

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11

Date: 24 January 2014

TRIAL CHAMBER V(B)

Before: Judge Kuniko Ozaki, Presiding
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 13 January 2014 'Defence Response to the Prosecution's "Notification of the removal of a witness from the Prosecution's witness list and application for an adjournment of the provisional trial date"' (ICC-01/09-02/11-878-Conf)

Source: Defence for Uhuru Muigai Kenyatta

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

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I. INTRODUCTION

1. The Defence for Uhuru Muigai Kenyatta (“Defence”) hereby submits its response to the Prosecution’s “Notification of the removal of a witness from the Prosecution’s witness list and application for an adjournment of the provisional trial date” (“Adjournment Request”).¹
2. This response is filed confidentially as it contains information that relates to protected witnesses and ongoing Defence investigations. A public redacted version will be filed in due course. Annexes A to G are filed confidentially.
3. The Prosecution has persistently failed to conduct necessary and timely investigations into the veracity of P-0012’s account pursuant to its obligation under Article 54(1)(a) of the Statute, notwithstanding frequent requests from the Defence to inquire into the reliability of the evidence upon which it sought to rely.² For the first time, the Prosecution has conceded publicly that “the case against Mr Kenyatta does not satisfy the high evidentiary standards required at trial,”³ following its rejection of P-0012’s false accounts concerning allegations “at the heart of the Prosecution’s evidence.”⁴
4. The Prosecution’s admitted failure of its ability to satisfy the high evidential threshold required at trial has been seriously compounded by P-0011’s wholesale rejection of the Prosecution’s case against Mr Kenyatta on 1 November 2013,⁵ and the Prosecution’s earlier inevitable

¹ ICC-01/09-02/11-875.

² See para. 22 below.

³ Public statement of the Prosecutor issued on 19 December 2013, http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-19-12-2013.aspx.

⁴ ICC-01/09-02/11-875, para. 15.

⁵ [REDACTED].

decision to abandon P-0004 as a Prosecution witness,⁶ given the inherent contradictory nature of his evidence, the fact that he lied in interview,⁷ and the Prosecution's failure to disclose an exculpatory affidavit to the Defence.⁸ Crucially, the three evidential sources upon which this case was confirmed against Mr Kenyatta⁹ are no longer relied upon¹⁰ or willing to be relied upon.¹¹ Consistent Defence warnings about the unreliability of these sources have gone unheeded.¹²

5. In circumstances where (i) the Defence requested reconsideration of the confirmation decision by the Pre-Trial Chamber in order to avoid a serious miscarriage of justice, which was denied,¹³ and (ii) the total time expended on Prosecution investigations which has now exceeded four years,¹⁴ the Defence submits that no further adjournment to facilitate additional Prosecution investigations should be permitted at this stage.

⁶ The Prosecution chose not to include P-0004 on its first witness list issued on 9 January 2013, ICC-01/09-02/11-596-Conf-AnxA-Red.

⁷ P-0004 admitted in his 22-25 May 2012 interview that he had lied about his attendance at an alleged meeting at Nairobi State House on 26 November 2007 with, *inter alia*, the Accused and Mungiki members ("26 November meeting"), KEN-OTP-0067-0604, paras 10-13. In the same interview, P-0004 admitted that he had lied about his attendance at an alleged meeting at the Yaya Centre, Nairobi on 17 November 2007 with, *inter alia*, the Accused and Mungiki members, KEN-OTP-0067-0604, paras 7-9.

⁸ The affidavit demonstrated that P-0004 had lied about his attendance at an alleged meeting at the Nairobi Members' Club on 3 January 2008 with, *inter alia*, the Accused and Mungiki members ("3 January meeting") KEN-OTP-0043-0083 at 0096, para. 33. The Defence repeatedly submitted oral and written arguments concerning the reliability and consistency of the evidence of P-0004: ICC-01/09-02/11-T-10-ENG, pp. 21-25; ICC-01/09-02/11-372, paras 26-32; ICC-01/09-02/11-384, paras 27-29; ICC-01/09-02/11-452, paras 21-25; ICC-01/09-02/11-622, paras 22-41; ICC-01/09-02/11-707-Conf-Corr, paras 20-24, 29-34.

