

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 5 December 2013

**TRIAL CHAMBER V(B)**

**Before:** Judge Kuniko Ozaki, Presiding Judge  
Judge Robert Fremr  
Judge Chile Eboe-Osuji

**SITUATION IN THE REPUBLIC OF KENYA**

**IN THE CASE OF  
*THE PROSECUTOR v. UHURU MUIGAI KENYATTA***

**Public redacted version**

**Decision on Defence application for a permanent stay of the proceedings due to  
abuse of process**

**Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:**

**The Office of the Prosecutor**

Ms Fatou Bensouda

Mr James Stewart

Mr Benjamin Gumpert

**Counsel for Uhuru Muigai Kenyatta**

Mr Steven Kay

Ms Gillian Higgins

**Legal Representatives for Victims**

Mr Fergal Gaynor

**Legal Representatives of Applicants**

**Unrepresented Victims**

**Unrepresented Applicants for  
Participation/Reparation**

**The Office of Public Counsel for  
Victims**

Ms Paolina Massidda

**The Office of Public Counsel for the  
Defence**

**States Representatives**

*Amicus Curiae*

**REGISTRY**

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**Registrar**

Mr Herman von Hebel

**Deputy Registrar**

**Victims and Witnesses Unit**

Mr Patrick Craig

**Detention Section**

**Victims Participation and Reparations  
Section Others**

**Trial Chamber V(B)** ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v Uhuru Muigai Kenyatta*, having regard to Articles 54(1), 54(3)(d), 64(2) and 67(1)(b), 67(1)(e) and 70 of the Rome Statute ('Statute'), Regulation 24(5) of the Regulations of the Court ('Regulations') and Articles 8, 29 and 34 of the Code of Professional Conduct for counsel ('Code of Conduct'), issues the following Decision on Defence application for a permanent stay of the proceedings due to abuse of process.

### **I. Procedural history**

1. On 30 August 2013, the Chamber issued a scheduling order and agenda for a status conference to be held on 6 September 2013.<sup>1</sup> The parties and participants were instructed to notify the Chamber, by 3 September 2013, of any issues they may wish to raise at the status conference.<sup>2</sup>
2. On 3 September 2013, the defence team for Mr Kenyatta ('Defence') sent an email listing, *inter alia*, the following issue as one the Defence 'wishe[d] to raise' at the status conference as part of agenda item D (Other matters):<sup>3</sup>

B. Adjournment of Trial Date as a Result of the Following Matters  
[TO BE ADDRESSED IN CLOSED SESSION]

3. OTP witnesses' conspiracy to interfere with Defence witnesses and the progression of Defence investigations – Article 70 submission.

4. OTP witnesses' fabrication of evidence given to OTP – Article 70 Submission.

5. With respect to points (3) and (4) above, the need for Defence witnesses to receive VWU protection before these issues can be advanced.

3. On 6 September 2013, the Defence filed a confidential *ex parte* 'Request for an Urgent Hearing for Disclosure of Materials to the Trial Chamber Concerning Interference with Defence Witnesses and Fabrication of Evidence by

<sup>1</sup> Scheduling Order and Agenda for Status Conference ('Scheduling Order'), ICC-01/09-02/11-799.

<sup>2</sup> Scheduling Order, ICC-01/09-02/11-799, para. 3.

<sup>3</sup> E-mail communication from the Defence to the Chamber, Prosecution and Legal Representative on 3 September 2013 at 20:20. The Defence's email was initially sent to the Chamber only on 3 September 2013 at 16:26. It was re-sent to the Prosecution and Legal Representative upon the direction of the Chamber, issued by email on 3 September 2013 at 18:11.

Prosecution Witnesses'.<sup>4</sup> Later that day, an *ex parte* hearing was held at which the Defence indicated, *inter alia*, an intention to file an abuse of process motion in this case.<sup>5</sup> The Defence stated that this could not be disclosed to the Office of the Prosecutor ('Prosecution') until certain individuals were 'in a place of safety'.<sup>6</sup> The Chamber was informed that the Defence were liaising with the Victims and Witnesses Unit ('VWU') in that regard.<sup>7</sup>

4. On 13 September 2013, the Chamber directed the VWU to inform the Chamber and the Defence as soon as interim protection measures, if applicable, were implemented for the relevant witnesses and directed the Defence to file any abuse of process motion not later than one day after it had been so notified by the VWU.<sup>8</sup> The VWU agreed to provide the Defence with 48 hours notice prior to the implementation of the interim measures.<sup>9</sup>
5. On 10 October 2013, the Defence filed the 'Defence Application for a Permanent Stay of the Proceedings due to Abuse of Process' ('Application').<sup>10</sup>
6. On 11 October 2013, following a direction by the Chamber,<sup>11</sup> the VWU notified the Chamber that it had not yet completed implementation of protective measures for the relevant witnesses and, consequently, had not

<sup>4</sup> ICC-01/09-02/11-801-Conf-Exp. A corrigendum was filed on 19 September 2013, ICC-01/09-02/11-801-Conf-Exp-Corr and ICC-01/09-02/11-801-Conf-Exp-Corr-AnxA. These documents were reclassified as 'confidential', available to all parties and participants pursuant to Trial Chamber V(b)'s Decision on Prosecution request for reclassification, 17 October 2013, ICC-01/09-02/11-828-Conf. *See also* e-mail communication from Legal Officer of the Chamber on 16 October 2013 at 15:36.

<sup>5</sup> Transcript of hearing on 6 September 2013, ICC-01/09-02/11-T-25-Conf-EXP-ENG, page 3, lines 17-20, page 5, lines 21-25 and page 8, lines 22-24. The transcript was reclassified as 'confidential' (ICC-01/09-02/11-T-25-Conf-ENG-ET) pursuant to Trial Chamber V(b)'s Decision on Prosecution request for reclassification, 17 October 2013, ICC-01/09-02/11-828-Conf. *See also* e-mail communication from Legal Officer of the Chamber on 16 October 2013 at 15:36.

<sup>6</sup> Transcript of hearing on 6 September, ICC-01/09-02/11-T-25-Conf-ENG-ET, page 3, lines 7-9; page 4, lines 15-16; page 4, line 24 to page 5, line 1 and page 9, lines 16-19.

<sup>7</sup> ICC-01/09-02/11-T-25-Conf-ENG-ET, page 7, line 20 to page 8, line 16.

<sup>8</sup> E-mail from Legal Officer of the Chamber on 13 September 2013 at 13:34.

<sup>9</sup> E-mail from VWU on 30 September 2013 at 17:55.

<sup>10</sup> Confidential version of the Defence Application for a Permanent Stay of the Proceedings due to Abuse of Process, ICC-01/09-02/11-822-Conf, with 87 confidential annexes A.1 to A.12 and B.1 to B.8; Public redacted version of the Defence Application for a Permanent Stay of the Proceedings due to Abuse of Process, ICC-01/09-02/11-822-Red.

<sup>11</sup> E-mail from Legal Officer of the Chamber on 11 October 2013 at 14:15.

notified the Defence of implementation of the protective measures. [REDACTED].<sup>12</sup>

7. On 17 October 2013, following a request from the Prosecution<sup>13</sup> and having considered submissions from the Defence<sup>14</sup> and VWU,<sup>15</sup> the Chamber reclassified one transcript and five filings relating to the Application<sup>16</sup> as 'confidential', available to all parties and participants.<sup>17</sup>
8. On 29 October 2013, the Legal Representative for Victims ('LRV') responded to the Application ('LRV Response').<sup>18</sup>
9. On 31 October 2013, the Chamber adjourned the date of the commencement of trial from 12 November 2013 to 5 February 2014 because, *inter alia*, both parties were in agreement that the Prosecution needed additional time to investigate the factual allegations raised in the Application ('Adjournment Decision').<sup>19</sup>
10. On 1 November 2013, the Prosecution responded to the Application ('Prosecution Response').<sup>20</sup>

<sup>12</sup> VWU's report on the implementation of interim measures for Defence Witnesses, ICC-01/09-02/11-825-Conf-Exp. This document was reclassified as 'confidential', available to all parties and participants, pursuant to Trial Chamber V(b)'s Decision on Prosecution request for reclassification, 17 October 2013, ICC-01/09-02/11-828-Conf. *See also* e-mail communication from Legal Officer of the Chamber on 16 October 2013 at 15:36; ICC-01/09-02/11-828-Conf.

<sup>13</sup> Prosecution request for reclassification, 11 October 2013, ICC-01/09-02/11-824-Conf.

<sup>14</sup> Response to the "Prosecution Request for Reclassification", 15 October 2013, ICC-01/09-02/11-826-Conf.

<sup>15</sup> E-mails from VWU to Trial Chamber V(b) Communications on 15 October 2013 at 15:20 and 16 October 2013 at 11:09.

<sup>16</sup> ICC-01/09-02/11-T-25-Conf-EXP-ENG; ICC-01/09-02/11-801-Conf-Exp-Corr and ICC-01/09-02/11-801-Conf-Exp-Corr-AnxA; ICC-01/09-02/11-808-Conf-Exp; ICC-01/09-02/11-811-Conf-Exp; ICC-01/09-02/11-825-Conf-Exp.

<sup>17</sup> Decision on Prosecution request for reclassification, ICC-01/09-02/11-828-Conf.

<sup>18</sup> Victims' Response to "Defence Application for a Permanent Stay of the Proceedings due to Abuse of Process", ICC-01/09-02/11-840-Conf; Public Redacted version of the "Victims' Response to "Defence Application for a Permanent Stay of the Proceedings due to Abuse of Process" notified on 30 October 2013, ICC-01/09-02/11-840-Red.

<sup>19</sup> Decision adjourning the commencement of trial, ICC-01/09-02/11-847.

<sup>20</sup> ICC-01/09-02/11-848-Conf, with two confidential annexes A and B; Public redacted version of the Prosecution's 1 November 2013 opposition to the Defence application for a permanent stay of proceedings, 5 November 2013, ICC-01/09-02/11-848-Red.

11. On 14 November 2013, the Defence made a request to the Chamber to file additional submissions ('Additional Submissions Request').<sup>21</sup>
12. On 20 November 2013, the Prosecution responded to the Additional Submissions Request, submitting that it should be rejected and that the Chamber should rule on the Application without delay.<sup>22</sup>

## II. Applicable law

13. The Chamber notes that the Application requests the Chamber to permanently stay the proceedings<sup>23</sup> and makes no alternative request for a conditional stay of proceedings. As such, the Chamber will only set out the law applicable to a request for a permanent stay of proceedings.
14. The Chamber recalls that, in its previous composition as Trial Chamber V, it considered the law applicable to a request for a stay of the proceedings.<sup>24</sup> Relying on this Court's previous jurisprudence, the following principles were identified:
  - (i) the jurisprudence of this Court has consistently confirmed the availability of a stay of proceedings where it would be repugnant or odious to the administration of justice to allow the case to continue,

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<sup>21</sup> Public redacted version of Defence observations on the Prosecution's further investigations resulting from the Defence application for a Permanent Stay of Proceedings Due to Abuse of Process, ICC-01/09-02/11-856-Red; Confidential version of Defence observations on the Prosecution's further investigations resulting from the Defence application for a Permanent Stay of Proceedings Due to Abuse of Process, ICC-01/09-02/11-856-Conf.

