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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. UHURU MUIGAI KENYATTA***

Public

Public redacted version of the “Additional Prosecution observations on Mr Kenyatta’s Article 64 application, filed in accordance with order number ICC-01/09-02-11-699”

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Introduction

1. The Prosecution hereby provides its answers to the questions contained in the Chamber's 20 March 2013 order.¹
2. The Defence principally argues that Mr Kenyatta's case should be sent back to the Pre-Trial Chamber because of the failure to disclose Witness 4's affidavit prior to confirmation, the alleged consequences of this failure, and the witness' subsequent recantations. The Defence also obliquely argues that the case should be sent back to the Pre-Trial Chamber because it has somehow changed since the confirmation decision.
3. With respect to the first claim, the parties' submissions reveal broad agreement on the analysis the Chamber should undertake: to determine whether a Pre-Trial Chamber reasonably could have confirmed the charges if apprised of the post-confirmation revelations with respect to Witness 4.² If a reasonable Pre-Trial Chamber could have confirmed the charges without relying on the findings based on Witness 4's evidence, Mr Kenyatta's Article 64 application ("Application") must be denied.
4. To resolve this first question, the Trial Chamber need look no further than the alleged meeting at Nairobi State House on or about 30 December 2007. The Chamber's analysis can begin and end with this event because (i) the Pre-Trial Chamber's factual findings with respect to this meeting were not based upon Witness 4's evidence; and (ii) Mr Kenyatta's alleged role at this meeting is sufficient, in and of itself, for criminal liability to attach. While the confirmation decision contains other findings regarding Mr Kenyatta's alleged role, the findings regarding the 30 December meeting are sufficient

¹ ICC-01/09-02/11-699.

² Compare ICC-01/09-02/11-664-Red2, paras 5-8, 22-24 with ICC-01/09-02/11-T-24-ENG CT, page 5 ("what we need to do . . . is look at the true state of the evidence, without Witness 4 . . . and look at what was actually relied upon by the Pre-Trial Chamber to see whether there is in fact a case that can go forward.").

to dismiss the Application. In the final analysis, an examination of four paragraphs of the confirmation decision³ demonstrates that there is no need for the decision to be referred back to the Pre-Trial Chamber and no need to undertake an unnecessary diversion that would unfairly delay this trial.

5. With respect to the second claim, the sole question is whether the trial will be on the same charges confirmed by the Pre-Trial Chamber. The issue is not whether the Prosecution will present additional evidence at trial to support those charges, or when the Prosecution might have collected its evidence. The only question is whether the charges are the same, and to answer that the Chamber need only compare the charges confirmed by the Pre-Trial Chamber with the Prosecution's pre-trial brief. That comparison demonstrates that there has been no change whatsoever in the charges.
6. Neither question before the Chamber, therefore, requires an inquiry into the Prosecution's investigation either before or after the confirmation hearing. Neither the Statute nor the Rules prohibits the Prosecution from conducting further investigation after confirmation, and neither requires the Prosecution to rely on the same evidence at the confirmation hearing as at trial (a rule which would obliterate the distinction between the two stages of proceedings). The only time that the Appeals Chamber squarely ruled on this issue, it reversed a ruling that the Prosecution could continue its investigation after confirmation only in "exceptional circumstances".⁴ In language directly relevant to this case, the Appeals Chamber stated that:

The Appeals Chamber also is not persuaded by the Pre-Trial Chamber's opinion . . . that the Prosecutor must be prevented from "routinely undertaking additional investigative steps to fill the gaps in the case against Thomas Lubanga Dyilo after the charges have been confirmed so that by the time the trial starts, the evidentiary nature of the case against which Thomas Lubanga Dyilo must prepare has substantially mutated to his detriment." . . . the Statute and Rules of

³ ICC-01/09-02/11-382-Red, paras 333-336 (Pre-Trial Chamber's findings regarding the 30 December 2007 State House meeting).

⁴ *Prosecutor v. Lubanga*, ICC-01/04-01/06-568, para 52.

Procedure and Evidence provide for mechanisms that ensure that the suspect can properly prepare for the trial even if the investigation of the crimes with which he is charged continues beyond the confirmation hearing.⁵

7. A decision in this case that turned on when the Prosecution obtained its trial evidence would intrude on the role of the Prosecution under the Statute,⁶ and would inject the Chamber into an unnecessary inquiry into the mechanics of the Prosecution's investigation. Since the Defence has been provided with disclosure and adequate time to prepare,⁷ the only issue is whether the Defence is facing the same *charges* that were confirmed by the Pre-Trial Chamber. As previously explained, it is.⁸ While the Prosecution has of course answered the Chamber's questions regarding the investigations after confirmation,⁹ the Prosecution respectfully submits that this issue should not form part of the Chamber's analysis of the Application because it does not bear on the relief sought by the Defence.