⁹ In Pre-Trial Chamber II's "Decision on the Confirmation of the Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute," see: (a) paras 311-332 with respect to the centrality of the evidence of P-0004 and, to a lesser extent, P-0011 and P-0012 to the 26 November meeting allegation; (b) paras 333-340 with respect to the centrality of the evidence of P-0011 and P-0012 concerning an alleged meeting at Nairobi State House on 30 December 2007 between, *inter alia*, the Accused and Mungiki members; (c) paras 341-359 with respect to the centrality of the evidence of P-0004 to the 3 January meeting allegation; (d) [REDACTED]; and (e) paras 384-397, in which P-0004, P-0011 and P-0012 are relied upon exclusively in support of the Pre-Trial Chamber's explanation of Mr Kenyatta's supposed role in the events leading to the commission of the crimes in or around Nakuru and Naivasha; ICC-01/09-02/11-382-Conf.

¹⁰ P-0004 and P-0012.

¹¹ P-0011.

¹² See para. 22 below.

¹³ ICC-01/09-02/11-728, p. 56.

¹⁴ The Prosecution's initial "Request for authorization of an investigation pursuant to Article 15" was filed on 26 November 2009, ICC-01/09-3.

To allow any further investigation would be antithetical to the fair trial rights of Mr Kenyatta, and inconsistent with the jurisprudence of Trial Chamber V(B) (“Chamber”) regarding the appropriate scope of post-confirmation investigations and the need to proceed in accordance with the interests of justice and expedition. The Defence respectfully requests that the Chamber deny the Adjournment Request and terminate the proceedings against Mr Kenyatta.

II. PROCEDURAL HISTORY

6. On 9 July 2012, the Chamber set the date for the commencement of trial as 11 April 2013.¹⁵
7. On 7 March 2013, the Chamber issued its “Order concerning the start date of trial,” in which it vacated the trial commencement date of 11 April 2013 and provisionally set the new date for start of trial as 9 July 2013.¹⁶ On 18 March 2013, the Chamber, Her Honour Judge Osaki partially dissenting,¹⁷ granted permission to the Prosecution to withdraw the charges against Mr Muthaura.¹⁸ His Honour Judge Eboe Osuji issued a concurring separate opinion.¹⁹
8. On 26 April 2013, the Chamber issued its “Decision on defence application pursuant to Article 64(4) and related requests” (“Article 64(4) Decision”).²⁰ Their Honours Judge Osaki,²¹ Judge Van den

¹⁵ ICC-01/09-02/11-451, para. 25.

¹⁶ ICC-01/09-02/11-677. See ICC-01/09-02/11-677, para. 10 in which the Chamber noted that sufficient time was required for the resolution of serious issues, including the impact of delayed disclosure by the Prosecution on the Defence’s ability to prepare for trial.

¹⁷ ICC-01/09-02/11-698, pp. 1-5.

¹⁸ ICC-01/09-02/11-696.

¹⁹ ICC-01/09-02/11-698, pp. 6-19.

²⁰ ICC-01/09-02/11-728.

²¹ ICC-01/09-02/11-728-Anx1.

Wyngaert²² and Judge Eboe-Osuji²³ each issued separate opinions. On 20 June 2013, the Chamber vacated the 9 July 2013 trial date, and set the trial commencement date as 12 November 2013.²⁴

9. On 31 October 2013, the Chamber vacated the 12 November 2013 trial date, setting the trial commencement date as 5 February 2014.²⁵
10. On 20 December 2013, the Prosecution filed the Adjournment Request.²⁶

III. LAW

(A) Termination of Proceedings

11. In accordance with the “Decision on the withdrawal of charges against Mr Muthaura” (“Muthaura Withdrawal Decision”), Her Honour Judge Ozaki dissenting, the discretion to grant the withdrawal of charges against an accused following a request by the Prosecution and to order the termination of the proceedings lies with the Chamber.²⁷ In such a situation, a Trial Chamber acts “pursuant to Article 64(2) of the Statute,” which states that “[t]he Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses.”²⁸
12. In Her Honour Judge Ozaki’s partial dissent from the Majority in the Muthaura Withdrawal Decision, holding that the authorisation of the

²² ICC-01/09-02/11-728-Anx2.

²³ ICC-01/09-02/11-728-Conf-Anx3.

²⁴ ICC-01/09-02/11-763. See para 31 in which The Chamber noted that the Prosecution’s failure to disclose significant volumes of evidence until the very last moment, coupled with requests for “delayed disclosure in respect of such a significant number of its witnesses,” resulted in the Defence not having been afforded sufficient time to prepare its case.