<sup>22</sup> Prosecution response to the public redacted version of the Defence's 14 November 2013 "observations" (ICC-01/09-02/11-856-Red), 20 November 2013, ICC-01/09-02/11-859.

<sup>23</sup> Application, ICC-01/09-02/11-822-Red, para. 89.

<sup>24</sup> Decision on defence application pursuant to Article 64(4) and related requests ('64(4) Decision'), 26 April 2013, ICC-01/09-02/11-728. *See also* Separate opinion of Judge Ozaki, 26 April 2013, ICC-01/09-02/11-728-Anx1; Concurring Opinion of Judge Christine Van den Wyngaert, 26 April 2013, ICC-01/09-02/11-728-Anx2 and Concurring Separate Opinion of Judge Eboe-Osuji, 2 May 2013, ICC-01/09-02/11-728-Anx3-Corr2-Red.

or where the rights of the accused have been breached to such an extent that a fair trial has been rendered impossible;<sup>25</sup>

(ii) in imposing a stay of proceedings, it is not necessary to find that the Prosecution acted in bad faith;<sup>26</sup> it is sufficient to show that:

- a. the rights of the accused have been violated to such an extent that the essential preconditions of a fair trial are missing and
- b. there is no sufficient indication that this will be resolved during the trial process;<sup>27</sup>

(iii) a stay of proceedings is an exceptional remedy to be applied as a last resort; not every violation of fair trial rights will justify the imposition of a stay of proceedings;<sup>28</sup> and

(iv) to ‘conceive of a stay of proceedings’ as an appropriate remedy for any difficulties encountered in accessing information or facilities

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<sup>25</sup> 64(4) Decision, ICC-01/09-02/11-728, paras 74-77. See generally Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, 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 (OA 4) (‘Lubanga OA 4 Judgment’); Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008”, 21 October 2008, ICC-01/04-01/06-1486 (OA 13); Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Redacted Decision on the “Defence Application Seeking a Permanent Stay of the Proceedings”, 7 March 2011, 8 March 2011, ICC-01/04-01/06-2690-Red2.

<sup>26</sup> 64(4) Decision, ICC-01/09-02/11-728, para. 76.

<sup>27</sup> 64(4) Decision, ICC-01/09-02/11-728, para. 76, citing to Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 13 June 2008, ICC-01/04-01/06-1401, para. 91.

<sup>28</sup> 64(4) Decision, ICC-01/09-02/11-728, para. 77. See Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, 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 the 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 (OA 18), para. 55 (a stay is a ‘drastic’ remedy which ‘potentially frustrat[es] the objective of the trial of delivering justice in a particular case as well as affecting the broader purposes expressed in the preamble to the Rome Statute’).

during trial preparation 'would run contrary to the responsibility of trial judges to relieve unfairness as part of the trial process'.<sup>29</sup>

15. This Chamber sees no need to depart from any of these principles when analysing the present Application.

### III. Preliminary Issue

16. As a preliminary issue, the Chamber notes that, in the Additional Submissions Request, the Defence requests the Chamber to: (i) permit the Defence to provide further submissions at a date to be determined in the future, following the conclusion of the investigations referenced in the Adjournment Decision and within a reasonable time before the commencement of trial and (ii) await the outcome of those investigations and the submission of further observations by the parties before ruling on the Application.<sup>30</sup>
17. The Chamber notes that the Defence does not present any legal basis for its Additional Submissions Request, which seems to be an attempt to reply to the Prosecution Response. However, Regulation 24(5) of the Regulations of the Court provides that leave must be granted before such submissions can be made.<sup>31</sup> The Chamber considers that no additional submissions are necessary in the present case, as it has sufficient information to render its decision. In particular, the conclusion of the investigations at issue in the Adjournment Decision is not a prerequisite to ruling on the Application.

<sup>29</sup> 64(4) Decision, ICC-01/09-02/11-728, para. 78, *citing to* Trial Chamber IV, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Decision on the defence request for a temporary stay of proceedings, 26 October 2012, ICC-02/05-03/09-410, para. 79.

<sup>30</sup> Additional Submissions Request, ICC-01/09-02/11-856-Red, para. 14.

<sup>31</sup> 'Participants may only reply to a response with the leave of the Chamber, unless otherwise provided in these Regulations'.



Accordingly, the relief sought in the Additional Submissions Request is rejected in full.

#### IV. Analysis

##### A. Overall Submissions

18. In the Application, the Defence requests a permanent stay of the proceedings for an abuse of process.<sup>32</sup> In the alternative, the Defence requests the Chamber to hold an evidentiary hearing entailing the calling of live evidence to 'determine this issue conclusively prior to the commencement of trial'.<sup>33</sup>
19. In the Prosecution Response, the Prosecution submits that the Application comes 'nowhere near' the threshold for a stay of proceedings and that it should be rejected in full.<sup>34</sup>
20. In the LRV Response, the LRV submits that the relief sought by the Defence should be denied,<sup>35</sup> arguing that: (i) the Application is made in the context of 'a multi-faceted campaign by the Accused, supported by his Government, to avoid trial';<sup>36</sup> (ii) a permanent stay of the proceedings due to abuse of process is to be used in very exceptional circumstances, and is 'an unsuitable remedy for dealing with offences against the administration of justice';<sup>37</sup> (iii) 'tools are available within the trial process' to deal fairly with the matters raised in the Application;<sup>38</sup> (iv) repeatedly litigating the credibility of key Prosecution witnesses before trial has even begun is 'neither appropriate nor necessary';<sup>39</sup>

<sup>32</sup> Application, ICC-01/09-02/11-822-Red, paras 1-2.

<sup>33</sup> Application, ICC-01/09-02/11-822-Red, para. 2.

<sup>34</sup> Prosecution Response, ICC-01/09-02/11-848-Red, paras 1 and 132.

<sup>35</sup> LRV Response, ICC-01/09-02/11-840-Red, para. 49.

<sup>36</sup> LRV Response, ICC-01/09-02/11-840-Red, paras 7-9.

<sup>37</sup> LRV Response, ICC-01/09-02/11-840-Red, paras 10-17.

<sup>38</sup> LRV Response, ICC-01/09-02/11-840-Red, paras 23-32.

<sup>39</sup> LRV Response, ICC-01/09-02/11-840-Red, paras 33-37.

(v) 'the trial is the proper forum' in which to test Prosecution evidence and to present evidence in support of the Accused<sup>40</sup> and (vi) the Defence should not be rewarded for 'employing yet another delaying tactic'.<sup>41</sup>

21. The Chamber will proceed to analyse the specific allegations made in the Application in the sub-sections below. For each allegation, the Chamber will summarise the submissions and supporting materials presented by the parties prior to making its assessment. After determining how much weight, if any, to give to each of the Defence's allegations, the Chamber will then give an overall assessment on the totality of the Application to determine whether the threshold for a stay of proceedings has been reached.

#### **B. Witness 118 and a Prosecution intermediary**

1. *Allegation that the evidence of ten Prosecution witnesses has been irremediably tainted by the actions of Witness 118 and a Prosecution intermediary*

##### *i. Relevant Submissions*

22. The Defence indicates that Witness 118 and a Prosecution intermediary ('Intermediary') were responsible for bringing ten trial witnesses to the Prosecution.<sup>42</sup> The Defence then argues that Witness 118 and the Intermediary formed part of a 'conspiracy to provide fabricated evidence to the Prosecution'.<sup>43</sup> The Defence alleges that Witness 118 has constructed this plan to 'sabotage the Defence case' by suggesting that witnesses provide different evidence to the Court to that which they were intended to provide.<sup>44</sup>

<sup>40</sup> LRV Response, ICC-01/09-02/11-840- Red, paras 38-42.

<sup>41</sup> LRV Response, ICC-01/09-02/11-840- Red, paras 43-46.

<sup>42</sup> Application, ICC-01/09-02/11-822-Red, para. 5 (Witnesses 217, 219, 428, 429, 430, 493, 494, 505, 506 and 510).

<sup>43</sup> Application, ICC-01/09-02/11-822-Red, para. 32.

<sup>44</sup> Application, ICC-01/09-02/11-822-Red, para. 74.

The Defence names Witnesses 12, 428, 429, 430 and 505 as being involved in the alleged fabricated evidence scheme.<sup>45</sup>

23. The Defence alleges that Witness 118 has been involved in coaching Prosecution witnesses<sup>46</sup> and that the Intermediary, in concert with Witness 118, has been interfering with the content of witness statements<sup>47</sup> in order to construct a false case against Mr Kenyatta. The Defence also argues that the Prosecution's screening materials relating to the ten witnesses provided by Witness 118 and the Intermediary reveal the 'inappropriate proximity' between these two individuals and the witnesses.<sup>48</sup> The Defence submits that the supporting materials provided with its Application demonstrate a 'mere fraction of the true extent of the fabrication'.<sup>49</sup>
24. Ultimately, the Defence submits that these ten witnesses' evidence must now be considered as 'irremediably tainted'<sup>50</sup> and that it is 'repugnant to the rule of law and seriously prejudicial to the integrity of the trial process to put Uhuru Kenyatta on trial'.<sup>51</sup>
25. The Prosecution responds that the assertions regarding alleged offences against the administration of justice by Witness 118 and the Intermediary do not meet the high bar required for the imposition of a stay.<sup>52</sup>
26. The Prosecution states that, if the Defence's allegations are substantiated, then 'the appropriate action will be taken pursuant to Article 70 of the

<sup>45</sup> Application, ICC-01/09-02/11-822-Red, para. 32.

<sup>46</sup> Application, ICC-01/09-02/11-822-Red, paras 62, 74 and 76.

<sup>47</sup> Application, ICC-01/09-02/11-822-Red, paras 60-62 and 75.

<sup>48</sup> Application, ICC-01/09-02/11-822-Red, para. 79.

<sup>49</sup> Application, ICC-01/09-02/11-822-Red, para. 32.

<sup>50</sup> Application, ICC-01/09-02/11-822-Red, paras 5 and 78.

<sup>51</sup> Application, ICC-01/09-02/11-822-Red, para. 7 *See also* Application, ICC-01/09-02/11-822-Red, para. 82.

<sup>52</sup> Prosecution Response, ICC-01/09-02/11-848-Red, para. 2.

