

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 28 March 2013

TRIAL CHAMBER V

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

SITUATION IN THE REPUBLIC OF KENYA

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

Public

Written Submissions Following 18 March 2013 Status Conference

Source: Defence for Uhuru Muigai Kenyatta

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 Uhuru Muigai Kenyatta hereby submits its written submissions following the 18 March 2013 Status Conference and the Trial Chamber's "Order requesting written submissions following 18 March 2013 status conference"¹ in which it requested the Defence to address questions (1), (2) and (4) as set out below:

- (1) Is a Trial Chamber competent to decide retroactively whether the non-disclosure (either as a result of (i) bad faith, (ii) negligence, or (iii) an innocent oversight) affected the fairness, integrity, or validity of the confirmation proceedings? If so, what factors should the Trial Chamber take into account when assessing the impact of the non-disclosure?
- (2) Is a Trial Chamber competent to order the Prosecution to seek amendment of, or withdraw, charges or to stay or terminate trial proceedings in case of a finding of deficiencies in the confirmation process?
- (4) What, if any, criteria or pre-conditions need to be met for the Prosecution to investigate post-confirmation? Were the post-confirmation investigations in the present case proportional to the reasons given by the Prosecution?

¹ ICC-01/09-02/11-699.

II. SUBMISSIONS IN RESPONSE TO THE CHAMBER'S QUESTIONS

1. Is a Trial Chamber competent to decide retroactively whether the non-disclosure (either as a result of (i) bad faith, (ii) negligence, or (iii) an innocent oversight) affected the fairness, integrity, or validity of the confirmation proceedings? If so, what factors should the Trial Chamber take into account when assessing the impact of the non-disclosure?

(i) Is a Trial Chamber competent to decide retroactively whether the non-disclosure (either as a result of (i) bad faith, (ii) negligence, or (iii) an innocent oversight) affected the fairness, integrity, or validity of the confirmation proceedings?

2. The issue of whether the non-disclosure of key evidence affected the fairness, integrity, or validity of the confirmation proceedings is a matter that can be decided only retroactively.

3. While the matter remains capable of being referred back to the Pre-Trial Chamber as a preliminary issue under Article 64(4) of the Statute, given that (i) the charges against Mr Muthaura have now been withdrawn, and (ii) the impact of the non-disclosure of key evidence upon the 'conduct of the proceedings', the Defence submits that the preferable course of action is for the Trial Chamber to determine this matter under Rule 134, which gives the Trial Chamber the power, prior to the commencement of trial, to 'rule on any issue concerning the conduct of the proceedings.' Article 64(6)(f) also provides the Trial Chamber with the power prior to trial and during the course of a trial to 'rule on any other relevant matters.'

4. In respect of the binding nature of the confirmation decision upon the Trial Chamber, the well-established principle has been recognised in *Lubanga* that “a court can depart from earlier decisions that would usually be binding if they are manifestly unsound and their consequences are manifestly unsatisfactory, because, for instance, a decision was made in ignorance of relevant information.”² The Defence submits that in the present case, for the reasons set out in the “Defence Observations Regarding the Impact of the Withdrawal of the Charges Against Mr Muthaura on the Case Against Mr Kenyatta Pursuant to the ‘Order Requesting Written Submissions Following 18 March Status Conference’”, the Confirmation Decision is manifestly unsound and its consequences manifestly unsatisfactory.³ The Trial Chamber can therefore depart from the Pre-Trial Chamber’s decision to confirm the charges.

(ii) What factors should the Trial Chamber take into account when assessing the impact of the non-disclosure?

5. In assessing the impact of the non-disclosure, the Defence submits that the Chamber should consider the following factors:
- a. The effect of the non-disclosure upon the reliability of the decision;
 - b. The prejudice caused to the innocent party by the non-disclosure;
 - c. The impact upon the fair trial rights of the accused;
 - d. The advantage gained by the party that failed to disclose the relevant document;

² *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Defence request to reconsider the ‘Order on numbering of evidence’ of 12 May 2010, ICC-01/04-01/06-2705, para. 18.

