

Concurring Opinion of Judge Christine Van den Wyngaert

1. I fully concur with the elucidation in the decision of the Prosecution's rights and obligations under article 54(1)(a) of the Statute.¹ However, I would have gone further in that I am of the view that there are serious questions as to whether the Prosecution conducted a full and thorough investigation of the case against the accused prior to confirmation. In fact, I believe that the facts show that the Prosecution had not complied with its obligations under article 54(1)(a) at the time when it sought confirmation and that it was still not even remotely ready when the proceedings before this Chamber started. In this regard, I stress the concerns expressed in the Decision about the overwhelming number of post-confirmation witnesses and the quantity of post-confirmation documentary evidence, as well as the very late disclosure of the latter.²
2. Apart from referring to serious but general difficulties it encountered during its pre-confirmation investigation,³ the Prosecution offers no cogent and sufficiently specific justification for why so many witnesses in this case were only interviewed for the first time post-confirmation. The mere invocation by the Prosecution of generic problems with the security situation in Kenya, without explaining how this situation

¹ Decision on defence application pursuant to Article 64(4) and related requests ("Decision"), 26 April 2013, paras 117–121.

² Decision, para. 122.

³ Additional Prosecution observations on the Defence's Article 64 applications, filed in accordance with order number ICC-01/09-02/11-673, 8 March 2013, ICC-01/09-02/11-683-Conf.

affected each of the individuals involved, does not adequately justify the extent and tardiness of the post-confirmation investigation.

3. In addition to insufficiently justifying the exceptional circumstances that meant it could not have taken these particular investigative steps prior to confirmation without unduly endangering the security of particular individuals, the Prosecution also did not offer cogent reasons for what led it to believe, prior to confirmation, that the situation of each of these persons would significantly change after confirmation or indeed that such a change actually occurred.
4. Finally, there can be no excuse for the Prosecution's negligent attitude towards verifying the trustworthiness of its evidence. In particular, the incidents relating to Witness 4 are clearly indicative of a negligent attitude towards verifying the reliability of central evidence in the Prosecution's case. This negligent attitude is particularly apparent in relation to Witness 4's evidence because, as the Prosecution concedes, 'the Office as a whole was on notice, prior to the confirmation hearing, of the inconsistencies in the account Witness 4 gave during his [second] screening'.⁴ The Prosecution offered a number of explanations for overlooking the problems with Witness 4's evidence.⁵ However, what all these explanations reveal is that there are grave problems in the Prosecution's system of evidence review, as well as a serious lack of

⁴ Prosecution response to the Defence "Submissions Regarding the Prosecution's 11 April 2013 Disclosure of Material Relating to its Initial Contact with OTP-4", 19 April 2013, ICC-01/09-02/11-722-Conf, para. 10.

⁵ Initially, the Prosecution submitted that it was due to a deficient review of the affidavit by reviewers who were unfamiliar with Witness 4's statements [ICC-01/09-02/11-664-Conf-Exp, para. 38]; later, that it was an 'oversight' by the team who interviewed Witness 4 which led to the relevant 'single sentence' being 'missed' [ICC-01/09-02/11-708-Conf, para. 12]; finally, that the other potentially exculpatory material relating to Witness 4 was stored in separate databases and not reviewed prior to confirmation due to 'error' [ICC-01/09-02/11-722-Conf, paras 7-12].

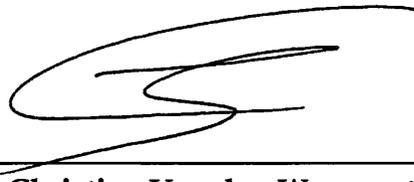
proper oversight by senior Prosecution staff. Clearly, thorough and comprehensive due diligence with regard to the reliability of the available evidence is an ongoing obligation of the Prosecution under article 54(1)(a), which is as important as the collection of that evidence itself.

5. Based on the foregoing considerations, 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.
6. As stated in the Decision,⁶ the appropriate remedy for the Prosecution's failure to fulfil its obligations under article 54(1)(a) would be to exclude all or part of the evidence obtained by way of excessive and unwarranted post-confirmation investigation. However, I agree with my colleagues that there are mitigating circumstances in this case which lessen the need to resort to such a drastic measure.⁷
7. In sum, whilst the application of the principles set out in the decision to the Prosecution's conduct in this case in my view results in a finding of a

⁶ Decision, para. 121.

⁷ Decision, para. 124.

violation by the Prosecution of several of its obligations and the infringement by the Prosecution upon various rights of the accused, I am, in the particular mitigating circumstances of this case, in agreement with my colleagues on the appropriate remedy as set out in the decision.



Judge Christine Van den Wyngaert

Dated 26 April 2013

At The Hague, The Netherlands