Statute'.<sup>53</sup> However, the Prosecution argues that any action under Article 70 of the Statute can be conducted in parallel with the trial and need not displace it.<sup>54</sup>

27. The Prosecution also argues that the Defence's credibility challenges 'do not justify a stay – they show why a trial is necessary'.<sup>55</sup> The Prosecution emphasises that credibility and 'intermediary taint' can only be reliably assessed at trial after a complete presentation of the evidence and that the Application requests the Chamber to 'bypass this process and to conduct a premature credibility assessment on the basis of an incomplete snapshot of the evidence, edited by one of the parties'.<sup>56</sup> The Prosecution emphasises that the trial process will enable the Chamber to fashion remedies, such as expunging the relevant evidence from the trial record or not relying upon it, to compensate for any unfairness established by the evidence.<sup>57</sup>

*ii. Supporting materials*

28. The Defence purports to substantiate the alleged conspiracy to provide fabricated evidence by providing [REDACTED]<sup>58</sup> and witness statements which are submitted to demonstrate, *inter alia*, that: (i) Witness 118 coached [REDACTED] for both the Prosecution and the Defence as to what they were supposed to say when describing the post-election violence, asking them in particular to say that they [REDACTED],<sup>59</sup> (ii) Witness 118 was seeking to

<sup>53</sup> Prosecution Response, ICC-01/09-02/11-848-Red, para 3. *See also* Application, ICC-01/09-02/11-822-Red, paras 76-77. Article 70 of the Statute governs '[o]ffences against the administration of justice'.

<sup>54</sup> Prosecution Response, ICC-01/09-02/11-848-Red, para. 3.

<sup>55</sup> Prosecution Response, ICC-01/09-02/11-848-Red, para 5. *See also* Prosecution Response, ICC-01/09-02/11-848-Red, para. 74.

<sup>56</sup> Prosecution Response, ICC-01/09-02/11-848-Red, paras 6 and 102.

<sup>57</sup> Prosecution Response, ICC-01/09-02/11-848-Red, paras 74, 79 and 103-04.

<sup>58</sup> *See* Annex A.2 of the Application, ICC-01/09-02/11-822-Conf-AnxA.2 ([REDACTED]).

<sup>59</sup> Annex A.1.i of the Application, ICC-01/09-02/11-822-Conf-AnxA.1.i, pages 13-18; Annex A.1.ii of the Application, ICC-01/09-02/11-822-Conf-AnxA.1.ii, pages 5-7; Annex A.1.iv of the Application, ICC-01/09-02/11-822-Conf-AnxA.1.iv, pages 8, 11-16, 19 and 29; Annex A.1.v of the Application, ICC-01/09-02/11-822-Conf-AnxA.1.v, page 7.

incriminate Mr Kenyatta and witnesses testifying in his defence<sup>60</sup> and (iii) Witness 118 sought financial gain from participating in the case and promised that others would likewise benefit from testifying.<sup>61</sup>

29. The Defence relies on portions of its supporting materials to argue that Witnesses 12,<sup>62</sup> 505,<sup>63</sup> 428,<sup>64</sup> 430<sup>65</sup> and 429<sup>66</sup> may have been involved in the alleged conspiracy.
30. The Defence also directs the Chamber to the Prosecution's screening notes of ten of the Prosecution's witnesses to prove [REDACTED] was in attendance during these interviews, that [REDACTED] pressured at least one of them to agree to speak with the Prosecution and [REDACTED] briefed at least one of them prior to the screening.<sup>67</sup>
31. The Defence further relies on supporting materials to argue that the Intermediary [REDACTED]<sup>68</sup> and was assisting witnesses to be on the side of the Prosecution.<sup>69</sup> The Defence also provides a series of reports from an alleged forensic linguistics expert,<sup>70</sup> who ultimately concludes that: (i) there

<sup>60</sup> Annex A.1.i of the Application, ICC-01/09-02/11-822-Conf-AnxA.1.i, pages 12-13; Annex A.1.iii of the Application, ICC-01/09-02/11-822-Conf-AnxA.1.iii, pages 5-6; Annex A.1.iv of the Application, ICC-01/09-02/11-822-Conf-AnxA.1.iv, pages 19 and 23.

<sup>61</sup> Annex A.1.ii of the Application, ICC-01/09-02/11-822-Conf-AnxA.1.ii, pages 3-4; Annex A.1.iii of the Application, ICC-01/09-02/11-822-Conf-AnxA.1.iii, page 4; Annex A.1.iv of the Application, ICC-01/09-02/11-822-Conf-AnxA.1.iv, pages 26-28; Annex A.1.v of the Application, ICC-01/09-02/11-822-Conf-AnxA.1.v, pages 8-9.

<sup>62</sup> Annex A.1.i of the Application, ICC-01/09-02/11-822-Conf-AnxA.1.i, page 8; Annex A.1.iv of the Application, ICC-01/09-02/11-822-Conf-AnxA.1.iv, pages 8 and 16.

<sup>63</sup> Annex A.1.i of the Application, ICC-01/09-02/11-822-Conf-AnxA.1.i, pages 9 and 16.

<sup>64</sup> Annex A.1.i of the Application, ICC-01/09-02/11-822-Conf-AnxA.1.i, page 16.

<sup>65</sup> Annex A.1.i of the Application, ICC-01/09-02/11-822-Conf-AnxA.1.i, page 21.

<sup>66</sup> Annex A.1.i of the Application, ICC-01/09-02/11-822-Conf-AnxA.1.i, page 21.

<sup>67</sup> Application, ICC-01/09-02/11-822-Red, para. 79. The Chamber notes that it does not have access to all of these screening notes in court, but, for purposes of the reasoning below, the Chamber will proceed on the basis that the screening notes say what the Defence purports them to say.

<sup>68</sup> Annex A.1 of the Application, ICC-01/09-02/11-822-Conf-AnxA.1, paras 86-96.

<sup>69</sup> Annex A.8 of the Application, ICC-01/09-02/11-822-Conf-AnxA.8, paras 18-22; Annex A.9 of the Application, ICC-01/09-02/11-822-Conf-AnxA.9.

<sup>70</sup> Annex A.10 of the Application, ICC-01/09-02/11-822-Conf-AnxA.10.i, ICC-01/09-02/11-822-Conf-AnxA.10.ii, ICC-01/09-02/11-822-Conf-AnxA.10.iii, ICC-01/09-02/11-822-Conf-AnxA.10.iv, ICC-01/09-02/11-822-Conf-AnxA.10.v, ICC-01/09-02/11-822-Conf-AnxA.10.vi, ICC-01/09-02/11-822-Conf-AnxA.10.vii.K0478, ICC-01/09-

are signs of ‘common authorship’<sup>71</sup> behind at least some of the contents of written statements of Witnesses 428, 429, 430, and 217<sup>72</sup> and (ii) that this other author is the Intermediary.<sup>73</sup>

32. As regards the allegations that the aforementioned statements of Prosecution witnesses demonstrate a ‘common authorship’ such that they reveal a plan to concoct false evidence, the Prosecution responds that: (i) it is inappropriate to assume that the defence expert is reliable without giving the Prosecution an opportunity to challenge the expert’s evidence,<sup>74</sup> (ii) stylistic similarities in statements transcribed by the same person are ‘unsurprising and do not, by themselves, demonstrate falsity’<sup>75</sup> and, (iii) according to the methodology employed by the Defence expert, the Defence witness statements annexed to the Application would also tend to indicate ‘common authorship’.<sup>76</sup>

*iii. Assessment of this allegation*

33. The Chamber notes that the Prosecution does not contest that Witness 118 and the Intermediary connected the Prosecution with at least ten of its trial witnesses.<sup>77</sup> The issue to be resolved is whether Witness 118 and the Intermediary improperly influenced the Prosecution’s witnesses; if so, to

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02/11-822-Conf-AnxA.10.vii.A, ICC-01/09-02/11-822-Conf-AnxA.10.vii.B, ICC-01/09-02/11-822-Conf-AnxA.10.vii.K1, ICC-01/09-02/11-822-Conf-AnxA.10.vii.K2, ICC-01/09-02/11-822-Conf-AnxA.10.vii.K0080 (12 documents in total).

<sup>71</sup> The Chamber understands that this term is synonymous with ‘shared authorship’ in the various reports, and the latter term is defined as referring to three possible authorship scenarios, namely: (i) the documents were produced by two authors collaborating with each other, (ii) the author of one document had access to a document which, however, had been produced by another author and (iii) the two documents were produced by the same author. Annex A.10.vi. of the Application, ICC-01/09-02/11-822-Conf-AnxA.10.vi, paras 16-19.

<sup>72</sup> Annex A.10.vi of the Application, ICC-01/09-02/11-822-Conf-AnxA.10.vi.

<sup>73</sup> Annex A.10.vi of the Application, ICC-01/09-02/11-822-Conf-AnxA.10.vi, para. 163.

<sup>74</sup> Prosecution Response, ICC-01/09-02/11-848-Red, para. 97.

<sup>75</sup> Prosecution Response, ICC-01/09-02/11-848-Red, para. 98.

<sup>76</sup> Prosecution Response, ICC-01/09-02/11-848-Red, paras 99-100.

<sup>77</sup> Application, ICC-01/09-02/11-822-Red, para. 5; Prosecution Response, ICC-01/09-02/11-848-Red, para. 11.

what extent such influence should be considered when ruling upon a request to stay the proceedings.

34. The Chamber does note with concern the supporting materials which tend to support the complaint that Witness 118 may have coached certain Prosecution witnesses and sought financial gain for participating in the case. Also, the Chamber is not at this time in a position to preclude the possibility that Witness 118 and/or other Prosecution witnesses agreed to fabricate evidence. However, the Chamber considers that what the Defence seeks to establish by this allegation would be more appropriately addressed in the course of the trial or proceedings commenced by the Prosecution under Article 70 of the Statute. In this regard, the Chamber notes that the Prosecution is undertaking an investigation for offences under Article 70 of the Statute related to this case.<sup>78</sup> As correctly noted by the Prosecution, any such Article 70 proceedings may run concurrently with the trial.
35. The Chamber emphasises that it is entirely unacceptable for any person to inappropriately manipulate the testimony of the Court's witnesses. Such behaviour will render the affected testimony unreliable or inadmissible. Further, corruptly influencing the Court's witnesses constitutes an offence against the administration of justice and is punishable under Article 70(1)(c) of the Statute.<sup>79</sup>
36. However, the supporting materials provided by the Defence, even if they are accepted as true, do not, as far as the Chamber is now able to see, reveal a conspiracy of the scale alleged in the Application.

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<sup>78</sup> Prosecution Response, ICC-01/09-02/11-848-Red, para 77.

<sup>79</sup> 'The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally: [...] (c) [c]orruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, retaliating against a witness for giving testimony or destroying, tampering with or interfering with the collection of evidence'.

