasions with particular emphasis [REDACTED]. The fact that a witness provides no information on a particular issue cannot, in and of itself, be indicative of investigative failure. It may simply indicate a lack of knowledge or recollection on the part of the witness on the particular point at hand.

43. In any event, here, too, the Defence claim fails to support the remedy sought: if the Defence believes that there is some information that this witness can provide, the Defence is perfectly free to explore areas that it feels ought to have been covered, but were not. A further opportunity to explore perceived lacuna will be available to the Defence at trial during cross -examination. Accordingly, even if there is a finding of

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49 ICC-01/09-02/11-728, Para.101.
50 Defence Request, Para 33 (a).

prejudice due to some gaps or omissions in the Prosecution's interview of witness P-419 or any other Prosecution witness, such prejudice is by no means "irreparable".

44. The Defence cites the screening [REDACTED] as one example of how the Prosecution failed in following up potentially exonerating information.[51] However, nothing in the screening note is potentially exculpatory. [REDACTED]. The Defence criticizes the Prosecution for not having asked certain questions. However – the Prosecution points out that this particular document is not a witness interview, but rather a witness screening note. Unlike a full interview –a screening note is merely meant to be a preliminary assessment of the witness's knowledge of the essential elements of the case under investigation as well as his background, to assess whether he should be interviewed further.

45. The Defence also cited another screening note[52] [REDACTED].[53] The screening note does not contain any exonerating information regarding the attack on MGS Haskanita. Again – the Defence's criticism is unfounded. Similarly, the fact that the Prosecution did not interview every single [REDACTED] at MGS Haskanita cannot be considered *per se* a failure of the investigation.

46. The Defence claims that by "failing to disclose exonerating evidence" the Prosecution "deprived the Defence of the opportunity to place that evidence before the PTC" and this "prevented the PTC from knowing, in full, the results of OTP's investigations".[54] This is an entirely unreasonable argument. The confirmation hearing is not meant to be a trial. It is not a stage where the Chamber is obliged to know, in full, the results of OTP investigations. Rather, the role of the Pre-Trial Chamber is to verify if the charges brought by the Prosecution and its supporting materials meet the standard of substantive

[51] Defence Request, Para.33 (c). [REDACTED].[REDACTED].
[52] Defence Request, Para.33 (d).
[53] [REDACTED].
[54] Defence Request, Para.3.

grounds under the Statute. Finally, a trial cannot be terminated simply because some limited information was not disclosed three years prior to its commencement.

d) **The Lifting of Redactions on in statements of witness P-419 & P-446 was not unreasonably delayed and did not prejudice the Defence.**

47. The Defence claims that "withholding telephone numbers [REDACTED] effectively denied the Defence the chance to talk to these individuals".[55] This is an entirely speculative argument. Proceedings cannot be terminated on the basis of a guess that there may have been a better chance of these individuals responding at a certain date. There is not obvious link between the lack of cooperation and the date of disclosure. In any case, it is not the case that the Defence is receiving this information in the midst of trial, or on the eve of trial. The Defence now has these numbers *one year before trial.*

48. The Defence adds that the Prosecution did not telephone [REDACTED] referred to the in the statement of Witness P-419.[56] The Prosecution did not do so since [REDACTED]. [REDACTED]. This lack of utility of calling [REDACTED] is indeed illustrated by the results of the Defence's own efforts in calling these persons. The Defence's lack of success is indicative of the lack of prejudice in the Defence not having access to the numbers sooner.

49. The Defence also claim that delay in disclosing the name of [REDACTED] "may have prejudiced" the Defence because "he appears now to be unwilling to talk to the Defence".[57] Again, there is no obvious link between the lack of cooperation by this individual and the date of disclosure. The Defence claims that "the burden should be on the OTP to prove no prejudice resulted from their failure to fulfil their obligations".[58] The Prosecution submits that while the burden of proof in relation to establishing the elements of this case to the requisite standard lies with the Prosecution, the Defence, as the moving

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55 Defence Request, Para.38.
56 Defence Request, Para. 33 (b).
57 Defence Request, Para.39.
58 Defence Request, Para.39.

party, must provide some indication of prejudice. It cannot be the case that an "egregious violation of human rights" is asked to be established on the basis of mere conjecture. Moreover, the Prosecution submits that it is not in breach of its disclosure obligations. The Prosecution has not missed an assigned disclosure deadline. The Prosecution must stress once more that the Defence is in possession of [REDACTED] number one year before trial.

