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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 Document

**Victims' observations relating to the "Order requesting written submissions
following 18 March 2013 status conference"**

Source: Common Legal Representative for Victims

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

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1. In accordance with the “Order requesting written submissions following 18 March 2013 status conference” (“Order”),¹ the Legal Representative for Victims (“Legal Representative”) hereby submits his observations on questions 1, 2 and 4 set out in paragraph 4 of the Order.

I. Is a Trial Chamber competent to decide retroactively whether the non-disclosure (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?

2. In summary, the Trial Chamber has no jurisdiction under the Statute² to entertain any appeal or application for judicial review of the confirmation decision, and it therefore has no power to inquire into the fairness, integrity, or validity of the confirmation proceedings. The only Chambers competent to do so are the Pre-Trial Chamber itself, and, should leave to appeal be granted by the Pre-Trial Chamber, the Appeals Chamber. It is very doubtful that there exists any valid basis in the Statute for the Trial Chamber to refer a case to the Pre-Trial Chamber for “a fresh Confirmation of Charges hearing”, as requested by the Defence.³ Further, referral to the Pre-Trial Chamber where there is a low likelihood that it would dismiss the charges against the accused would cause wholly unnecessary delay, would be of no benefit either to the accused or to the victims, and would impact negatively on the Court’s credibility. In addition, as further argued below, none of this affects the Trial Chamber’s powers to sanction a party for violation of disclosure obligations, if it appears to the Trial Chamber that such action is warranted. Remitting a case

¹ ICC-01/09-02/11-699, p.6.

² Rome Statute of the International Criminal Court hereafter referred to as “Statute”.

³ Status Conference, 11 March 2013, ICC-01/09-02/11-T-23-ENGET WT 11-03-2013 1-28 NBT, page 20.

back to the Pre-Trial Chamber is not an appropriate sanction for violation of disclosure obligations.

3. As the Pre-Trial Chamber noted, the drafters of the Statute intentionally excluded the decision on the confirmation of charges from the categories of decisions which may be appealed directly to the Appeals Chamber.⁴ Furthermore, the Trial Chamber's powers under Article 61(11) are subject to Article 61(9) and Article 64(4), which reserve control over the confirmation or amendment of charges to the Pre-Trial Chamber. The Trial Chamber has not been given appellate jurisdiction over any decision of the Pre-Trial Chamber, and most particularly has not been given a power to review the decision on the confirmation of the charges.⁵ The Statute does not foresee the possibility of reopening the confirmation stage on application by the accused in any circumstances. It foresees an additional confirmation of charges hearing *only* where the Prosecutor "seeks to add additional charges or to substitute more serious charges" in accordance with Article 61(9) of the Statute.
4. Read as a whole, the Statute does not appear to contemplate the existence of any jurisdiction for the Trial Chamber to entertain an appeal, or to judicially review the fairness or integrity or validity, of the confirmation decision. Rather, the position is that once the Pre-Trial Chamber has confirmed the charges any related appeal has been dealt with, the case is transferred to a Trial Chamber and the preliminary stage is over. The proper forum to fully hear arguments relating to the sufficiency of prosecution evidence, including the credibility of key prosecution witnesses, is the Trial Chamber during the trial.

⁴ Decision on the Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges", 9 March 2012, ICC-01/09-02/11-406, para. 25 and footnote 22.

⁵ Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, 13 December 2007, ICC-01/04-01/06-1084 para. 43.

5. The confirmation of charges hearing is of summary character and its evidentiary rules are more relaxed than at trial: in particular, the Prosecutor does not have to call witnesses and may rely on summaries of evidence. It was not conceived of as a forum to which the accused can return simply because the nature of the evidence against the accused has developed in the period between confirmation and trial, or because the accused wishes to repeat arguments already made there regarding the sufficiency and credibility of prosecution evidence. The principal forum in which the sufficiency and credibility of the prosecution's evidence is tested by the defence is not the confirmation hearing, but the trial. The confirmation process is intended, as the Pre-Trial Chamber noted, "primarily to protect the suspect against wrongful prosecution and ensure judicial economy by distinguishing cases that should go to trial and those that should not".⁶

6. It follows that a case cannot and should not be remitted to the Pre-Trial Chamber for a fresh confirmation hearing. Where the evidence against an accused has collapsed completely prior to trial, the proper procedure is for the Prosecutor to apply to withdraw the charges. Remitting a case to the Pre-Trial Chamber on the basis of a speculative argument that the Pre-Trial Chamber might change its mind, on the basis of new evidence or new circumstances, would threaten to turn the confirmation hearing into a forum in which endless re-litigation could take place, all without the benefit of the Pre-Trial Chamber observing key prosecution witnesses testify live and under cross-examination.