³ These evidential submissions are set out at Section III, Evidential Submissions on Individual Criminal Responsibility, “Defence Observations Regarding the Impact of the Withdrawal of the Charges Against Mr Muthaura on the Case Against Mr Kenyatta Pursuant to the ‘Order Requesting Written Submissions Following 18 March Status Conference’”, 28 March 2013.

- e. The extent of the support that disclosure of the document would have given to the case of the party denied use of the document; and
- f. The importance to the proceedings of the facts contained in the document.

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

Applicable Law

- 6. Article 64(2) imposes upon the Chamber the obligation to ensure that the proceedings are fair and expeditious and conducted with full respect for the rights of the accused.
- 7. Rule 134 of the Rules of Procedure of Evidence provides that the Trial Chamber may, prior to the commencement of trial, rule on any issue concerning the conduct of proceedings, whether on its own motion, or at the request of the Prosecution or Defence.
- 8. Article 64(6)(f) enables the Trial Chamber in performing its functions prior to trial may, as necessary, “rule on any other relevant matters”.
- 9. Article 61(9) of the Statute provides that the Prosecution may amend the charges before the commencement of trial with the permission of the Pre-Trial Chamber. It also provides that the Prosecution may withdraw the charges after the commencement of trial with the permission of the Trial Chamber.

10. The Chamber has endorsed the interpretation of Trial Chamber I in *Lubanga* that the reference to the commencement of trial in Article 61(9) refers to the ‘true opening of the trial when the opening statements, if any, are made prior to the calling of witnesses’.⁴
11. The Appeals Chamber in *Lubanga* ruled that a Chamber of the Court is vested with the power to stay proceedings if it is impossible to hold a fair trial.⁵

(i) Ordering the Prosecution to Withdraw or Amend the Charges

12. In the recent “Decision on the withdrawal of charges against Mr Muthaura,”⁶ the Defence observes that by granting the Prosecution permission to withdraw the charges against Mr Muthaura *before* the commencement of trial, the Chamber has by Majority implicitly determined that it is competent to permit the withdrawal of charges, once the issue has been raised by the Prosecution.⁷ The Defence submits, however, that the decision to withdraw the charges remains the sole discretion of the Prosecution, and that Her Honour Judge Ozaki was correct in her assessment that the powers conferred on the Chamber by Articles 64(2) and 61(11) of the Statute and Rule 134(1) of the Rules extend to ordering the formal discontinuance of the case and issuing any related orders but not authorising a withdrawal of charges.⁸ Her Honour Judge Ozaki adopts the position that there is no express power to authorise the withdrawal of charges.

⁴ ICC-01/09-02/11-696, para. 10, citing: *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, ICC-01/04-01/06-1084, para. 39.

⁵ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, ICC-01/04-01/06-772.

⁶ ICC-01/09-02/11-696.

⁷ ICC-01/09-02/11-696.

⁸ ICC-01/09-02/11-698.

13. Neither the Majority nor Her Honour Judge Ozaki addressed the issue of whether or not the Chamber has the power to *order* the Prosecution to withdraw or amend the charges *proprio motu*. The Defence submits that the *lex specialis* in relation to amending or withdrawing the charges in the post-confirmation phase of proceedings is Article 61(9). Neither this provision, nor any other within the Statute confers upon the Chamber the power to *order* the withdrawal or amendment of charges. The Defence takes the position that notwithstanding the wide-ranging powers of the Chamber, given the remit of the Prosecution's discretion and authority to modify or withdraw the charges, any such power to *order* the Prosecution in this regard, if intended, would have been expressly provided in the Statute.
14. The Defence submits that, similarly, the decision to seek to amend the charges remains within the discretion of the Prosecution. There is no power expressly provided in the Statute for the Trial Chamber to *order* the Prosecution to amend the charges. The *lex specialis* of Article 61(9) provides only that after the charges are confirmed and before the trial has begun, 'the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges.'

(ii) Ordering the Stay of Trial Proceedings

15. The Appeals Chamber in *Lubanga* ruled that a Chamber of the Court is vested with the power to stay proceedings if it is impossible to hold a fair trial.⁹ Rule 134 of the Rules of Procedure of Evidence provides that the Trial Chamber may, *prior to the commencement of trial*, rule on any issue concerning the conduct of

⁹ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, ICC-01/04-01/06-772.

proceedings, whether on its own motion, or at the request of the Prosecution or Defence.

