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No.: **ICC-01/09-02/11**
Date: **5 November 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 of the Prosecution's 1 November 2013 opposition to the Defence application for a permanent stay of proceedings

Source: **The Office of the Prosecutor**

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Introduction

1. The Accused's application for a permanent stay of proceedings ("Application")[1] comes nowhere near the high threshold the Appeals Chamber has established for such relief. On the contrary, the matters raised in the Application show why a trial is necessary.

2. The Application proceeds on two fronts: (i) assertions regarding alleged offences against the administration of justice by P-0118 and [REDACTED]; and (ii) attacks on the credibility of two Prosecution witnesses. Neither surpasses the high bar required for the imposition of a stay.

3. *First*, the allegations regarding offences against the administration of justice – even if ultimately established – are insufficient to warrant a stay. If, after a full investigation, the Defence's allegations are established on the basis of reliable evidence, the appropriate action will be taken pursuant to Article 70 of the Statute. But any action under Article 70 can be conducted in parallel with the Accused's trial; it need not displace it.

4. Moreover, the Chamber will be able to fashion remedies at trial to compensate for the unfairness, if any, it determines the Defence has suffered as a result of the alleged misconduct. Under this Court's jurisprudence, which permits proceedings to be stayed only when no lesser remedies are available, the possibility of tailored remedies at trial requires that the request for a stay be denied.

5. *Second*, the Defence's credibility challenges do not justify a stay – they show why a trial is necessary. Even viewed in the light most favourable to the Defence, the arguments regarding the credibility of the Prosecution's Mungiki witnesses merely raise possible avenues of cross-examination and lines of defence. The Defence's arguments on witness credibility – which

[1] ICC-01/09-02/11-822-Red.

omit facts that undermine the Defence's position and which the Prosecution disputes – are reasons to have a trial, not reasons to avoid a trial.

6. Credibility can reliably be assessed only at trial when the Chamber has a complete presentation of the evidence and the opportunity to hear from the witnesses. 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. From this rough assessment, the Defence asks the Chamber to take the extraordinary step of terminating the case before hearing from a single witness, or admitting a single item of evidence. This position finds no support in the law of this Court and comes nowhere near the high threshold required for a stay.

7. There is also no basis for the Defence's alternative request for relief – an evidentiary hearing prior to trial. Even if every allegation in the Application is accepted as true – which is the maximum the Defence could hope to establish in an evidential hearing – they would be inadequate to justify a stay. A hearing would thus accomplish nothing other than a further delay and an unnecessary diversion of judicial resources. In any event, the Defence will be able to explore the issues raised in the Application during the testimony of the relevant witnesses at trial. The Application should be denied and the case should proceed to trial.

Confidentiality

8. This document is filed confidentially as a response to a filing so designated.[2]

Annexes

9. To avoid burdening the Chamber with voluminous annexes, the Prosecution has annexed only those documents that are not available in

[2] *See* Regulation 23*bis*(2) of the Regulations of the Court.

TRIM or E-court. If the Chamber wishes to receive copies of items available in TRIM or E-court, the Prosecution will be happy to provide them.

Statement of facts

I. P-0118 and [REDACTED].

10. P-0118 is [REDACTED].

11. Between them, [REDACTED] and [REDACTED] connected the Prosecution with 11 trial witnesses, all of whom are Mungiki members.[3]

A. The challenges of accessing the Mungiki.

12. The difficulty of accessing the Mungiki organisation became evident early in the Prosecution's investigation. Mungiki members were afraid for their lives as a result of the extra-judicial killings of members of the organisation and did not wish to expose themselves to the government security apparatus by talking to the Prosecution.[4] The 5 November 2009 extra-judicial killing of Njuguna Gitau, a former Mungiki spokesman, exemplified the risk – he was reportedly killed by plain-clothes police officers after expressing an intention to meet with the former ICC Prosecutor, who was in Nairobi that day.[5] Fears caused by this and other executions, together with the closed nature of the Mungiki organisation and its oath of secrecy, meant that locating and speaking to Mungiki members was extremely difficult without the assistance of someone inside or close to the organisation.[6]

13. The Prosecution's efforts to contact Mungiki members directly met with limited success. The majority refused to engage, and the few who did

[3] [REDACTED] Stmt., paras 29, 49, 58, 60, 63, attached as Annex A.
[4] [REDACTED] Stmt., para 4, Annex A.
[5] Standard Digital, "Mungiki spokesman shot dead", 6 November 2009, http://www.standardmedia.co.ke/business/article/1144027857/mungiki-spokesman-shot-dead; Daily Nation, "Mungiki leader killed in Nairobi", 6 November 2009, http://www.nation.co.ke/News/-/1056/682504/-/uoltct/-/index.html; Capital News, "Mungiki spokesman shot dead on Kenyan street", 5 November 2009, http://www.capitalfm.co.ke/news/2009/11/mungiki-spokesman-shot-dead-on-kenyan-street/comment-page-4/.
[6] [REDACTED] Stmt., paras 4-5, Annex A.

obfuscated or declined to provide information germane to the investigation.[7] Against this backdrop, the Prosecution made efforts to identify senior individuals in, or closely associated with, the organisation who could identify Mungiki willing to assist the Court's investigation, and who could vouch for the Prosecution's goodwill.[8]

14. [REDACTED].[9] [REDACTED].[10] [REDACTED].[11]

15. The Prosecution used [REDACTED] and P-0118 to facilitate introductions with a number of Mungiki members.[12] The Prosecution was aware that [REDACTED].[13] [REDACTED].[14] The Prosecution concluded, however, that [REDACTED] and [REDACTED] presented the only available option to gain access to the Mungiki organisation and obtain information on the 2007-2008 post-election violence ("PEV") from its members.[15]

B. Initial contact with [REDACTED] and P-0118.

16. In April 2010, shortly after the Pre-Trial Chamber authorised an investigation into the Kenya situation, Prosecution staff conducted a screening interview with [REDACTED] to determine his information potential.[16]

17. [REDACTED] provided the names of two Mungiki thought to have knowledge of the PEV.[17] The Prosecution did not establish contact with the first.[18] The second, [REDACTED], was located and screened by the

[7] [REDACTED] Stmt., para 6, Annex A.. Exceptions were Witnesses 11, 12 and 152, who [REDACTED] were willing to engage openly with the Prosecution from the outset.
[8] [REDACTED] Stmt., para 7, Annex A.
[9] KEN-OTP-0066-0225.
[10] [REDACTED] Stmt., para 8, Annex A.
[11] [REDACTED] Stmt., para 9, Annex A.
[12] [REDACTED] Stmt., para 13, 16, 21, 28, 29, 49, 58, 60, 63, Annex A.
[13] [REDACTED] Stmt., para 10, Annex A.
[14] [REDACTED] Stmt., para 38, Annex A.
[15] [REDACTED] Stmt., para 11, Annex A.
[16] [REDACTED] Stmt., para 13, Annex A.
[17] [REDACTED] Stmt., para 13, Annex A.
[18] [REDACTED] Stmt., para 14, Annex A.

Prosecution in [REDACTED] 2010.[19] The Prosecution judged him to be unreliable and did not proceed further.[20] This assessment was proved correct in September 2011, when [REDACTED].[21]

18. [REDACTED].[22]

19. From late 2010 until mid-2011, the Prosecution attempted to organise a meeting with P-0118, using [REDACTED] as a go-between. While [REDACTED] initially indicated that P-0118 was willing to meet, he later informed the Prosecution that P-0118 was unwilling to do so because he was [REDACTED].[23] [REDACTED] did, however, provide the Prosecution with [REDACTED], which was created for a purpose unrelated to the ICC.[24]

20. After the confirmation hearing, the Prosecution received information that P-0118 was willing to be interviewed and [REDACTED] established contact between the Prosecution and P-0118.[25] The Prosecution conducted a screening interview of P-0118 on 12 December 2011, and a full interview between 13 and 15 January 2012.[26] After the interview, P-0118 agreed to talk to certain Mungiki members to determine whether they would be willing to speak to the Prosecution.[27]

C. [REDACTED] and P-0118 connect the Prosecution with Mungiki members.

21. In [REDACTED] 2011, [REDACTED] facilitated contact between the Prosecution and [REDACTED], a senior Mungiki member.[28] The

[19] [REDACTED] Stmt., para 15, Annex A.
[20] [REDACTED] Stmt., para 15, Annex A.
[21] [REDACTED].
[22] *See* ICC-01/09-02/11-822-Conf-AnxA.12, para 17.
[23] [REDACTED] Stmt., paras 17, 18, 22, Annex A.
[24] KEN-OTP-0065-0037, attached at ICC-01/09-02/11-822-Conf-AnxA.10.vii.A.
[25] [REDACTED] Stmt., paras 23, 25, Annex A.
[26] [REDACTED] Stmt., paras 26, 27, Annex A.
[27] [REDACTED] Stmt., para 27, Annex A.
[28] [REDACTED] Stmt., para 20, Annex A.

