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**International
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Court**

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TRIAL CHAMBER V

Before: Judge Kuniko Ozaki, Presiding Judge
Judge Christine Van den Wyngaert
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

***IN THE CASE OF
THE PROSECUTOR V. FRANCIS KIRIMI MUTHAURA AND UHURU MUIGAI
KENYATTA***

Public Redacted Document with Public Annexes A-C

**Defence Response to "Prosecution Motion Regarding the Scope of Witness
Preparation"**

Source: Defence for Uhuru Muigai Kenyatta
Defence for Francis Kirimi Muthaura

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

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I. Introduction

1. The Defence for Ambassador Francis K. Muthaura and Mr. Uhuru Muigai Kenyatta (the “Defence”) files this response to the “Prosecution Motion Regarding the Scope of Witness Preparation” (the “Motion”).¹
2. The Office of the Prosecutor (the “Prosecution”) requests a significant alteration to the Protocol on Witness Familiarisation adopted in this case,² and other cases before the International Criminal Court (the “ICC”).³
3. The Defence takes issue with the Prosecution’s proposal and interprets it as an attempt to usurp the duty of the Victims and Witnesses Unit (the “VWU”) and seek judicial approval to conduct additional interviews and possibly coach witnesses during the trial proceedings, immediately before those witnesses are due to testify. The Prosecution would then be obligated to disclose any further statements obtained, before the start of the examination-in-chief and after the 9 January 2013 deadline for final disclosure. Further, the Defence submits that the Prosecution’s proposal would entail the abdication of its duties under articles 54(1)(a) and (c) and 64(3)(c) of the Rome Statute (the “Statute”). These proposals advanced by the Prosecution are without merit, create a real danger of unduly influencing witnesses before they are due to testify and raise the substantial issues of the Accused’s right to a fair trial.
4. Rejection of the Prosecution’s proposals is critical particularly given the factual matrix of the instant case whereby the Prosecution is seeking to use misleading and unreliable witnesses.⁴ Recently, one of the core Prosecution witnesses admitted to lying about material events at which he had claimed he was present.⁵ His evidence had formed a major plank of the Confirmation Decision. The Defence submits that the Prosecution’s proposal to serve further statements immediately before the start of the examination-

¹ ICC-01/09-02/11-462.

² See ICC-01/09-02/11-260 and ICC-01/09-02/11-260-Anx.

³ ICC-01/09-02-11-462 at para 3.

⁴ ICC-01/09-02/11-281-Conf-Anx1, ICC-01/09-02/11-372 at paras 21-25, ICC-01/09-02/11-452 at para 13, KEN-OTP-0067-0604_R01 at 0606-07 and KEN-OTP-0051-1045.

⁵ KEN-OTP-0067-0604_R01 at pages 0606-07 [REDACTED].

in-chief will lead to manifest unfairness by denying the Defence a proper opportunity to consider the statement and properly investigate rebuttal evidence.

II. Procedural History

5. On 22 August 2011, the Registrar submitted the “Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony” (the “Protocol on Witness Familiarisation”).⁶ The Registrar suggested and Pre-Trial Chamber II agreed that the Protocol on Witness Familiarisation be used during the Confirmation of Charges hearing.⁷
6. On 14 May 2012, Trial Chamber V (the “Chamber”) scheduled a status conference with the parties and participants of the case.⁸ In the scheduling order, the Chamber requested that “[s]hould the parties...wish to add other items to the agenda of the status conference, they should indicate it in their written submissions.”⁹ On 28 May 2012, the Prosecution informed the Chamber that it would seek a ruling “regarding the permissible scope of witness preparation” in advance of trial.¹⁰ On 13 August 2012, the Prosecution filed its Motion.¹¹

III. Witness Familiarisation and Witness Proofing

7. In the Motion, the Prosecution attempts to combine current practices of the ICC witness familiarisation process, with actions that have been consistently denied by different Chambers of the ICC, as they amount to the practice of witness proofing. The Chamber is referred to the decisions of other ICC Chambers on this matter.¹² The Prosecution avoids using the term “witness proofing” by supplanting it with the

⁶ ICC-01/09-02/11-260-Anx.

⁷ ICC-01/09-02/11-260 at page 4, second and third paragraphs.

⁸ ICC-01/09-02/11-422.

⁹ ICC-01/09-02/11-422 at para 4.

¹⁰ ICC-01/09-02/11-428 at para 40.

¹¹ ICC-01/09-02/11-462.