Confidentiality

8. This document is filed confidentially because it identifies individuals whose names were designated "confidential" by the Pre-Trial Chamber or Defence.

Submissions

A. Response to allegations regarding prosecutorial misconduct.

9. The Prosecution makes the following observations on the Defence allegations of prosecutorial misconduct, which supplement those previously made in writing,¹⁰ and by the Prosecutor at the 11 March 2013 status

⁵ ICC-01/04-01/06-568, para 55.

⁶ The Appeals Chamber has held that "[t]he duty to establish the truth is not limited to the time before the confirmation hearing. Therefore, the Prosecutor must be allowed to continue his investigation beyond the confirmation hearing, if this is necessary in order to establish the truth." ICC-01/04-01/06-568, para 52. Since the Prosecution's principal function under Article 54 is to investigate in order to establish the truth, the presumption should be that all of the Prosecution's investigation is done for this purpose absent a showing to the contrary.

⁷ See ICC-01/09-02/11-677 (substituting 11 April 2013 trial date for provisional date of 9 July 2013).

⁸ See ICC-01/09-02/11-644-Red2, paras 25-30.

⁹ Questions 3, 4 and 6.

¹⁰ ICC-01/09-02/11-664-Red2, paras 31-41.

conference.¹¹ In sum, there is no merit whatsoever to the Defence assertion that the Prosecution deliberately withheld Witness 4's affidavit prior to the confirmation hearing.¹²

10. As an initial matter, the Defence misstates the content of the affidavit. The Defence asserts that "OTP-4 clearly states in the . . . affidavit, that he did not attend the alleged meeting at the Nairobi Members' Club on 3 January 2008" and "admitted that he was not present at the 3 January 2008 meeting".¹³ This is inaccurate. At paragraph 33 of his 28-page asylum affidavit, Witness 4 refers to the alleged Nairobi Club meeting and, in one line, states that he heard about the meeting from a third party. The inference is that Witness 4 did not attend the meeting, which differs from the account in his ICC statements, in which he asserts that he attended the meeting in person. There is no "clear[]" admission of non-attendance, as the Defence claims.

11. The Prosecution has acknowledged that the affidavit, or at least the impeachment material contained therein, ought to have been disclosed, and has taken responsibility for that oversight.¹⁴ The Prosecution emphasises that an oversight is precisely what it was, and *unequivocally* denies that the non-disclosure was deliberate or undertaken in bad faith. To determine what transpired with respect to the affidavit, the Prosecution has conducted a comprehensive review of the document's metadata, and enquired with the lawyers and investigators involved in collecting the document and in

¹¹ ICC-01/09-02/11-T-23-ENG ET, page 5.

¹² See ICC-01/09-02/11-622, paras 32-36, ICC-01/09-02/11-681-Red, para 33, ICC-01/09-02/11-T-24-ENG CT, pages 29, 40-41; *see also* ICC-01/09-02/11-628, paras 18, 20; ICC-01/09-02/11-678-Red. Although the charges have been withdrawn against Mr Muthaura, the Prosecution considers it important to respond to the serious and unfounded allegations of misconduct levelled by his counsel.

¹³ ICC-01/09-02/11-622, para 28 and n .76.

¹⁴ ICC-01/09-02/11-664-Red2, paras 31-41.

Witness 4's interviews.¹⁵ The unambiguous conclusion is that the potential significance of the sentence now at issue was simply missed.

12. From today's perspective, with the focus of the Application on the Nairobi Club meeting, the Defence seeks to cast the oversight as a "systematic failure".¹⁶ This ignores reality. At the time, many other issues were in play with Witness 4, who provided detailed evidence over a wide range of subjects and had significant security concerns. Witness 4's first ICC statement, for example, ran to 345 paragraphs over 64 single-spaced pages.¹⁷ During that interview, the witness provided a series of documents to the Prosecution, which included the affidavit. The interview team had time only to ask general questions about the affidavit and the asylum process, and did not walk the witness through the affidavit line-by-line.¹⁸ It was in this context that a single sentence in a 28-page affidavit originally provided to a third party, which potentially undermines the witness' credibility through an inference, was missed. The oversight was not deliberate.

13. Indeed, the Prosecution's actions with respect to the affidavit are wholly inconsistent with the Defence theory that the Prosecution attempted to improperly "suppress[] evidence".¹⁹ The Prosecution put the affidavit before the Single Judge twice, seeking leave to withhold or redact the document.²⁰ Although the Prosecution's failure to spot the inconsistency in paragraph 33 meant that it did not highlight the issue for the Single Judge, placing the document before the Court (twice) is not consistent with a deliberate attempt to "suppress" evidence. Had the intention been to "hide"

¹⁵ None of the relevant lawyers or investigators recall becoming aware of the critical sentence of paragraph 33 prior to the confirmation hearing.