²⁵ ICC-01/09-02/11-847.

²⁶ ICC-01/09-02/11-875.

²⁷ ICC-01/09-02/11-696, para. 11 and disposition.

²⁸ ICC-01/09-02/11-696, para. 11.

withdrawal of the charges “remains in the sole discretion of the Prosecutor,”²⁹ the Learned Judge held that, in the circumstances, (a) she “would have terminated the proceedings without granting leave”;³⁰ and (b) “the powers conferred on the Chamber, in Articles 64(2) and 61(11) of the Statute and Rule 134(1) of the Rules [...] extend to ordering the formal discontinuance of the case and issuing any related orders.”³¹

13. It is undisputed that pursuant to Article 64(2) of the Statute, the Chamber has the power to order the termination of the proceedings *proprio motu* or at the request of the Defence.

(B) Post-Confirmation Investigations

14. Article 54 of the Statute governs the Prosecution’s investigative duties and powers. Principally, the Prosecution is under an ongoing obligation to investigate incriminating and exonerating circumstances equally, including the reliability of evidence in its possession.³² Pursuant to Article 67(2) of the Statute, this duty includes the investigation of evidence that may affect the credibility of Prosecution evidence.
15. The Chamber has previously noted that the Prosecution does not enjoy an unlimited prerogative to continue investigating the same facts and circumstances after confirmation of the charges.³³ In the Article 64(4) Decision, the Chamber ruled, by Majority, that, under the framework of the Statute, the Prosecution is expected to have largely completed its investigation prior to the confirmation hearing,³⁴ and “should not

²⁹ ICC-01/09-02/11-698, para. 3.

³⁰ ICC-01/09-02/11-698, para. 1.

³¹ ICC-01/09-02/11-698, para. 3.

³² Article 54(1)(a). See also ICC-01/09-02/11-728-Anx2, para. 4.

³³ ICC-01/09-02/11-728, para. 119.

³⁴ ICC-01/09-02/11-728, para. 119.

continue investigating post-confirmation for the purpose of collecting evidence which it could reasonably have been expected to have collected prior to confirmation.”³⁵ In her Concurring Opinion, Her Honour Judge Van den Wyngaert noted that failure properly to investigate the case against an accused prior to confirmation in accordance with Article 54(1)(a) naturally violates the Prosecution’s obligation under Article 54(1)(c) of the Statute to fully respect the rights of persons arising under the Statute.³⁶

16. The Chamber suggested that post-confirmation investigation *may* be appropriate in circumstances where the evidence *could not with reasonable diligence* have been discovered or obtained prior to confirmation, or where evidence that was available prior to confirmation, *unexpectedly and through no fault of the Prosecution*, becomes unavailable for use at trial.³⁷
17. In his Concurring Separate Opinion, His Honour Judge Eboe-Osuji observed that “prejudice to the accused may be occasioned where an overwhelming tranche of the fruits of late prosecutorial investigation is dumped upon the Defence. [...] And the limitation on the Prosecutor’s ability to use the new material is self-evidently engaged, if provision of more time to the Defence is neither reasonably possible nor in the interest of justice.”³⁸ These more lenient suggested parameters presuppose that the evidence has already been obtained and are therefore not applicable in these circumstances.

³⁵ ICC-01/09-02/11-728, para. 121.

³⁶ ICC-01/09-02/11-728-Anx2, para. 5.

³⁷ ICC-01/09-02/11-728, para. 120.

³⁸ ICC-01/09-02/11-728-Anx3, para. 100.

IV. SUBMISSIONS

(A) The Prosecution's Persistent Failure to Investigate the Veracity and Reliability of P-0012's Evidence Renders Further Investigation at this Late Stage Impermissible