¹² See *Prosecutor v Lubanga*, Pre-Trial Chamber I, Decision on the Practices of Witness Familiarisation and Witness Proofing, 8 November 2006, ICC-01/04-01/06-679 (the “*Lubanga* PTC Decision”); *Prosecutor v Lubanga*, Trial Chamber I, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, 30 November 2007, ICC-01/04-01/06-1049 (the “*Lubanga* Trial Chamber Decision”); *Prosecutor v Jean-Pierre Bemba Gombo*, Trial Chamber III, Decision on the Unified Protocol on the practices used to prepare and familiarise witnesses for giving testimony at trial, 18 November 2010, ICC-01/05-01/08-1016 (the “*Bemba* Trial Chamber Decision”).

euphemism “witness preparation”. The Prosecution has merely repeated the arguments it has made in previous ICC proceedings, in which it has also sought to uphold the practice by reference to other international tribunals,¹³ citing efficiency, expedition and notice, all of which have been firmly rejected by previous Chambers.¹⁴

A. Witness Familiarisation

8. The Prosecution contends that the proposed modifications “would allow the party calling a witness to talk to the witness in advance of testimony, with safeguards to avoid coaching or otherwise improperly influencing the witness.”¹⁵
9. Whilst witness familiarisation is an accepted practice at the ICC,¹⁶ governed by several provisions of the Rome Statute (the “Statute”) and Rules of Evidence and Procedure (the “Rules”) as detailed below, the “goals and measures” encompassed by the term witness proofing are not covered by any provision of the Statute, the Rules or the Regulations of the Court.¹⁷
10. On 30 November 2007, the *Lubanga* Trial Chamber prohibited the practice of witness proofing or substantive preparation of evidence by the parties, affirming the earlier decision by the Pre-Trial Chamber on 8 November 2006.¹⁸

¹³ It is interesting to note that in rejecting the Defence’s application to prohibit proofing in the *Limaj* case before the ICTY, the *Limaj* Trial Chamber noted that: “the practice of proofing witnesses, by both the prosecution and defence has been in place and accepted since the inception of this tribunal. It is certainly not unique to this Chamber” and that there was no need to depart from the settled practice of ICTY in previous cases. The Prosecution having argued that the Defence had failed to establish that the “existing proofing practice which has prevailed throughout the life of this Tribunal” should be departed from. (*Prosecutor v Limaj et al*, “Decision on Defence Motion on Prosecution Practice of “Proofing” Witnesses”, IT-03-66-T, 10 December 2004, pg.2). This same reasoning was also applied in the *Karemera* Appeal referred to by the Prosecution, where the Appeal Chamber held that “it is evidence from the jurisprudence of the ad hoc Tribunals that, as Trial Chambers have exercised this discretion, a practice of witness proofing has developed and has been accepted in various cases.” (*Prosecutor v Karemera et al*, “Decision on Interlocutory Appeal regarding Witness Proofing”, ICTR-98-44-AR73.8, 11 May 2007, para 8). To the extent that the *Limaj* and *Karemera* decisions are relevant at all to the ICC, they would support the inference that the prevailing jurisprudence of the ICC should not be set aside absent a showing of good cause and necessity. Irrespective of the non applicability of the principle of *stare decisis* between Trial Chambers of the ICC, the interests of legal certainty and of like cases being treated alike militate in favour of following the established jurisprudence of the ICC prohibiting witness proofing.

¹⁴ *Lubanga* PTC Decision at paras 29, 32 and *Lubanga* Trial Chamber Decision at para 13.

¹⁵ ICC-01/09-02/11-462 at para 1.

¹⁶ See generally *Lubanga* Trial Chamber Decision and *Lubanga* PTC Decision.

¹⁷ *Lubanga* PTC Decision at para 28.

¹⁸ Jordash, Wayne, “The Practice of ‘Witness Proofing’ in International Tribunals: Why the International Criminal Court Should Prohibit the Practice”, *Leiden Journal of International Law*, Volume 22 (2009), pages 501-523, (citing *Lubanga* Trial Chamber Decision and *Lubanga* PTC Decision).

11. In *Bemba*, the Majority of Trial Chamber III recalled that the issue of the parties' preparation of witnesses for trial had already been addressed, unanimously, by the other Chambers of the ICC, by way of explicit decisions on the issue or by implicitly adopting the Protocol on Witness Familiarisation, a protocol in which no provisions for the preparation of witnesses by the parties, or proofing, were adopted. The Majority saw no compelling reason to depart from the uncontroversial jurisprudence of the Court and maintained the view that no proofing or preparation of witnesses for trial by the parties shall be allowed.¹⁹

12. The Defence submits that the Prosecution's proposal set out in paragraph 5 of its Motion²⁰ moves beyond the realm of witness familiarisation as defined by this Court²¹ and amounts to yet another request by the Prosecution for permission to proof witnesses in a way which could lead to a distortion of the truth and may come dangerously close to constituting a rehearsal of in-court testimony and diminish spontaneity.²² Effectively, the Prosecution want to iron out weaknesses and evidential flaws in its case as revealed by Defence disclosure and investigations. Indeed, the Prosecution have unwittingly revealed the real purpose of its proposal in footnote 34 and 35 to its Motion. The Prosecution intends nothing less than to school its witnesses and to explain to them why evidence may be relevant or irrelevant. Such discussion should not, the Defence submit, be permitted as it may, even unwittingly, reveal to the witness an account that is preferred by the calling party - which may not completely or accurately reflect what the witness would say if such discussion had not been permitted. It may also be used as a device to get evidence in through a witness who actually is not competent or properly able to speak on certain matters. The Prosecution's example in footnote 35 of wanting to teach an illiterate witness cartography is but one example of the dangers and indeed absurdity of what the Prosecution propose.