¹⁶ ICC-01/09-02/11-681-Red, para 29.

¹⁷ KEN-OTP-0043-0002.

¹⁸ See KEN-OTP-0043-0002, paras 311-319.

¹⁹ ICC-01/09-02/11-T-24-ENG CT, page 29.

²⁰ ICC-01/09-02/11-101-Conf-Exp-AnxE4; ICC-01/09-02/11-241-Conf-Exp-AnxA2.

the affidavit, it would not have been placed before the Court. Further, it was the Prosecution that in fact ultimately provided the affidavit to the Defence.

14. The answer is the same with respect to the allegation that the Prosecution “fundamentally misled” the Pre-Trial Chamber in its submissions on Witness 4’s credibility.²¹ Because the inconsistency in Witness 4’s account was missed, it did not form part of the Prosecution’s assessment of his reliability, and was not considered by Prosecution lawyers in their submissions. Far from a deliberate attempt to “mislead”, the Prosecution’s submissions demonstrate that the oversight was simply an innocent error.

B. *Is a Trial Chamber competent to decide retroactively whether the nondisclosure (either as a result of i) bad faith, ii) negligence, or iii) an innocent oversight) affected the fairness, integrity, or validity of the confirmation proceedings? If so, what factors should the Trial Chamber take into account when assessing the impact of the non-disclosure?*

i. The Trial Chamber’s competence.

15. Yes. Articles 61(11), 64(6)(a) and 64(6)(f) of the Statute provide the Trial Chamber with the authority to consider whether the non-disclosure affected the confirmation proceedings to such an extent that referring the confirmation decision to the Pre-Trial Chamber is “necessary” under Article 64(4). As explained below, however, the non-disclosure did not affect the confirmation proceedings to such an extent that a referral is “necessary”.

ii. Factors for the Trial Chamber to take into account.

16. Because “bad faith” is not an issue, the only factor the Trial Chamber need consider is whether the Pre-Trial Chamber could reasonably have confirmed the charges against Mr Kenyatta if Witness 4’s evidence had been discarded.

17. It suffices in this case for the Trial Chamber to take the Defence argument at its highest and assume, for the sake of argument, that the affidavit would

²¹ ICC-01/09-02-11-681-Red, paras 33(d)-(f).

have caused the Pre-Trial Chamber to discard Witness 4's evidence in its entirety. Proceeding on the basis of this charitable assumption, the question is whether the findings in the confirmation decision that are not based on Witness 4's evidence are sufficient for a reasonable Trial Chamber to reach a finding of "substantial grounds to believe". Even under this analysis the Defence's argument fails, because the remaining findings were sufficient for the Pre-Trial Chamber to have confirmed the charges.²²

18. To reach this conclusion, the Trial Chamber need look no further than the alleged 30 December 2007 State House meeting. While the confirmation decision contains additional factual findings regarding Mr Kenyatta's alleged contributions that the Trial Chamber may consider if it wishes,²³ the Application can be resolved using a narrower analysis that focuses solely on the 30 December State House meeting.

19. At the 18 March 2013 status conference, the Defence stated that Witness 4 "was fundamental to each of the three key meetings that underscored the confirmation of charges",²⁴ *i.e.*, the 26 November 2007, 30 December 2007 and 3 January 2008 meetings. This is wrong. Even a cursory review of the confirmation decision demonstrates that the Pre-Trial Chamber did not rely on Witness 4's evidence at all with respect to the 30 December State House meeting.²⁵ Its findings were based upon the evidence of Witnesses 11, 12 and 6.²⁶ The Pre-Trial Chamber found that their evidence "established [the 30 December State House meeting] to the requisite threshold" of "substantial grounds".²⁷ This finding is not affected in any way by the post-confirmation revelations with respect to Witness 4. This is important because the 30

²² See ICC-01/09-02/11-664, paras 23-24.

²³ See ICC-01/09-02/11-664, para 23.

²⁴ ICC-01/09-02/11-T-24-ENG ET, page 39.

²⁵ ICC-01/09-02/11-382, paras 333-336.

²⁶ ICC-01/09-02/11-382, para 333.

²⁷ ICC-01/09-02/11-382, para 333.