18. P-0012 provided the last remaining central account relied upon by the Prosecution in its case against the Accused. This witness claimed he was an eyewitness attendee of a meeting he alleged Mr Kenyatta attended at Nairobi State House on 30 December 2007,³⁹ the day of the announcement of the Kenyan presidential election results,⁴⁰ where the common plan for retaliatory post-election violence was supposedly formed. This meeting was alleged to have been with members of the Mungiki and other individuals from the "Mount Kenya Group"⁴¹ community in which various attendees "were given 3.3 million [Ksh]"⁴² for the purposes of organising retaliatory violence against perceived ODM supporters.⁴³
19. P-0012's evidence underpinned the facts and circumstances described in the charges confirmed by the Pre-Trial Chamber⁴⁴ and framed in the original⁴⁵ and Updated Document Containing the Charges.⁴⁶ The extent of the Pre-Trial Chamber's reliance on the evidence of P-0012 in confirming the charges is set out in Annex A. The Prosecution has persistently failed to conduct necessary and timely investigations into the veracity of P-0012's accounts, despite serial detailed requests

³⁹ KEN-OTP-0060-0405 at 0408, lines 92-94; KEN-OTP-0060-0405 at 0419, lines 515.

⁴⁰ KEN-OTP-0061-0187 at 0197, lines 360-361; KEN-OTP-0060-0405 at 0408, line 92.

⁴¹ KEN-OTP-0060-0405 at 0408, line 93.

⁴² KEN-OTP-0060-0405 at 0419, lines 513-518.

⁴³ OTP-0060-0112, at 0115-0117; KEN-OTP-0060-0299 at 0313-0314; KEN-OTP-0060-0405 at 0408; KEN-OTP-0060-0426 at 0427-0433.

⁴⁴ ICC-01/09-02/11-382-Red, paras 333-336.

⁴⁵ ICC-01/09-02/11-591-Conf-AnxA.

⁴⁶ ICC-01/09-02/11-732-Conf-AnxA-Corr, para. 37.

supported by evidence from the Defence, in violation of its obligations under Article 54(1)(a) of the Statute.

20. P-0012 approached the Prosecution and was interviewed for the first time on 12 June 2011.⁴⁷ His reliability and credibility was contested by the Defence at the confirmation of charges hearing, notwithstanding the Prosecution's strategy of attempting to obscure him and P-0011 from scrutiny for the purposes of that hearing.⁴⁸ It was not until 4 December 2013, more than two years later, that the Prosecution sought to address the obvious and fundamental inconsistencies between the accounts P-0012 had provided to the Prosecution and the inconsistencies between his evidence and the evidence of P-0152.⁴⁹ Once confronted by his own differing accounts in interview, the speed with which P-0012 admitted the fabrication of events is no less than sobering when considered within the context of the Prosecution's duty to conduct timely investigations, including into the veracity of its own evidence.⁵⁰
21. Crucially, the Defence submits that the Adjournment Request constitutes no more than an inappropriate attempt to seek time to investigate a case that is no longer underpinned by any confirmation

⁴⁷ KEN-OTP-0061-0187.

⁴⁸ The Prosecution's heavy-handed redaction of P-0012's statements unnecessarily obscured key passages and internal inconsistencies, thereby precluding proper Defence scrutiny and challenge. The Defence notes that the following passages, which reveal fundamental inconsistencies in P-0012's account, could and should have been revealed to the Defence before the confirmation hearing: KEN-OTP-0061-0187_R01, at 0197, lines 360-361; KEN-OTP-0060-0112_R01, at 0115, lines 101-102 and 110-111; KEN-OTP-0060-0426_R01, at 0431, lines 161-163; KEN-OTP-0060-0426_R01, at 0429-0431; and KEN-OTP-0060-0426_R01, at 0435 (see Annex C). Further, at the confirmation hearing, the Defence explained that it believed it had "identified the names" of P-0011 and P-0012, ICC-01/09-02/11-T-10-ENG, p. 16 lines 15-18. The Prosecution did not confirm the identities of P-0011 and P-0012 until 1 August 2012, ICC-01/09-02/11-452.

⁴⁹ KEN-OTP-0123-0158, KEN-OTP-0123-0191, KEN-OTP-0123-0222, KEN-OTP-0123-0247, and KEN-OTP-0123-0268.