7. However, should the Trial Chamber wish to satisfy itself that the withdrawal of Witness OTP-4 does not affect the integrity of these proceedings as a whole, it can do so by reading the confirmation decision itself, which discloses that

⁶ Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red 23 January 2012, para. 52.

the evidence against the accused consists of much more than merely the evidence of OTP-4. It should also defer to the Prosecutor's assessment that it continues to have sufficient evidence to go to trial against Mr. Kenyatta.⁷ It would be inappropriate for a Trial Chamber to engage in a detailed analysis of the credibility of witnesses to be called at trial before the trial has begun. As was pointed out in the *Lubanga* case, "a Trial Chamber will not ordinarily engage in questions involving a detailed examination and resolution of facts or evidence before the commencement of the trial itself".⁸

8. When assessing the impact of the non-disclosure, and assessing what, if any, remedy is necessary in the current circumstances, the Legal Representative submits that the following factors are relevant:
 - a. The Defence Application⁹ appears to be a delay tactic. If granted, it will result in substantial delay, as it would require a fresh confirmation hearing, possibly involving the submission of much more evidence than at the original confirmation hearing, and would require the preparation of a new confirmation decision which itself will likely be subject to an application for leave to appeal. Any further delay in this case carries with it enormous risk. The pre-trial preparation period in this case has taken place in the context of an exceptionally high level of witness intimidation. Potential witnesses have been killed or have died

⁷ The Prosecution has stated that "with regards to the acts that have been attributed to Mr Kenyatta, [the Prosecution is] going to maintain that those acts are attributable to him. (...) [The Prosecution is] entirely confident that that body of evidence would be more than sufficient to surpass the substantial grounds threshold. [The Prosecution's position] is that there is still sufficient evidence for a reasonable Pre-Trial Chamber to have confirmed." Transcript of the status conference held on 18 March 2013, ICC-01/09-02/11-T-24-ENG CT WT, pages 19, 22, 37 and 41.

⁸ *Ibid*, para. 44.

⁹ Defence Application to the Trial Chamber Pursuant to Article 64(4) of the Rome Statute to Refer the Preliminary Issue of the Confirmation Decision to the Pre-Trial Chamber for Reconsideration, 5 February 2013, ICC-01/09-02/11-622 ("Defence Application"). See also, Defence Reply to the "Confidential redacted version of the 25 February 2013 Consolidated Prosecution Response to the Defence applications under Article 64 of the Statute to refer the confirmation decision back to the Pre-Trial Chamber", 8 March 2013, ICC-01/09-02/11 ("Defence Reply").

and existing witnesses have been bribed.¹⁰ In a case of this nature, the more time that passes before a critical witness testifies, the greater the chance there is that somebody will attempt to bribe or intimidate that witness. Furthermore, delay in the commencement of trial directly impacts the right of the victims to know the truth as to what happened; the right to have those responsible for the crimes committed against them to be declared guilty; and the date on which any reparations proceedings could begin and the date on which any reparations would be ordered.

- b. The Trial Chamber has a portfolio of sanctions available to it in the Statute, the Rules of Procedure and Evidence, the Regulations of the Court and the Code of Professional Conduct for Counsel to secure compliance with disclosure obligations. Insofar as the Defence appears to be seeking to have the case referred back to the Pre-Trial Chamber as a means of sanctioning the Prosecution,¹¹ such a remedy would be inappropriate. Assuming *arguendo* that the Defence had established a *prima facie* case of misconduct by the Prosecution¹² it would be unfair to the thousands of victims in this case, who have waited over five years for this trial to begin, for the matter to be remitted to the Pre-Trial Chamber as a method of punishing the prosecution.¹³ Such a sanction would also be an inappropriate use of the Court's limited resources, inconsistent with the purpose of the confirmation hearing, and possibly *ultra vires* the Trial Chamber.