December State House meeting is sufficient, by itself, for a reasonable Pre-Trial Chamber to have confirmed the charges against Mr Kenyatta. This is because his actions at this meeting are sufficient, in and of themselves, for criminal liability to attach. At this meeting, Mr Kenyatta allegedly:

- Articulated the plan to retain control by launching retaliatory attacks;²⁸
- Instructed his agents to organise and mobilise Mungiki for the attacks;²⁹ and
- Provided his agents with cash to mobilise men and purchase materiel used in the attacks.³⁰

20. The Pre-Trial Chamber found that these actions, among others, led to the Nakuru and Naivasha attacks being carried out.³¹ Mr Kenyatta's alleged role at the 30 December State House meeting is therefore sufficient for criminal liability to attach. Thus, the Trial Chamber can dismiss the Application without delving into the Pre-Trial Chamber's other findings regarding his alleged contributions. For these reasons, the "integrity" and "validity" of the confirmation decision remain sound even if one takes the Defence argument at its highest and discards Witness 4's evidence entirely. There is nothing unfair about Mr Kenyatta standing trial when the unaffected evidence is sufficient to satisfy the requisite "substantial grounds" threshold.

C. *Is a Trial Chamber competent to order the Prosecution to seek amendment of, or withdraw, charges or to stay or terminate trial proceedings in case of a finding of deficiencies in the confirmation process?*

i. Competence to order an amendment of charges.

21. The Court's legal framework does not permit the Trial Chamber to "order the Prosecution to seek amendment of [its] charges", which would violate

²⁸ ICC-01/09-02/11-382, paras 334-335; *see also* ICC-01/09-02/11-596-Conf-AnxD-Red-Corr, para 27.

²⁹ ICC-01/09-02/11-382, paras 334-335; *see also* ICC-01/09-02/11-596-Conf-AnxD-Red-Corr, para 27.

³⁰ ICC-01/09-02/11-382, paras 334-335; *see also* ICC-01/09-02/11-596-Conf-AnxD-Red-Corr, para 27.

³¹ ICC-01/09-02/11-382, para 400, n. 776; para 406, nn. 786, 787; para 408, n. 790.

the separation of powers enshrined in the Statute. Under Articles 61(1) and 61(3) and Rule 121(3), the Prosecution is the organ of the Court responsible for formulating the charges.³² Article 61(7) demonstrates that the discretion to seek an amendment of the charges lies with the Prosecution. This article provides the Pre-Trial Chamber with three options when considering the Prosecution's charges: (i) "[c]onfirm those charges";³³ (ii) "decline to confirm";³⁴ or (iii) "*request the Prosecutor to consider . . . [a]mending a charge*".³⁵ The Pre-Trial Chamber does not have the authority to amend the charges itself, or to order the Prosecution to do so.³⁶ The same is true of the Trial Chamber, which has no greater authority over the formulation of the charges than the Pre-Trial Chamber. In any event, there is no need to order an amendment of the charges here.

22. *First*, the mode of liability pled with respect to Mr Kenyatta remains viable despite the withdrawal of Mr Muthaura's charges.

23. During the 18 March 2013 status conference, the Bench queried the continued viability of the alleged "common plan" articulated in the confirmation decision in light of the Pre-Trial Chamber's finding that Mr Muthaura was a member of the common plan,³⁷ and made an "essential contribution to the commission of the crimes".³⁸ On this issue, it is important to distinguish between two separate elements of indirect co-perpetrator

³² *Prosecutor v. Lubanga*, ICC-01/04-01/06-2205, para 94 ("it is the Prosecutor who, pursuant to article 54 (1) of the Statute, is tasked with the investigation of crimes under the jurisdiction of the Court and who, pursuant to article 61 (1) and (3) of the Statute, proffers charges against suspects.").

³³ Article 61(7)(a).

³⁴ Article 61(7)(b).

³⁵ Article 61(7)(c) (emphasis added).

³⁶ *Prosecutor v. Lubanga*, ICC-01/04-01/06-2069-Anx1, para 45 ("Only the Prosecutor is entitled to apply to amend, add or substitute charges and in each instance the Pre-Trial Chamber alone has jurisdiction to allow or refuse the application, and then only before the commencement of the trial."); *Prosecutor v. Bemba*, ICC-01/05-01/08-388, para 39 ("the Chamber makes it clear that by way of adjourning the hearing it does not purport to impinge upon the Prosecutor's functions as regards the formulation of the appropriate charges or to advise the Prosecutor on how best to prepare the [DCC].").

³⁷ ICC-01/09-02/11-382-Red, para 400.

³⁸ ICC-01/09-02/11-382-Red, para 401.

liability: (i) the *existence* of a common plan between two or more persons, including the accused; and (ii) the accused's *contribution* to the plan.³⁹

24. To secure a conviction against Mr Kenyatta under an indirect co-perpetration theory, the Prosecution must prove that he was a member of a common plan and that he made a contribution to it, whether "essential", "substantial" or otherwise.⁴⁰ However, even under the Pre-Trial Chamber's "essential contribution" standard, the Prosecution need not prove the contributions of *other* alleged members of the common plan.⁴¹ If that were the case, trials at this Court would focus as much on individuals outside the courtroom as the accused himself, and could also lead to absurd results – requiring a Chamber to acquit *all* alleged co-perpetrators if there was insufficient evidence regarding the contribution of *one*.