⁵⁰ On 4 December 2013, P-0012 was interviewed for no more than 3.2 hours, during which time he admitted that he had lied to the Prosecution concerning his presence at the alleged 30 December meeting: "OK. So instead of all that, then you can just move it. I was not there," KEN-OTP-0123-0247 at 0265, line 651.

structure, and therefore subverts the entire process by which the Pre-Trial Chamber confirms the charges under Article 61 of the Statute.⁵¹ The Prosecution's decision not to rely on P-0012 on the eve of trial brings to an end all reliance upon the trio of individuals upon which the present charges were confirmed.⁵²

22. In a manner unprecedented in pre-trial proceedings before the ICC, the Defence informed the Prosecution, the Pre-Trial Chamber and the Trial Chamber clearly and repeatedly of its grave concerns in relation to the lack of veracity and the unreliability of P-0012 and its two other core witnesses, P-0011 and P-0004. These warnings were provided to the Prosecution even before the commencement of the confirmation hearing, which took place between 21 September and 5 October 2011. Particulars of the warnings provided by the Defence to the Prosecution are set out in Annex B. Annex C sets out the main inconsistencies in the evidence of P-0012 and the dates on which those inconsistencies ought to have been known by the Prosecution.
23. In addition to the warnings given to the Prosecution by the Defence, and the evident inconsistencies in the accounts provided by P-0012 identifiable from a basic analysis of the evidence, the Prosecution failed to grapple with the fundamental differences in the accounts provided by P-0012⁵³ and P-0152,⁵⁴ both of whom it sought to rely on at trial, but both of whom contradicted each other as to the alleged presence of P-0152 at the alleged meeting at Nairobi State House on 30 December 2007. These

⁵¹ In particular, Article 61(7)(a), which states that the Pre-Trial Chamber shall “[c]onfirm those charges in relation to which it has determined that there is sufficient evidence, and commit the person to a Trial Chamber for trial on the charges as confirmed.”

⁵² See para. 4, footnote 9 above.

⁵³ See para. 18 above. P-0012 claims that P-0152 was supposed to “with us” but was “left outside” State House on 30 December 2007, KEN-OTP-0060-0426 at 0431, lines 161-163.

⁵⁴ Regarding 30 December 2007, see, in particular, KEN-OTP-0062-0478 and KEN-OTP-0077-0684.

differences have been known to the Prosecution since P-0152's 16 October 2011 interview.⁵⁵

24. Crucially, the Prosecution has failed to conduct the most basic of checks in a timely manner in order to satisfy itself of the veracity and reliability of P-0012 as a Prosecution witness in accordance with its duty to do so under Article 54 of the Statute. Having previously violated Article 54(1)(a) in respect of P-0004,⁵⁶ engaging in conduct which was clearly "indicative of a negligent attitude towards verifying the reliability of central evidence in the Prosecution's case,"⁵⁷ the Prosecution's further failure to verify the truthfulness of P-0012's central account represents a grave breach of its obligations which should not be rewarded by the provision of additional time to investigate what has demonstrably been revealed as a false case, on the eve of trial. The authorisation of such conduct would seriously undermine the integrity of the confirmation process and condone both negligent and irresponsible prosecution, thereby endangering the integrity of the institution of the International Criminal Court.

⁵⁵ KEN-OTP-0062-0478.

⁵⁶ In the Article 64(4) Decision, the Chamber held that "the Prosecution should have conducted a more thorough investigation prior to confirmation in accordance with its statutory obligations under Article 54(1)(a)...In addition, the timing, manner and volume of disclosure of new evidence, failed to fully respect the accused's rights under Articles 54(1)(c) and 67(1)(a), (b) and (c) as well as Article 67(2) of the Statute," ICC-01/09-02/11-728, para. 728.

⁵⁷ ICC-01/09-02/11-728-Anx2, para. 4. Judge Van den Wyngaert also stated that "there can be no excuse for the Prosecution's negligent attitude towards verifying the trustworthiness of its evidence...there are grave problems in the Prosecution's system of evidence review, as well as a serious lack of proper oversight by senior Prosecution staff. Clearly, thorough and comprehensive due diligence with regard to the reliability of the available evidence is an ongoing obligation of the Prosecution under article 54(1)(a), which is as important as the collection of that evidence itself... I find that the Prosecution failed to properly investigate the case against the accused prior to confirmation in accordance with its statutory obligations under article 54(1)(a) of the Statute. In so doing, the Prosecution has also violated its obligation under article 54(1)(c) of the Statute to fully respect the rights of persons arising under the Statute. In particular, by the extremely late and piecemeal disclosure of an inordinate amount of totally new evidence, which was the immediate consequence of the Prosecution's failure to investigate properly prior to confirmation, the Prosecution has infringed upon the accused's rights under article 67(1)(a), (b) and (c) as well as article 67(2) of the Statute," ICC-01/09-02/11-728-Anx2, paras 4-5.