37. The supporting materials do tend to suggest that Witness 118 was telling [REDACTED] to incriminate Mr Kenyatta and [REDACTED]. But this only suggests a conspiracy to fabricate evidence if these witnesses were encouraged to provide accounts of events different from what, to their knowledge, actually happened.<sup>80</sup>
38. There is, as far as the Chamber is now able to see, little support in the materials provided which establishes that the Prosecution witnesses identified at paragraph 29 above are expected to give false testimony. The Defence puts a great deal of emphasis on [REDACTED]<sup>81</sup> [REDACTED] describing what they heard second-hand [REDACTED]. Several of the Prosecution witnesses who are associated with Witness 118 and the Intermediary are not mentioned in the Defence's supporting materials at all. And, as far as the Chamber is now able to see, it is only inferences from association that would taint their evidence to the extent claimed by the Defence.
39. Ultimately, the Chamber is not persuaded that it is appropriate or safe to evaluate the truth or falsity of the testimony of the named Prosecution witnesses on the basis of the supporting materials, or pre-trial submissions, alone. The Chamber does not accept that these are issues that can be assessed in isolation from the evidence as a whole. These assertions go to the ultimate issues to be resolved at trial, and the Chamber does not consider it appropriate or safe to attempt to resolve them at this stage.
40. As to the Intermediary, the Chamber considers that the arguments on the involvement of the Intermediary also appear to be premised on inferences

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<sup>80</sup> The supporting materials to the Application conflict in this regard. *Contrast, for example*, Application, ICC-01/09-02/11-822-Conf-AnxA.1.iv, page 29 [REDACTED] with page 18, [REDACTED].

<sup>81</sup> Annex A.1.i of the Application, ICC-01/09-02/11-822-Conf-AnxA.1.i.



based on association. The Defence's own supporting materials suggest that the Intermediary [REDACTED].<sup>82</sup> As to the reports of the proposed forensic linguist, even if the allegations of common authorship were accepted as true, the Chamber does not consider that common authorship necessarily precludes the truth of the contents of the statements. As noted by the Prosecution, where the same individual transcribes statements from a number of witnesses, stylistic similarities may arise. It will be a matter for cross-examination at trial, to see whether the similarities were natural or in bad faith.

2. *Allegation of Witness 118 and the Intermediary preventing effective Defence investigation*

i. *Relevant Submissions*

41. The Defence submits that the conduct of Witness 118 and the Intermediary, and persons acting on their behalf, have [REDACTED].<sup>83</sup> The Defence alleges that Witness 118 and the Intermediary, both directly and indirectly 'intimidated and interfered' with [REDACTED] to 'stop the cooperation of these witnesses with the Defence, and to secure a change of testimony in line with the Prosecution's case, in return for reward'.<sup>84</sup>
42. The Defence further submits that the conduct of Witness 118 and the Intermediary has 'interfered significantly and irreparably with the ability of the Defence to conduct investigations' and has prevented the Defence from obtaining witness cooperation.<sup>85</sup> The Defence alleges that the conduct of

<sup>82</sup> Annex A.1 of the Application, ICC-01/09-02/11-822-Conf-AnxA.1, paras 76, 85 and 87.

<sup>83</sup> Application, ICC-01/09-02/11-822-Conf, para. 6. *See also* Application, ICC-01/09-02/11-822-Conf, para. 77.

<sup>84</sup> Application, ICC-01/09-02/11-822-Conf, para. 30. *See also* Application, ICC-01/09-02/11-822-Conf, para. 77.

<sup>85</sup> Application, ICC-01/09-02/11-822-Red, paras 6 and 83.

Witness 118 was 'designed to send a message [REDACTED].<sup>86</sup> It is claimed that the evidence reveals 'involvement of the entire [REDACTED] in the conspiracy to prevent the Defence from having a fair trial'.<sup>87</sup>

43. The Defence submits that [REDACTED] represent 'the only type of source' it could use to challenge the [REDACTED] relied on by the Prosecution.<sup>88</sup> It is argued that the conduct of Witness 118 and the Intermediary has 'prevented the Defence from obtaining witnesses to the truth and thereby significantly affected their ability to ensure the fairness of any subsequent trial'. The Defence claims that providing protection to Defence witnesses cannot 'remedy the damage caused to the trial' which goes to the 'viability of Defence investigations'.<sup>89</sup>
44. The Prosecution states that it 'views all serious allegations of witness interference with the utmost concern', including the allegation that Witness 118 'intimidated and interfered' with potential Defence witnesses.<sup>90</sup> As noted above, the Prosecution states it has initiated an investigation relating to offences under Article 70 of the Statute.<sup>91</sup> However, the Prosecution argues that, even if the allegations regarding Witness 118 are established to be accurate, 'such misconduct on the part of a witness does not merit the "drastic remedy" of a stay of the Accused's case'.<sup>92</sup>

<sup>86</sup> Application, ICC-01/09-02/11-822-Conf, para. 30. *See also* Application, ICC-01/09-02/11-822-Conf, paras 73-74.

<sup>87</sup> Application, ICC-01/09-02/11-822-Red, para. 73.

<sup>88</sup> Application, ICC-01/09-02/11-822-Red, para. 83.

<sup>89</sup> Application, ICC-01/09-02/11-822-Red, para. 83.

<sup>90</sup> Prosecution Response, ICC-01/09-02/11-848-Red, paras 76-77.

<sup>91</sup> Prosecution Response, ICC-01/09-02/11-848-Red, para. 77.

<sup>92</sup> Prosecution Response, ICC-01/09-02/11-848-Red, para.78.

45. The Prosecution submits that the Defence has not demonstrated ‘any misconduct with respect to Defence witnesses’ on the part of the Intermediary.<sup>93</sup>
46. The Prosecution argues that the Defence allegation that Witness 118 [REDACTED] is unsupported other than by the ‘speculation of Defence investigators’ and one witness.<sup>94</sup> It further submits that [REDACTED].<sup>95</sup> The Prosecution argues that it is ‘unjustified to order a stay at this stage’ as the Defence [REDACTED].<sup>96</sup> In asserting that [REDACTED] the Prosecution relies upon the jurisprudence of Trial Chamber IV in *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* where, it claims, the situation was ‘more compelling’, as it was argued in that case that *all* actual and potential witnesses were closed to defence investigation from the outset.<sup>97</sup>
47. The Prosecution additionally contests the Defence assertion [REDACTED] and states that the Defence has ‘unfettered access to a wide array’ of alternative potential sources of evidence.<sup>98</sup>

*ii. Supporting materials*

48. In substantiation of this allegation the Defence relies on the statements of two members of the defence team at Annexes A.11 and A.12 of the Application which, *inter alia*, recount [REDACTED].<sup>99</sup> It is noted that the [REDACTED]

<sup>93</sup> Prosecution Response, ICC-01/09-02/11-848-Red, paras 91-92 and 95.

<sup>94</sup> Prosecution Response, ICC-01/09-02/11-848-Conf, paras 83-85.

<sup>95</sup> Prosecution Response, ICC-01/09-02/11-848-Conf, para. 86.

<sup>96</sup> Prosecution Response, ICC-01/09-02/11-848-Conf, para. 87. *See also* Prosecution Response, ICC-01/09-02/11-848-Conf, para. 89.

<sup>97</sup> Prosecution Response, ICC-01/09-02/11-848-Conf, paras 88-90.

<sup>98</sup> Prosecution Response, ICC-01/09-02/11-848-Red, paras 87 and 90.

<sup>99</sup> Application, ICC-01/09-02/11-822-Red, para. 84.

and the statements at Annexes A.1, A.4, and A.6-A.8 of the Application are of additional relevance to this allegation.

49. The Prosecution submits that Annexes A.11 and A.12 of the Application provide ‘little more than [Defence team] opinions’ as to why [REDACTED] are ‘non-cooperative’, that ‘opinions are not facts’ and that, in this case, their opinions are not the ‘only reasonable explanation for the refusal of persons to speak with the Defence’.<sup>100</sup>
50. The Prosecution provides, at Annex A of the Prosecution Response, a statement from a Prosecution investigations team leader which, *inter alia*, provides a detailed chronological account of Prosecution interactions with the Intermediary, Witness 118 [REDACTED].

*iii. Assessment of this allegation*

51. On the basis of the material currently before it, the Chamber finds the Defence allegations that the Intermediary was involved in witness intimidation, or engaged in conduct which has ‘interfered significantly and irreparably’ with the Defence’s ability to conduct investigations, to be unsubstantiated. None of the material submitted provides direct support for such allegations. By contrast, it is noted, for example, that [REDACTED].<sup>101</sup> This information is consistent [REDACTED]<sup>102</sup> and provides no basis for believing that the Intermediary was aware of any intimidation or interference which the witnesses may have been subjected to by Witness 118 or others acting on his behalf. Consequently, the Chamber will consider only the

<sup>100</sup> Prosecution Response, ICC-01/09-02/11-848-Red, para. 84.

<sup>101</sup> Annex A.1 of the Application, ICC-01/09-02/11-822-Conf-AnxA.1, para. 89.

<sup>102</sup> Prosecution Response, ICC-01/09-02/11-848-Conf, para. 93.

alleged conduct of Witness 118, or persons working on his behalf, in respect of this allegation.

52. The Chamber is concerned that the supporting materials tend to show that Witness 118, and others acting on this witness' behalf, may have engaged in efforts to intimidate Defence witnesses.
53. However, it is noted that both parties appear to have experienced difficulties in obtaining evidence from [REDACTED], and to serious security concerns on the part of the potential witnesses.<sup>103</sup> However, the Chamber considers that such difficulties fall within the scope of investigative difficulties that are not unheard of in the context of large-scale investigations into serious or organised crime. The statutory framework provides means of addressing and mitigating the impact of such factors, including through prosecution of perpetrators under Article 70 of the Statute, as mentioned above, and through seeking appropriate protection measures for the witnesses concerned through the VWU. At this stage, the Chamber is not convinced that the difficulties facing the Defence are of a nature which cannot be addressed through such means. Nor are they beyond the remedial abilities of the trial process, including appropriate reflection in the outcome of the case at the end of the trial.
54. The Chamber notes that, [REDACTED]. Additionally, as is evident from Annex A.12 of the Application, the Defence [REDACTED],<sup>104</sup> [REDACTED].<sup>105</sup>

<sup>103</sup> Application, ICC-01/09-02/11-822-Red, paras 6, 83-84 and Annexes A.11 and A.12; Prosecution Response, ICC-01/09-02/11-848-Red, paras 12-13.

<sup>104</sup> [REDACTED] *see e.g.* Application, ICC-01/09-02/11-822-Conf-Anx.A.12, paras 50, 60, 61, 67 and 69.

<sup>105</sup> *See, e.g.*, Annex A.12 of the Application, ICC-01/09-02/11-822-Conf-Anx.A.12, [REDACTED].