Prosecution interviewed [REDACTED] from [REDACTED] to [REDACTED] 2011 and re-interviewed him [REDACTED] 2012.[29] His evidence was unhelpful to the Prosecution case, and the Prosecution did not include him on its confirmation or trial witness lists.

22. In [REDACTED] 2012, [REDACTED] and P-0118 facilitated contact between the Prosecution and two Mungiki members: P-0219 and [REDACTED].[30] [REDACTED] facilitated contact with a third Mungiki member, P-0217,[31] and [REDACTED]. The Prosecution interviewed the three in [REDACTED] 2012.[32] The information provided by [REDACTED] was not helpful in terms of proving the Prosecution's case and he was not included on the Prosecution's list of trial witnesses. His interview transcripts were disclosed to the Defence on 5 October 2012. P-0217 and P-0219 were included on the Prosecution's list of trial witnesses.[33]

23. In [REDACTED] 2012, [REDACTED] and P-0118 facilitated contact between the Prosecution and P-0428, P-0429 and P-0430, whom the Prosecution interviewed [REDACTED] 2012.[34] [REDACTED].[35] The Prosecution's decision to interview P-0428, P-0429 and P-0430 was based in part on non-ICC statements received from [REDACTED], which are discussed below in paragraph 26.

24. In [REDACTED] 2012, [REDACTED] and P-0118 facilitated the Prosecution's initial contact with P-0493 and P-0494,[36] whom the Prosecution interviewed [REDACTED] 2012.[37] In [REDACTED] 2012, [REDACTED]

[29] [REDACTED] Stmt., paras 21, 36, Annex A. The Prosecution disclosed the transcripts of [REDACTED]'s interviews to the Defence on 14 December 2012.
[30] [REDACTED] Stmt., paras 28, 29, Annex A.
[31] [REDACTED] Stmt., para 29, Annex A.
[32] [REDACTED].
[33] ICC-01/09-02/11-773-Conf-AnxA..
[34] [REDACTED].
[35] [REDACTED] Stmt., para 51, Annex A.
[36] [REDACTED] Stmt., para 58, Annex A.
[37] [REDACTED].

facilitated the Prosecution's initial contact with P-0505, P-0506, and P-0510, and in [REDACTED], he connected the Prosecution with P-0548.[38] [REDACTED].[39] The Prosecution interviewed P-0505, P-0506, and P-0510 in [REDACTED] 2012,[40] and P-548 in [REDACTED] 2013.[41]

25. Notwithstanding the introductions provided by [REDACTED] and P-0118, certain Mungiki initially appeared to be wary of the Prosecution and became forthcoming only upon further engagement with the Prosecution. P-0219, for example, was vague and evasive during his first Prosecution interview in [REDACTED] 2012. In [REDACTED], [REDACTED] informed the Prosecution that P-0219 was willing to provide additional information on PEV planning meetings and on [REDACTED] 2012, P-0118 told the Prosecution that he was willing to speak to P-0219 to encourage him to provide a more truthful account.[42] When the Prosecution interviewed P-0219 for a second time [REDACTED] 2012, he provided more information than in his first interview.[43]

D. [REDACTED] provides the Prosecution with documents.

26. [REDACTED] has provided the Prosecution with various documents, the majority of which relate to Mungiki members that he and/or P-0118 introduced to the Prosecution. Those relevant to the Application are discussed below.

- On 27 July 2012, [REDACTED] sent to the Prosecution: (i) KEN-OTP-0076-0017, a chart reflecting [REDACTED]; and (ii) KEN-OTP-0076-0018, an unsigned statement that appeared to be from P-0118.[44]

[38] [REDACTED] Stmt., paras 60-64, Annex A.
[39] [REDACTED] Stmt., paras 61-65, Annex A.
[40] [REDACTED].
[41] [REDACTED].
[42] [REDACTED] Stmt., paras 43, 56, Annex A.
[43] *See generally* KEN-OTP-0087-0666 to KEN-OTP-0087-0855.
[44] [REDACTED] Stmt., para 44, Annex A.

- On 9 August 2012, [REDACTED] sent to the Prosecution: (i) KEN-OTP-0076-0478, an unsigned statement that appeared to be from P-0118; (ii) KEN-OTP-0076-0476, an unsigned statement that appeared to be from [REDACTED] in the Nakuru and Naivasha attacks; and (iii) KEN-OTP-0076-0477, a list of [REDACTED] said to be able to provide similar statements.[45]
- On 24 August 2012, [REDACTED] sent to the Prosecution four unsigned statements, which appeared to be from P-0217, P-0428, P-0429, and P-0430.[46] [REDACTED] sent to the Prosecution signed versions of the statements on 6 September 2012.[47]

II. P-0011 and P-0012.

27. P-0011 and P-0012 are [REDACTED].[48] For a period in early 2011, they interacted with the Kenyatta Defence team and its intermediaries. The nature of those interactions is a matter of dispute between the parties.

A. Contact with the Defence in early 2011.

28. On 7 and 9 February 2011, Gillian Higgins, counsel for the Accused, interviewed P-0011 and P-0012, both of whom provided largely exculpatory accounts.[49]

29. On or about [REDACTED].[50]

30. On or about [REDACTED].[51] The document described [REDACTED].[52] The document provided [REDACTED].[53]

[45] [REDACTED] Stmt., para 48, Annex A.
[46] KEN-OTP-0077-0429; KEN-OTP-0077-0435; KEN-OTP-0077-0437; KEN-OTP-0077-0441.
[47] KEN-OTP-0077-0898; KEN-OTP-0077-0902; KEN-OTP-0077-0908; KEN-OTP-0077-0910.
[48] P-0011, KEN-OTP-0052-1244, at 1251; P-0012, KEN-OTP-0060-0250, at 0267.
[49] KEN-D13-0010-0023; KEN-D13-0010-0164.
[50] KEN-OTP-0056-0109; KEN-OTP-0080-0105; KEN-OTP-0109-0284.
[51] KEN-D13-0006-0031; P-0011, KEN-OTP-0052-1624, at 1633-34, KEN-OTP-0081-0216, at 0223; P-0012, KEN-OTP-0074-0664, at 0667-68.
[52] KEN-D13-0006-0031, at 0033, 0035.
[53] KEN-D13-0006-0031, at 0032-33.

31. On or about [REDACTED].[54]

32. From mid-March 2011, P-0011 sent a series of emails to the Defence and its intermediaries, accusing the intermediaries of not honouring an agreement to organise a meeting with the Accused[55] and warning that the Mungiki members introduced to the Defence "will demand their pay".[56] In his emails, P-0011 explained that "we had agreed with Mr [REDACTED] and Mr [REDACTED] to just give a simple outlook [to the Accused's British lawyers] without exposing actual facts of what happened to you".[57] P-0011 stated that the Accused "was not involved at all in the whole issue of the PEV",[58] but warned that people "surrounding Hon. Kenyatta are shielding him from getting the whole truth".[59]

33. On 21 and 24 March 2011, prompted by P-0011's emails and having received the [REDACTED] document, Ms Higgins interviewed P-0011 and P-0012 a second time.[60] She explained that the Defence intermediary who had promised them a meeting with the Accused had no power to do so,[61] that the [REDACTED] document could be viewed as "witness intimidation", and that the Defence wanted "nothing to do" with it.[62]

34. P-0011 contacted the Prosecution for the first time via email on 28 March 2011, stating that he and [REDACTED] were "ready to expose the crimes that were committed by pnu in pev".[63]

B. <u>The Prosecution interviews the witnesses.</u>

[54] KEN-D13-0008-0014.
[55] KEN-OTP-0056-0191, at 0192.
[56] KEN-D13-0007-0027, at 0051.
[57] KEN-OTP-0056-0202.
[58] KEN-OTP-0056-0201.
[59] KEN-OTP-0056-0195.
[60] KEN-D13-0010-0092; KEN-D13-0010-0246.
[61] KEN-D13-0010-0092, at 0104.
[62] KEN-D13-0010-0092, at 0117-19.
[63] KEN-OTP-0102-0814, attached as Annex B.

35. Having determined that P-0011 and P-0012 were subject to security risks, the Prosecution [REDACTED] and conducted screening interviews of the two on 11 and 12 June 2011.[64] Full interviews were conducted from 16 to 23 June 2011.[65] Both witnesses provided substantial incriminatory evidence and volunteered that they had previously given false statements to the Defence.[66] Their account of their interactions with the Defence, which the Defence challenges, is as follows.

a. Witness coaching and false statements.