(B) Any Adjournment at this Stage of the Proceedings Would be Antithetical to Mr Kenyatta's Right to an Expeditious Trial

25. The Defence submits that granting the proposed adjournment would violate the Accused's right to expeditious proceedings.⁵⁸ It is now over four years since the start of the Prosecution's investigation into the Kenyan situation,⁵⁹ significantly more than two and half years since Mr Kenyatta was summonsed to appear⁶⁰ and two years since the confirmation of charges in this case.⁶¹
26. The Defence rejects the Prosecution's submission that previous Defence requests for adjournment imply that Mr Kenyatta has partially waived his right to an expeditious trial.⁶² These adjournments were necessitated by repeated failings in the Prosecution's conduct that had breached fair trial obligations and were based on (a) the need for the Chamber to address and decide upon Defence applications concerning, *inter alia*, the Prosecution's failure to adhere to its investigation and disclosure obligations;⁶³ (b) the need for the Prosecution to conduct a review of its case file and to ensure that all relevant materials had been disclosed to the Defence;⁶⁴ (c) the need for the Defence to be provided with further time to conduct its investigations and fully prepare for trial;⁶⁵ and, most recently, and (d) the need for the Prosecution to conduct investigations

⁵⁸ The Defence notes Articles 64(2), "[t]he Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses," and 67(1)(b) "[i]n the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality... To be tried without undue delay."

⁵⁹ ICC-01/09-3, 26 November 2009.

⁶⁰ ICC-01/09-02/11-01, 8 March 2011.

⁶¹ ICC-01/09-02/11-382-Conf, 23 January 2012.

⁶² ICC-01/09-02/11-875, para. 21.

⁶³ ICC-01/09-02/11-677, para. 10.

⁶⁴ ICC-01/09-02/11-728, para. 97; ICC-01/09-02/11-740.

⁶⁵ ICC-01/09-02/11-728, para. 125; ICC-01/09-02/11-763-Conf.

into the conduct of a number of its witnesses and one intermediary,⁶⁶ which has resulted in an Article 70 investigation into their conduct.

27. The Defence notes that, throughout these proceedings, the actions of the Prosecution, particularly its failure to adhere to its obligations under Articles 54(1) and 67(2), and its failure to respect the Accused's rights under Articles 67(1)(a), (b) and (c), have forced the Accused to sacrifice his right to an expeditious trial in order to ensure that obligations are adhered to and fundamental rights respected.⁶⁷ The Prosecution's characterisation of the Accused's proper conduct of his Defence case as an implied waiver misrepresents the true state of affairs, and is further evidence that the Prosecution has failed to recognise that all delays to date have been the consequence of its flawed investigation and the case it has constructed. Any further adjournment breaches the right of Mr Kenyatta to expeditious proceedings that must now be terminated given the Prosecution's concession that after over four years of investigation, this case does not satisfy the high evidentiary standards required at trial.

(C) The Prosecution's Proposed Actions Contravene the Scope of Post-Confirmation Investigations

28. The failure of the Prosecution's case at this very late stage is a direct result of its fundamental breaches of Article 54. The withdrawal of P-0012 provides yet further proof that the Prosecution sought confirmation of the charges without effective and proper investigations. The version of events it presented at confirmation was, contrary to its most basic

⁶⁶ ICC-01/09-02/11-847, para. 9, 13.

⁶⁷ ICC-01/09-02/11-728, para.728; ICC-01/09-02/11-728-Anx2, paras 4, 5.

obligations under the Statute, neither thoroughly investigated nor reliable.⁶⁸

29. The Prosecution's request for an adjournment to enable it to conduct further (speculative) investigations on the cusp of trial is another consequence of its "negligent attitude towards verifying the trustworthiness of its evidence"⁶⁹ and cannot be allowed to infringe the rights of the Accused any further.
30. The Prosecution's proposed investigative actions clearly far exceed the scope of permissible post-confirmation investigations and do not satisfy any of the envisaged 'gateways' set out by the Chamber.⁷⁰ Nor, for the reasons set out at paragraphs 31 to 36 below, do they promise to yield any results. The Defence submits that any further investigations would be both excessive and unwarranted, and therefore cannot be allowed under the Statute or jurisprudence of the Court.