55. In this regard, the Chamber finds it necessary to note that the Defence chose to publicly file the Application: (i) before interim protection measures had been implemented for relevant witnesses and (ii) without providing advance notice to the VWU. The Defence has provided no explanation for this course of action and it is not apparent to the Chamber that any circumstances existed which could have justified that decision. The Chamber finds that the [REDACTED].<sup>106</sup> The Chamber must therefore conclude that the Defence acted with serious disregard for the witnesses' safety. Moreover, such conduct, which fails to prioritise the security and well-being of witnesses, would appear to be self-evidently uncondusive to securing their continuing cooperation.
56. In summary, the Chamber is not convinced that 'the viability of Defence investigations' has been damaged to an extent which 'vitiates the integrity of the judicial process'.<sup>107</sup> In that regard, the Chamber notes that the allegations relate to only one type of evidence - albeit a significant one - in the Prosecution's case. Furthermore, the Chamber is not persuaded that [REDACTED] provide the only source of potentially relevant evidence available to the Defence to challenge [REDACTED].

### **C. Witnesses 11 and 12**

1. *Allegation that Witnesses 11 and 12 were involved in a conspiracy to tamper with evidence or to interfere with the collection of evidence for the payment of money*

- i. *Relevant Submissions*

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<sup>106</sup> ICC-01/09-02/11-825-Conf. *See also* ICC-01/09-02/11-858-Conf-Exp ([REDACTED]).

<sup>107</sup> Application, ICC-01/09-02/11-822-Red, paras 83-84.

57. The Defence alleges that Witnesses 11 and 12 - in collaboration with others - were involved in a conspiracy to 'extort money in return for favourable evidence'.<sup>108</sup>
58. The Defence states that these activities were conducted for the purpose, *inter alia*, of 'interfering with the Accused's right to a fair trial'.<sup>109</sup> It claims that there is also evidence of intent to carry out a 'plan to enrich themselves' with the purpose being to relocate Witness 12's entire extended family.<sup>110</sup> It is further submitted that the conspiracy was conducted without the knowledge of Mr Kenyatta.<sup>111</sup>
59. The Defence alleges that Witness 11 was involved in the conspiracy to 'tamper with the collection of evidence'.<sup>112</sup> It is alleged that [REDACTED] acted as an intermediary between Witness 11 and Witness 12 in relation to this conspiracy.<sup>113</sup>
60. The Defence argues that the conduct of Witnesses 11 and 12 'further compounds the seriousness and scale of the abuse of process on the current proceedings'.<sup>114</sup>
61. The Prosecution submits that the 'credibility challenges' which the Defence has raised in respect of Witness 11 and Witness 12 do not warrant a stay and 'can be resolved only through a full airing of the evidence at trial'.<sup>115</sup> It is argued that the Defence allegations do not 'present the full picture' to the

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<sup>108</sup> Application, ICC-01/09-02/11-822-Red, para. 8

<sup>109</sup> Application, ICC-01/09-02/11-822-Red, para. 8.

<sup>110</sup> Application, ICC-01/09-02/11-822-Red, para. 66.

<sup>111</sup> Application, ICC-01/09-02/11-822-Red, paras 63, 67 and 72.

<sup>112</sup> Application, ICC-01/09-02/11-822-Red, para. 69. *See also* Application, ICC-01/09-02/11-822-Red, paras 8, 70 and 85.

<sup>113</sup> Application, ICC-01/09-02/11-822-Conf, paras 8 and 69.

<sup>114</sup> Application, ICC-01/09-02/11-822-Red, para. 85.

<sup>115</sup> Prosecution Response, ICC-01/09-02/11-848-Red, para. 105. *See also* Prosecution Response, ICC-01/09-02/11-848-Red, paras 112-113 and 121-24.

Chamber and rely on ‘selectively edited snippets of evidence’.<sup>116</sup> The Prosecution additionally submits that the ‘open and transparent’ actions of Witness 11 and Witness 12 in contacting the VWU and Prosecution to inform them of attempts to ‘contact and bribe’ them, and the subsequent agreement on the part of Witness 12 to having his telephone conversations recorded by the Prosecution, are not consistent with a ‘desire to solicit or receive bribes’ as alleged by the Defence.<sup>117</sup>

62. The Prosecution additionally submits that the Defence submissions rely largely on arguments that were previously raised both at the confirmation stage and before this Chamber.<sup>118</sup>

*ii. Supporting materials*<sup>119</sup>

63. In substantiation of the allegation, the Defence relies upon extracts from 48 audio recordings of telephone conversations, [REDACTED], between, amongst others, Witness 12, [REDACTED], OTP ‘handlers’ [REDACTED] (‘2012 Audio Recordings’).<sup>120</sup> In particular, the Defence cites to conversations between Witness 12 and [REDACTED] where the amount of money to seek and the purpose for which the money will be used is discussed.<sup>121</sup> The Chamber additionally notes that Witness 11 appears to be referred to in a number of the 2012 Audio Recordings.<sup>122</sup>

<sup>116</sup> Prosecution Response, ICC-01/09-02/11-848-Red, para. 106.

<sup>117</sup> Prosecution Response, ICC-01/09-02/11-848-Red, para. 118. *See also* Prosecution Response, ICC-01/09-02/11-848-Red, paras 50-56.

<sup>118</sup> Prosecution Response, ICC-01/09-02/11-848-Red, para. 105.

<sup>119</sup> In the Application, the Defence makes no submission to indicate that it is relying on the unsigned draft statements at Annexes A.5.i-iv for anything other than that they are [REDACTED].

<sup>120</sup> Application, ICC-01/09-02/11-822-Conf, section IV, B, paras 63-67.

<sup>121</sup> Application, ICC-01/09-02/11-822-Conf, paras 63-66.

<sup>122</sup> *See, e.g.*, Annexes B.2.iv- B.2.vi, B.2.xii, B.2.xiv, B.2.xviii and B.2.xxiii of the Application.



64. The 2012 Audio Recordings were disclosed to the Defence by the Prosecution in January and February 2013.<sup>123</sup> Transcriptions or translations of the 2012 Audio Recordings were not provided to the Defence by the Prosecution at that time, but were described as being 'in progress'.<sup>124</sup> The Prosecution provided the Defence with a brief summary of its understanding of the recordings, which the Defence contests.<sup>125</sup>
65. The Defence also relies upon the statement contained at Annex B.6 of the Application and the letters at Annexes B.7-B.8 of the Application.<sup>126</sup>
66. The Prosecution argues that the 2012 Audio Recordings do not support the allegations made or the granting of a stay of the proceedings.<sup>127</sup> It submits that the Application relies on a 'skewed selection' from the conversations in the 2012 Audio Recordings and 'fails to address the context in which the conversations took place, which is critical to their understanding'.<sup>128</sup> The Prosecution argues that the witness's 'purported interest' in payment for withdrawing his testimony, as reflected in the recordings, is 'consistent with the role he was playing as instructed by the Prosecution'.<sup>129</sup> The Prosecution further argues that portions of the conversations omitted from the Application are 'pertinent and damning', as it claims they reveal an attempt to bribe the witness to withdraw his testimony by someone purporting to act on behalf of the accused.<sup>130</sup>

<sup>123</sup> Application, ICC-01/09-02/11-822-Red, paras 18 and 20; Prosecution Response, ICC-01/09-02/11-848-Red, paras 60- 62.

<sup>124</sup> Application, ICC-01/09-02/11-822-Red, para. 18 and Annex B.1; Prosecution Response, ICC-01/09-02/11-848-Red, paras 60 and 62.

<sup>125</sup> Application, ICC-01/09-02/11-822-Red, paras 18-19 and 21.

<sup>126</sup> Application, ICC-01/09-02/11-822-Red, paras 67 and 69-70, footnotes 215 and 218.

<sup>127</sup> Prosecution Response, ICC-01/09-02/11-848-Red, para. 121.

<sup>128</sup> Prosecution Response, ICC-01/09-02/11-848-Red, para. 112.

<sup>129</sup> Prosecution Response, ICC-01/09-02/11-848-Red, para. 120.

<sup>130</sup> Prosecution Response, ICC-01/09-02/11-848-Red, para. 113. *See also* Prosecution Response, ICC-01/09-02/11-848-Conf, paras 114-117.

67. The Prosecution provides a statement from an OTP investigations team leader which provides additional background on the events involving Witness 11 and Witness 12 and the context in which the 2012 Audio Recordings were made.<sup>131</sup>
68. Additionally, the Prosecution submits that there are some 'significant' differences in translation between the Defence and Prosecution transcriptions, affecting 'important parts of the conversations'.<sup>132</sup>
69. In respect of the statement at Annex B.6 of the Application, the Prosecution submits that the Application again uses 'selective reliance on helpful evidence' and disputes the Defence representation of the statement.<sup>133</sup> The Prosecution submits that the statement and letter, at Annexes B.6 and B.8 of the Application, 'do not support the conclusions for which they are proffered'.<sup>134</sup>

*iii. Assessment of this allegation*

70. The Chamber notes that the fact of some degree of involvement in the events at issue on the part of each of Witness 11 and Witness 12, and communication between them, whether directly [REDACTED], does not appear to be contested.<sup>135</sup> However, the issue revolves around the interpretation to be given to the events in question.
71. The Chamber considers that even if the Defence allegations against Witness 12 are accepted, they lend very little support for a permanent stay of the proceedings. The material involves issues which may go to the credibility of

<sup>131</sup> Prosecution Response, ICC-01/09-02/11-848-Conf-AnxA.

<sup>132</sup> Prosecution Response, ICC-01/09-02/11-848-Red, para. 64.

<sup>133</sup> Prosecution Response, ICC-01/09-02/11-848-Red, para. 119.

<sup>134</sup> Prosecution Response, ICC-01/09-02/11-848-Red, para. 123.

<sup>135</sup> See, e.g., Prosecution Response, ICC-01/09-02/11-848-Red, para. 123.

the specific witness(es) and would more appropriately be raised at trial and assessed by the Chamber when considering the evidence as a whole and, in particular, the weight to be attributed to their testimony.

72. In that regard, the Chamber notes that the precise manner in which the alleged conduct of Witnesses 11 and 12 is claimed to constitute, or contribute to, an abuse of process is not clearly explained in the Application. It is not demonstrated, for example, how an unsuccessful attempt to extort money in exchange for a withdrawal of evidence or the provision of favourable evidence, as is alleged, would necessarily impact the fairness of the subsequent trial proceedings. This attempted 'interference with the collection of evidence' in the form of the extortion conspiracy alleged, while it may constitute a criminal offence, does not *per se* violate the rights of the accused, let alone render a fair trial impossible.
73. Moreover, on the basis of the material currently before it, the Chamber finds that the allegations against Witnesses 11 and 12 have not been adequately substantiated for the purposes of the Application. In particular, the Chamber notes that the statements of Witness 12 in the 2012 Audio Recordings cannot be considered in isolation from the context in which the recordings were made, including the cooperation of the witness with the Prosecution. In that light, the Chamber notes that, when assessed in context and as a whole, the 2012 Audio Recordings, together with the statement at Annex B.6 and the letter at Annex B.7 of the Application, could well indicate a narrative entirely different from the version of events represented by the Defence.