36. P-0012 explained that before he was introduced to the Accused's British lawyers, [REDACTED], a local lawyer working for the Defence, instructed him to say that "Uhuru was not involved in any way of maybe funding the people who go and fight [and] kill . . . he did not use Mungiki at all" during the PEV.[67] The witnesses reported that before their interviews, [REDACTED] promised them that "we shall arrange [to meet the Accused] later on", to obtain security "assurance[s]" and to discuss payment.[68] [REDACTED] was present during Ms Higgins' interviews with the witnesses.[69]

37. P-0011 also explains the rationale for lying to the Defence: he did not dare "expose the exact facts" before Mr Kenyatta "commit[ted] himself on my security".[70]

[64] P-0011, KEN-OTP-0097-0160, KEN-OTP-0097-0184; P-0012, KEN-OTP-0061-0187 to KEN-OTP-0061-0235.
[65] P-0011, KEN-OTP-0052-1211 to KEN-OTP-0052-1646; P-0012, KEN-OTP-0060-0003 to KEN-OTP-0060-0526.
[66] P-0011, KEN-OTP-0052-1331, at 1341-42; P-0012, KEN-OTP-0060-0470, 0476.
[67] P-0012, KEN-OTP-0060-0470, at 0475.
[68] P-0011, KEN-OTP-0052-1331, at 1341; P-0012, KEN-OTP-0060-0470, at 0475.
[69] KEN-D13-0010-0023; KEN-D13-0010-0164.
[70] P-0011, KEN-OTP-0052-1331, at 1341; *see also* P-0012, KEN-OTP-0060-0470, at 0475 ("it would be better if I met Uhuru himself, so that we can talk one on one, so that I can tell him what I can help, or maybe his request is about what.").

38. P-0012 reported that he received a similar message from [REDACTED],[71] [REDACTED], who told him that "whatever you tell them [the Accused's counsel] make sure you don't say something that can incriminate him [the Accused]".[72]

b. The scheme to suborn Mungiki witnesses.

39. P-0011 and P-0012 informed the Prosecution that they were approached in February 2011 by Defence intermediaries, including [REDACTED], an individual purportedly from "State House", and [REDACTED], who attempted to enlist them to identify witnesses who would be willing to "say whatever they [the intermediaries] want" about the Accused's involvement in the PEV.[73] According to the account provided by P-0012, the intermediaries stated that funds had been "set aside to buy" witnesses,[74] and instructed the two to "[l]ook for these people. We buy them".[75] The intermediaries are reported to have stated that individuals who agreed "to say Uhuru . . . did not use the Mungikis, will be paid a large amount of money".[76]

40. P-0012 reported that the intermediaries' offer of payment was coupled with the threat of harm: the intermediaries would "just get rid of . . . kill" those who refused to comply with the scheme to procure false testimony.[77] The message was that "unless a witness . . . cooperate[d] with [the scheme], he would be eliminated".[78]

[71] Materials submitted by the Defence at the confirmation stage demonstrate that [REDACTED] had the opportunity to coach P-0012 before he was introduced to Defence counsel. *See* ICC-01/09-02/11-281-Conf-Anx1, page 201, para 7 ("[REDACTED]").
[72] P-0012, KEN-OTP-0060-0470, at 0474.
[73] P-0011, KEN-OTP-0052-1345, at 1346-47.
[74] P-0012, KEN-OTP-0060-0130, at 0138.
[75] P-0012, KEN-OTP-0060-0130, at 0140.
[76] P-0012, KEN-OTP-0060-0470, at 0481.
[77] P-0012, KEN-OTP-0060-0130, at 0138.
[78] P-0011, KEN-OTP-0052-1345, at 1348.

41. P-0011 explained that as part of the scheme to procure false testimony, [REDACTED] instructed him and P-0012 to "write a report" about "how you'll go about it",[79] that he could "take . . . to Uhuru".[80] To this end, P-0011 and P-0012 worked with [REDACTED],[81] whom the Prosecution alleges to have been an agent for the Accused during the PEV,[82] to create the [REDACTED] document.[83]

42. P-0011 explained that the document was given to [REDACTED],[84] and [REDACTED].[85] P-0011 explained that the goal was to obtain a security assurance: "we wanted to make sure that the top leadership is understanding the job we are being given here", so that he and P-0012 would not "be given the blame later or . . . be killed".[86] P-0011's and P-0012's fears were grounded in the extra-judicial killings [REDACTED] in the immediate aftermath of the PEV.[87]

43. P-0011 and P-0012 reported that they went along with the scheme for a time and acted as Defence intermediaries, connecting Defence counsel with Mungiki members.[88] P-0011 and P-0012 explained that they told the Mungiki members they introduced not to "say exactly what you know or how you think Uhuru was involved", which could get them "killed",[89] and that "later they will be paid".[90] P-0012 stated that he introduced [REDACTED] and

[79] P-0011, KEN-OTP-0052-1345, at 1350; *see also* P-0012, KEN-OTP-0074-0664, at 0668.
[80] P-0011, KEN-OTP-0052-1345, at 1353.
[81] P-0011, KEN-OTP-0052-1345, at 1355-56.
[82] ICC-01/09-02/11-796-Conf-AnxA, paras 28, 37, 40-41, 43.
[83] KEN-D13-0006-0031; P-0011, KEN-OTP-0052-1345, at 1355-56, KEN-OTP-0081-0216, at 0223-24; P-0012, KEN-OTP-0074-0664, at 0667-68.
[84] [REDACTED].
[85] P-0011, KEN-OTP-0052-1345, at 1356, KEN-OTP-0052-1545, at 1550; KEN-D13-0010-0092, at 0126.
[86] P-0011, KEN-OTP-0052-1345, at 1356.
[87] P-0011, KEN-OTP-0052-1317, at 1320-25, esp. 1322 ("I became almost sick. Fear was all over"); P-0012, KEN-OTP-0060-0093, at 0110-11, KEN-OTP-0060-0112, at 0125.
[88] P-0011, KEN-OTP-0052-1345, at 1353-55; P-0012, KEN-OTP-0060-0130, at 0134-37.
[89] P-0011, KEN-OTP-0052-1345, at 1354, KEN-OTP-0052-1545, at 1547; P-0012, KEN-OTP-0060-0130, at 0137.
[90] P-0011, KEN-OTP-0052-1523, at 1543.

[REDACTED] to the Defence,[91] and that he told them the Accused wanted people who would "tell lies in a court of law, that he was not using Mungiki".[92]

c. [REDACTED].

44. P-0011 and P-0012 informed the Prosecution that [REDACTED],[93] [REDACTED].[94] P-0011 and P-0012 explain that they agreed to [REDACTED] because "they would have [been] killed" otherwise.[95]

d. Contact with the Prosecution.

45. P-0011 and P-0012 stated that when they realised they would not be permitted to meet to Accused to obtain a security guarantee, they explored options to extricate themselves.[96] P-0011 became convinced that a trap was being laid to kill them,[97] at which point, he explains, "we got really scared and we decided to tell ICC [sic] as much as we know".[98]

C. The witnesses are relied upon at confirmation and their identities are disclosed to the Defence.

46. The Prosecution submitted the evidence of P-0011 and P-0012 at confirmation, and the Pre-Trial Chamber relied upon it in its decision confirming the charges.[99] In accordance with the Single Judge's rulings, the Prosecution did not disclose the identities of the witnesses to the Defence at the confirmation stage.[100]

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[91] P-0012, KEN-OTP-0060-0130, at 0135.
[92] P-0012, KEN-OTP-0060-0130, at 0134-37.
[93] P-0011, KEN-OTP-0052-1345, at 1357; P-0012, KEN-OTP-0060-0470, at 0481-82.
[94] P-0011, KEN-OTP-0052-1345, at 1357, KEN-OTP-0052-1545, at 1552-53; KEN-OTP-0081-0216, at 0234-35; P-0012, KEN-OTP-0060-0470, at 0482-84.
[95] P-0011, KEN-OTP-0081-0216, at 0235; P-0012, KEN-OTP-0060-0470, at 0482.
[96] P-0011, KEN-OTP-0052-1360, at 1361-69; P-0012, KEN-OTP-0060-0130, at 0141, KEN-OTP-0060-0193, at 0200.
[97] P-0011, KEN-OTP-0052-1360, at 1369-71; P-0012, KEN-OTP-0060-0486, at 0489-92.
[98] P-0011, KEN-OTP-0052-1360, at 1371.
[99] *See*, *e.g.*, ICC-01/09-02/11-382-Red, paras 333-335, 363-365, 385-386, 389, 393, 395, 396, 406.
[100] ICC-01/09-02/11-236-Conf-Red, p. 13.

47. On 26 June 2012, the Prosecution received a letter [REDACTED] and requesting confirmation that "the two persons are indeed ICC Prosecution witnesses".[101] The Prosecution viewed the letter as an effort to discover the identities of protected witnesses, and did not reply.

48. The Prosecution disclosed the identities of P-0011 and P-0012 to the Defence on 1 August 2012.[102] [REDACTED].

D. After the identities of P-0011 and P-0012 are disclosed, an associate of the Accused attempts to bribe them to withdraw their testimony.

