



Original: English

No.: ICC-01/09-02/11
Date: 25 February 2013

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

Public redacted version of the 25 February 2013 Consolidated Prosecution response to the Defence applications under Article 64 of the Statue to refer the confirmation decision back to the Pre-Trial Chamber

Source: The Office of the Prosecutor

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Introduction

1. The Prosecution hereby submits its omnibus response to the Kenyatta “Defence Application to the Trial Chamber Pursuant to Article 64(4) of the Rome Statute to Refer the Preliminary Issue of the Confirmation Decision to the Pre-Trial Chamber for Reconsideration” (“Kenyatta Application”),¹ and the Muthaura “Defence Application pursuant to Article 64(4) for an order to refer back to Pre-Trial Chamber II or a Judge of the Pre-Trial Division the Preliminary issue of the Validity of the Decision on the Confirmation of Charges or for an order striking out new facts alleged in the Prosecution’s Pre-Trial Brief and Request for an extension of the page limit pursuant to Regulation 37(2)” (“Muthaura Application”) (together, “Applications”).²
2. The relief sought – an order referring the confirmation decision to the Pre-Trial Chamber for “reconsideration” – amounts to a request for a “re-do” of the confirmation process, 15 months after the confirmation hearing and a full year after the Pre-Trial Chamber confirmed the charges and committed the case to trial. This remedy is unprecedented at this Court, is not envisaged in its statutory framework, and has the potential to seriously affect the orderly conduct of proceedings in all pending and future cases before the Court. If such a remedy is available, it should be granted only in the most exceptional instance.
3. In the Prosecution’s view, the remedy should not be granted unless, as a matter of law, the Chamber concludes that the confirmation decision is necessarily unsound with respect to the particular accused. Permitting reconsideration on a lesser showing will impede the interests of justice and the need for this institution to establish that it is able to proceed expeditiously. It will also violate the principle of finality, promote the view

¹ ICC-01/09-02/11-622.

² ICC-01/09-02/11-628-Red.

that confirmation decisions are provisional, and encourage future applications – a tactic guaranteed to create delay – to refer cases for reconsideration of confirmation decisions that are legally sufficient.

4. Thus, the Prosecution submits that reconsideration of confirmation decisions should not be required merely because the Prosecution's evidence changes subsequent to the confirmation hearing. Over time, witnesses may die, disappear, refuse to testify, recant, their reliability may be called into question, or the Prosecution may opt, within its discretion, to rely at trial on other evidence. The fact that evidence relied on by the Pre-Trial Chamber is subsequently withdrawn, and/or new evidence is substituted, cannot be sufficient to require a new confirmation process. To hold otherwise would convert the confirmation hearing into a literal rehearsal of the trial, impose an intolerable burden on the Pre-Trial Chamber, or result in circular litigation that would cause repeated delays in the progress to the trial itself.
5. With respect to the issue of the withholding of impeachment evidence that, if disclosed at the confirmation stage, might have affected the confirmation decision, the Prosecution agrees that such an instance could justify reconsideration – but only if it is clear that had the Chamber rejected the witness' evidence, it could not have confirmed the charges. This does not task the Trial Chamber to sit as a court of appeal to *review* the Pre-Trial Chamber's judgment, which would be beyond its statutory competence.³ Rather, the Trial Chamber should permit the confirmation decision to be re-litigated only if it determines that, as a matter of law, the Pre-Trial Chamber would have reached a different conclusion if appraised of the changed circumstances or new information at issue.

³ *Prosecutor v. Lubanga*, ICC-01/04-01/06-1084, para 43 (“The Trial Chamber has not been given an appellate jurisdiction over any decision of the Pre-Trial Chamber . . . and most particularly the Trial Chamber has not been given a power to review the only decision of the Pre-Trial Chamber that is definitely binding on the Trial Chamber: the Decision on the confirmation of charges.”).

6. This standard of review is consistent with the narrow leeway accorded for Chambers even to reconsider their own decisions,⁴ and is, in the Prosecution's view, essential for the fair and efficient administration of justice. It protects the rights of the Accused and also the compelling interests of victims, witnesses, and the public in avoiding unnecessary delay in bringing persons to justice.