13. Certain provisions of the Statute and Rules are specifically designed to assist witnesses in providing oral evidence before the ICC so as to prevent the witness from finding himself or herself in a disadvantageous position, or from being taken by

¹⁹ *Bemba* Trial Chamber Decision at para 34.

²⁰ ICC-01/09-02/11-462 at para 1.

²¹ *Lubanga* PTC Decision at paras 18, 20.

²² *Ibid* at paras 51-52.

surprise as a result of his or her ignorance of the process of giving oral testimony before the ICC.²³ These arrangements are generally referred to as "witness preparation" for giving oral testimony or "witness familiarisation" within the ICC proceedings.²⁴

14. These provisions include the following:

- a. Article 57(3)(c) of the Statute, which imposes on the Chamber the duty to provide, where necessary, for the protection of victims and witnesses;
- b. Article 68(1) of the Statute, which imposes upon the different organs of the Court within the scope of their competency, including the Chamber, the duty to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses;
- c. Rules 87 and 88 of the Rules, which provide for a series of measures for the protection of the safety, physical and psychological well-being, dignity and privacy of the witnesses, including measures to facilitate their testimony; and
- d. Article 43(6) of the Statute, which imposes upon the Registrar the duty to set up a VWU within the Registry, which in consultation with the Office of the Prosecutor, shall provide protective measures and security arrangements, counselling and other appropriate assistance for witnesses.

15. Furthermore, in accordance with the Statute, rules 16 and 17(2) require that the VWU shall perform *inter alia* the following functions in relation to witnesses:

- a. assisting witnesses when they are called to testify before the Court;²⁵
- b. taking gender-sensitive measures to facilitate the testimony of victims of sexual violence at all stages of the proceedings;²⁶
- c. informing witnesses of their rights under the Statute and the Rules;²⁷
- d. advising witnesses where to obtain legal advice for the purpose of protecting their rights, in particular in relation to their testimony;²⁸

²³ *Ibid* at para 20.

²⁴ *Ibid* at para 18.

²⁵ Rule 17(2)(b)(ii) of the Rules.

²⁶ Rule 17(2)(b)(iii) of the Rules.

²⁷ Rule 16(2)(a) of the Rules.

- e. assisting witnesses in obtaining medical, psychological and other appropriate assistance;²⁹ and
- f. providing witnesses with adequate protective and security measures and formulating long-term and short-term plans for their protection.³⁰

16. In its decision in *Lubanga*, Pre-Trial Chamber I considered that the following functions would fall within the category of witness familiarisation (and thus, within the remit of the VWU):

- a. assisting the witness to fully understand the Court proceedings, its participants and their respective roles;
- b. reassuring the witness about her role in proceedings before the Court;
- c. ensuring that the witness clearly understands that she is under a strict legal obligation to tell the truth when testifying;
- d. explaining to the witness the process of examination first by the Prosecution and subsequently by the Defence;
- e. discussing matters that are related to the security and safety of the witness in order to determine the necessity of applications for protective measures before the Court; and
- f. making arrangements with the Prosecution in order to provide the witness with an opportunity to acquaint herself with the Prosecution's Trial Lawyer and others who may examine the witness in Court.³¹

17. The Trial Chamber in *Lubanga* agreed with the Pre-Trial Chamber that these tasks appropriately form part of a witness familiarisation process.³² It also expanded the first function, stating that a visit to the courtroom and a "walk through" of the particular features the witness will encounter during their testimony is necessary.³³ The Trial Chamber agreed that the VWU should be responsible for undertaking the process of familiarising the witness with courtroom procedures.³⁴

²⁸ Rules 16(1)(b) and 17(2)(b)(i) of the Rules.

²⁹ Rule 17(2)(a)(iii) of the Rules.

³⁰ Rule 17(2)(a)(i) of the Rules.

³¹ *Lubanga* PTC Decision at para 22.

³² *Lubanga* Trial Chamber Decision at para 30.

³³ *Ibid* at para 31.

³⁴ *Ibid* at para 33.