49. In late 2012, [REDACTED], tried to persuade P-0011 and P-0012 to withdraw their testimony. The Prosecution conducted an operation to determine the scope of the scheme and, for this purpose, engaged P-0012 to participate in recorded telephone conversations with [REDACTED] and [REDACTED].[103]

50. The facts regarding these events are a matter of dispute. The Defence casts the Prosecution's operation as "a conspiracy [by P-0012] to interfere with the collection of evidence with others, without the knowledge of Uhuru Kenyatta, for the payment of money".[104] As explained below, the Prosecution's evidence tells a different story.

51. Efforts to locate P-0011 and P-0012 and persuade them to withdraw their evidence began days after the Prosecution disclosed their identities to the Defence. On 14 August 2012 (two weeks after disclosure), the VWU informed the Prosecution that P-0011 had communicated with it the previous day.[105] According to the VWU, P-0011 stated that two individuals, purporting to be representatives of the Accused, asked P-0011 and P-0012's

[101] KEN-OTP-0102-0445 (ICC-01/09-02/11-822-Conf-AnxB.8).
[102] ICC-01/09-02/11-461-Conf-Anx1.
[103] *See* [REDACTED] Stmt., paras 76, 77, 83-108, Annex A.
[104] ICC-01/09-02/11-822-Conf, para 63.
[105] [REDACTED] Stmt., para 70, Annex A.

[REDACTED] family members to assist in contacting the witnesses.[106] One also gave a telephone number to be passed on to the witnesses.[107] Before speaking to the VWU, P-0011 called the number and was told to call back later.[108]

52. On 15 August 2012, the VWU facilitated a call between P-0012 and his brother, who confirmed the above account provided by P-0011.[109]

53. After agreeing with the Prosecution to record the call, on 30 August 2012, P-0012 calling the number provided by the purported Kenyatta representative.[110] No one answered.[111] He tried twice more, but again no one answered.[112] Further calls were attempted on 31 August and 10 September, without success.[113]

54. On 20 September 2012, the VWU facilitated a call between the Prosecution and P-0012.[114] After speaking with his family, P-0012 told the Prosecution that [REDACTED].[115] [REDACTED] allegedly informed P-0012's family that the Accused had sent him to speak to P-0011 and P-0012 to find out how much money they wanted for the case not to proceed.[116] P-0012's family informed him that a meeting had been arranged between the family and the Accused [REDACTED].[117] P-0012's mother provided him with [REDACTED]'s telephone number for the witness to call him.[118]

[106] [REDACTED] Stmt., paras 70-72, Annex A.
[107] [REDACTED] Stmt., para 71, Annex A.
[108] [REDACTED] Stmt., para 71, Annex A.
[109] [REDACTED] Stmt., paras 73-75, Annex A.
[110] [REDACTED] Stmt., paras 75, 78, Annex A.
[111] [REDACTED] Stmt., para 78, Annex A.
[112] [REDACTED] Stmt., para 78, Annex A.
[113] [REDACTED] Stmt., para 78, Annex A.
[114] [REDACTED] Stmt., para 79, Annex A.
[115] [REDACTED] Stmt., para 80, Annex A.
[116] [REDACTED] Stmt., para 80, Annex A.
[117] [REDACTED] Stmt., para 81, Annex A.
[118] [REDACTED] Stmt., para 81, Annex A.

55. To determine the scope of the bribery scheme, the Prosecution conducted a series of monitored telephone calls between P-0012 and [REDACTED], and between the witness and his family members.[119] The telephone calls took place between [REDACTED] and [REDACTED] 2012 and were recorded with P-0012's consent.[120]

56. Prior to the telephone calls, the Prosecution instructed P-0012 on how to conduct the conversations.[121] The Prosecution explained who was to be called, the purpose of the calls, and, where appropriate, what to say.[122] For example, before one call the Prosecution instructed P-0012 [REDACTED].[123]

57. The conversations were in Kikuyu. Before certain calls, P-0012 spoke in English with the Prosecution investigators monitoring the call.[124] After certain calls, P-0012 summarised their content to the Prosecution in English.[125]

58. The conversations revealed that [REDACTED], holding himself out as acting on behalf of the Accused, offered P-0012 money and other benefits in exchange for the witness's agreement to withdraw his evidence.[126]

59. In January 2013, [REDACTED], gave a statement to the Prosecution regarding these events.[127] The statement explained that [REDACTED],[128]

[119] [REDACTED] Stmt., paras 82-108, Annex A.
[120] [REDACTED] Stmt., paras 82-108, Annex A.
[121] [REDACTED] Stmt., paras 84, 85, 92, 98, 100, 101, Annex A.
[122] [REDACTED] Stmt., paras 84, 85, 92, 98, 100, 101, Annex A.
[123] [REDACTED] Stmt., para 92, Annex A.
[124] [REDACTED] Stmt., para 87, Annex A.
[125] [REDACTED] Stmt., para 87, Annex A.
[126] [REDACTED] Stmt., para 82-108, Annex A.
[127] KEN-OTP-0092-0737, attached to the Application as ICC-01/09-02/11-822-Conf-AnxB.6.
[128] KEN-OTP-0092-0737, at paras 76-99 (ICC-01/09-02/11-822-Conf-AnxB.6).

during which [REDACTED]: (i) [REDACTED];[129] (ii) [REDACTED];[130] and (iii) [REDACTED].[131]

60. On 4 January 2013, the Prosecution disclosed 11 of the [REDACTED] recordings to the Defence, explaining that their transcription and translation was underway.[132] The Prosecution summarised the contents of the conversations to the Defence:

> [REDACTED] seeks to persuade Witness 12 to meet to discuss the 'amount of money to be given' to resolve the case. [REDACTED] indicates that Mr Kenyatta was informed of the scheme and wanted to avoid direct involvement because he was concerned about getting caught tampering with evidence.[133]

61. On 8 January 2013, the Prosecution [REDACTED].[134] The Chamber [REDACTED].[135] Also on 9 January 2013, the Prosecution disclosed an additional recording to the Defence.

62. [REDACTED], the Prosecution disclosed or re-disclosed to the Defence 39 recordings on 11 February 2013.[136] Transcriptions and translations were not disclosed because they were not complete.

63. The Defence disclosed its own transcripts and translations of 39 of the [REDACTED] recordings to the Prosecution on 10 May 2013, together with a letter highlighting excerpts of the conversations between P-0012 and his family members. As a result of this letter, on 9 July 2013, the Prosecution disclosed to the Defence investigative reports that provided the

[129] KEN-OTP-0092-0737, at para 76 (ICC-01/09-02/11-822-Conf-AnxB.6).
[130] KEN-OTP-0092-0737, at para 78 (ICC-01/09-02/11-822-Conf-AnxB.6).
[131] KEN-OTP-0092-0737, at paras 88-97 (ICC-01/09-02/11-822-Conf-AnxB.6).
[132] ICC-01/09-02/11-597, para 3; see also ICC-01/09-02/11-822-Conf, Annex B.1.
[133] Letter from the Prosecution to the Kenyatta Defence, 4 January 2013. See also ICC-01/09-02-/1-822-Conf, Annex B.1.
[134] ICC-01/09-02/11-592-Conf, at para 15.
[135] ICC-01/09-02/11-595-Conf.
[136] In the re-disclosed recordings, redactions to the identities of certain participants were lifted.

investigative context in which the conversations were recorded and certain instructions the Prosecution provided to P-0012.[137]

64. When the Defence transcripts were received, it was apparent that there were differences between the Defence's translations and the Prosecution's translations, which were in the quality control process at that time. Some differences were significant and affected important parts of the conversations.[138] In the circumstances, the Prosecution undertook an additional level of quality control to ensure that its translations were an accurate record of what was said.

65. For this reason, and because a time-consuming voice recognition process was required with respect to certain calls, the translation and transcription of the recordings took an unusually long period. The Prosecution disclosed eight transcripts to the Defence on 25 October 2013, and three on 1 November, with the rest to follow as they become available.

E. Renewed attempts are made to persuade P-0011 and P-0012 to withdraw their evidence.

66. On [REDACTED] 2013, the Prosecution and the VWU facilitated a call between P-0012 and his family. With the witness's consent, the call was recorded. [REDACTED],[139] [REDACTED].[140] [REDACTED].[141] [REDACTED].[142] [REDACTED].[143] [REDACTED].[144]

67. [REDACTED].[145] [REDACTED].[146]

[137] Rule 77 disclosure package 45.
[138] For instance, [REDACTED].
[139] ICC-01/09-02/11-796-Conf-AnxA, paras 26, 50, 70.
[140] KEN-OTP-0116-0135, at lines 113-30.
[141] KEN-OTP-0116-0135, at lines 125-59.
[142] KEN-OTP-0116-0135, at lines 391-96.
[143] KEN-OTP-0116-0135, at lines 397-405.
[144] KEN-OTP-0116-0135, at line 463.
[145] KEN-OTP-0116-0155, at lines 66-70.
[146] KEN-OTP-0116-0155, at lines 96-134.