7. To be sure, the Defence argues here that the need to refer the case to the Pre-Trial Chamber arises from affirmative and deliberate misconduct by the Prosecution, and one might argue that a different standard should apply when prosecutorial bad faith is at issue. However, the issue is not presented here because the Defence accusation of deliberate prosecutorial misconduct is untrue. As we explain below, it was not immediately obvious that the withheld statement was inconsistent in a substantial way with the witness' other statements and, in the process of evaluating evidence for disclosure and security concerns, the reviewer of that statement failed to appreciate the impeachment value of the sentence now at issue.

8. Turning from the standard to be employed to the result in this case, the Prosecution firmly submits that Mr Kenyatta's request should be denied. As we outline below, the evidence as set forth in the confirmation decision, even without the evidence of the witness at issue, is sufficient as a matter of law to establish substantial grounds to believe he committed the charged crimes. Under such circumstances, it cannot be said that no reasonable Pre-Trial Chamber would have confirmed the charges had it known that a witness provided an inconsistent account in one statement regarding his presence at a key meeting, or even – taking the Defence argument to its

⁴ See *Prosecutor v. Lubanga*, ICC-01/04-01/06-2705, para 18 (allowing reconsideration under the narrow test “that irregular decisions can be varied if they are manifestly unsound and their consequences are manifestly unsatisfactory”).

extreme – had the Pre-Trial Chamber discarded the witness’ evidence entirely.

9. The Prosecution agrees, however, that Mr Muthaura’s request is different. The witness whose statement is at issue was essential on the issue of Mr Muthaura’s criminal responsibility and, in fact, was the only direct witness against him. Hence, the confirmation decision, if stripped of references to the witness’ evidence, might not establish substantial grounds as a matter of law. The Prosecution also acknowledges that its disclosure error limited the Defence’s ability to challenge the critical witness’ testimony, which appears to have been the principal evidence relied upon by the Pre-Trial Chamber in its decision to confirm the charges against Mr Muthaura. In the particular circumstances of Mr Muthaura’s case, and given that he has elected to waive his Article 67(1)(c) right to go to trial without undue delay, the Prosecution does not oppose new confirmation proceedings with respect to him, should the Trial Chamber determine that there is a legal basis for such relief.

Confidentiality

10. This response is designated “confidential, *ex parte*” because it refers to (i) decisions of this Chamber and the Pre-Trial Chamber that bear that designation; and (ii) evidence of Prosecution trial witnesses whose identities have not yet been disclosed pursuant to rulings of the Chamber, and whose evidence would identify the witness. Redacted versions will be filed.

Submissions

- I. Reconsideration of confirmation decisions should be contemplated only in exceptional circumstances, and never simply because the evidence has evolved subsequent to the confirmation proceeding.
11. The Court’s legislative framework does not contain an express mechanism for sending a confirmation decision back to the Pre-Trial Chamber for

reconsideration. The Defence therefore frames its challenge to the validity of the confirmation decision as a “preliminary issue” and requests that the matter be sent back under Article 64(4).⁵ Nothing in the Statute’s drafting history suggests that Article 64(4) was intended to be a vehicle for sending confirmed cases to the Pre-Trial Chamber for reconsideration. Nor is there a mechanism anywhere else in the Court’s legal framework for such a step.⁶

12. Trial Chambers have twice used Article 64(4) to refer matters to the Pre-Trial Chamber. In the first, the *Lubanga* Trial Chamber requested the Pre-Trial Chamber to review the accused’s detention,⁷ a straight-forward process that is distinguishable from the complex analysis sought here and that additionally did not interfere with or delay the proceedings.⁸ The second was [REDACTED].⁹ [REDACTED].¹⁰

13. This Chamber also declined to adopt the Defence’s broad reading of Article 64(4) in a prior decision. In litigation regarding the content of the Updated Document Containing the Charges (“UDCC”), the Defence argued that the parties’ disputes over the charges “constitute preliminary issues within the meaning of Article 64(4)” and should be referred to the Pre-Trial Chamber for adjudication.¹¹ The Chamber disagreed, holding that because the disputes “concern the impact of the Pre-Trial Chamber’s findings”, there was no need for a referral under Article 64(4).¹² Trial Chambers III and IV

⁵ ICC-01/09-02/11-622, para 13; ICC-01/09-02/11-628-Red, para 3.

⁶ The closest provision is Rule 126(3), which envisages referrals under Article 64(4) when the Pre-Trial Chamber confirmed charges in absentia pursuant to Article 61(2)(b) and Rule 125, and the suspect is subsequently arrested. In that particular scenario, the drafters allowed the confirmation to be revisited. The narrow provision of a referral remedy in that singular situation substantiates that the framers did not intend generally that confirmation would be reconsidered. .