¹⁰ Prosecution notification of withdrawal of the charges against Francis Kirimi Muthaura, 11 March 2013, ICC-01/09-02/11-687, para. 11.

¹¹ Defence Reply, paras. 28-36.

¹² For the avoidance of doubt, the Common Legal Representative clarifies that he is not aware of any *prima facie* basis on which to base an allegation of misconduct by the Prosecutor.

¹³ "Recourse to sanctions enables a Trial Chamber, using the tools available within the trial process itself, to cure the underlying obstacles to a fair trial, thereby allowing the trial to proceed speedily to a conclusion on its merits": Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled "Decision on the Prosecution's Urgent Request for Variation of Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU", 8 October 2010, ICC-01/04-01/06-2582, paragraphs 59 and 60.

- c. In the Defence Application and the Defence Reply, the Defence has set forth a weak basis on which to conclude that there is any reasonable likelihood that the Pre-Trial Chamber would not reconfirm charges against Mr. Kenyatta if this matter is referred for “a fresh Confirmation of Charges hearing”.¹⁴ The Defence’s arguments now rest largely on the assertion that: “Had the PTC been aware of the true nature of OTP-4’s evidence at the time of its deliberations, the Defence submits that the PTC would not have confirmed the present case for trial.”¹⁵ The principal plank of this is the argument that the non-disclosure relating to OTP-4 has affected the credibility of the written evidence of OTP-11 and OTP-12. The Pre-Trial Chamber was well aware of the nature of OTP-11 and OTP-12 and has already twice considered and rejected detailed defence arguments relating to their credibility: once in the confirmation decision¹⁶ and subsequently in its decision denying leave to appeal the confirmation decision.¹⁷ Neither OTP-11 and OTP-12 testified at the confirmation hearing, the Defence has never had the chance to cross-examine them, and the Prosecution would not be obliged to call them to testify live in any fresh confirmation hearing. The Defence Reply amounts to little more than a third round of litigation about the credibility of OTP-11 and OTP-12, all three rounds without the benefit of hearing the two witnesses testify live and under cross-examination. In particular, the Defence now argues that, in respect of OTP-11 and OTP-12: “it is impossible to discern whether the witness is speaking from personal recollection or not”¹⁸; “the source of his information is unknown”¹⁹; “he fails to cite the source of his

¹⁴ Status Conference, 11 March 2013 ICC-01/09-02/11-T-23-ENGET WT 11-03-2013 1-28 NB T, page 20.

¹⁵ ICC-01/09-02/11-681-Red, para. 23

¹⁶ Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red, 23 January 2012, paras. 93-100.

¹⁷ Decision on the Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges, ICC-01/09-02/11-406, 9 March 2012, para. 74.

¹⁸ Defence Reply, paras. 25 and 26.

¹⁹ *Ibid.*

information”²⁰; he “does not specify which individual met”²¹ a certain person. These points are all eminently suitable to be addressed in the crucible of cross-examination. The fairest and most effective method of testing the evidence of those witnesses would be to call them to testify in a trial, which provides a far superior forum than the confirmation process in which the defence can challenge the prosecution’s evidence and in which the truth can be revealed. Unlike the pre-trial judges, the trial judges will be provided with an opportunity to hear the evidence of OTP-11 and OTP-12 *viva voce*, and the Defence will be provided with the opportunity to cross-examine each of them and to put to them any documentary evidence which might be relevant to their credibility.

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

9. As submitted above, the only Chambers with authority to review the confirmation process are the Pre-Trial Chamber, and the Appeals Chamber.
10. The Trial Chamber’s express powers in respect of charges appear to be limited to its powers under Regulation 55 of the Regulations to change the legal characterisation of facts, and its power to permit the Prosecutor to withdraw the charges under Article 61(9) of the Statute. The Trial Chamber’s general powers to ensure the fairness of the trial (Article 64(2) and Regulation 54) do not appear to be intended to encompass an order to the Prosecutor to apply to withdraw or amend charges, on the basis of a deficiency in the confirmation process.