68. [REDACTED].[147] [REDACTED].[148] [REDACTED].[149]

69. On 9 October 2013, P-0011 confirmed to the Prosecution that [REDACTED].[150] [REDACTED]. [151]

The law

70. The Appeals Chamber has set "a high threshold for a Trial Chamber to impose a stay of proceedings, requiring that it be 'impossible to piece together the constituent elements of a fair trial'".[152] If a "lesser remedy" is available,[153] the "drastic" and "exceptional remedy" of a stay may not be granted.[154] A stay "is to be reserved strictly for those cases that necessitate" the remedy,[155] "when the specific circumstances of the case render a fair trial impossible",[156] and where there are no other options open to cure the unfairness at issue.[157]

Submissions

I. Even taken at their highest, the Defence's factual assertions do not warrant the drastic remedy of a stay.

71. The Defence makes a series of factual allegations in support of its claim that the trial cannot begin. Even if true – and not only are the facts in dispute, but the Prosecution also disputes the Defence's factual assumptions and the inferences it draws – these allegations, viewed both individually and cumulatively, do not justify a permanent stay of proceedings.

[147] KEN-OTP-0116-0162, at lines 104-08.
[148] KEN-OTP-0116-0162, at lines 108-12.
[149] KEN-OTP-0116-0162, at line 194.
[150] [REDACTED] Stmt., para 109, Annex A.
[151] [REDACTED] Stmt., para 109, Annex A.
[152] *Prosecutor v. Lubanga*, ICC-01/04-01/06-2582 OA 18, para 55.
[153] *Prosecutor v. Lubanga*, ICC-01/04-01/06-2690-Red2, para 168.
[154] ICC-01/04-01/06-2582 OA 18, para 55.
[155] ICC-01/04-01/06-2690-Red2, para 168.
[156] *Prosecutor v. Banda and Jerbo*, ICC-02/05-03/09-410, para 78.
[157] ICC-01/04-01/06-2582 OA 18, para 55; ICC-01/04-01/06-2690-Red2, para 168.

72. The Defence correctly acknowledges that terminating the case is a measure of last resort, only to be imposed when (a) the process has been "rupture[d] […] to an extent making it impossible to piece together the constituent elements of a fair trial",[158] or (b) "the integrity of the judicial process is irremediably vitiated by such serious prejudice that to continue the proceedings would offend the fundamental principles of justice".[159] As the Trial Chamber explained in *Lubanga,* a stay may be granted only if it would be "'odious' or 'repugnant' to the administration of justice to allow the proceedings to continue", or that the breach of the accused's rights render it impossible to give him a fair trial.[160]

73. The Prosecution submits that when assessing the need for a permanent stay, the issue is not whether alleged past conduct was egregious, but whether the upcoming trial itself would be an abuse of process if allowed to proceed.[161] In other words, a stay is required only if continuing the process necessarily "would harm the integrity of the criminal justice system or would be contrary to the recognised purposes of the administration of justice".[162] None of the claims raised by the Defence meets these standards.

74. Moreover, it would be inappropriate to terminate the trial before it even begins based on one-sided and heavily disputed factual accounts that are classically matters for the trial itself. It is impossible on the materials provided to conclude that the matters raised by the Defence render a fair trial impossible or undermine the integrity of the proceedings to such an

[158] ICC-01/09-02/11-822-Red, para 35 (quoting ICC-01/04-01/06-772, para 39).
[159] ICC-01/09-02/11-822-Red, para 24; *see also Queen v. Antonievic et al.*, CA818/2012 [2013] NZCA 483, paras 82, 102.
[160] ICC-01/04-01/06-2690-Red2, para 166.
[161] *See Prosecutor v. Lubanga*, ICC-01/04-01/06-1486 OA 13, para 76 ("[i]f, at the outset, it is clear that the essential preconditions of a fair trial are missing and *there is no sufficient indication that this will be resolved during the trial process*, it is necessary . . . that the proceedings should be stayed." (emphasis added)); ICC-01/04-01/06-2582 OA 18, para 60 ("[r]ecourse to sanctions enables a Trial Chamber, using the tools available within the trial process itself, to cure the underlying obstacles to a fair trial"); *Antonievic*, paras 82, 102.
[162] *Antonievic*, para 93; *see also* para 102.

extent that the case must be stayed. Each of the matters raised by the Defence can and should be resolved at trial, where the Chamber will be able to assess, on a full record, the conflicting interpretations of the evidence advanced by the parties. The trial process will also enable the Chamber to fashion remedies - such as expunging the relevant evidence from the trial record or not relying on the evidence in question when the Chamber makes conclusions on the relevant area or issue - tailored to compensate for the unfairness, if any, established by the evidence.[163] In the circumstances, the Defence's request for a permanent stay is premature, unsupported by the material submitted, and disproportionate to the alleged harm.

75. Nor is it appropriate to consider holding a preliminary evidentiary hearing on these issues. The Court has already scheduled the ultimate evidentiary proceeding – the trial. That is the forum in which disputes and conflicting versions are to be presented for credibility assessments and evaluation.

A. Allegations regarding P-0118's contact with Defence witnesses.

76. The Prosecution views all serious allegations of witness interference with the utmost concern. Interference is never acceptable, whether done by the parties, their agents, or persons sympathetic to but not controlled by the parties. Both parties must take steps to investigate allegations of evidence tampering and to remedy the situation should tampering be established.

77. This case in particular has been characterised by significant accusations of attempts to tamper with witnesses and interfere with the collection of evidence.[164] Against this backdrop, the Prosecution views with concern the allegation that P-0118 "intimidated and interfered with [REDACTED] potential Defence witnesses".[165] Though P-0118 has enabled the Prosecution

[163] *See* ICC-01/04-01/06-2690-Conf, para 204.
[164] *See*, *e.g.*, ICC-01/09-02/11-796-Conf-AnxA, paras 89-95.
[165] ICC-01/09-02/11-822-Conf, para 30.

to [REDACTED] have access to members of [REDACTED] – an organisation that nobody disputes was involved in the violence that is the subject of this criminal case – he did not act and is not acting under Prosecution control. That said, however, the Prosecutor has initiated an investigation – undertaken by an investigative team separate from that responsible for the current case – to determine whether there is sufficient objective information to suggest that P-0118 has been involved in offences against the administration of justice under Article 70.

78. For the purpose of resolving the Application, however, the ultimate result of the Prosecution's investigation is immaterial. Even if the investigation reveals that the Defence's allegations regarding P-0118 are accurate, such misconduct on the part of a witness does not merit the "drastic remedy" of a stay of the Accused's case.[166]

79. Under this Court's jurisprudence, a stay may be imposed only if there is no "lesser remedy" available to ensure the integrity of the proceedings.[167] Such a conclusion is unsupported in this case. Should actual misconduct be established, the Chamber will be able to fashion remedies that are tailored to ameliorate whatever unfairness, if any, it determines the Defence suffered. It is impossible to determine now, however, that there is actual, ongoing, severe, and irreparable prejudice that makes a fair trial impossible.

80. Instead, "[a]ny prejudice resulting from unfairness can be relieved against by the Trial Chamber in the trial process".[168] The "better approach is to allow the case to proceed to trial",[169] and "to reflect the effects of the abused

[166] ICC-01/04-01/06-2582 OA 18, para 55; ICC-01/04-01/06-2690-Red2, para 168.
[167] ICC-01/04-01/06-2690-Red2, para 168; *see also* ICC-01/04-01/06-2582 OA 18, para 61 (reversing stay where a lesser remedy may have cured the problem).
[168] ICC-02/05-03/09-410, para 114.
[169] ICC-02/05-03/09-410, concurring opinion of Judge Eboe-Osuji, para 85.

process in the ultimate outcome of the proceedings".[170] Given the possibility of adequate alternative remedies in the event that the Accused's fair trial rights are shown to have been compromised, the Court's jurisprudence establishes that the stay Application must be denied.[171]

81. Contrary to the Defence assertion,[172] it is not appropriate for the Chamber to determine, before trial even starts, that P-0118's alleged actions irreparably taint [REDACTED] (presumptively, Defence as well as Prosecution) and to terminate the trial before it starts on that basis. Reliability assessments are for the Chamber to conduct at the end of the case, on a witness-by-witness basis, based on a complete evidentiary record and the Chamber's evaluation of the witnesses' live testimony. As explained in detail below, this was the approach taken in *Lubanga*, where the Trial Chamber refused to grant a permanent stay on the basis of alleged intermediary taint, ruling that "the appropriate remedy will lie in the Court's approach to the evidence in question, and particularly the extent to which it is to be relied on".[173]

B. Allegations regarding P-0118's "[REDACTED]".

82. The Defence asserts that P-0118 has [REDACTED],[174] and [REDACTED] preventing any person or former person [REDACTED] from co-operating with the Defence".[175] These assertions do not support a stay of proceedings.