25. There is no merit to the Defence assertion that the Pre-Trial Chamber limited the membership of the common plan to the three individuals emphasised in one paragraph of the confirmation decision.⁴² The "common plan" section of the decision refers to "[t]he common plan between Mr. Muthaura, Mr. Kenyatta and *others* . . .".⁴³ The Pre-Trial Chamber's use of the plural "others", and its mention of several mid-level perpetrators in the decision, demonstrates that it did not view the common plan as involving only three people.⁴⁴ Thus, even under the Pre-Trial Chamber's conception of the common plan – which is not binding on the Trial Chamber – the withdrawal of Mr Muthaura's charges does not alter the common plan,

³⁹ For a fuller explanation of the Prosecution's views on the elements of indirect co-perpetration, see ICC-01/09-02/11-444, paras 8-23.

⁴⁰ See ICC-01/09-02/11-444, paras 9-13.

⁴¹ See ICC-01/09-02/11-382-Red, para 297 (Pre-Trial Chamber's views of the elements of indirect co-perpetration under Article 25(3)(a)).

⁴² ICC-01/09-02/11-T-24-ENG CT, pages 4-5. The individuals named in the paragraph of the confirmation decision cited by the Defence (para 400) are Messrs Muthaura, Kenyatta and Njenga.

⁴³ ICC-01/09-02/11-382-Red, para 399 (emphasis added).

⁴⁴ See, e.g., ICC-01/09-02/11-382-Red, paras 302-03, 323, 367 ([REDACTED]); 387-93 ([REDACTED]); 334, 386, 393 ([REDACTED]); 147, 155, 175 ([REDACTED]); 147 ([REDACTED]).

which was always contingent on the contributions of multiple individuals. In sum, the insufficiency of evidence with respect to Mr Muthaura alters neither the conception of the plan, nor the Prosecution's ability to prove the plan's existence, nor Mr Kenyatta's contribution to it. Indirect co-perpetration therefore remains a viable mode of liability.

26. *Second*, even if the Trial Chamber were to conclude that indirect co-perpetration is no longer a viable mode of liability, Regulation 55 permits different modes of liability to be considered at trial without an amendment to the charges. The Appeals Chamber has held that Regulation 55 permits the Trial Chamber to modify "legal qualifications confirmed in the pre-trial phase that turn out to be incorrect",⁴⁵ and to do so "without a formal amendment to the charges".⁴⁶ Of significance to this case, the Appeals Chamber held yesterday that Regulation 55 enables a Trial Chamber "to re-characterise the facts so that the role of [the accused] changes from . . . that of an essential contribution to that of a significant but not necessarily essential contribution".⁴⁷ Regulation 55 thus ensures that Trial Chambers are not constrained to "the precise characterisations established by the Pre-Trial Chamber at a much earlier stage of the proceedings and with a necessarily more restricted view of the case as a whole".⁴⁸

27. In the present situation, the Chamber would give the parties notice under Regulation 55(2) that Articles 25(3)(b), (c) and (d) may be considered as possible modes of liability for Mr Kenyatta.⁴⁹ The Chamber could act *proprio motu*,⁵⁰ or by granting the Prosecution's 3 July 2012 Regulation 55(2)

⁴⁵ *Prosecutor v. Katanga*, ICC-01/04-01/07-3363, para 22; *see also* ICC-01/04-01/06-2205, para 77.

⁴⁶ ICC-01/04-01/06-2205, para 84.

⁴⁷ ICC-01/04-01/07-3363, para 57 (quoting from Defence arguments) (internal quotation marks omitted).

⁴⁸ ICC-01/04-01/07-3363, para 57.

⁴⁹ The reasons why Articles 25(3)(b), (c) and (d) are appropriate modes of liability in this case are explained in paras 29-35 of filing ICC-01/09-02/11-444 and paras 130-133 of filing ICC-01/09-02/11-596-Conf-AnxD-Red-Corr.

⁵⁰ ICC-01/04-01/07-3363, para 104.

application, which seeks this relief.⁵¹ Such an approach would be consistent with the *Lubanga* Trial Chamber's decision to give notice under Regulation 55(2) (before trial began) that it might depart from the Pre-Trial Chamber's legal characterisation of the armed conflict in that case.⁵² This approach would cure any perceived problems with an indirect co-perpetration theory without the delay involved in a formal amendment of the charges.⁵³ If the Chamber wished the additional modes of liability to be memorialised in the Updated DCC, the Prosecution would have no objection.

ii. Competence to order the withdrawal of charges.