18. Whilst the Trial Chamber agreed with the conclusion that witnesses are not attributable to parties, but are witnesses of the Court, the Trial Chamber recognised that the party intending to call a particular witness will be likely to have greater insight into the background of the witness, which may assist the VWU in discharging its role during the witness familiarisation process. Consequently, the Trial Chamber allowed the VWU to work in consultation with the party calling the witness, in order to undertake the practice of witness familiarisation in the most appropriate manner.³⁵
19. Once the process of witness familiarisation has commenced, any further meeting between a party and its witness prior to testifying was prohibited by the Trial Chamber in *Lubanga*.³⁶ However, it was also held that the party calling the witness shall make any previous witness statements available to the VWU, which will in turn make them available to the witness in order to refresh his or her memory prior to giving testimony.³⁷
20. In the present case, Pre-Trial Chamber II in consultation with the VWU and without objection from the parties,³⁸ explicitly adopted the Protocol on Witness Familiarisation.³⁹ The Defence submits that there is no reason to depart from the ICC's well-established processes in this case.⁴⁰

B. Witness Proofing

21. The Prosecution seeks to proof witnesses before they testify at trial.⁴¹ In essence, the Prosecution desires a final chance to discuss the testimony of impending witnesses directly before they intend to testify in circumstances where the Prosecution has already interviewed such witnesses, often over days and on multiple occasions, invariably with prosecution lawyers as well as Prosecution investigators present and without any showing of necessity, exceptional circumstances or good cause to justify

³⁵ *Ibid* at para 34; *see also* *Lubanga* PTC Decision at para 24.

³⁶ *Lubanga* Trial Chamber Decision at para 56.

³⁷ *Ibid* at para 55.

³⁸ The Defence notes regulation 24(1) of the Regulations of the Court which allows the Prosecution and Defence to file a response to any document filed in the case within 21 days after the document is filed. Neither the Prosecution nor any defence team filed an objection to the Protocol on Familiarisation.

³⁹ *See* ICC-01/09-02/11-260 and ICC-01/09-02/11-260-Anx.

⁴⁰ *Compare* this to the reasoning put forth by the *Limaj* and *Karemera* Trial Chamber (*see* footnote 13 above).

⁴¹ *See* ICC-01/09-02/11-462 and ICC-01/09-02/11-462-AnxA.

departing from the jurisprudence of the ICC prohibiting such practice. Properly considered, the Prosecution would have the Chamber grant it a summary, blanket permission to engage in proofing without establishing, on a case by case basis, that such proofing is actually required or justified or how or why it would advance the interests of justice. The Prosecution proposal would grant an unfettered and unwarranted licence to the Prosecution to discuss with a putative witness disclosed Defence evidence (including that disclosed by the Defence during cross-examination of other prosecution witnesses) that contradicts the account given by that witness in a prior statement. All this is proposed, under the guise of clarifying a witness' account before testimony or as a pretext of getting to the truth.

22. The Defence submits that this will inevitably include disclosed Defence evidence that contradicts the account given by a witness, that the Prosecution will then seek to explain away as revealed in the recent disclosure of the further changed statement of Witness 4, revealing that he had lied in evidence relied upon at the Confirmation Hearing.⁴²

23. The Defence submits that the proposed modifications to the Protocol on Witness Familiarisation in the Motion, which would validate witness proofing, would violate the Prosecution's duty to fully investigate the case and the Defence's right to disclosure sufficiently in advance of trial in order to ensure proper preparations for trial. The proposal would also violate Mr. Kenyatta and Ambassador Muthaura's right to an expeditious trial and unduly influence the witness's testimony.

i. The Prosecution's Proposal would allow it to abdicate its Duty to Fully Investigate the Case before Trial and Deny the Defence its Right to receive Disclosure Sufficiently in Advance of Trial

24. The Defence submits that the Motion violates the Prosecution's duty to fully investigate all incriminating and exonerating evidence,⁴³ so that the Defence receives all disclosure sufficiently in advance of trial, as required by Article 64(3)(c). Article 54(1)(c) requires that the Prosecution also conducts itself with full respect for the

⁴² KEN-OTP-0067-0604_R01 at 0606-07.

⁴³ Article 54(1)(a) of the Statute.

rights of persons arising under the Statute. The Defence submits that the proposed practice of late witness proofing would plainly breach these rights.

25. The Defence challenged the Prosecution's discharge of this duty during the Confirmation Hearing and gave notice of the inadequate investigations in this case.⁴⁴ Since that time, the Prosecution has had 15 months in which to conclude its investigations. The Prosecution should not be allowed to continue its investigations beyond the time scheduled for final disclosure on 9 January 2012.⁴⁵ The Office of the Prosecutor had stated, with affirmation from the Appeals Chamber,⁴⁶ that ideally it should have completed its investigations by the start of the Confirmation Hearing in order to ensure the expeditious conduct of proceedings.⁴⁷ Moreover, in this case, the Prosecution has previously informed the Chamber that it could be trial ready by the end of 2012.⁴⁸

26. The Prosecution submits that witness proofing during trial will expedite the proceedings.⁴⁹ The Defence submits however that this request amounts to no more than a mere tactic, which if permitted, would in fact cause prejudice to the Defence consistent with previous tactics employed to delay disclosure and prejudice Defence case preparations as exemplified below:

- a. On 19 August 2011, the Prosecution disclosed a new statement by Witness 4 alleging a different location for a meeting on 3 January 2008, which was crucial to their case theory.⁵⁰ The alleged change of location was known to the Prosecution since [REDACTED], but this fact was not disclosed to the

⁴⁴ ICC-01/09-02/11-338, paras 72-83; ICC-01/09-02/11-T-4-ENG, p. 88, lines 15-22; ICC-01/09-02/11-T-15-Red-ENG, p. 58, line 8, to p. 59, line 6; p. 65, lines 9-17; ICC-01/09-02/11-374-Red, paras 69-72.