(D) The Prosecution's Proposed Investigative Actions Will Not Yield Incriminatory Evidence and do not Justify an Adjournment

31. The Defence submits that the Prosecution's proposed investigative actions set out in Annex A to the Adjournment Request will not yield incriminatory evidence and do not constitute sufficient cause to merit an adjournment.

⁶⁸ ICC-01/09-02/11-728, paras 119 and 122.

⁶⁹ ICC-01/09-02/11-728-Anx2, para. 4.

⁷⁰ ICC-01/09-02/11-728, para. 120.

Witness P-0011

32. The Defence submits that the Chamber should not attach any weight to the Prosecution's submission that it requires time "to determine conclusively whether P-0011 is willing to testify."⁷¹ On 1 November 2013, P-0011 communicated via email⁷² to the Defence and the Prosecution that he had "no alternative except to withdraw from the case as a witness."⁷³ P-0011's complaint, attached at Annex D, was that [REDACTED]. That conduct probably caused him to provide the false account he no longer wishes to advance. Crucially, P-0011 provided the following information in relation to the acts and conduct of Uhuru Kenyatta, none of which supports any aspect of the Prosecution's case: [REDACTED].⁷⁴

33. Clearly, P-0011 has withdrawn his association from the Prosecution and their theory of the case. Recent Defence investigations have revealed that [REDACTED],⁷⁵ after the Prosecution and VWU claim to have contacted him to change his mind.⁷⁶ [REDACTED]⁷⁷ [REDACTED].⁷⁸ This has been reported to the Prosecution.⁷⁹

[REDACTED]

34. Notwithstanding attempts by the Defence to assist the Prosecution in their requests to interview [REDACTED], all of these individuals have communicated their position to the Prosecution that they do not wish to

⁷¹ ICC-01/09-02/11-875, para. 20.

⁷² Annex D, p. 6.

⁷³ Annex D, p. 2.

⁷⁴ Annex D, pp. 2-3.

⁷⁵ [REDACTED].

⁷⁶ [REDACTED].

⁷⁷ [REDACTED].

⁷⁸ Annex D, pp. 11-12.

⁷⁹ Annex D, p. 10.

be interviewed. Each individual has provided pertinent reasons, and their letters are contained in Annex E. In general, the Defence notes that these individuals were moved to withdraw their co-operation as a result of their mistrust of the Prosecution's conduct of the case to date.⁸⁰ The Prosecution appears to take the misguided view that it can advance its discredited case theory through defence witnesses who give exculpatory accounts.

30 December 2007 and the Single Joint Expert, Mr Vella

35. The Defence submits that any investigative attempt by the Prosecution to resurrect the notion of a meeting at State House on 30 December 2007 attended by Mr Kenyatta, Mungiki members and others, is untenable and cannot justify any adjournment to replace the evidence of P-0012 given the cell-site analysis report pertaining to this date by the Single Joint Expert ("SJE"). The report, at Annex F, concludes that of all the mobile telephones that the Defence has associated with certain key individuals (see Annex G), who were alleged by P-0012 to have been in the area at the relevant time, "only one handset...[REDACTED]...used cells that cover State House between 15:00 and 20:00 on 30th December 2007."⁸¹ The Defence notes that [REDACTED] belongs to [REDACTED],⁸² who appeared on national television on this date at the swearing-in ceremony of Mwai Kibaki.⁸³ In particular, the Defence notes that the telephones associated with [REDACTED],⁸⁴ who P-0012 now claims told

⁸⁰ [REDACTED].

⁸¹ Annex F, para. 5.2.

⁸² Annex G, p. 2, row 1. [REDACTED].

⁸³ [REDACTED].

⁸⁴ Telephone numbers associated with [REDACTED] are listed under the name code "AO" at Annex G.

him about the 30 December meeting and refers to as the “master planner,”⁸⁵ did not visit Nairobi State House on 30 December 2007.⁸⁶

Financial Investigations

36. The Prosecution cites the need to conduct financial investigations, and seeks time to enable the Chamber to adjudicate the Prosecution’s “application for a finding of non-compliance against the Government of Kenya (“GoK”).”⁸⁷ The Prosecution’s application has, however, been made late in these proceedings on 20 December 2013, and the GoK has now responded.⁸⁸ No adjournment of the trial to adjudicate this issue is required or justified, particularly given that the Prosecution has been on full notice of the issue of the alleged provision of money by Mr Kenyatta since before the confirmation proceedings.⁸⁹ The line of enquiry as to financial records could have been followed from the perspective of the alleged recipients, but no evidence to support such allegations has ever been provided. The Defence submits that no adjournment can be justified on these grounds.