28. The Court's legal framework does not provide a Trial Chamber with a legal basis to order the Prosecution to withdraw the charges. Such an order would violate the separation of powers enshrined in the Court's legal framework, under which the Prosecution is designated as the charging authority.⁵⁴ If it were otherwise, Trial Chambers would effectively have a veto power over the Prosecution's charging decisions as well as any parts of a Pre-Trial Chamber's confirmation decision with which the Trial Chamber disagreed. It may also create problems regarding the appearance of partiality, because the Trial Chamber may be seen to be exercising prosecutorial discretion by ordering the withdrawal of charges. That is not the system embodied in the Rome Statute. This conclusion is demonstrated by a review of Articles 61(4) and 61(9), which confer the authority to withdraw charges upon the Prosecutor (albeit with judicial oversight), and which would be deprived of their meaning if the Trial Chamber were able to order the Prosecution to withdraw charges.

⁵¹ ICC-01/09-02/11-444, para 49.

⁵² *Prosecutor v. Lubanga*, ICC-01/04-01/06-1084, paras 48-49.

⁵³ There would be no question of insufficient notice because the Defence has been aware since June 2012 of a possible recharacterisation of the mode of liability. See ICC-01/09-02/11-T-18-ENG CT, pages 33-37. The Prosecution's Regulation 55(2) application was filed on 3 July 2012. See ICC-01/09-02/11-444. The Prosecution's pre-trial brief gave further notice of the possibility of recharacterisation under Articles 25(b), (c) and (d). See ICC-01/09-02/11-596-Conf-AnxD-Red-Corr, paras 130-133.

⁵⁴ See Articles 61(1) and 61(3) and Rules 121(3); ICC-01/04-01/06-2205, para 94.

29. In any event, withdrawal of charges is not at issue here. The Application requests the Chamber to “[r]efer the preliminary issue of the validity of the Confirmation Decision back to the PTC”.⁵⁵ At the 18 March 2013 status conference, the Defence asserted that the Chamber “could be invited” to request the Prosecution to consider withdrawing the charges,⁵⁶ but did not request an order to withdraw the charges. When pressed on the specific relief sought, Defence Counsel demurred and suggested that the most the Trial Chamber could do is order the Prosecution “to consider its position”.⁵⁷

iii. Competence to stay or terminate trial proceedings.

30. While the Trial Chamber has the authority to stay proceedings in certain prescribed circumstances, it would be an error to grant such relief here. The Appeals Chamber has set “a high threshold for a Trial Chamber to impose a stay of proceedings, requiring that it be ‘impossible to piece together the constituent elements of a fair trial’”.⁵⁸ If a “lesser remedy” is available,⁵⁹ the “drastic” and “exceptional remedy” of a stay may not be granted.⁶⁰ A stay “is to be reserved strictly for those cases that necessitate”,⁶¹ “when the specific circumstances of the case render a fair trial impossible”,⁶² and where there are no other options open to cure the unfairness at issue.⁶³

31. This case does not come close to meeting the “high threshold” required for a stay. The developments with respect to Witness 4 or the withdrawal of charges against Mr Muthaura do not render it “impossible to piece together the constituent elements of a fair trial”,⁶⁴ and the Defence has not suggested

⁵⁵ ICC-01/09-02/11-622, para 42. The request to “[v]acate the day set for trial” is moot in light of decision ICC-01/09-02/11-677.

⁵⁶ ICC-01/09-02/11-T-24-ENG ET, pages 12-13.

⁵⁷ ICC-01/09-02/11-T-24-ENG ET, page 36.

⁵⁸ *Prosecutor v. Lubanga*, ICC-01/04-01/06-2582 OA 18, para 55.

⁵⁹ *Prosecutor v. Lubanga*, ICC-01/04-01/06-2690-Red2, para 168.

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

⁶¹ ICC-01/04-01/06-2690-Red2, para 168.

⁶² *Prosecutor v. Banda and Jerbo*, ICC-02/05-03/09-410, para 78.

⁶³ ICC-01/04-01/06-2582 OA 18, para 55; ICC-01/04-01/06-2690-Red2, para 168.

⁶⁴ ICC-01/04-01/06-2582 OA 18, para 55.

otherwise. As previously explained,⁶⁵ the withdrawal of Mr Muthaura's charges does not create a legal impediment to Mr Kenyatta's trial. And even if there were an impediment, there are "lesser remedies" available – referring the confirmation decision to the Pre-Trial Chamber for reconsideration (the remedy the Defence seeks),⁶⁶ or using Regulation 55 to cure any perceived problem with the charges. The same analysis applies to any suggestion of "terminat[ing]" trial proceedings, which is the functional equivalent of imposing a permanent stay of proceedings.