16. The Chamber therefore has the power to order a stay of proceedings prior to or after the commencement of trial proceedings pursuant to Rule 134 of the Rules of Procedure and Evidence and the appellate jurisprudence of *Lubanga*.
17. The Appeals Chamber in *Lubanga* held that '[w]here the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed.'¹⁰ The Appeals Chamber later held that a conditional stay of proceedings could be considered appropriate in circumstances where a fair trial cannot be held at the time that the stay is imposed, but where the unfairness to the accused person might be remedied, such that a fair trial does become possible.¹¹
18. The Defence submits that the present case cannot be considered suitable for a conditional stay of proceedings, as a fair trial cannot at any stage become possible on the factual and legal matrix upon which the case is brought. The Defence refers the Trial Chamber to the arguments set out in Section III of the 'Defence Observations Regarding the Impact of the Withdrawal of the Charges Against Mr Muthaura on the Case Against Mr Kenyatta Pursuant to the "Order Requesting Written Submissions Following 18 March Status Conference"', filed on 28 March 2013.

¹⁰ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, ICC-01/04-01/06-772, para. 39.

¹¹ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008', ICC-01/04-01/06-1486, para. 4.

(iii) Ordering the Termination of Trial Proceedings

19. The Defence submits that the withdrawal by the Prosecutor of the charges against Mr Muthaura requires the Chamber in this case to consider exercising its power to terminate the proceedings against Mr Kenyatta, in performing its functions prior to the commencement of trial as necessary under Article 64(6)(f) 'to rule on any other relevant matters.' The grounds for terminating the proceedings are based similarly upon a lack of evidence to support the Confirmation of Charges Decision, as in the case of Mr Muthaura. The Defence refers the Chamber in this regard to the arguments at Section III of the 'Defence Observations Regarding the Impact of the Withdrawal of the Charges Against Mr Muthaura on the Case Against Mr Kenyatta Pursuant to the "Order Requesting Written Submissions Following 18 March Status Conference"'.¹²
20. Article 64(2) of the Statute imposes upon the Chamber the obligation to ensure that the proceedings are fair and expeditious and conducted with full respect for the rights of the accused. The Chamber may, under Article 64(6)(f), rule on any relevant matter.
21. The Appeals Chamber in *Lubanga* noted that a fair trial is the only means by which to do justice, and that '[i]f no fair trial can be held, the object of the judicial process is frustrated and the process must be stopped'.¹² The Defence maintains that the deficiencies in the confirmation process, and the resultant fundamentally flawed factual and legal bases of the Prosecution's case have rendered a fair trial impossible. These deficiencies have been set out in Section III of the 'Defence Observations Regarding the Impact of the Withdrawal of the Charges Against Mr Muthaura on the Case Against Mr Kenyatta Pursuant to

¹² ICC-01/04-01/06-772, para. 37.

the “Order Requesting Written Submissions Following 18 March Status Conference”’.

22. Further, in his Separate Opinion to the Appeals Chamber’s 21 October 2008 Decision in the case of *Lubanga*, His Honour Judge Pikis held that ‘[t]he reasonableness of the time within which judicial proceedings are conducted and concluded and the absence of undue delay constitute an inseverable element of a fair trial, forming part of internationally recognized human rights.’¹³ The Defence submits that the deficiencies in the confirmation process have already led to unacceptable delays to the trial proceedings in this case. Potential remedies to these deficiencies will lead to yet further delay. Ultimately, ‘if the fabric of a fair trial is shattered before its commencement, no fair trial can be held.’¹⁴

¹³ *Prosecutor v. Thomas Lubanga Dyilo*, Separate Opinion of Judge Georgios M. Pikis to ‘Judgment on the Appeal of the Prosecutor against the decision of Trial Chamber I entitled ‘Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008’’, ICC-01/04-01/06-1486, para. 30.

¹⁴ *Prosecutor v. Thomas Lubanga Dyilo*, Separate Opinion of Judge Georgios M. Pikis to ‘Judgment on the Appeal of the Prosecutor against the decision of Trial Chamber I entitled ‘Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008’’, ICC-01/04-01/06-1486, para. 44.