83. *First*, the Defence does not cite sufficient or compelling facts to establish that P-0118 [REDACTED]: the references to P-0118's supposed "[REDACTED]" or "[REDACTED]" have no footnote citations, and at its core the assertion

[170] ICC-02/05-03/09-410, concurring opinion of Judge Eboe-Osuji, para 111.
[171] ICC-01/04-01/06-2690-Red2, para 168; *see also* ICC-01/04-01/06-2582 OA 18, para 61.
[172] ICC-01/09-02/11-822-Conf, paras 78-82.
[173] ICC-01/04-01/06-2690-Red2, para 204.
[174] ICC-01/09-02/11-822-Conf, para 30.
[175] ICC-01/09-02/11-822-Conf, para 6.

depends on the conclusions drawn by Defence investigators and one witness.[176]

84. The Defence staff, who cannot be viewed as disinterested parties in this litigation, provide little more than their own opinions that [REDACTED] are non-cooperative because P-0118 [REDACTED] to not cooperate.[177] Opinions are not facts. Nor, in this instance, do their opinions provide the only reasonable explanation for the refusal of persons to speak with the Defence. An equally plausible explanation is that [REDACTED]. In short, the speculation of Defence investigators that there has been witness interference cannot satisfy the Defence's burden.[178]

85. Nor do the statements of [REDACTED] establish that P-0118 [REDACTED]. [REDACTED] asserts that P-0118 [REDACTED],[179] [REDACTED].[180] [REDACTED] does not suggest that P-0118 [REDACTED], as the Application asserts.[181] Thus, even if [REDACTED]'s account is accepted as true, it does not establish that P-0118 [REDACTED].

86. *Second,* the Defence's materials undermine the assertion that, if in fact P-0118 [REDACTED].[182] The transcripts provided by the Defence suggest that [REDACTED]. In short, even if P-0118 [REDACTED], it did not [REDACTED], as the Application suggests.

87. *Third*, even if there were sufficient evidence to establish that P-0118 had [REDACTED] – and there is not – it is unjustified to order a stay at this

[176] *See* ICC-01/09-02/11-822-Conf-AnxA.11, para 51 ([REDACTED]); ICC-01/09-02/11-822-Conf-AnxA.12, para 71 ([REDACTED]); ICC-01/09-02/11-822-Conf-AnxA.1, paras 24, 54, 98.
[177] ICC-01/09-02/11-822-Conf-AnxA.11, para 51 ([REDACTED]); *see also* ICC-01/09-02/11-822-Conf-AnxA.12, para 71 ([REDACTED]).
[178] *See* ICC-02/11-01/11-548-Red OA 4, para 82 (refusing to grant relief where the movant "fail[ed] to provide any concrete evidence establishing" his assertions and relied instead on "speculat[ion]")..
[179] ICC-01/09-02/11-822-Conf-AnxA.1, para 98.
[180] ICC-01/09-02/11-822-Conf-AnxA.1, para 54.
[181] [REDACTED].
[182] ICC-01/09-02/11-822-Conf, para 74.

stage. It is unjustified because the Defence had access for years to [REDACTED], continues to have access to some (even after the purported [REDACTED]), and has unfettered access to a wide array of potentially relevant sources of evidence.

88. Trial Chamber IV's decision in *Banda & Jerbo* is on point.[183] In that case, the stay request was based in part on the Defence's inability to travel to Sudan to interview potential witnesses.[184] The Chamber denied the application, holding that "an unsubstantiated claim that lines of defence and exculpatory evidence might have become available had the defence been allowed to enter the Sudan is insufficient to meet the high threshold set out for a stay of proceedings".[185]

89. The situation in that case was more compelling than the claim raised here. The defence complained that the site of the crime and all actual and potential witnesses within that area were closed to any defence investigation from the outset.[186] Here, the claim is that [REDACTED]. Even assuming, for the sake of argument, that the claim is true, the Defence has access to a wide array of [REDACTED] sources who, among other things, can contest the truthfulness of the Prosecution's Mungiki witnesses. For example, the Defence submitted statements from [REDACTED], [REDACTED] and Lewis Nguyai at confirmation, all of whom disputed allegations by the Prosecution's Mungiki witnesses that they promoted the PEV on behalf of the Accused.[187]

90. Moreover, the Accused enjoys considerable influence and unfettered access to public officials and private citizens in Kenya. In these circumstances, it is

[183] ICC-02/05-03/09-410.
[184] ICC-02/05-03/09-410, para 101.
[185] ICC-02/05-03/09-410, para 102.
[186] ICC-02/05-03/09-274, paras 4-17.
[187] KEN-D13-0005-0815 ([REDACTED]), KEN-D13-0005-0859 ([REDACTED]), KEN-D13-0008-0015 ([REDACTED]).

incorrect for the Defence to assert that Mungiki witnesses "represent the only type of source from which the Defence can challenge the insider evidence relied upon by the Prosecution".[188] As in *Banda & Jerbo*, the hypothetical argument that the Defence might be able to obtain additional evidence if more Mungiki members cooperate is "insufficient to meet the high threshold set out for a stay of proceedings".[189]

C. Allegations regarding [REDACTED]'s contact with Defence witnesses.

91. The Defence's first attack on [REDACTED] is based on [REDACTED]'s description of [REDACTED]'s alleged actions at [REDACTED].[190] Under [REDACTED]'s account, [REDACTED] appears not to have engaged in any misconduct at that meeting, much less misconduct that would warrant a stay.

92. According to [REDACTED].[191] [REDACTED].[192] The Defence asserts that [REDACTED].[193] There is no support for the Defence's supposition regarding [REDACTED], which is an attempt to suggest misconduct where none is apparent on the face of the evidence.

93. In this regard, the statements provided by the relevant Defence witnesses should be viewed with caution. While the witnesses claim to [REDACTED], the Prosecution received the opposite message when, [REDACTED].[194] [REDACTED].[195] [REDACTED].[196]

[188] ICC-01/09-02/11-822-Conf, para 83.
[189] ICC-02/05-03/09-410, para 102.
[190] *See* ICC-01/09-02/11-822-Conf, para 43(iii) – (v) and ICC-01/09-02/11-822-Conf-AnxA.1, paras 86-91.
[191] ICC-01/09-02/11-822-Conf-AnxA.1, para 89.
[192] ICC-01/09-02/11-822-Conf-AnxA.1, paras 88, 90.
[193] ICC-01/09-02/11-822-Conf, para 75.
[194] [REDACTED] Stmt., para 68, Annex A.
[195] [REDACTED] Stmt., para 68, Annex A.
[196] [REDACTED] Stmt., para 69, Annex A.

94. The theory that this exchange reflects corruption and interference with Defence witnesses is not the only plausible explanation. Rather, it is equally possible that the actions of [REDACTED] are part of the same pattern reported by P-0011, P-0012, P-0219 and P-0428: [REDACTED], approached by representatives of Kenya's most powerful man, tell them what they want to hear as a protection strategy but also contact the Prosecution to secure protection and provide full evidence.[197] It is entirely plausible that the same dynamic is at play with [REDACTED], the only difference being that the Prosecution did not interview them or provide them with protection, so they continued to cooperate with the Defence.

95. The Prosecution's investigations into the allegations against P-0118 may shed light on this issue. In the meantime, however, the Defence has not demonstrated that [REDACTED] engaged in any misconduct with respect to Defence witnesses.

D. Allegations regarding non-ICC statements of Prosecution witnesses.

96. The Defence's second attack on [REDACTED] is based upon written statements he provided to the Prosecution on behalf of certain witnesses.[198] Relying on expert evidence suggesting that some of the statements "have one common author", the Defence argues that "the common authorship . . . suggests that [REDACTED] has been integral to the plan to concoct false evidence".[199] This argument does not support a stay.

97. *First*, the Defence argument assumes that the expert evidence is reliable, and asks the Chamber to render a decision based on that unchallenged assumption. This has the process backwards. The proponent of expert evidence must first demonstrate the evidence to be reliable before the

[197] *See* paras 27 – 45; P-0219, KEN-OTP-0103-2755, at 2756-58; P-0428, KEN-OTP-0103-0021, at 0029-32.
[198] ICC-01/09-02/11-822-Conf, para 61.
[199] ICC-01/09-02/11-822-Conf, paras 61-62.

Chamber can safely render decisions based on it. The Prosecution must be given an opportunity to challenge the expert evidence, and to seek the exclusion of opinions reached through unreliable methodology. At this stage, before the expert evidence has been subjected to proper scrutiny through the trial process, it is inappropriate to ask the Chamber to draw conclusions from it, or to use it as a basis to stay the proceedings.

98. *Second*, even if the Defence is ultimately able to establish that [REDACTED] was involved in drafting the statements, this would not demonstrate that he "concoct[ed] false evidence", as the Application asserts.[200] Stylistic similarities in statements transcribed by the same lawyer or investigator are unsurprising and do not, by themselves, demonstrate falsity.