74. In relation to the letter at Annex B.8 of the Application,<sup>136</sup> the Chamber notes that it refers to a domestic investigation arising from certain ‘allegations’. The Chamber does not consider that this letter is specific enough to substantiate the allegations of a conspiracy to interfere with the collection of evidence.
75. Finally, the Chamber does not find it necessary to consider whether or not Mr Kenyatta was aware of the alleged conspiracy<sup>137</sup> for the purposes of the present determination.

2. *Allegation that Witness 12 interfered with the collection of evidence by the Defence*

*i. Relevant Submissions*

76. In the Application, the Defence submits that Witness 12 interfered with the collection of evidence by the Defence by ‘providing the Defence with an initial exculpatory account and then giving a false incriminating account to the Prosecution’.<sup>138</sup> The Defence indicates that it exposed this ‘plan’ at the confirmation hearing and thereafter.<sup>139</sup> The Defence submits that Witness 12 has demonstrated a ‘clear willingness to change testimony in the event of alleged agreements not being reached and money not being sent’.<sup>140</sup>
77. The Prosecution responds that Witness 12’s provision of a largely exculpatory statement does not support the grant of a stay.<sup>141</sup> The Prosecution submits that this statement goes to the witness’ credibility, which is to be assessed at trial.<sup>142</sup>

<sup>136</sup> The Chamber notes a slight unexplained variation in the name of one of the individuals mentioned in the letter.

<sup>137</sup> See Application, ICC-01/09-02/11-822-Red, para.67; Prosecution Response, ICC-01/09-02/11-848-Red, para. 117.

<sup>138</sup> Application, ICC-01/09-02/11-822-Red, para. 68 (footnotes omitted).

<sup>139</sup> Application, ICC-01/09-02/11-822-Red, para. 68.

<sup>140</sup> Application, ICC-01/09-02/11-822-Red, para. 68.

<sup>141</sup> Prosecution Response, ICC-01/09-02/11-848-Red, paras 107-111.

<sup>142</sup> Prosecution Response, ICC-01/09-02/11-848-Red, para. 107.

*ii. Supporting materials*

78. The Defence cites to Witness 12's previous statements in the case as proof that Witness 12's account changed from an exculpatory one into an incriminating one.<sup>143</sup> The Defence also makes reference to Witness 12's statements in the 2012 Audio Recordings which allegedly demonstrate that Witness 12 changed his statements because the Defence failed to make an agreement and send him money.<sup>144</sup>

*iii. Assessment of this allegation*

79. As stated above when discussing the alleged conspiracy of Witnesses 11 and 12, the Chamber has already considered the unsuccessful alleged extortion attempt for the withdrawal of evidence or the provision of favourable evidence. For the purposes of this section, the Chamber will only focus on whether any weight should be attributed to the specific allegation that the alleged changes in Witness 12's testimony affected the Defence's 'collection of evidence'.

80. Even if the Defence's line of reasoning was assumed to be correct, the Chamber fails to see how these changes in Witness 12's account have impaired the Defence's ability to investigate. An attempt by a witness to change their account for personal gain does not, without more, impact the Defence's ability to collect evidence or investigate the case more generally. Any concerns that Witness 12's account changed as part of seeking financial gain can be dealt with in the course of the trial process.

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<sup>143</sup> Application, ICC-01/09-02/11-822-Red, para. 68, footnotes 219-220.

<sup>144</sup> Application, ICC-01/09-02/11-822-Red, para. 68, *citing to* Annex B.2.xxxvi of the Application, Annex ICC-01/09-02/11-822-Conf-AnxB.2.xxxvi, page 6; Annex B.2.xxxvii of the Application, ICC-01/09-02/11-822-Conf-AnxB.2.xxxvii, pages 10-11 and 16.

81. If this Defence allegation is understood more broadly to refer to how Witness 12's changed account may have misdirected the Defence's investigation, the Chamber is not persuaded that any such concerns would hold merit. The Defence has been on notice of the alleged changes in Witness 12's account for some time,<sup>145</sup> and has had sufficient opportunity to adapt its investigation to this knowledge.
82. For the foregoing reasons, the Chamber declines to give any weight to this specific allegation in its final assessment as to whether to grant a stay of proceedings.

**D. Allegation of Prosecution's failure to exercise due diligence over its case**

*i. Relevant Submissions*

83. The Defence claims that the Prosecution is 'presiding over an utterly corrupt and dishonest case'.<sup>146</sup> The Defence submits that the Prosecution has failed in its Article 54 duties to investigate incriminating and exonerating circumstances equally and to investigate the 'truthfulness of its witnesses and intermediaries'.<sup>147</sup> The Defence asserts that it has provided the Prosecution with evidence of the lack of reliability of Prosecution witnesses.<sup>148</sup>
84. The Defence argues that the ten witnesses introduced to the Prosecution by Witness 118 and the Intermediary have all been added after the confirmation

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<sup>145</sup> The Defence was aware of the changes in Witnesses 11 and 12's statements at the confirmation hearing, and attacked the credibility of both on this point before the Pre-Trial Chamber. *See* Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red, para. 93. The 2012 Audio Recordings were disclosed, at the latest, by 11 February 2013. *See* Application, ICC-01/09-02/11-822-Red, paras 18-20.

<sup>146</sup> Application, ICC-01/09-02/11-822-Red, para. 72.

<sup>147</sup> Application, ICC-01/09-02/11-822-Red, para. 86.

<sup>148</sup> Application, ICC-01/09-02/11-822-Red, paras 72, 81 and 86.

of charges stage and that the 'lack of scrutiny of this recent evidence has led to and obscured a perversion of justice'.<sup>149</sup> It is claimed that the Prosecution has failed to 'exercise due diligence in its use of intermediaries' by using Witness 118 and the Intermediary, who - it is alleged - each have 'their own causes to serve'.<sup>150</sup> The Defence claims that the evidence reveals a 'lack of prosecutorial wisdom' which is 'shocking when compared to the normal standards of criminal justice'.<sup>151</sup>

85. In relation to the alleged conspiracy of Witness 11 and Witness 12, as discussed above, the Defence alleges that their interference was conducted 'through channels provided by the Prosecution'.<sup>152</sup> The Defence further alleges that the Prosecution has 'been misled or deliberately tried to evade the truth as to the activity' of Witness 12.<sup>153</sup> It is argued that Witness 12's 'clear willingness' to change testimony for reward is an offence requiring investigation under Article 70 of the Statute, but that the Prosecution has been 'unwilling to recognise' this as it has 'an interest in maintaining the credibility of its witness'.<sup>154</sup> The Defence submits that 'the Prosecution is wilfully blind to these issues or, even worse, constructing a case deliberately in defiance of its Article 54 duties'.<sup>155</sup>
86. The Defence additionally submits that the use by the Prosecution of 'Agreements on Statement of Limited Use' has contributed to a perception on the part of Prosecution witnesses that they are immune from prosecution.

<sup>149</sup> Application, ICC-01/09-02/11-822-Red, para. 80.

<sup>150</sup> Application, ICC-01/09-02/11-822-Red, para. 81.

<sup>151</sup> Application, ICC-01/09-02/11-822-Red, para. 81.

<sup>152</sup> Application, ICC-01/09-02/11-822-Red, para. 8.

<sup>153</sup> Application, ICC-01/09-02/11-822-Red, para. 23.

<sup>154</sup> Application, ICC-01/09-02/11-822-Red, para. 68.

<sup>155</sup> Application, ICC-01/09-02/11-822-Red, para. 68. *See also* Application, ICC-01/09-02/11-822-Red, paras 22 and 86.

The Defence claims that consequently '[t]he plain pressure on the witness is to agree to a Prosecution version of facts'.<sup>156</sup>

87. As previously recounted above, the Prosecution states that it 'views all serious allegations of witness interference with the utmost concern' and, in light of the material pertaining to Witness 118 as provided to it in the Application, has initiated an investigation to determine whether there is 'sufficient objective information' to indicate that Witness 118 has committed offences under Article 70 of the Statute. The Prosecution states that Witness 118 'did not act and is not acting under Prosecution control'.<sup>157</sup> The Prosecution submits that no misconduct on the part of the Intermediary has been established.<sup>158</sup>

88. The Prosecution additionally contests the Defence interpretation of events relating to Witness 11 and Witness 12. The Prosecution explains that the delay in disclosing transcriptions and translations of the 2012 Audio Recordings<sup>159</sup> is attributable to the 'quality control' process employed and a 'time-consuming voice recognition process', as well as the need to undertake additional 'quality control' when it became apparent that there were 'significant' differences between the Prosecution and Defence translations.<sup>160</sup>

*ii. Supporting materials*

89. The Defence cites to Annex B.3 of the Application and certain disclosure notifications to support its argument that it notified the Prosecution of matters potentially impacting the reliability of certain of its witnesses.

<sup>156</sup> Application, ICC-01/09-02/11-822-Red, para. 76.

<sup>157</sup> Prosecution Response, ICC-01/09-02/11-848-Red, para. 77.

<sup>158</sup> Prosecution Response, ICC-01/09-02/11-848-Red, paras 91-95.

<sup>159</sup> *Supra*, para. 64.

<sup>160</sup> Prosecution Response, ICC-01/09-02/11-848-Red, paras 64-65.



90. In support of the allegations regarding the Prosecution reliance on Witness 11 and Witness 12, the Defence provides in Annexes B.3-B.5 of the Application copies of relevant *inter partes* correspondence.

*iii. Assessment of this allegation*

91. The Chamber again notes that the Prosecution is currently undertaking investigations regarding the alleged conduct of Witness 118. The Chamber does not consider the fact that Witness 118 and the Intermediary may have personal motivations for cooperating with a particular party to the litigation is sufficient in itself to render them unreliable. Rather, it is a factor to be considered when evaluating their evidence and that of other witnesses who may be subject to their influence.

92. Similarly, in respect of the allegations regarding the credibility of certain other witnesses – including that they may have provided varying accounts to the Prosecution and the Defence - the Chamber notes that the obligations on the Prosecution are to investigate exonerating circumstances and to disclose evidence which, *inter alia*, tends to show the innocence of the accused or ‘may affect the credibility of prosecution evidence’.<sup>161</sup> This does not preclude the Prosecution from continuing to rely upon evidence which, notwithstanding the existence of material which may affect its credibility, it believes to be sufficiently reliable to put before the Chamber. The Chamber does not consider it necessary at this stage to resolve the reasons why differing accounts may have been provided to the parties.