4. What, if any, criteria or pre-conditions need to be met for the Prosecution to investigate post-confirmation? Were the post-confirmation investigations in the present case proportional to the reasons given by the Prosecution?

(i) *What, if any, criteria or pre-conditions need to be met for the Prosecution to investigate post-confirmation?*

23. In order to ascertain the criteria, if any, to be met by the Prosecution to investigate post-confirmation, it is necessary to examine the provisions and requirements of the Statute.

24. At the outset, the Statute does not refer to this category of post-confirmation investigation. Article 61(4) specifically refers to the right of the Prosecutor to *continue* the investigation *before* the confirmation of charges hearing. There are clear procedural distinctions in the Statute at Section V as between investigations and prosecutions. The power to continue investigation in the trial stage of the case is not provided in the Statute.

25. The generic duty of the Prosecutor is set out in Article 54(1) of the Statute, which provides that the Prosecutor shall “[i]n order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally.” The Appeals Chamber in *Lubanga* confirmed that in this regard the Prosecutor’s ‘duty to establish the truth is not limited to the time before the confirmation hearing’ and that ‘the Prosecutor must be allowed to continue his investigation

beyond the confirmation hearing, if this is necessary in order to establish the truth.’¹⁵

26. The *Lubanga* Appeals Chamber reiterates however that although it is not a requirement of the Statute, ‘ideally, it would be desirable for the investigation to be complete by the time of the confirmation hearing.’¹⁶ The Defence submits that by holding that ‘the investigation should largely be completed’ at this stage, the Appeals Chamber impliedly held that any further investigation would be exceptional and require justification. This interpretation is consistent with the Prosecution’s continuing duty to ensure that its investigations are proper, expeditious and effective.¹⁷ The Prosecution’s investigative powers and ability to search for new evidence are not, however, unlimited.
27. In *The Prosecutor v Callixte Mbarushimana*, the Appeals Chamber held that most of the evidence should be available at the Confirmation Hearing, and it is up to the Prosecutor to submit this evidence to the Pre-Trial Chamber.¹⁸ This approach reflects the carefully designed procedural structure of the Court that devolves to the Pre-Trial Chamber the role of determining the charges for trial so that the Trial Chamber ‘upon assignment of a case for trial’ pursuant to Article 64(3), deals with the ‘disclosure of documents or information not previously disclosed.’ These ‘documents or information’ are those *not* disclosed for the confirmation of charges under Article 61(3) and (5).

¹⁵ *Prosecutor v. Thomas Lubanga Dyilo*, 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, para. 52.

¹⁶ *Prosecutor v. Thomas Lubanga Dyilo*, 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, para. 54.

¹⁷ Article 54(1) of the Statute.

¹⁸ *Prosecutor v. Callixte Mbarushimana*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled ‘Decision on the confirmation of charges’, 30 May 2012, ICC-01/04-01/10-514, para. 44.

28. In his Dissenting Opinion on the Decision on the Confirmation of Charges, His Honour Judge Kaul warned about the dangers of phased investigation whereby the Prosecution seeks only to reach the “sufficiency standard” at the confirmation stage:

Another example of such unsatisfactory investigation would be an approach which *de facto* is aiming, in a first phase, (only) at gathering enough evidence to reach the “sufficiency standard” within the meaning of article 61(7) of the Statute, maybe in the expectation or hope that in a further phase after the confirmation proceedings, additional and more convincing evidence may be assembled to attain the ‘beyond reasonable doubt’ threshold, as required by article 66(3) of the Statute.¹⁹

29. Referring to the Appeals Chamber’s Judgment of 13 October 2006,²⁰ His Honour Judge Kaul expressed his concern that the Prosecution might seek to interpret too broadly the limited permission of post-confirmation investigations articulated therein.²¹
30. Further concerns were raised by Her Honour Judge Trendafilova in the Pre-Trial Chamber’s ‘Decision Requesting Observations on the “Prosecution’s Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute”’, noting the *Lubanga* Appeals Chamber in which the Learned Judge stated that ‘the principled approach is that the Prosecutor should be ready with the investigation during [the confirmation] phase and any delay in doing so is exceptional and should be justified.’²²

¹⁹ Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II’s ‘Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute’, ICC-01/09-02/11-382-Conf, para. 52.