²⁰ *Ibid.*

²¹ *Ibid.*

11. The Trial Chamber's power, under Articles 64(6) (a) and 61(11), to "exercise any function of the Pre-Trial Chamber that is relevant and capable of application", is expressly subject to Article 61(9) and 64(4). Therefore, approval for the amendment of charges remains within the competence of the Pre-Trial Chamber, not the Trial Chamber.
12. However, in order to enable the accused to better understand the charges against him, it would be appropriate for the Trial Chamber to rule upon the two pending Regulation 55 applications²² and to request the Prosecutor to produce an updated document containing the charges, to reflect: (a) the Trial Chamber's findings on the Regulation 55 applications; (b) the recent decision of the Pre-Trial Judge permitting an amendment to the charges;²³ (c) the withdrawal of charges regarding Mr Muthaura; and (d) any consequential amendments which arise due to the withdrawal of those charges.
13. While primary responsibility for the preparation of the charges, and decisions as to whether to seek amendment of, or to withdraw²⁴ the charges, rests with the Prosecutor, there appears to be nothing to prevent the Trial Chamber from requesting (rather than ordering) the Prosecutor to seek amendment or withdrawal of charges. In the *Bemba* case, for example, the Pre-Trial Chamber requested the Prosecutor to consider amending the charging document to

²² Prosecution's Submissions on the law of indirect co-perpetration under Article 25(3)(a) of the Statute and application for notice to be given under Regulation 55(2) with respect to the accused's individual criminal responsibility, 30 July 2012, ICC-01/09-02/11-444; Prosecution's application for notice to be given under Regulation 55(2) with respect to certain crimes charged, 30 July 2012, ICC-01/09-02/11-445.

²³ Corrigendum to "Decision on the 'Prosecution's Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute'", 21 March 2013, ICC-01/09-02/11-700-Corr.

²⁴ Some victims in this case have expressed deep disappointment with the Prosecutor's decision not to proceed to trial with the case against Mr. Muthaura. They know that the case against him collapsed in a context in which a key witness was bribed by people holding themselves out as representatives of both accused, witnesses have been killed, and the Government of Kenya has failed to provide the Prosecution with important evidence, and has failed to facilitate its access to critical witnesses. The Legal Representative understands the victims would have preferred for the Prosecutor to have taken all action available to her under the Statute, in order to gain access to all relevant evidence against Mr. Muthaura, prior to taking the decision to drop the charges. The Legal Representative notes in this respect that, as far as he is aware, the Prosecutor has not applied to the Court to have Kenya referred to the Assembly of States Parties under Article 87(7) of the Statute in respect of its obstruction of access to relevant evidence against Mr. Muthaura, nor have any proceedings been instituted in relation to the bribery or intimidation of witnesses.

include superior responsibility, but made clear that “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 document containing the charges”.²⁵

14. The power to stay or to terminate proceedings²⁶ has been recognised by the Appeals Chamber: “Where the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed.”²⁷ However, where a disciplinary measure might bring about the same result as that sought by a stay of proceedings, a disciplinary measure should be used.²⁸

III. 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?

15. No criteria or pre-conditions need to be met for the Prosecution to investigate post-confirmation: its duty to uncover exculpatory evidence and to uncover the truth is ongoing.²⁹ As the Appeals Chamber said in the *Lubanga* case, “the Prosecutor’s duty to establish the truth is not explicitly limited to the time before the confirmation hearing. Therefore, the Prosecutor must be allowed to

²⁵ Decision adjourning the hearing pursuant to Article 61(7)(c)(ii) of the Rome Statute, 3 March 2009, ICC-01/05-01/08, para. 39.

²⁶ For the avoidance of doubt, the Common Legal Representative clarifies that he is not aware of any reason to stay or to terminate proceedings in the instant case.

²⁷ Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 14 December 2006, ICC-01/04-01/06-772, para. 36.

²⁸ Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled “Decision on the Prosecution’s Urgent Request for Variation of Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU”, 8 October 2010, ICC-01/04-01/06-2582, paragraphs 59 and 60.