50. Finally, the Defence claims that the Prosecutor delayed disclosing references to the "the key role played by [REDACTED] in the Cease fire Commission established to handle the reports of ceasefire violations […]".[59] The Defence adds that since [REDACTED] was [REDACTED], the timing of the disclosure has precluded the Defence from interviewing a "key individual". The Defence does not explain how [REDACTED] would be a key witness re the Haskanita attack – merely making generic reference to "relevant issues" and "the relationship between AMIS, the non-signatory movements and the GoS personnel serving on the AMIS bases."[60] The Prosecution reiterates in this context that the information was disclosed within the deadline set by the Chamber. The Prosecution also notes that analogous evidence/witnesses should reasonably be available to provide overview evidence regarding "the relationship between AMIS, the non-signatory movements and the GoS personnel serving on the AMIS bases".

e) Termination is not legally justified in these circumstances.

51. The Defence appears to rely on article 85(3) for its Request for Termination.[61] The Defence does not identify with any specificity the precise grounds upon which it submits that a termination of proceedings is warranted – it merely lists a series of allegations.

52. As noted in the *Kenyatta* case, it is clear from ICC jurisprudence that "not every violation of fair trial rights will justify the imposition of a stay …and that this is an exceptional

59 Defence Request, Para.40.
60 Defence Request, Para 40.
61 Defence Request, Para.25-26.

remedy to be applied as a last resort".[62] The Appeals Chamber has referred to a stay as a "drastic" remedy which "potentially frustrate[es] the objective of the trial of delivering justice in a particular case as well as affecting the broader purposes expressed in the preamble to the Rome Statute".[63] Trial Chamber I in the Lubanga proceedings held that a stay of proceedings should only be ordered if it "would be 'repugnant' to the administration of justice to allow the case to continue."[64]

53. The Prosecution submits that the threshold for termination of proceedings must logically be even higher than that for a temporary stay – since, while a temporary stay can cease to exist once circumstances change, a termination of proceedings is irrevocable.

54. In the *Kenyatta* case, in a dispute regarding the late disclosure of a piece of evidence in similar, if graver circumstances, the Chamber held that:

> "it simply does not consider that they cast sufficient doubt on the integrity of the proceedings or amount to such a gross violation of the accused's rights that it is impossible for a fair trial to take place. The Defence will have adequate opportunity, during the trial, to challenge the credibility of Prosecution witnesses and the strength of its case as a whole".[65]

55. The Prosecution notes in this context that the statements of Witness P-467 and P-471, the information contained in the statement of Witness P-419 that was later un-redacted, and the screenings cited by the Defence do not contain information that changes the contours of this case. No core piece of Prosecution evidence is contradicted by the evidence discussed above. There are no contradictory prior statements by Prosecution witnesses. The evidentiary support for the removal of Captain Bashir has not changed post

[62] ICC-01/09-02/11-728, Para.77.
[63] ICC-01/04-01/06-2582, Para. 55.
[64] ICC-01/04-01/06-2690-Red2, Para. 195.
[65] ICC-01/09-02/11-728, Para. 110. See further Para.97.

confirmation. There has been no marked change in witness line-up. The only development has been the increase in evidence indicating the [REDACTED].[66]

56. Consequently, there is no indication whatsoever that it would be “repugnant” to the administration of justice to allow the case to continue. There no justification to deploy a "drastic" remedy which potentially frustrates the objective of the trial of delivering justice and should only be used as a “last resort” where the relevant information is in the hands of the defence one year prior to trial.

57. Even if the Chamber finds that there has been a breach on the part of the Prosecution when it disclosed the relevant information to the defence on 2 May 2013, the Prosecution notes its previous finding that to "conceive of a stay of proceedings" as an appropriate remedy for any difficulties encountered in accessing information or facilities during trial preparation "would run contrary to the responsibility of trial judges to relieve unfairness as part of the trial process".[67] As noted in the *Mbarushimana* case, not every breach of a suspect's or accused's rights justifies halting a trial.[68]

58. Since the circumstances in the *Kenyatta* case did not meet the threshold required for termination of proceedings, it is unreasonable to claim that the circumstances in this case meet the threshold. The Prosecution submits that in the current circumstances, it is not the case that fair trial has become impossible. The Defence has the information in question, between one and one and a half years prior to trial.

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66 See statement of witness P-486 at DAR-OTP-0181-0204 at page 0220 Para 92 and page 0221 Paras 94-99 – the statement was first time disclosed to the defence on 26 August 2011 through INCRIM package 11; statement of witness P-487 at DAR-OTP-0181-0158 at page 0168 Para 55- the statement was first time disclosed to the defence through Pre-Trial INCRIM package 11 on 26 August 2011.

67 ICC-02/05-03/09-410, Para.79. See further: ICC-01/09-02/11-728, Para.78.

68 ICC-01/04-01/10-264, pages 4-6.

V. Conclusion

59. The Prosecution requests that the Chamber rejects the Defence Request and orders the Defence to desist from the systematic use of overstatement and unsubstantiated allegations of bad faith regarding the fulfillment of the Prosecution's disclosure obligations.

Fatou Bensouda

Prosecutor

Dated this 27th day of September 2013

At The Hague, The Netherlands