93. In respect of the allegations relating to Witness 11 and Witness 12, the Chamber refers to its analysis above. The Defence submissions in this regard

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<sup>161</sup> Articles 54(1)(a) and 67(2) of the Statute.

appear to rely on a speculative presumption that the Prosecution was unaware of or misled as to the content of the 2012 Audio Recordings. The Chamber notes that from the transcripts it appears that [REDACTED], and therefore does not consider it reasonable to conclude that the Prosecution was unaware of the contents of these recordings. The Chamber recalls that it has previously indicated to the Prosecution that it is under an obligation to prepare and disclose translations of the 2012 Audio Recordings<sup>162</sup> and finds that there has been an unjustified delay in doing so.<sup>163</sup> However, the Chamber does not consider that a delay in disclosure of the translations is sufficient to support a conclusion that the Prosecution was ignorant of their contents.

94. The Chamber considers unpersuasive the Defence submission regarding the use of statements of limited use. It is apparent from the transcript relied upon by the Defence that witnesses are clearly and explicitly told that their obligation is to tell the truth and that failing to do so would render the agreement on limited use void.<sup>164</sup> Contrary to the Defence submissions, the Chamber finds that the 'plain pressure' on the witness from such an agreement is not to 'agree to a Prosecution version of facts', but rather to tell the truth.
95. Finally, the Chamber notes that the Prosecution did not object to postponement of the commencement of the trial on the ground that certain of

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<sup>162</sup> Public redacted version of 'Decision on commencement date of trial', 20 June 2013, ICC-01/09-02/11-763-Red, para. 36.

<sup>163</sup> See Prosecution Response, ICC-01/09-02/11-848-Red, para. 65, which indicates that the first disclosure of the translations took place on 25 October 2013, only after the filing of the Application.

<sup>164</sup> Transcript of interview, KEN-OTP-0091-1594, page 1597 (for example see '[i]f the Prosecutor discovers that you have not been truthful in giving the statement of limited use or have withheld important information then the Prosecutor is no longer bound by this agreement and can use the statement of limited [use] against you in any way').

the allegations raised in the Application ‘merit further investigation’.<sup>165</sup> Given that the material relating to Witness 118 and the Intermediary had only just been disclosed to the Prosecution, by way of the Application, the Chamber considers that such action was appropriate in the circumstances and is consistent with the obligations of the Prosecution under Article 54 of the Statute.

96. For the reasons discussed above, no weight will be attached to this allegation for the purposes of the final assessment as to whether a permanent stay of proceedings for abuse of process is warranted.

## V. Overall Assessment

### A. Conclusion whether the threshold for a stay of proceedings has been met

97. The Chamber recalls its findings above that the following Defence allegations are not entitled to any weight in its final assessment as to whether a stay of proceedings is warranted: (i) the allegation that Witness 12 interfered with the collection of evidence by the Defence through allegedly changing his proposed testimony<sup>166</sup> and (ii) the allegation of the Prosecution’s failure to exercise due diligence over its case.<sup>167</sup>
98. The Chamber also recalls that some of the Defence’s allegations were found to justify attributing weight to them in the final assessment: (i) the allegation that the evidence of ten Prosecution witnesses has been irremediably tainted by the actions of Witness 118<sup>168</sup> (ii) the allegation of Witness 118 and the

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<sup>165</sup> Public redacted version of the Prosecution response to the Defence application to vacate the 12 November 2013 date for the commencement of trial, 30 October 2013, ICC-01/09-02/11-842-Red, para. 9.

<sup>166</sup> *Supra*, paras 79-82.

<sup>167</sup> *Supra*, paras 91-96.

<sup>168</sup> *Supra*, paras 33-40.

Intermediary preventing effective Defence investigation<sup>169</sup> and (iii) the allegation that Witnesses 11 and 12 were involved in a conspiracy to tamper with evidence or to interfere with the collection of evidence for the payment of money.<sup>170</sup> However, each of these allegations will only be accorded limited weight, for the reasons explained in each of the analyses above.

99. The Chamber recalls that a stay of proceedings is an exceptional remedy only to be granted as a last resort. The Chamber considers that a significant portion of the material relied upon by the Defence in the Application would more appropriately be used during cross-examination, rather than being presented prematurely as an attempted substitute for the trial itself.
100. The Chamber also does not consider it warranted to stay the proceedings because of the alleged difficulties encountered in the Defence's trial preparation, particularly when those difficulties have been aggravated by the Defence's own conduct. In this regard, the Chamber recalls its finding above that the Defence acted with serious disregard for the safety of its own witnesses [REDACTED]. The Chamber considers that this conduct risked endangering these persons and constituted a violation of the Defence's obligations to respect confidential information<sup>171</sup> and not to expose witnesses to unnecessary pressure outside the courtroom.<sup>172</sup> The Chamber warns that future violations in this regard may be referred to the Registry pursuant to Article 34(1)(a) of the Code of Conduct.

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<sup>169</sup> *Supra*, paras 51-56.

<sup>170</sup> *Supra*, paras 70-75.

<sup>171</sup> Article 8(1) of the Code of Conduct. *See also* Annex of Decision on the protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call, 24 August 2012, ICC-01/09-02/11-469-Anx, paras 17 and 29-32.

<sup>172</sup> Article 29(1) of the Code of Conduct.

101. The Chamber recalls that a stay of proceedings is an appropriate remedy only when the essential conditions of a fair trial are missing *and that there is no sufficient indication that this will be resolved during the trial process*.<sup>173</sup> The Application's own supporting materials demonstrate that the Defence is able to investigate, compile materials which go to the credibility of Prosecution witnesses and find its own witnesses in support of its case. A variety of steps could be taken to address whatever unfairness, if any, the Defence faced in its trial preparation, including: (i) ruling certain testimony and other materials inadmissible, (ii) determining that certain evidence be given little to no weight at the end of the trial, (iii) making evidentiary inferences to counterbalance the fact that the Defence may have been wrongfully deprived of access to specific evidence (iv) adjourning the trial to allow for additional investigations and (v) ensuring that appropriate measures are taken to protect Defence witnesses. These measures can also be implemented as necessary in parallel to any investigations which the Prosecution elects to conduct under Article 70 of the Statute in response to the supporting materials in the Application. The fact that so many other options short of a stay of proceedings are available to respond to the Defence's allegations confirms that granting the relief sought in the Application would be a disproportionate remedy.

102. The Chamber emphasises that none of the findings in the present decision should be considered as pre-determining the credibility of any trial witnesses, the admissibility of any evidence or the need to implement any of the remedial measures outlined above.

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<sup>173</sup> *Supra*, para. 14(ii).

103. On the allegations to which weight is given and the totality of the supporting materials before the Chamber, the Chamber is unpersuaded that it would be odious or repugnant to the administration of justice to allow the proceedings to continue. The Chamber is likewise not persuaded that it is impossible for a fair trial to take place.
104. For these reasons, the Chamber rejects the Defence request to impose a stay of proceedings.

**B. Additional request to hold an evidentiary hearing**

105. As an alternative to its request for a permanent stay of the proceedings, the Defence requests the Chamber to hold an evidentiary hearing to determine the issue of abuse of process prior to the commencement of trial.<sup>174</sup> The Defence contemplates that such a hearing would require the calling of live witnesses, including Witness 118, the Intermediary, Witness 11 and Witness 12.<sup>175</sup>
106. The Prosecution responds that there is no basis to hold an evidentiary hearing prior to trial.<sup>176</sup> The Prosecution argues that an evidentiary hearing is unnecessary because even if 'every allegation in the Application is accepted as true [...] they would be inadequate to justify a stay'.<sup>177</sup> The Prosecution submits that the Defence will be able to explore the issues raised in the Application during the testimony of the relevant witnesses at trial and that the Defence request in this regard should be rejected.<sup>178</sup>

<sup>174</sup> Application, ICC-01/09-02/11-822-Red, paras 2 and 89(ii).

<sup>175</sup> Application, ICC-01/09-02/11-822-Red, para 2.

<sup>176</sup> Prosecution Response, ICC-01/09-02/11-848-Red, paras 7, 126 and 130.

<sup>177</sup> Prosecution Response, ICC-01/09-02/11-848-Red, para. 7. *See also* Prosecution Response, ICC-01/09-02/11-848-Red, para. 127.

<sup>178</sup> Prosecution Response, ICC-01/09-02/11-848-Red, paras 7 and 128-129.

107. The LRV responds that this alternative request should also be rejected because a pre-trial evidentiary hearing is 'not envisaged in the Court's regulatory structure, is unnecessary, and might dissuade key witnesses from testifying at trial'.<sup>179</sup>
108. The Chamber recalls its finding above that it is possible for a fair trial to take place and that there is insufficient justification to permanently stay the proceedings. The Chamber, having carefully assessed the Defence's allegations and supporting materials, is not persuaded that having an evidentiary hearing of the kind described by the Defence would materially impact this determination. In this regard, the Chamber notes the many occasions in the reasoning above where, in cases of ambiguity, the Chamber's determination was made assuming that the Defence's allegations and/or supporting materials were true.<sup>180</sup>
109. Accordingly, in the present case, the Chamber considers that the issues raised by the Defence ought not be separated from the trial or adjudicated prior to it but are more properly addressed during the course of the trial.
110. For these reasons, the Defence's request for a pre-trial evidentiary hearing to determine the issue of abuse of process is also rejected.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

**REJECTS** the relief sought in the Additional Submissions Request; and

**REJECTS** the relief sought in the Application.

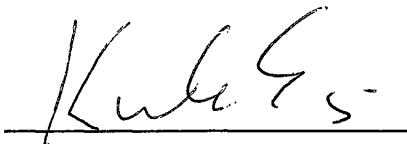
Judge Eboe-Osuji appends a concurring separate opinion.

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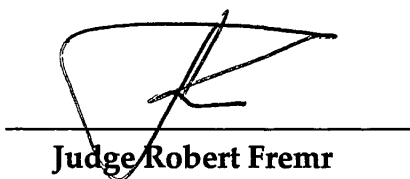
<sup>179</sup> LRV Response, ICC-01/09-02/11-840- Red, paras 18-22.

<sup>180</sup> *Supra*, paras 36, 40, 71, 80 and footnote 67.

Done in both English and French, the English version being authoritative.



**Judge Kuniko Ozaki, Presiding**



**Judge Robert Fremr**



**Judge Chile Eboe-Osuji**

Dated 5 December 2013

At The Hague, The Netherlands



## CONCURRING SEPARATE OPINION OF JUDGE EBOE-OSUJI

1. I concur fully with the outcome of the Chamber's decision denying the request to stay proceedings. I also concur with much of the reasoning expressed in the Main Opinion. I prefer, however, to express myself differently, in light of divergent views—possibly a matter of important nuances—on some of the legal premises of the decision.

2. In the *Banda and Jerbo* case,<sup>1</sup> I had occasion to discuss at length (in a concurring separate opinion) the law concerning stay of proceedings as I understand it—a little differently on some operative aspects. It is not necessary to repeat that exercise in full here. But, I should only outline briefly some aspects of the earlier opinion. They are fully in support of the outcome of the decision of the Chamber in the case at bar.