²⁹ See also Corrigendum to “Decision on the Prosecution’s Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute”, 21 March 2013, ICC-01/09-02/11-700-Corr, paras. 36, 37, 38, 39, 41 and 42.

continue his investigation beyond the confirmation hearing, if this is necessary in order to establish the truth.”³⁰ The Appeals Chamber, overturning a previous decision of a Pre-Trial Chamber, ruled that it is not necessary “that the Prosecutor’s investigation [...] must be brought to an end before the confirmation hearing, barring exceptional circumstances that might justify later isolated acts of investigation.” This applies equally whether “‘investigation in the current case’ refers to the investigation of [the defendant] with respect to the specific charges which the Prosecutor intends to bring in the upcoming confirmation hearing, or whether it extends to the investigation of [the defendant]’s potential criminal responsibility for other conduct not encompassed by the charges.”³¹ The Appeals Chamber has ruled that the fact that Article 61(9), which provides that the Prosecutor may amend or withdraw charges after they are confirmed, indicates that the Prosecutor has flexibility with respect to the investigation and that “the Prosecutor does not need to seek permission from the Pre-Trial Chamber to continue his investigation.”³² Moreover, the Prosecution maintains the general power to investigate crimes of relevance to the situation and the accused: “The document containing the specific charges of the confirmation hearing pursuant to article 61 is an assertion by the Prosecutor that he intends to bring a person to trial for the specific crimes set out in the document; it is not an assertion that he will not seek to put the suspect on trial for other crimes in the future.”³³

16. The post-confirmation investigations in the present case appear to be reasonable. In any complex criminal case, both the prosecution and the

³⁰ Judgment on Disclosure Restriction pursuant to Rule 81 (2) and (4), 13 October 2006, ICC-01/04-01/06-568 OA3, paras. 52-53.

³¹ *Ibid.*, paras. 49-50.

³² Judgment on Disclosure Restriction pursuant to Rule 81 (2) and (4), 13 October 2006, ICC-01/04-01/06-568 OA3, paras. 52-53: “the Prosecutor’s duty to establish the truth is not explicitly 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.”

³³ *Ibid.*, para. 51.

defence will encounter opportunities to receive considerable quantity of evidentiary material in the period after confirmation of the charges. As the receipt of that additional evidence inevitably leads to a more considered analysis of existing evidence, both parties will refine their case theories, and might decide not to rely, at trial, on some witnesses on whom they might have relied in the confirmation hearing. This is an inevitable part of the process of complex criminal litigation.

17. The Trial Chamber is entitled to receive at trial the best evidence, fairly obtained, which is available, even if it is collected post-confirmation or after the commencement of trial. That is to say, it should receive the evidence which will most clearly and efficiently reveal the truth: hence the powers of the Trial Chamber in Article 64(6)(d) and 69(3), which aim to ensure that the Trial Chamber is in possession of all evidence necessary for a determination of the truth.
18. In cases such as the present case, in which the Prosecution has reported state obstruction in attempting to access relevant evidence, and unprecedented levels of witness intimidation, the Trial Chamber should not hesitate to make full use of its powers under Article 64(6)(d) and 69(3) and to impose appropriate sanctions for any offences against the administration of justice. The withdrawal of the charges against Mr. Muthaura and the reasons provided by the Prosecutor for that withdrawal cannot be allowed to stand as an incentive to those who would seek to undermine the work of this Court through bribery, intimidation and blocking access to relevant evidence.
19. The Defence might occasionally find itself unprepared at trial to deal with prosecution evidence collected in the period after confirmation, including after the start of trial, which is relevant to the facts and circumstances described in the charges. If so, a range of remedies are available to the Trial

Chamber, including postponing the evidence-in-chief or cross-examination of the witness; re-calling the witness for further cross-examination at a later date; in the case of documentary evidence, providing the Defence with further time to investigate its content or authenticity; and, *in extremis*, excluding the evidence in its totality. The Trial Chamber should continue to use all means available to it under the Statute to ensure that it receives the best evidence available, given the exceptional circumstances of this case.

Respectfully submitted,

A handwritten signature in dark ink, reading "Fergal Gaynor", with a long horizontal stroke extending to the right.

Fergal Gaynor
Common Legal Representative for Victims

Dated this 28th day of March 2013
at Killaloe, Ireland