⁷ ICC-01/04-01/06-921.

⁸ The Trial Chamber ruled that it did not “have sufficient time ... to familiarize itself with the record [of the case] in order to review Mr. Thomas Lubanga Dyilo’s detention in a fair and effective manner”. ICC-01/04-01/06-921, page 2.

⁹ [REDACTED]. The Prosecution has filed an application requesting the reclassification of the filings on this issue, including the rulings of the Trial Chamber and Pre-Trial Chambers. *See* [REDACTED].

¹⁰ [REDACTED].

¹¹ ICC-01/09-02/11-481-Red, paras 11-14.

¹² ICC-01/09-02/11-584, para 10.

have similarly declined to refer disputes to the Pre-Trial Chamber under Article 64(4).¹³

14. Absent specific statutory authorization, this Court takes a “restrictive approach” and denies requests for relief “not contemplated in the Rome Statute or its procedural instruments”, absent “exceptional” circumstances.¹⁴ The Prosecution submits that the Applications should be evaluated under that exacting standard. Any lower threshold would open the floodgates to ancillary litigation that could mire trial-ready cases in circular disputes that unnecessarily delay proceedings.¹⁵

15. In many, if not most, cases, there will be changes in the evidence between the confirmation and trial stages. This is due to multiple factors, including the length of time between the two stages; the possibility that critical witnesses may die or disappear or withdraw or change their evidence, or turn out to be less reliable than was initially thought;¹⁶ and the discovery of new witnesses who were reluctant to come forward before charges were confirmed. It is also due to the limited scope of the confirmation hearing, which is designed to confirm charges but not the full parameters of cases, and as Pre-Trial Chambers have observed, is not a “mini-trial” or a “trial

¹³ ICC-01/05-01/08-769, paras 35-47 (declining to entertain the Prosecution’s suggestion (*see id.*, para 15) that a dispute over a possible conflict of interest be referred to a Pre-Trial Judge under Article 64(4)); ICC-02/05-03/09-168 (same).

¹⁴ ICC-02/05-03/09-410, para 78 (denying a defence application for a stay of proceedings filed before the commencement of trial); *see also* ICC-01/04-01/06-2690-Red2, paras 166-68 (noting, in the context of a request for a permanent stay of proceedings, that a “drastic remedy is to be reserved strictly for those cases that necessitate”).

¹⁵ Judge Eboe-Osuji has expressed a similar concern in a different context. *See* ICC-02/05-03/09-410, para 131 (“The procedural costs of [pre-trial stay] litigation do not justify a rampant system of judicial indulgence of counsel in wispy hopes of bagging the wild goose of stay at the stage prior to trial”).

¹⁶ In this case, for example, it has emerged since confirmation that a key Defence witness, [REDACTED], attempted to persuade Mungiki members to provide false exonerating testimony in exchange for money and/or security assurances, and admitted to providing false evidence at the confirmation stage. *See* [REDACTED]. Similarly, [REDACTED], a Muthaura Defence witness at confirmation, has recanted much of the exculpatory information contained in his written statement submitted at confirmation. *See* KEN-OTP-0074-0053, at 0059-67. [REDACTED] claims to have provided false exculpatory evidence because he was pressured (*see* KEN-OTP-0074-0021, at 0024-25); other evidence suggests that he was bribed. *See* P-0430, KEN-OTP-0083-0270, at 0273-76.

before the trial”.¹⁷ Proceedings of such a limited scope cannot be expected to touch upon every aspect of a case, and there will always be evidence that was not aired during the confirmation process. If accused persons can trigger new confirmation proceedings whenever the Prosecution withdraws earlier evidence or discloses new evidence, the confirmation process will be endless. This will undermine the expeditiousness of the Court’s proceedings and could in fact undermine even the possibility of trial proceedings. For these reasons, the Prosecution submits that changes in the evidence after confirmation are not a sufficient ground to send a case back to the Pre-Trial Chamber.

II. The Kenyatta Application should be denied.

- a. The Prosecution’s decision to not rely on Witness 4’s evidence at trial does not render the confirmation fundamentally unfair or vitiate the confirmation decision.