⁴⁵ ICC-01/09-02/11-451 at para 19.

⁴⁶ *Prosecutor v. Lubanga*, Appeals Chamber, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence", 13 October 2006, ICC-01/04-01/06-568 at para 54 (the "*Lubanga Appeals Chamber Judgment*"); see also ICC-01/09-02/11-382-Conf, *Dissenting Opinion by Judge Hans-Peter Kaul* at para 57.

⁴⁷ *Lubanga Appeals Chamber Judgment* at para 46; see also ICC-01/09-02/11-382-Conf, *Dissenting Opinion by Judge Hans-Peter Kaul* at para 57.

⁴⁸ ICC-01/09-02/11-T-18-ENG ET WT, page 12, lines 8-12 (noting that the Prosecution stated this was contingent upon disclosure obligations and decisions on witness protection issues).

⁴⁹ ICC-01/09-02/11-462 at paras 22-29.

⁵⁰ KEN-OTP-0043-0002 at paras 188-90.

Defence.⁵¹ The Defence had only 17 days in which to investigate the truth and respond to the allegations, which included conducting extensive witness interviews, before the deadline for Defence disclosure. Whilst the Defence for Mr. Kenyatta and Ambassador Muthaura were [REDACTED] [REDACTED] before the deadline for Defence disclosure, none of the defence teams were able to undertake a proper and complete investigation in respect of this allegation in such a short period of time.

- b. Accompanying this disclosure package was a 21 page post-summons statement from Witness 4 taken in [REDACTED] which further recanted and changed statements made by him [REDACTED].⁵²
- c. The Prosecution re-interviewed Witness 4 [REDACTED]. On 22 August 2012, the Prosecution disclosed this further interview in a statement in which Witness 4 admitted lying in a previous OTP statement.⁵³ This changed account substantially altered facts relied upon by the Prosecution at confirmation. However, the Prosecution delayed the disclosure of this material [REDACTED], thereby causing delay to Defence investigations in respect of this changed allegation.
- d. The evidence from witnesses 11 and 12 was taken in interviews [REDACTED]. However, disclosure of this crucial material was delayed until 19 August 2011, the last date possible for disclosure of Prosecution evidence for the Confirmation Hearing.⁵⁴ This approach prejudiced the Defence and prevented it from being able to definitively prove the untruthfulness of the witnesses, both of whom have substantial credibility issues.⁵⁵

27. This conduct of delayed disclosure, which the Prosecution seeks to perpetuate by witness proofing *during* the trial proceedings, will similarly result in prejudice to the Defence's preparations and investigations. It is evident from an objective assessment of the calibre of the statements from Prosecution witnesses 4, 11 and 12 that the

⁵¹ *Ibid* at page 1.

⁵² KEN-OTP-0051-1045.

⁵³ KEN-OTP-0067-0604_R01 at 0606-07.

⁵⁴ ICC-01/09-02/11-258-Conf-AnxA.

⁵⁵ ICC-01/09-02/11-281 at para 14.

Prosecution has not properly engaged in a rigorous and impartial truth finding exercise envisaged by the drafters of the Rome Statute. The damage to the credibility of these witnesses is so apparent that it is beyond comprehension that they are still being relied upon as the foundation for this case.

28. The impact of late disclosure in other international tribunals that permit witness proofing has been the subject of critique by academics. Jordash noted that the Prosecution in *Limaj* disclosed over 70 pieces of new evidence during trial as a result of witness proofing.⁵⁶ Similarly, he noted that over 100 new criminal allegations were added in *Sesay et al* as a result of mid-trial witness proofing.⁵⁷ As previously stated, late service of this category of disclosure does not comply with the Prosecution's duty under articles 54(1) and 64(3)(c) of the Statute.⁵⁸

29. The Prosecution has had ample time to re-interview witnesses on the ground since Pre-Trial Chamber II issued the summonses, over 15 months ago.⁵⁹ The Defence is aware of only one witness [REDACTED] who has been re-interviewed.⁶⁰ One year has passed since the Prosecution filed the amended Document Containing the Charges.⁶¹ Over seven months have elapsed since Pre-Trial Chamber II's Decision on the Confirmation of Charges.⁶² The Prosecution has not cited any specific instance preventing it from conducting particular witness re-interviews of any of those witnesses it relied upon for the Confirmation Hearing, especially those protected by the ICC Protection Programme.