²⁰ *Prosecutor v. Thomas Lubanga Dyilo*, 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, para. 54.

²¹ Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II’s ‘Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute’, ICC-01/09-02/11-382-Conf, para. 56.

²² Pre-Trial Chamber II, Decision Requesting Observations on the ‘Prosecution’s Request to Amend the Final Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute’, 29 January 2013, ICC-01/09-02/11-614, para. 9.

31. In accordance with the jurisprudence of the Appeals Chamber, post-confirmation investigations are clearly intended to be the exception rather than the rule.²³ In order to protect the validity of the confirmation process as the marker for the 'termination' of 'the preliminary proceedings', the Defence submits that in respect of evidence gathered post-confirmation of the charges, the Prosecution must apply to the Trial Chamber to seek its admission.
32. To allow automatically the admission of wholly new evidence that was available with the exercise of reasonable diligence at confirmation, but which was not collected or presented by the Prosecution, without any judicial oversight, would be to emasculate the confirmation of charges process and denude confirmation decisions of the required legal certainty. The Prosecution must not be encouraged or permitted to proceed to confirmation on unsatisfactory evidence in the knowledge that they will have a second chance to fill gaps and omissions at a later stage.
33. While it is accepted by the Defence that the Prosecution's investigation may continue beyond the confirmation process 'in order to establish the truth' in exceptional situations, if the Prosecution intends to rely on any of the evidence it collects *after* the confirmation of charges in the forthcoming trial, the Defence submits that an assessment must be made by the Chamber as to whether or not it is admissible pursuant to Articles 64(2) and 69(4). It is clearly within the purview and duty of the Chamber to ensure that any evidence obtained post-

²³ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Filing of a Summary of the Charges by the Prosecutor, 21 October 2009, ICC-01/04-01/07-1547-tENG, para. 22; *Prosecutor v. Thomas Lubanga Dyilo*, 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, para. 54; *Prosecutor v. Callixte Mbarushimana*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 16 December 2011 entitled 'Decision on the confirmation of charges', 30 May 2012, ICC-01/04-01/10-514, para. 44; Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute', ICC-01/09-02/11-382-Conf, paras 52 and 56.

confirmation was collected in accordance with the Prosecution's Article 54(1)(a) duty and does not breach the fundamental rights of the accused. Pursuant to Article 69(4), the Trial Chamber may 'rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.'

34. The admissibility of evidence collected by the Prosecution post-confirmation requires careful scrutiny in order to ensure that the current situation does not repeat in the future, whereby 84% of the testimonial evidence sought to be relied upon in the trial of Uhuru Kenyatta was collected by the Prosecution *after* the confirmation of the charges. The extent of the Prosecution's post-confirmation investigations in this case is manifestly excessive and has resulted in a fundamental factual shift of the Prosecution case,²⁴ which has placed on the Defence a significant burden to identify and investigate the case it faces in preparation for trial. In accordance with its duty under Article 64(2), the Trial Chamber must ensure the regulation and control of its proceedings in order to ensure a fair and efficient trial.
35. Ultimately, the power of the Prosecution to conduct additional investigations must not infringe the accused's fair trial rights in Article 67 and the fulfilment of the minimum guarantees set out therein, including the right to have adequate time and facilities for the preparation of his defence. The touchstone must be fairness.

²⁴ ICC-01/09-02/11-622, paras 20-31.

(ii) Were the post-confirmation investigations in the present case proportional to the reasons given by the Prosecution?

36. The Defence submits that the Prosecution's post-confirmation investigations in the present case have been wholly disproportionate to the reasons given by the Prosecution. An overwhelming proportion of the Prosecution's case has been gathered post-confirmation, contravening its duty under Article 54(1) and undermining the accused's rights under Article 67(1)(b).
37. The Defence reiterates in their entirety the arguments contained in the 'Observations on the Conduct, Extent and Impact of the Prosecution's Investigation and Disclosure on the Defence's Ability to Prepare for Trial' ("Observations on the Prosecution's Investigation").²⁵ The Defence refers the Chamber to paragraphs 11 to 23 of its Observations on the Prosecution's Investigation, and emphasises, in particular, that the testimony of those interviewed for the first time after the Confirmation Hearing is expected to account for 84 *per cent* of the Prosecution's case. The Defence also refers the Chamber to paragraphs 24 to 28 of its Observations on the Prosecution's Investigation, and emphasises the discrepancy between the Prosecution's disclosure estimates at the June 2012 Status Conference and the actual volume of material disclosed. Of a total of 31,581 pages of documentary evidence disclosed to the Defence by 20 February 2013, 27,301 pages, or 86% of the total number of pages, was disclosed after confirmation.
38. The Defence submits that the statistical analyses contained therein illustrate clearly the Prosecution's inappropriate approach to the investigation of its case, and its ultimate failure to act in a manner that respects the rights of the Defence. This conduct has been further compounded by the Prosecution's approach to