16. The Kenyatta Application focuses on former Witness 4, whose evidence was relied upon by the Prosecution at confirmation and by the Pre-Trial Chamber in confirming the charges. Contrary to the Defence’s argument, the Prosecution’s decision not to rely on former Witness 4 at trial does not vitiate the confirmation decision. The Court’s legal framework and jurisprudence permit the Prosecution to rely at trial on evidence other than that presented at the confirmation stage. Put another way, the Prosecution is not obligated to present the same evidence at confirmation and at trial; it is instead obligated only to prosecute the same charges at trial that were confirmed by the Pre-Trial Chamber. The Prosecution’s decision to withdraw Witness 4 from its list of trial witnesses is consistent with this

¹⁷ See, e.g., ICC-01/09-02/11-321, para 8 (“the confirmation of charges hearing pursuant to article 61 of the Statute is not a mini-trial”); ICC-01/04-01/07-717, para 64 (“the confirmation hearing has a limited scope and purpose and should not be seen as a ‘mini-trial’ or a ‘trial before the trial.’”); ICC-01/09-01/11-221, para 9; ICC-02/05-03/09-121-Corr-Red, para 31.

principle and does not, as the Defence argues, render the case “substantially different” and require a new confirmation decision.¹⁸

17. The Prosecution will not call Witness 4 at trial because information that emerged since confirmation that could substantially undermine his credibility at trial. *First*, in a post-confirmation interview conducted in May 2012, he stated that he had lied in his earlier statements regarding the 26 November 2007 State House meeting and the 17 November 2007 Yaya Centre meeting.¹⁹ *Second*, Witness 4 revealed in the May 2012 interview that he had been offered, and accepted, money from individuals holding themselves out as representatives of the Accused to withdraw his testimony regarding the PEV,²⁰ and provided emails and bank records that confirmed the bribery scheme. In light of these cumulative revelations, the Prosecution considers that it is not useful to call him as a witness.

i. The Court’s legal framework allows for changes in evidence between confirmation and trial.

18. The Court’s legislative framework contemplates that the Prosecution will add or withdraw evidence between confirmation and trial. Article 61(5) provides that at confirmation, the Prosecution may “rely on documentary or summary evidence and need not call the witnesses expected to testify at trial”. In contrast, Article 69(2) generally requires trial witnesses to testify “in person”. Clearly, the Statute anticipates that the Prosecution may present different evidence at trial than was presented at confirmation. Judge Ozaki highlighted this point in a dissenting opinion in *Bemba*:

The purpose of the pre-trial stage is to determine whether the evidence against the accused is sufficient to “establish substantial grounds to believe that the person committed each of the crimes charged” and thereby justify the confirmation of any charges against him. To do so, the Pre-Trial Chamber mainly relies on written

¹⁸ ICC-01/09-02/11-622, para 2(a), 22-27.

¹⁹ KEN-OTP-0067-0604, at paras 7-13.

²⁰ KEN-OTP-0067-0604, at paras 23-146.

evidence. This is not the case at the trial stage, as explained above. Pre-Trial and Trial Chambers apply different evidentiary standards.²¹

19. The Appeals Chamber endorsed Judge Ozaki's reasoning.²² Similarly, in *Lubanga*, the Appeals Chamber highlighted the evidentiary differences between the confirmation and trial stages:

. . . Mr Lubanga Dyilo's interpretation of article 61 (9) of the Statute bears the risk of acquittals that are merely the result of legal qualifications confirmed in the pre-trial phase that turn out to be incorrect, in particular *based on the evidence presented at the trial*.²³

20. In *Katanga and Ngudjolo*, Trial Chamber II opined that the Prosecution may change its evidentiary presentation between confirmation and trial:

[W]hile the facts can no longer be amended once the Pre-Trial Chamber has rendered its decision on the confirmation of the charges, the *evidence* presented during the pre-trial phase can, by contrast, be amended or added to in the course of the trial. This distinction between the facts and the evidence is essential, for it enables the Prosecutor, at the confirmation hearing, to select at this stage only such evidence as appears to him to be "sufficient" to give the Pre-Trial Chamber substantial grounds to believe that an accused committed the crimes with which he is charged. (original emphasis).²⁴

21. In sum, the Court's statutory framework and case law permit the Prosecution to alter its evidentiary presentation between confirmation and trial.²⁵ The Prosecution's decision not to call Witness 4 at trial is consistent with this principle.

²¹ *Prosecutor v. Bemba*, Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the admission into evidence of materials contained in the prosecution's list of evidence, 23 November 2010, ICC-01/05-01/08-1028, para 29 (internal citations omitted).