30. As for those potential witnesses not protected through the ICC Protection Programme, the Defence submits that the issues raised by the Prosecution are not unique to the Prosecution. The Defence also has to address witness security issues, assessments which are carried out over time with the assistance of specific protocols developed to ensure anonymity and safety. The mere fact that the Prosecution cannot call someone at short notice to answer questions relating to prior statements is not a satisfactory

⁵⁶ Jordash at page 517.

⁵⁷ *Ibid* at page 518.

⁵⁸ *See Ibid.*

⁵⁹ ICC-01/09-02/11-1. The summonses were issued on 8 March 2011.

⁶⁰ [REDACTED]

⁶¹ ICC-01/09-02/11-280-AnxA. The amended DCC was filed on 2 September 2011.

⁶² ICC-01/09-02/11-382-Conf. The Confirmation Decision was issued on 23 January 2012.

reason to abdicate its duties pursuant to the Statute. By the time final disclosure is served, almost two years will have passed since the issuance of the summonses. The Prosecution had, and still has, ample time to conduct safe and secure meetings with its witnesses, a task it should have completed before the Confirmation of Charges hearing. The Defence submits that it is possible that the foundation of the Prosecution's case is in fact so weak that the perceived evidential problems relate to the quality of the case, rather than any external factors.

31. The Defence also wishes to underscore in the strongest possible terms its deprecation of the Prosecution assertions contained in paragraph 17 of its Motion.⁶³ The Prosecution raises therein the spectre of its witnesses being offered bribes not to cooperate with the prosecution and/or threats said to have been made against such witnesses if they do cooperate with the Prosecution, without any evidence whatsoever in support of such claims. It is unacceptable for the Prosecution to make such serious allegations, especially in a public filing, whilst presumably either not possessing or choosing to redact or withhold from the Defence any evidence in support of such contentions. The end result is that the Defence is significantly prejudiced in that it cannot controvert or properly challenge serious public allegations in any meaningful way. The current practice of the Prosecution is rather invidious and has the capacity to cause significant prejudice to the Defence. It is also most unfair to Ambassador Muthaura and Mr. Kenyatta who are presumed innocent and who deny in absolute terms any conduct that amounts to bribery, inducement or improper pressure on any witness to decline to give evidence before the ICC. If such allegations are made, it must be right that the Defence are allowed the material possibility to answer them, a right which the Prosecution has denied the Defence.

32. Interestingly, it was the Defence that first raised allegations of extortion and an attempt to pervert or otherwise obstruct the course of justice well before the confirmation of charges decision in the present case.⁶⁴ As recently as May 2012 the Defence again stated that:

⁶³ ICC-01/09-02/11-462 at para 17.

⁶⁴ ICC-01/09-02/11-281-Conf-Anx1 at pages 207-18.

“The Defence takes this opportunity to underscore that it has grave concerns about the veracity of key prosecution witnesses. This case appears perhaps unprecedented in the extent that certain witnesses appear willing to fabricate evidence, in some cases, as part of organised extortion plans, and in other cases simply in the belief that there is money to be made in the ICC process.”⁶⁵

33. The merits of the various contentions by the parties will be determined by the Chamber in due course. What the Prosecution cannot, in all fairness, do is to make unsupported allegations of witness intimidation and bribery, in a bid to bolster an argument – that it be allowed to engage in proofing - that it has been making even before the present case commenced. Arguments, of course, that successive Trial Chambers and Pre-Trial Chambers have rejected.

34. In conclusion, the Defence reiterates its submission that the Prosecution’s proposal to proof witnesses during the trial violates the Defence’s right to receive all disclosure sufficiently in advance of trial in order to ensure proper preparation. Furthermore, the Defence maintains that the proposed deviations from the Protocol on Witness Familiarisation would allow the Prosecution to abandon its duty to fully investigate incriminatory and exonerating evidence while respecting the rights of Ambassador Muthaura and Mr. Kenyatta.

ii. The Prosecution’s Proposal would violate Ambassador Muthaura and Mr. Kenyatta’s Right to an Expeditious Trial

35. The Defence submits that the Prosecution’s proposal in the Motion infringes Ambassador Muthaura and Mr. Kenyatta’s right to an expeditious trial. The practice of other tribunals has demonstrated that mid-trial proofing produces significant amounts of disclosure,⁶⁶ which would require further Defence investigations, with a real prospect of postponements during the trial in order to investigate newly-disclosed evidence or facilitate the re-calling of witnesses.

36. In the Prosecution’s Motion, it is suggested that mid-trial disclosure of newly received evidence would be served “as soon as practicable, and in any event, before the witness

⁶⁵ ICC-01/09-02/11-427 at para 6.

⁶⁶ See Jordash at pages 515-20.

begins his or her examination-in-chief.”⁶⁷ The Prosecution also asserts that witness proofing should be completed “as early as possible and at least 24 hours before the witness’ testimony is due to commence.”⁶⁸ The Defence submits that the receipt of new disclosure a mere 24 hours before the witness is due to testify will not enable it to properly prepare or investigate the new evidence disclosed resulting from the proofing session.