D. *Did the Prosecution, in addition to the evidence presented to the Pre-Trial Chamber, have other evidence to support the charges against Mr Kenyatta at the time of the confirmation hearing? What proportion of the prosecution evidence relating to Mr Kenyatta's criminal responsibility contemplated for use at trial was obtained post-confirmation?*

32. As explained above, the Prosecution respectfully submits that the issues addressed in this question – as well as questions 4 and 6 – are extraneous to the Application and should not form part of the Chamber's analysis when ruling on the Application. Nevertheless, the Prosecution provides the following answers in compliance with the Chamber's order.

i. Additional evidence at the confirmation stage.

33. The Prosecution submitted to the Pre-Trial Chamber the core of the incriminatory evidence in its possession at the time of the confirmation hearing. That said, the Prosecution had additional evidence to support the charges against Mr Kenyatta, which it chose not to rely upon. For example, the Prosecution had a statement of former Mungiki member [REDACTED] ("Witness 18"), who was also a Muthaura witness at the confirmation stage.⁶⁷ The Prosecution opted not to rely upon Witness 18's evidence at confirmation due to concerns about the completeness of his account and his

⁶⁵ ICC-01/09-02/11-692-Red, paras 4-11.

⁶⁶ ICC-01/09-02/11-622, para 42; *see also* ICC-01/09-02/11-T-24-ENG CT, page 4.

⁶⁷ *See* ICC-01/09-02/11-628-Red, para 22.

credibility.⁶⁸ Similarly, the Prosecution opted not to rely at confirmation on certain materials from the Commission of Inquiry into the Post-Election Violence and the Kenya National Commission on Human Rights, which spoke, among other matters, to the crimes charged and the widespread and systematic nature of the attacks.

ii. Proportion of evidence obtained post-confirmation.

34. All the evidence the Prosecution intends to offer at trial, as detailed in its witness and evidence lists, relates to the criminal responsibility of the accused. For a breakdown of the evidence obtained post-confirmation, the Prosecution refers the Chamber to paragraphs 27-30 of the 8 March 2013 observations,⁶⁹ as well as the information contained in Annex B thereto.⁷⁰

E. *What, if any, criteria or pre-conditions need to be met for the Prosecution to investigate post-confirmation? Were the post-confirmation investigations in the present case proportional to the reasons given by the Prosecution?*

35. As explained above, these issues are extraneous to the Application. Nevertheless, the Prosecution submits that no “criteria or pre-conditions need to be met for the Prosecution to investigate post-confirmation”.⁷¹

36. As explained above, nothing in the Court’s statutory framework limits the Prosecution’s ability to conduct investigative activities post-confirmation, and the relevant statutory provisions suggest the opposite. As the Appeals Chamber noted in *Lubanga*, Article 61(9) of the Statute permits the charges to be amended after confirmation, which “indicates that the investigation does not have to stop before the confirmation hearing”.⁷² Indeed, the Appeals Chamber rejected Pre-Trial Chamber I’s suggestion that the

⁶⁸ These concerns proved to be well-founded; in a post-confirmation interview with the Prosecution, Witness 18 admitted providing false evidence at the confirmation stage in his Defence statement.

⁶⁹ ICC-01/09-02/11-683-Red.

⁷⁰ ICC-01/09-02/11-683-AnxB.

⁷¹ ICC-01/09-02/11-699, para 4(4).

⁷² ICC-01/04-01/06-568, para 52.

Prosecution could conduct its investigations post-confirmation hearing only in “exceptional circumstances” that needed to be “justif[ied]”.⁷³ The Appeals Chamber restated this position in *Mbarushimana*, when it noted, in *dictum*, that “the investigation should largely be completed at the stage of the confirmation of charges hearing”, a statement that presupposes the permissibility of post-confirmation investigations.⁷⁴

37. In the Prosecution’s view, the recent decision of the Single Judge on the amendment of the charges misinterprets the relevant law.⁷⁵ There is no basis in the Court’s legal texts or the Appeals Chamber’s jurisprudence to support the Single Judge’s suggestion that post-confirmation investigations are permitted only “when there is a genuine need to pursue certain investigative activities crucial for her case”.⁷⁶ Nor is there support for the notion that post-confirmation investigations “cannot be the rule, but rather the exception, and should be justified”.⁷⁷ In fact, this conclusion of the Single Judge is directly contrary to the holding of the Appeals Chamber in its *Lubanga* judgment. Article 54(1) requires the Prosecution’s investigations to be aimed at “establish[ing] the truth”, and actions undertaken to establish the truth, whenever they arise, must be the “rule”, not the “exception”.⁷⁸ In other words, requiring that the Prosecution’s investigations be aimed at determining the truth, whether they occur before or after confirmation, is a

⁷³ ICC-01/04-01/06-568, paras 2, 49-53 (“Prosecutor does not need to seek permission from the Pre-Trial Chamber to continue his investigation”).