(E) Denial of Request for Adjournment and Termination of the Proceedings Against Mr Kenyatta

37. Notwithstanding the use of almost identical language, the Prosecution has not sought to withdraw the charges against Mr Kenyatta as it did in

⁸⁵ KEN-OTP-0123-0268 at 0271, lines 106.

⁸⁶ Annex F, paras 5.2, 7.21-7.29.

⁸⁷ ICC-01/09-02/11-875, para. 19.

⁸⁸ ICC-01/09-02/11-877-Conf-Anx2.

⁸⁹ KEN-OTP-0043-0002, at 0034, 0040-0041; KEN-OTP-0052-1451, at 1463; KEN-OTP-0052-1469, at 1485; KEN-OTP-0052-1506, at 1514; KEN-OTP-0052-1292, at 1295-1296; KEN-OTP-0052-1523, at 1527-1528; KEN-OTP-0052-1487, at 1494; KEN-OTP-0052-1305, at 1308-1309; KEN-OTP-0052-1487, at 1494; KEN-OTP-0060-0112, at 0118, 0126; KEN-OTP-0060-0405, at 0408-0412, 0419; KEN-OTP-0060-0272, at 0297; KEN-OTP-0060-0074, at 0089; KEN-OTP-0060-0325, at 0333-0334; KEN-OTP-0060-0365, at 0371, 0378.

respect of Mr Muthaura, but has instead sought a last ditch attempt to secure an adjournment to obtain fresh evidence in a failed case no longer underpinned by confirmed evidence.⁹⁰ As P-0012 admitted a financial motive for going to the Prosecution,⁹¹ there is a clear risk that as it is now perceived that there is money to be made by such an association, more false witnesses will seek to participate in proceedings in which the deadline for submission of the Prosecution's witness list expired on 9 January 2013.⁹²

38. For the reasons set out herein, the Defence requests the Chamber to deny the Prosecution's request for an adjournment at this late stage and terminate the proceedings against Mr Kenyatta pursuant to Article 64(2) of the Statute. The Chamber has the power to terminate and a duty to do so in the interests of justice.

V. RELIEF



39. For the reasons set out herein, the Defence respectfully requests the Chamber to:
- a. Dismiss the Adjournment Request; and
 - b. Terminate the proceedings under Article 64(2) of the Statute on the grounds of insufficiency of evidence.

⁹⁰ The Defence notes that the Prosecution uses almost identical justifications with respect to its withdrawal of the charges against Mr Muthaura (ICC-01/09-02/11-687 ("Muthaura Withdrawal Request")) as it does in support of its request to adjourn the proceedings against the Accused: (a) "Having considered the totality of the evidence, the Prosecution considers that, at this stage, it has no reasonable prospect of conviction were it to proceed to trial against Mr Muthaura on the charges as confirmed" (Muthaura Withdrawal Request, para. 1) compared to "the Prosecution considers that it has insufficient evidence to proceed to trial at this stage" (Adjournment Request, para. 3); (b) "With respect to Mr Muthaura, the Prosecution is not satisfied that the available evidence is sufficient to meet the Article 66(3) requirement that the accused's guilt be established 'beyond reasonable doubt'" (Muthaura Withdrawal Request, para. 10) compared to "[h]aving considered the impact of P-0012's recantation on the case as a whole, the Prosecution does not consider that it is currently in a position to present a case that satisfies the evidentiary standard applicable at trial, 'beyond reasonable doubt'" (Adjournment Request, para. 15).

⁹¹ See ICC-01/09-02/11-822-Conf, para. 68; citing KEN-OTP-0089-0136 from 00:07:47 to 00:07:49; 00:10:53 to 00:10:56; 00:10:58 to 00:11:00; 00:16:52 to 00:16:57; 00:11:05 to 00:11:17.

⁹² ICC-01/09-02/11-451, para. 18.

Respectfully submitted,

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Steven Kay QC and Gillian Higgins

On behalf of Uhuru Muigai Kenyatta

Dated this 24th day of January 2014

At London, England