99. Indeed, Defence witness statements annexed to the Application also contain similarities indicative of "common authorship". The statements refer to people using their full names (with the last name capitalised),[201] and use complex verbiage,[202] technical legal terms, and oddly precise formulations that are unlikely to be part of the everyday parlance of non-lawyers [REDACTED].[203] For example, three witnesses attested that they learned that they or others had been "adversely mentioned in the matter before the International Criminal Court".[204]

100. According to the methodology employed by the Defence expert, these features would tend to indicate "common authorship".[205] They do not, of course, automatically render the witnesses' evidence false or unreliable. That assessment is a matter to be determined at trial, when the Court is able to elicit whether the shared and oddly legalistic phrases reflected the

[200] ICC-01/09-02/11-822-Conf, paras 61-62.
[201] *See*, *e.g.*, [REDACTED].
[202] *See*, *e.g.*, [REDACTED].
[203] *See*, *e.g.*, [REDACTED].
[204] *See* [REDACTED].
[205] *See*, *e.g.*, ICC-01/09-02/11-822-Conf-AnxA.10.v, page 1.

witnesses' own words and to observe their demeanour during questioning. It is not a matter that can reliably be determined on paper beforehand.

101. The same is true of the statements [REDACTED] provided to the Prosecution. Even if it is established that [REDACTED] assisted in drafting them, the ultimate question for the Chamber will be whether this affects the reliability of the witnesses' evidence. This is a matter that can only properly be determined at trial. For this reason, the Defence arguments regarding the authorship of the statements do not support a stay – they demand a trial.

E. Allegations regarding alleged "intermediary taint".

102. The Defence's allegations of intermediary "taint" do not warrant a stay. At trial, the Defence will have the opportunity to advance its theory of intermediary taint in oral submissions and by cross-examining Prosecution witnesses and presenting its own evidence. This process will enable the Chamber properly to evaluate whether the manner in which certain witnesses came to the Prosecution's attention affects the reliability of their evidence. Only after a full airing of the issue through the presentation of evidence will the Chamber be able to "reach final conclusions on the alleged impact of the involvement of the intermediaries on the evidence in this case".[206]

103. Though the Application fails to mention it, *Lubanga* provides the relevant precedent, in a decision that is directly on point.[207] In that decision, the Trial Chamber denied a defence request for stay based not only on alleged intermediary taint, but also on allegations that the Prosecution was negligent in introducing unreliable evidence.[208] The Trial Chamber denied the request because it had taken steps to ensure that "the totality of the

[206] ICC-01/04-01/06-2690-Red2, para 198.
[207] ICC-01/04-01/06-2690-Red2.
[208] ICC-01/04-01/06-2690-Red2, paras 23, 26 and 204.

available evidence on the relevant intermediaries is explored during the trial".[209] Since the defence was able to present its theory of intermediary taint at trial, the Chamber concluded that "the alleged abuse on the part of the prosecution, even taken at its highest, would not justify staying the case at this stage".[210]

104. The same is true in this case. As in *Lubanga*, the Defence has alleged misconduct on the part of individuals who connected the Prosecution with trial witnesses. As in *Lubanga*, the Defence will be able at trial to challenge the evidence of the witnesses concerned and to present its evidence in support of its intermediary theory. As in *Lubanga*, the Defence's theory "can be addressed as part of the ongoing trial process", and if proven, "the appropriate remedy will lie in the Court's approach to the evidence in question".[211] As in *Lubanga*, it would "be a disproportionate reaction to discontinue the proceedings at this juncture".[212]

F. Allegations regarding P-0011 and P-0012.

105. Relying in large part on arguments already raised at confirmation and before this Chamber,[213] the Defence asserts that its credibility challenges to P-0011 and P-0012 warrant a stay.[214] They actually demonstrate the opposite – that the parties' disagreements over the credibility of P-0011 and P-0012 can be resolved only through a full airing of the evidence at trial, and not on paper beforehand.

106. The Defence theory relies on selectively edited snippets of evidence while omitting information that undermines the Defence position. Moreover, the Application does not present the full picture to the Chamber.

[209] ICC-01/04-01/06-2690-Red2, para 188.
[210] ICC-01/04-01/06-2690-Red2, para 197.
[211] ICC-01/04-01/06-2690-Red2, paras 204-205.
[212] ICC-01/04-01/06-2690-Red2, para 197.
[213] *See, e.g.*, ICC-01/09-02/11-281-Conf-Anx1; ICC-01/09-02/11-452, paras 26-40.
[214] ICC-01/09-02/11-822-Conf, paras 63-70, 85-88.

No trial Chamber could make reliable credibility determinations before trial, on the basis of an incomplete snapshot of the evidence, and without the opportunity to hear from the witnesses themselves.

a. P-0012's prior inconsistent statement.

107. P-0012's provision of a largely exculpatory statement to the Defence does not support the grant of a stay.[215] It goes to the witness's credibility, and that will be assessed at trial. Only after the Chamber has heard P-0012's live testimony will it be in a position to determine the extent to which his prior statement bears on the reliability of his evidence.

108. At trial, the Chamber will need to assess the explanation P-0012 gives for the inconsistencies – namely, that he was coached by Defence intermediaries before making his original exculpatory statement and also understood that he would be harmed if he implicated the Accused. The Application fails to mention, much less rebut, P-0012's explanation.

109. Perhaps even more striking is the Defence's reliance on excerpts from phone conversations between P-0012 and his mother.[216] While the selections might build a seemingly incriminating narrative, they ignore the evidence that defeats that narrative, including the fact that the conversations took place in the context of a Prosecution bribery investigation in which P-0012 was instructed to [REDACTED].[217] This context is critical to understanding the conversations, and the Chamber cannot be expected to determine their meaning until it has received a full presentation of the evidence, robustly tested by both parties through the trial process.

110. The danger of the premature credibility assessment sought in the Application is illustrated in paragraph 68 of the Application, where the

[215] ICC-01/09-02/11-822-Conf, para 68.
[216] ICC-01/09-02/11-822-Conf, para 68.
[217] *See* section F. (b).

Defence asserts that "OTP-12 stated explicitly that if agreements are not reached, statements will be changed".[218] In support, the Defence quotes a statement it attributes to P-0012.[219] In fact, the transcript reveals that it is the witness's mother speaking.[220] This error demonstrates the inadvisability of the premature credibility determination the Application invites the Chamber to undertake.

111. Ultimately it will be for the Chamber to reach its own conclusions regarding the impact of P-0012's prior statements on his trial evidence. But those conclusions must be reached only after a full airing of the evidence, including an assessment of the witness's live testimony, which can happen only at trial.

b. P-0012's assistance in the Prosecution's bribery investigation.

112. Of all the arguments raised in the Application, those based on P-0012's recorded conversations demonstrate most clearly why a trial is necessary.[221] The Application relies on a skewed selection from the conversations, and fails to address the context in which the conversations occurred, which is critical to their understanding.

113. As an initial matter, the Application relies exclusively on P-0012's conversations with his family members and fails to mention *any* of the conversations between the witness and [REDACTED]. Those omitted conversations are both pertinent and damning, revealing as they do that [REDACTED] attempted to bribe the witness to withdraw his testimony and purported to act with the Accused's knowledge and acquiescence. The Application thus presents the Chamber with a one-sided analysis that

[218] ICC-01/09-02/11-822-Conf, para 68.
[219] ICC-01/09-02/11-822-Conf, para 68 ("'recording a statement is no big deal, in fact one can record three or four statements . . . depending on what they agree on but if you fail to reach an agreement one can change what they have said'").
[220] *See* ICC-01/09-02/11-822-Conf-AnxB.2.xxxvii, pp. 9-11.
[221] ICC-01/09-02/11-822-Conf, paras 63-67.

cannot be the basis for determining the witness's credibility. Only at trial will the Chamber be able to assess the totality of the evidence.

114. Material excluded from the Application but necessary for a full understanding of the statements the Defence now relies upon to impugn P-0012's character are set out below.

115. In his first conversation with P-0012, [REDACTED].[222] [REDACTED];[223] [REDACTED];[224] [REDACTED];[225] [REDACTED].[226]

116. [REDACTED].[227] [REDACTED].[228] [REDACTED].[229]

117. The Application fails to mention these statements, which, if [REDACTED]'s claims are to be taken at face value, undercut the assertion that the Accused "had no knowledge of" the scheme.[230] Faced with these awkward facts, the Defence proposes that "[i]t is unclear from the transcripts as to whether or not [REDACTED] is in fact a victim of a plot to extort money".[231] It is not "unclear" – the unedited transcripts, and [REDACTED]'s own words, demonstrate his role as the instigator and not the victim.