⁷⁴ *Prosecutor v. Mbarushimana*, ICC-01/04-01/10-514, para 44. Consistent with its holding in *Lubanga*, the Appeals Chamber did not impose any restrictions on the Prosecution’s ability to conduct investigative activity post-confirmation.

⁷⁵ ICC-01/09-02/11-700-Corr, paras 33-41.

⁷⁶ ICC-01/09-02/11-700-Corr, para 35.

⁷⁷ ICC-01/09-02/11-700-Corr, para 35.

⁷⁸ Similarly problematic is the suggestion that post-confirmation investigations should be related only to “essential pieces of evidence” (ICC-01/09-02/11-700-Corr, para 37). The concept of “crucial investigative activities” and “essential pieces of evidence” conflates investigative activities with their end product – evidence collected. Prior to undertaking an investigative activity, it is difficult, if not impossible, to determine what type of evidence (if any) will be obtained, much less to determine whether the evidence will be of such quality as to be “essential”. It is therefore impossible to determine which investigative activities are “crucial” in the sense articulated by the Single Judge, prior to completing them. The proposed standard is thus unhelpful.

requirement that is already contained within the Statute and has always guided the Prosecution in everything it does. The Appeals Chamber has recognised this, explaining that while it would “ideally” be “desirable” for investigations to be completed before confirmation, “to rule out further investigation after the confirmation hearing may deprive the Court of significant and relevant evidence, including potentially exonerating evidence”.⁷⁹ It should be presumed that the Prosecution’s investigations are aimed at uncovering the truth, absent a contrary showing.

38. In sum, the law of this Court imposes no “criteria or pre-conditions” for post-confirmation investigations, and no “proportionality” requirement. That said, the Prosecution was amply justified in tailoring its investigations to the unique challenges of the Kenya cases.⁸⁰ In particular, the Prosecution’s investigation accounted for the limited cooperation from the Government of Kenya, the need to limit the exposure of witnesses in a situation involving unprecedented levels of tampering and anti-witness activity, and the sustained efforts required to penetrate a closed criminal organisation such as the Mungiki. It also took account of the very real risk that confirmation-stage witnesses would be interfered with and would ultimately not testify at trial. The Prosecution balanced its Article 68(1) obligations to safeguard witnesses with the need to avoid overburdening the Court’s protection system with demands for long-term protection of dozens of witnesses (and their families) before it was absolutely necessary to do so. Indeed, the Single Judge found that the Prosecution provided “reasonable justification for the continuation of [its] investigation subsequent to the confirmation hearing”.⁸¹

F. *With reference to para. 28 of the Prosecution’s written submissions of 8 March 2013, could the Prosecution clarify how many witnesses retracted their willingness*

⁷⁹ ICC-01/04-01/06-568, para 54.

⁸⁰ For a comprehensive explanation of the Prosecution’s investigation, *see* ICC-01/09-02/11-683-Red, paras 22-26 and ICC-01/09-02/11-683-Conf-Exp-AnxA; *see also* ICC-01/09-02/11-633-Conf-AnxA.

⁸¹ ICC-01/09-02/11-700-Corr, para 38.

to testify after confirmation, and at what moment the Prosecution learned that this was the case? What gave the Prosecution reason to believe, prior to confirmation, that these witnesses were in fact willing to testify?

39. As explained above, these issues are extraneous to the Application. Three of the 12 Prosecution witnesses relied upon at confirmation retracted their willingness to testify after the confirmation hearing: Witnesses 2, 9 and 10. Their provision of formal statements to the Prosecution prior to confirmation indicated their willingness to testify.
40. **Witness 2:** When the Prosecution contacted Witness 2 on 3 November 2012 to confirm his availability to testify, he said he was rethinking his decision. The Prosecution made several attempts to persuade Witness 2 to testify, either as a Prosecution or as a Court witness, but on 20 November 2012, he informed the Prosecution that his decision not to testify was final.
41. **Witness 9:** On 17 August 2012, Witness 9 informed the Prosecution that he was unsure whether he could continue to cooperate with the Prosecution due to concerns about “retaliation against his family” from the “accused persons”. On 28 August 2012, he indicated that he would testify only if he could do so “completely anonymously” because he did “not want to put anyone’s life at risk”. He reaffirmed this position on 15 September 2012.
42. **Witness 10:** During a 2 February 2012 psycho-social assessment, Witness 10 stated that “he did not feel like moving towards testimony”. In a series of contacts between April and June 2012, Witness 10 and his lawyer informed the Prosecution that the witness had received harassing phone calls, had “cold feet”, and wanted to withdraw his cooperation. When Prosecution representatives met with Witness 10 on 15 August 2012 to discuss his concerns, he stated that he “did not want to testify” for health and security reasons. Witness 10 reaffirmed this position on 10 October 2012.



Fatou Bensouda,
Prosecutor

Dated this 28th of March 2013
At The Hague, The Netherlands