37. Article 64(3)(c) is highly relevant to this issue. If the Prosecution fulfils its obligations under article 54(1) of the Statute, both the Defence and Prosecution will commence trial informed of the nature of the case against the Accused. However, mid-trial proofing carries a serious risk of delaying the trial due to the need for the Defence to investigate newly alleged facts.

38. Vigorous investigations conducted over an extended period of time have confirmed the Defence’s challenge to the veracity of two other Prosecution witnesses.⁶⁹ In response, the Prosecution has stated its intention to investigate the truth of the Defence’s findings.⁷⁰ These investigations conducted by the Defence did not happen overnight: it took a substantial period of time to uncover inconsistencies and ill motives. The Defence submits that attempting to perform such feats during an ongoing trial will not be possible, particularly given the legitimate concern to ensure the expediency of the proceedings.

39. The history of these proceedings to date has revealed the importance of in-depth investigations *before* trial, not during trial. The Defence submits that following a comprehensive investigation, the Prosecution should not need to use “newly-discovered information that may have emerged during the trial itself...to elicit complete testimony in court”.⁷¹

⁶⁷ ICC-01/09-02/11-462-AnxA at page 4.

⁶⁸ ICC-01/09-02/11-462-AnxA at page 2.

⁶⁹ The details of the extortion attempt have previously been set out in ICC-01/09-02/11-452 at paras 27-35 and ICC-01/09-02/11-384-Conf at paras 11-26.

⁷⁰ ICC-01/09-02/11-461-Conf-AnxI at Section III, pages 3-4.

⁷¹ ICC-01/09-02/11-462 at para 29.

iii. The Prosecution's Proposal could unduly Influence Witnesses' Testimony

40. The Defence submits that the Prosecution's proposal in the Motion could unduly influence witnesses' testimony. Mid-trial witness proofing sessions will corrupt witness spontaneity and create an undue burden on the Chamber to assess the truth, while risking the lowering of the victims' and wider public's confidence in the ICC.
41. The Chamber has the ultimate responsibility to establish the truth of the case. The Prosecution claims that this is best achieved by a witness answering questions pursuant to being informed of "what to expect questions on,"⁷² reviewing the witness's previous statement(s) with the witness while discussing possible additions or retractions,⁷³ building a rapport with the witness during proofing sessions,⁷⁴ questioning the witnesses on inconsistencies in their statements and with other evidence,⁷⁵ explaining topics for the examination-in-chief⁷⁶ and, perhaps most remarkably, explaining possible topics the witness may face in cross-examination.⁷⁷
42. The Defence submits that this type of practice amounts to witness proofing. By explaining the topics to be discussed in the examination-in-chief, witnesses will be made aware of areas that the calling party has explicitly determined to be important, which has the real possibility of influencing how the witness will testify. In the same fashion, informing the witness of those topics that are likely to be raised by the opposing party implicitly exposes deficiencies in the witness's statement, which has the real possibility of negatively influencing the testimony.⁷⁸
43. Whilst the Prosecution does not accept that the practices outlined in the Motion amount to coaching, the Defence asserts that there is no distinguishable difference between giving the witness the precise questions to be asked and walking the witness through the topics to be discussed during the testimony. Both practices amount to witness coaching and have the capacity to erode the truth finding capacity of the

⁷² ICC-01/09-02/11-462 at para 19.

⁷³ ICC-01/09-02/11-462-AnxA at page 3.

⁷⁴ ICC-01/09-02/11-462 at paras 18 and 21.

⁷⁵ ICC-01/09-02/11-462-AnxA at page 3.

⁷⁶ ICC-01/09-02/11-462-AnxA at page 3.

⁷⁷ ICC-01/09-02/11-462-AnxA at page 3.

⁷⁸ Vasiliev, Sergey, "Proofing the ban on "witness proofing": did the ICC get it right?", Criminal Law Forum, Volume 20 (2009), 193-261, pages 247-49.

Chamber. Furthermore, as set out above, if the Prosecution is in fact trial ready, there should be no need to discuss any possible retractions or additions to the witness's statement. Inconsistencies will be fleshed out by proper investigations before trial.