²² *Prosecutor v. Bemba*, ICC-01/05-01/08-1386 OA5 OA6, para 80.

²³ *Prosecutor v. Lubanga*, ICC-01/04-01/06-2205 OA 15, OA 16, para 77 (emphasis added).

²⁴ *Prosecutor v. Katanga and Ngudjolo*, ICC-01/04-01/07-1547-tENG, para 25. While Trial Chamber II's views on the differences in evidence between the confirmation and trial stages remains good law, its suggestion that the Prosecution must present "all of the facts and circumstances relating to his case" at confirmation (*id.*, para 23) is not supported by the subsequent Appeals Chamber's decision in *Lubanga*, cited above in footnote 23. Nor is Trial Chamber II's *dictum* regarding the authoritative nature of the confirmation decision consistent with this Chamber's ruling that "the Confirmation Decision cannot be expected to serve as the only authoritative statement of the charges for the trial". ICC-01/09-02/11-584, para 22; *see also id.* paras 16-23.

²⁵ *See Prosecutor v. Lubanga*, 19 May 2006, ICC-01/04-01/06-108-Corr, para 34 ("the Prosecution need not present at the confirmation hearing all incriminating evidence that might be in its possession"); *see also* Michela Miraglia, ICC Confirmation of Charges in *Lubanga*, JICJ 6 (2008), 489-503, p 497 (noting that "[t]he evidentiary materials upon which the PTC bases its decision . . . are different in nature from

- ii. Even without Witness 4, the evidence relied upon by the Pre-Trial Chamber in the confirmation decision was sufficient to commit Mr Kenyatta to trial.

22. There is no merit to the argument of the Kenyatta Defence that “the PTC would not have confirmed the present case for trial” if it had been “aware of the true nature of [Witness 4’s] evidence at the time of its deliberations”.²⁶ This argument is, in effect, a claim that a change in the evidence, if previously known to the Pre-Trial Chamber, would have affected the confirmation decision. But, as set forth above, changes are inevitable and thus cannot justify referral of cases back to the Pre-Trial Chamber. Nor does the passage in the confirmation decision cited by the Defence establish that the Pre-Trial Chamber would necessarily have rejected Witness 4’s evidence had it known that he had provided an inconsistent account of his attendance at the Nairobi Club meeting in a previous, non-ICC, statement.

23. Even if the Pre-Trial Chamber would have discarded Witness 4’s evidence in its entirety, the remaining evidence cited in the confirmation decision establishes “substantial grounds to believe” that Mr Kenyatta committed the crimes charged.²⁷ The Defence argument ignores the totality of the evidence relied upon by the Pre-Trial Chamber. For example, there is no mention of the following findings that were based on other evidence, including Witnesses 11 and 12, and not on Witness 4:

- Mr Kenyatta’s role at the Nairobi State House meeting on or about 30 December 2007. The Pre-Trial Chamber’s findings with respect to this

the ones that the Trial Chamber will utilize for a final judgment on the guilt or innocence of the defendant.”).

²⁶ ICC-01/09-02/11-622, para 31.

²⁷ Article 61(7) of the Statute.

meeting relied upon the evidence of Witnesses 11 and 12, as corroborated by Witness 6.²⁸

- Mr Kenyatta's payments to secure Maina Njenga's approval for Mungiki members to be used to carry out the retaliatory attacks. The Pre-Trial Chamber's findings on this point were based upon evidence from Witnesses 11 and 12.²⁹
- Mr Kenyatta's provision of cash to the local coordinators in Nakuru and Naivasha. The Pre-Trial Chamber's findings were based on the evidence of Witnesses 11 and 12.³⁰
- Mr Kenyatta's payments to the Mungiki leader [REDACTED] to gather a group of Mungiki to replace deserters. The Pre-Trial Chamber's findings were based on the evidence of Witnesses 11 and 12.³¹
- Mr Kenyatta's instructions to [REDACTED] to recruit "as many people as possible for the retaliatory attacks".³² The Pre-Trial Chamber's findings were based upon the evidence of Witness 11, as corroborated by Witness 12.³³
- Mr Kenyatta's role in "establishing links, through intermediaries, between the PNU Coalition and the Mungiki".³⁴ The Pre-Trial

²⁸ ICC-01/09-02/11-382-Red, paras 333-336.

²⁹ ICC-01/09-02/11-382-Red, paras 363-365.