### I

3. It is asserted in the Main Opinion that the 'jurisprudence of this Court has consistently confirmed the availability of a stay of proceedings where it would be repugnant or odious to the administration of justice to allow the case to continue, or where the rights of the accused have been breached to such an extent that a fair trial has been rendered impossible.' Indeed, the power to stay proceedings has been asserted amply in the jurisprudence of the Court. I remain, however, of the humble view that certain difficulties attending the source of that power should positively undermine confidence—or recommend great modesty—in its exercise.

4. In the *Banda and Jerbo* separate opinion, discussion was conducted in some detail about the fundamental problem that confronts a Trial Chamber of the ICC in any exercise of the power to stay proceedings in a case that was instituted by the Prosecutor and properly confirmed by a Pre-Trial Chamber. In my view, there is a defect in original legitimacy in the source of the power—quite apart from the lack of a clear statutory basis for the power. The defect necessarily puts the exercise of the power on shaky legal grounds. The problem centres mainly<sup>2</sup>—though not exclusively<sup>3</sup>—on questions concerning the source of that power that is

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<sup>1</sup> *Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus (Decision on the defence request for a temporary stay of proceedings)* 26 October 2012, ICC-01/05-03/09-410, Concurring Separate Opinion of Judge Eboe-Osuji.

<sup>2</sup> See *Banda & Jerbo*, Concurring Separate Opinion of Judge Eboe-Osuji, paras 98—130.

<sup>3</sup> Another source of the problem engages the impetus that generated the need to devise the remedy of stay of proceedings at common law, which is largely absent at the ICC. That impetus was the traditional absence of power in common law judges to prevent vexatious or frivolous cases being brought to court for trial. Common law judges had then to devise a creative way to remedy the handicap and retain control of their own processes: hence, the remedy of stay of proceedings. In contrast, ICC judges do not have that handicap. For, the Rome Statute contains carefully contrived procedures that entail clear role and controlling power for the ICC judiciary in the processes of initiation of investigations, issuing of arrest warrants, and summonses to appear, confirmations of charges, and determinations of questions of admissibility of cases either on their own or at the instance of defendants and States. These procedures are precisely intended to insulate the ICC processes against

often described as deriving from the ‘inherent jurisdiction’ of the court, in similar terms as the source of the common law court’s power that had inspired the reception of the idea of stay of proceedings in international law. But, the source of the power for the ICC cannot be the same as the fountain of unlimited reserve of residual power that common law superior courts are said to possess (for purposes of their exercise of ‘inherent jurisdiction’ or any derivative power) by virtue of their history and heritage. Nor is the problem of legitimacy of this power (said to derive from ‘inherent jurisdiction’) wholly resolved merely by the cosmetic process of replacing the terminology of ‘inherent jurisdiction’ with ‘incidental jurisdiction’. The latter term may be accepted as meaning the sum of powers conferred upon an international organisation ‘by necessary implication *as being essential to the performance of its duties*.’<sup>4</sup> But, then, for purposes of the power of stay at the ICC, that meaning of *incidental* jurisdiction quickly throws its intended utility into the syllogistic snare of tail wags dog. This is the case when the derivative power is purportedly used to decline the exercise of the *primary* jurisdiction—which at the ICC is the jurisdiction to inquire into properly confirmed charges of criminal conducts that shock the conscience of humanity. As was observed in the *Banda and Jerbo* separate opinion: ‘[T]o exercise “incidental power” in a manner that results in a refusal to pursue that primary object is truly to make “incidental power” the overlord of the primary jurisdiction, rather than the servant that it should be. By any other description, this would be *ultra vires* exercise of power.’<sup>5</sup> This is a dilemma that common law courts are spared by their unique nature.<sup>6</sup>

5. As suggested in the *Banda and Jerbo* separate opinion: ‘[T]he better approach at the ICC lies in a conscious judicial policy that favours proceeding with the trial, but to reflect the effects of the abused process in the ultimate outcome of the proceedings. Such an approach would give trial of the charge the existential social value that belongs to it as the primary object of the exercise of jurisdiction, while also giving to a just complaint of unfair trial its own proper due as the object of exercise of incidental jurisdiction.’<sup>7</sup> Though not articulated at

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the possibility of ‘a prosecution which is oppressive or vexatious or undertaken for illegitimate reasons.’ The result of those procedures is to diminish the need for the jurisdiction in a Trial Chamber to stay proceedings later. See *Banda & Jerbo*, Concurring Separate Opinion of Judge Eboe-Osuji, paras 94–97.

<sup>4</sup> See *Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations* (1949) ICJ Reports 174, p 182 [emphasis added]. See also G G Fitzmaurice, ‘The Law and Procedure of the International Court of Justice: International Organizations and Tribunals’ (1952) 29 *British Yearbook of International Law* 1 pp 5 to 6; and C F Amerasinghe, *Jurisdiction of International Tribunals* [The Hague: Kluwer, 2003], p 171.

<sup>5</sup> See *Banda & Jerbo*, Concurring Separate Opinion of Judge Eboe-Osuji, *supra*, para 109.

<sup>6</sup> As was explained in *Banda & Jerbo*, Concurring Separate Opinion of Judge Eboe-Osuji: ‘[S]uch questions of *vires* seldom troubled a common law superior court in the exercise of its inherent jurisdiction. This is because the full sense of the term is ‘inherent jurisdiction *to do justice*’—not just incidental jurisdiction to fulfil something else specifically spelt out for it as the primary object in a parent statute. And, ‘to do justice’, in the fullest sense of the idea in the context of the common law jurisdiction of the superior court, fully embraces the power to decline to exercise any other jurisdiction conferred by a statute. Hence, a common law superior court’s ‘inherent jurisdiction to do justice’ is, by virtue of its primordial origins and sovereign heritage, arguably the true overlord of an item of jurisdiction expressly conferred by statute. That is not so at the ICC’: *ibid*, para 110.

<sup>7</sup> *Ibid*, para 111.

the level of a conscious judicial policy, I nevertheless underscore, in this connection, the correctness and congruency of the Chamber's decision dismissing the current application: for lack of a showing that any prejudice complained of is a prejudice that is beyond the corrective abilities of the Trial Chamber as part of the trial process.

## II

6. Much that is said in the Court's case law on stay of proceedings is amenable to the following observation of Lon Fuller: 'In law the pressure of new cases, presenting varied situations of fact, will in time compel the judge either to clarify rules previously obscure or to draw with some precision the line at which the constraints of law leave off. Neither task is easy.'<sup>8</sup>

7. It is said in the Main Opinion that 'in imposing a stay of proceedings, it is not necessary to find that the Prosecution acted in bad faith ...'. I would respectfully urge caution in both the expression and comprehension of that proposition, stated indeed in that way in the Court's case law. In my view, this is one of those statements of legal principle that 'the pressure of new cases, presenting varied situations of fact' will compel this Court to clarify or sharpen 'in time'. In that regard, it is to be kept in mind that the law in common law jurisdictions has continued to evolve in relation to stay of proceedings,<sup>9</sup> notwithstanding their longer practice at it. There is, therefore, no reason to consider the law as settled in any respect in the adoptive sphere of international law.

8. For purposes of evolution of the Court's case law, in relation to the question of prosecutorial bad faith as a factor or not in stay of proceedings, a review of legal developments in the common law jurisdictions was conducted in the *Banda and Jerbo* separate opinion. It led to the following conclusion: '[T]he overwhelming flow of judicial precedents on stay of proceedings has now set the proposition that criminal courts should be extremely reluctant to impose a stay of proceedings "in the absence of any fault on the part of the complainant or the prosecution."' [Internal footnote omitted.] That, indeed, is to cast the proposition at its minimum level of appreciation. For, ..., some Courts have been even more categorical in their rejection of stay of proceedings in the absence of fault on the part of the prosecution or the complainant.'<sup>10</sup>

9. It is for the foregoing reasons that I approach with caution the proposition that 'it is not necessary to find that the Prosecution acted in bad faith' in considering applications for stay of proceedings at the ICC. And, I am less inclined to accept any proposition to the effect

<sup>8</sup> Lon L Fuller, *Legal Fictions* [Stanford: Stanford University Press, 1967] p xi.

<sup>9</sup> See *R v Bow Street Metropolitan Stipendiary Magistrate, ex p DPP* (1992) 95 Cr App R 9 [Divisional Court, England] at p 16. See also *R v Beckford* [1996] 1 Cr App R 94 [Court of Appeal of England and Wales], p 102.

<sup>10</sup> *Banda & Jerbo*, Concurring Separate Opinion Eboe-Osuji, *supra*, paras 49—58, especially at para 49.

that a Trial Chamber may order a stay of proceedings on account of the impugned conducts of third parties that were not procured or condoned by the Prosecution or the victims.

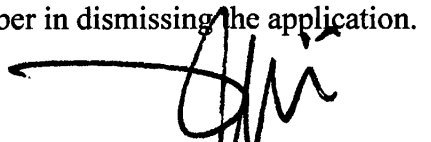
### III

10. In his submissions opposing the application for stay of proceedings, the victims' counsel pointed out that this application for stay was made in the context of other extra-judicial efforts (notably at the African Union and the UN Security Council) aimed at preventing the commencement of the trial. It is an observation with which I have much sympathy. It is also noted in that context that this is the second time the Defence Counsel have brought an application for stay of proceedings. On the first occasion, the application came with other requests aimed at preventing the case from proceeding to trial.

11. I have observed once before that the Defence Counsel in this case are jointly and severally among the most experienced in the practice of international criminal law. If it had truly appeared to them that the case they make in these applications could conceivably attract the very drastic and exceptional remedy of permanent stay of proceedings, it surely must have occurred to them that they could—more profitably—convert their complaint into a strategy of a criminal defence that is aimed at raising reasonable doubt on the merits of the case. But they seek, rather, a strategy the aim of which is to abort trial—amidst widely publicised extra-judicial manoeuvres that were similarly aimed at aborting trial on the merits. Is it unfair then for the victims' counsel to convey the impression of these applications as he has done on behalf of his clients?

12. In the circumstances, I am constrained to reiterate an earlier observation. The indictment in this case has been confirmed by a Pre-Trial Chamber in a carefully considered decision following an inquiry. In the intermediate outcome, a judicial inquiry has been primed to try and find out whether the accused is criminally responsible, as charged, for any aspect of a violent national upheaval that resulted in the death of very many human beings; and the maiming and the displacement and the dispossession of many more. The balance of justice swings in favour of conducting that judicial inquiry—and not in favour of legal technical or extra-judicial manoeuvres that are aimed at aborting the trial. Let the victims have their inquiry, while the accused continues to enjoy his presumption of innocence.

13. I fully join the Chamber in dismissing the application.



Chile Eboe-Osuji  
Judge

Dated this 5 December 2013  
The Hague, the Netherlands.