118. Similarly illogical, given the clear (if unacknowledged) evidence that [REDACTED] was the schemer and not the victim, is the Defence suggestion that P-0012 can be demonstrated to be acting discreditably through these recordings. As explained above, it was the witnesses themselves who raised

[222] OTP Translation of the conversation between [REDACTED] (KEN-OTP-0116-0275), lines 129-37.
[223] OTP Translation of the conversation between [REDACTED] (KEN-OTP-0116-0275), line 392.
[224] OTP Translation of the conversation between [REDACTED] (KEN-OTP-0116-0275), line 418.
[225] OTP Translation of the conversation [REDACTED] (KEN-OTP-0116-0275), line 530. In this context, "young men" appears to refer to Mungiki members.
[226] OTP Translation of the conversation between [REDACTED] (KEN-OTP-0116-0275), lines 485-86.
[227] KEN-OTP-0116-0033, at 0035.
[228] KEN-OTP-0116-0033, at 0036.
[229] KEN-OTP-0116-0033, at 0036.
[230] ICC-01/09-02/11-822-Conf, para 67.
[231] ICC-01/09-02/11-822-Conf, para 67.

the alarm to the VWU and the Prosecution after attempts were made to contact and bribe them.[232] P-0012 then agreed to have the Prosecution record his telephone conversations.[233] These open and transparent actions are hardly consistent with a desire to solicit or receive bribes.

119. Further selective reliance on helpful evidence occurs when the Defence asserts that the statement of [REDACTED] "contradicts the Prosecution assertions and claims" about [REDACTED]'s efforts to bribe P-0012.[234] The statement is said to "reveal[ ] that it was in fact [REDACTED] who initiated contact with [REDACTED]".[235] What [REDACTED]'s statement actually says is that [REDACTED] gave his number to [REDACTED] and asked [REDACTED] to pass it on to [REDACTED].[236] Further, [REDACTED] asked [REDACTED], when they first spoke, "[REDACTED]".[237] [REDACTED] then explains that [REDACTED] claimed "he is close with Kenyatta" and could [REDACTED].[238]

120. Contrary to the implied assertion made in the Application, it was [REDACTED], not P-0012, who first mentioned the payment of money in return for the latter withdrawing his evidence.[239] The witness's purported interest once the subject had been raised was consistent with the role he was playing as instructed by the Prosecution. The same is true of P-0012's conversations with [REDACTED].[240]

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[232] *See supra* paras 51-52.
[233] *See supra* paras 53, 55.
[234] ICC-01/09-02/11-822-Conf, para 23.
[235] ICC-01/09-02/11-822-Conf, para 23.
[236] KEN-OTP-0092-0737, at 0747 (ICC-01/09-02/11-822-Conf-AnxB.6).
[237] KEN-OTP-0092-0737, at 0747 (ICC-01/09-02/11-822-Conf-AnxB.6).
[238] KEN-OTP-0092-0737, at 0747 (ICC-01/09-02/11-822-Conf-AnxB.6).
[239] *See* KEN-D13-0014-0014 (Defence Translation of the conversation between [REDACTED], KEN-OTP-0089-0087, annexed to the Application at ICC-01/09-02/11-822-Conf-AnxB.2.xviii), esp. at 0014-0015.
[240] *See* KEN-D13-0014-0369 (Defence Translation of the conversation between [REDACTED], KEN-OTP-0089-0034, annexed to the Application as ICC-01/09-02/11-822-Conf-AnxB.2.vi), esp. at 0370-0374; and KEN-D13-0014-0358 (Defence Translation of the conversation [REDACTED], KEN-OTP-0089-0033, annexed to the Application as ICC-01/09-02/11-822-Conf-AnxB.2.v), esp. at 0359-0361.

121. In sum, the recorded conversations do not support the assertion that P-0012 acted as part of a "conspiracy to interfere with the collection of evidence", as the Application suggests,[241] and do not support the extraordinary remedy of staying the proceedings. On the contrary, the parties' disagreement as to impact of the recordings on P-0012's credibility is a matter that can only be fully explored at trial.

c. Allegations that P-0011 was "involved in a conspiracy . . . to tamper with the collection of evidence".

122. As with P-0012, the Defence's submissions regarding P-0011 amount to attacks on his credibility, which are matters for trial.

123. In any event, the credibility arguments raised in the Application are without merit. The purported "extensive evidence"[242] of wrongdoing set out in the Application is in fact two assertions that do not support the conclusions for which they are proffered:

- [REDACTED]'s statement shows that P-0011 was keeping himself informed of [REDACTED]'s dealings with his family during the bribery attempts. This comes as no surprise given the witness's concerns about his family's safety. It does not in any way suggest P-0011's involvement "in a conspiracy to tamper with the collection of evidence", as the Application suggests.[243]

- The [REDACTED] 2012 letter [REDACTED] suggests only that the Government of Kenya attempted to uncover the identities of protected Prosecution witnesses before they were disclosed to the Defence.[244] This inference is strengthened by the fact that after the

[241] ICC-01/09-02/11-822-Conf, para 63.
[242] ICC-01/09-02/11-822-Conf, para 8.
[243] ICC-01/09-02/11-822-Conf, para 69.
[244] [REDACTED].

Prosecution disclosed the identities of P-0011 and P-0012 to the Defence on 1 August 2012, [REDACTED] on his letter.

124. The weaknesses in the Defence's attacks on P-0011's credibility demonstrate that it is only through the trial process that the Chamber can reach an informed decision on the basis of all the evidence.

II. The Application fails to demonstrate that an evidentiary hearing prior to trial is warranted.

125. A pre-trial evidentiary hearing would unquestionably delay proceedings, and the Defence has failed to show that such a delay is necessary, or that a hearing would assist the Chamber in resolving the Application.

126. *First*, there is no provision in the Court's legal framework for the pre-trial evidentiary hearing requested in the Application. The Statute provides for only one pre-trial evidentiary hearing – the confirmation hearing.[245] The fact that no other pre-trial evidentiary hearings are envisaged in the Court's regulatory framework suggests that the appropriate forum to resolve the evidentiary issues raised in the Application is the trial itself. *Lubanga* stands for precisely this proposition.[246]

127. *Second*, an evidentiary hearing would further delay trial, for no good reason. The Prosecution accepts the need for adjournments where necessary (and has recently done so on this basis),[247] but it is not appropriate to delay the trial to accommodate an unnecessary diversion. That is what a pre-trial evidentiary hearing would be. Even if every allegation in the Application is accepted as true – which is the maximum the Defence could hope to establish in an evidential hearing – those allegations are insufficient to

[245] Article 61 of the Statute.
[246] ICC-01/04-01/06-2690-Red2, paras 188, 197.
[247] *See* ICC-01/09-02/11-842-Red.

justify a stay. Thus, even in the Defence's best case scenario, any pre-trial hearing would end in the same situation as now – without sufficient grounds to warrant a stay. A pre-trial evidentiary hearing would thus achieve nothing.

128. *Third*, an evidentiary hearing would be inefficient. The Defence asserts that the proposed hearing would require the calling of live witnesses, including P-0118, P-0011, and P-0012.[248] These individuals are currently scheduled to be called during the Prosecution case, which will enable the Defence to question them on the allegations levelled against them in the Application. Similarly, the Defence will have the opportunity to call [REDACTED] as part of its own case.[249] Since the Chamber will be able to receive the relevant evidence during trial, there is no need to hold a pre-trial hearing to achieve the same result.

129. *Fourth*, it would be inappropriate to provide the Defence with the opportunity to cross-examine P-0011 and P-0012 before the trial begins. As explained above, each of the allegations regarding P-0011 and P-0012 goes to their credibility, which, by definition, is a matter to be resolved at trial. If P-0011 and P-0012 were called at a pre-trial evidentiary hearing, the Defence would no doubt wish to cross-examine them on these credibility issues. The Defence would then presumably wish to do the same in the main case. Thus, the Defence would have two opportunities to cross-examine the witnesses on the same topics, which is unfair to the witnesses, would provide the Defence with an unfair tactical advantage, and would be inefficient. This is particularly true since the Defence had the opportunity to challenge the credibility of P-0011 and P-0012 at confirmation, an opportunity which it exercised.

[248] ICC-01/09-02/11-822-Conf, para 2.
[249] ICC-01/09-02/11-822-Conf, para 2.

130. *Fifth*, the Defence's request for a pre-trial evidentiary hearing is yet another attempt to erect a procedural obstacle to trial, which is not supported in law or warranted on the facts. As the Chamber will recall, the parties undertook lengthy litigation earlier this year over the Defence's request for a new confirmation hearing. After carefully considering that request, the Chamber denied it, ruling that new confirmation proceedings were unwarranted,[250] in part because the "Defence will have adequate opportunity, during the trial, to challenge the credibility of Prosecution witnesses and the strength of its case as a whole".[251] The same reasoning holds true now. At trial, the Defence will be able to present evidence in support of its allegations and to make submissions on the impact of that evidence on the Prosecution's case. There is no need for the Defence to have an additional opportunity to do so before the trial begins.

131. In sum, the Defence has failed to demonstrate that a pre-trial hearing would accomplish anything other than a further delay and an unnecessary diversion of judicial resources. The request should be denied.

[250] ICC-01/09-02/11-728, paras 99-111.
[251] ICC-01/09-02/11-728, para 110.

Conclusion

132. For the foregoing reasons, the Application should be rejected and the case should proceed to trial.

Fatou Bensouda,
Prosecutor

Dated this 5th day of November 2013
At The Hague, The Netherlands