²⁵ ICC-01/09-02/11-655.

disclosure. In this regard, the Defence refers the Chamber to paragraphs 29 to 37 of its Observations on the Prosecution's Investigation.

39. The Prosecution provided its justifications for conducting post-confirmation investigations in a confidential and *ex parte* annex to the Pre-Trial Chamber.²⁶ The Defence refers the Chamber to its 'Observations on ICC-01/09-02/11-633-Conf-AnxA-Red with Confidential Annexes A and B, and Confidential *Ex parte*, Kenyatta Defence only, Annex C' ("Observations on the Prosecution's Justifications")²⁷ and to the Defence for Mr Muthaura's 'Response to ICC-01/09-02/11-633-Conf-AnxA-Red'.²⁸
40. The Prosecution justified its post-confirmation investigations with reference to: (i) an allegation of insufficient cooperation of the Government of Kenya; (ii) witness security concerns in Kenya; and (iii) the difficulty of penetrating the Mungiki organisation. The Defence refers the Chamber to its responses to these justifications at, respectively: (i) paragraphs 18 to 19; (ii) paragraphs 20 to 24; and (iii) paragraphs 25 to 31, of its Observations on the Prosecution's Justifications.
41. The Prosecution did not submit that these claimed difficulties have in any way diminished in the period since confirmation. The Defence submits, therefore, that the Prosecution could and should have conducted the investigations prior to, rather than after, the confirmation hearing. By choosing to take only those investigative steps that it deemed 'strictly necessary for the purposes of the confirmation of charges hearing',²⁹ the Prosecution has conducted the type of

²⁶ ICC-01/09-02/11-633-Conf-AnxA-Red.

²⁷ ICC_01/09-02/11-661-Conf.

²⁸ ICC-01/09-02/11-653-Conf.

²⁹ ICC-01/09-02/11-633-Conf-AnxA-Red.

improper investigation warned against by His Honour Judge Kaul in his Dissenting Opinion on the Confirmation of Charges.³⁰

42. The Defence submits that it was irresponsible for the Prosecution to elect to proceed to confirmation before it had thoroughly investigated its case. To do so runs contrary to the Prosecution's role as a truth seeking body and constitutes an unacceptable subversion of the confirmation process. The inevitable consequences of the Prosecution's late investigations and its disclosure strategy led to the postponement of the commencement of trial, and infringed Mr Kenyatta's right to an expeditious trial.

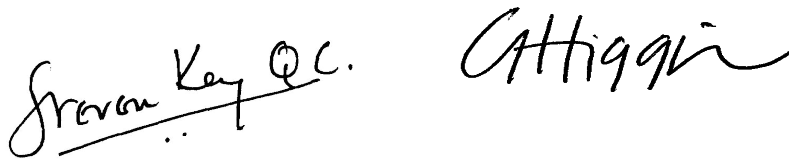
³⁰ Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute', ICC-01/09-02/11-382-Conf, para. 52.

III. RELIEF

43. For the reasons set out above, the Defence respectfully requests that the Chamber:

- a. Adopts the above observations; and
- b. Terminates the proceedings; or
- c. Orders a stay of the proceedings; or
- d. Refers the confirmation decision back to the Pre-Trial Chamber for reconsideration.

Respectfully submitted,

The block contains two handwritten signatures. On the left, the signature reads 'Steven Kay QC.' with a horizontal line drawn underneath. On the right, the signature is 'G Higgins' in a cursive script.

.....
Steven Kay QC and Gillian Higgins
On behalf of Uhuru Muigai Kenyatta

Dated this 28th day of March 2013

At London, England