44. The Defence submits that the Prosecution's assertion of rapport building between the witness and the questioning trial lawyer is unconvincing. Leading commentators have noted that the general population distrusts lawyers more in jurisdictions in which witness proofing is routinely practiced.⁷⁹ Consequently, there is a real risk that the introduction of mid-trial witness proofing will lead to a reduced confidence in the neutrality of the system and the ability of the ICC to determine the truth.
45. Most interestingly, of all the "safeguards" the Prosecution recommends in the Motion, it refrained from proposing a key precautionary measure formulated by Judge Ozaki in her dissent in *Bemba*. Judge Ozaki recommended that audio/video recording of the witness proofing session(s) or the inclusion of a neutral person from the Registry could aid in the protection against a party improperly questioning or placing an undue influence on a witness's testimony.⁸⁰ The Defence shares this concern due to improper interviewing practices employed by the Prosecution in this case and in the recently dismissed *Mbarushimana* case.⁸¹ The Defence has identified in numerous witness transcripts disclosed to date, the practice of the Prosecution asking inappropriate leading questions in the interviews it has conducted.⁸² Such a practice should not be allowed to occur in mid-trial proofing sessions, as the damage caused by improper questioning is irremediable. If this practice is permitted, the credibility of the testimony would need to be gauged against any undue influences caused by witness proofing, thus impeding the Chamber's duty to assess the truth.
46. The dissenting Judge in *Bemba* - the presiding Judge in the present case - acknowledged that "there is certainly a grey area between what is acceptable,

⁷⁹ See Ambos, Kai, "Witness proofing' before the International Criminal Court: a reply to Karemaker, Taylor, and Pittman", *Leiden Journal of International Law* 21(4) (2008), 911-916, page 914; *see also* Vasiliev at p. 254.

⁸⁰ ICC-01/05-01/08-1039 at para 27.

⁸¹ *Prosecutor v. MBarushimana*, Decision on the confirmation of charges, 16 December 2011, ICC-01/04-01/10-465-Red at para 51.

⁸² For examples *see* KEN-OTP-0060-0405 at 0418, lines 478-88; KEN-OTP-0060-0250 at 0260-62, lines 361-63, 379-82 and 447-53; KEN-OTP-0060-01469 at 1481, lines 459-70.

permissible proofing and prohibited contamination of evidence on the other hand.”⁸³ The accounts and *bona fides* of key prosecution witnesses in the present case, especially witnesses 11, 12, 4 and 9, are vigorously contested by the Defence. These are not victim witnesses where additional safeguards, it could be argued, are necessary to avoid or lessen trauma. These are individuals who allege that they were members of or linked to a proscribed criminal gang and who the Defence allege are knowingly coming to the ICC to lie. Given that Article 64(2) provides that any balancing exercise must ensure “full respect” for the rights of the Accused, it is imperative that such witnesses are not assisted in the way proposed by the Prosecution which will have the effect of assisting them to deceive.

47. Finally, the Prosecution suggests that cross-examination will cure any influences caused by improper witness proofing.⁸⁴ Whilst the Defence accepts that cross-examination is a useful tool to expose inconsistencies in a witness’s testimony, scholars have disputed its effectiveness in detecting improprieties during witness proofing sessions.⁸⁵ One commentator notes that: “[w]itnesses who have been subtly influenced [through proofing] may well not appreciate the fact and may be reluctant to accept it. They may not remember the specifics of the proofing which led to the distortion...”.⁸⁶ Vasiliev, quoting Mirjan Damaška, points to the fact that even “interviews conducted by partisan lawyers in preparation for the adversary trial can potentially pollute informational sources in ways that cannot be detected even by skilful examination; lawyers are prone to place greater faith that is warranted in the power of cross-examination to expose testimonial distortions.”⁸⁷ Sharing these legitimate concerns, the Defence submits that the proposed safeguard of cross-examination is inadequate in respect of improprieties that may result from the practice of witness proofing.

48. The Defence submits that witness proofing, as proposed by the Prosecution, would create an undue risk of influencing the impending witness’s testimony. This poses a

⁸³ ICC-01/05-01/08-1039 at para 25.

⁸⁴ ICC-01/09-02/11-462 at para 32.

⁸⁵ Ambos at page 915.

⁸⁶ Jordash at page 515.

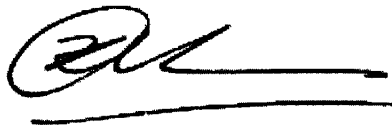
⁸⁷ Vasiliev at page 251 (citing Mirjan Damsaska, “Evidence Law Adrift”, New Haven/London: Yale University Press (1997), page 97)

serious risk of undermining the Chamber's ability to determine the truth. The proposed safeguards of the Prosecution do little to protect against these dangers.

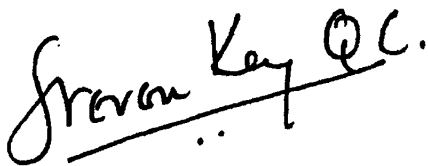
IV. Relief Requested

49. The Defence requests the Chamber to deny the Prosecution's Motion to alter the Protocol on Witness Familiarisation to allow witness proofing. The Defence submits that there is no valid reason to depart from the practices employed by Pre-Trial Chamber II in this case and other Chambers of the ICC.

Respectfully submitted,



Karim A.A. Khan QC
On Behalf of Ambassador Francis K. Muthaura




Steven Kay QC and Gillian Higgins
On Behalf of Uhuru Muigai Kenyatta

Dated this 3rd day of September, 2012
At London, England