³⁰ ICC-01/09-02/11-382-Red, paras 385-386, 389, 393. The Pre-Trial Chamber's reference to Witness 4's evidence in paragraph 385 does not relate to Mr Kenyatta's provision of cash to the local coordinators, but rather to his appointment of the coordinator of the Nakuru attack. The Prosecution acknowledges that the Pre-Trial Chamber relied upon Witness 4's evidence to establish the latter point.

³¹ ICC-01/09-02/11-382-Red, para 395.

³² ICC-01/09-02/11-382-Red, para 396.

³³ ICC-01/09-02/11-382-Red, para 396.

³⁴ ICC-01/09-02/11-382-Red, para 406.

Chamber's findings were based on the evidence of Witnesses 11 and 12.³⁵

24. The findings above go directly to Mr Kenyatta's alleged role in the common plan and the retaliatory attacks that sprang from it. Together, they are more than sufficient to support confirmation of the charges. This is particularly true with respect to the 30 December 2007 State House meeting, for which Witness 4 provided no evidence. At this meeting (a) Mr Kenyatta instructed his agents to organise Mungiki members to carry out retaliatory attacks against perceived ODM supporters and gave them cash to mobilise men and purchase materiel;³⁶ (b) the common plan to retain control by launching retaliatory attacks was articulated; and (c) Mr Kenyatta personally took important actions – articulating the common plan, issuing instructions, delegating authority to mid-level perpetrators and distributing money – that led to the Mungiki and pro-PNU youth carrying out the Nakuru and Naivasha attacks. The Pre-Trial Chamber's findings regarding Mr Kenyatta's contributions at the 30 December 2007 meeting are themselves sufficient for the charges to be confirmed. Together with the other factual findings listed above, the "substantial grounds" threshold is comfortably surpassed, even discarding Witness 4's evidence in its entirety.

iii. The Prosecution's case is not "substantially different" from the confirmation decision.

25. The Prosecution disagrees with the Defence suggestion that the case is now "substantially different" from the confirmation decision.³⁷ The confirmation decision summarised Mr Kenyatta's alleged role in the PEV as being "in charge of the provision of financial and logistical support to the direct

³⁵ ICC-01/09-02/11-382-Red, paras 302-303.

³⁶ See ICC-01/09-02/11-596-Conf-AnxD-Red-Corr, para 27; see also ICC-01/09-02/11-382-Red, paras 334-336.

³⁷ ICC-01/09-02/11-622, para 20.

perpetrators of the crimes”.³⁸ The Prosecution’s case, as articulated in the pre-trial brief (“PTB”), is the same.³⁹ The Defence’s analysis is factually incorrect and artificially narrow.

26. *First*, the Kenyatta Application incorrectly assumes that the Prosecution has withdrawn its allegations regarding the 26 November 2007 State House meeting and the January 2008 Nairobi Club meeting. With respect to the first, the 26 November 2007 Nairobi State House meeting,⁴⁰ the Prosecution no longer alleges that Mr Kenyatta personally attended the meeting but continues to allege that it was a significant step, taken by members of the common plan, to secure the Mungiki’s support for the PNU coalition, which was a precondition for the deployment of Mungiki members to carry out the Nakuru and Naivasha attacks.⁴¹ The 26 November meeting thus remains part of the common plan and, as such, is still incriminatory as to Mr Kenyatta.

27. Similarly, the Defence incorrectly suggests that the Prosecution abandoned allegations regarding the January 2008 Nairobi Club meeting because the confirmation decision states that the meeting took place on “3 January 2008”, whereas the PTB states that it took place “in early January 2008”.⁴² The PTB’s “early January” meeting is the same meeting described in the confirmation decision.⁴³ This is demonstrated by a comparison of paragraph 342 of the confirmation decision and paragraph 31 of the PTB.⁴⁴

³⁸ ICC-01/09-02/11-382-Red, para 384.

³⁹ *See, e.g.*, ICC-01/09-02/11-596-Conf-AnxD-Red-Corr, paras 115, 117.

⁴⁰ *See* ICC-01/09-02/11-622, paras 22-25.

⁴¹ ICC-01/09-02/11-596-Conf-AnxD-Red-Corr, para 24.

⁴² ICC-01/09-02/11-622, para 27.

⁴³ *See, e.g.*, ICC-01/09-02/11-591-Conf-AnxA, paras 47, 75, 80, 88, 89 (referring to meeting held at the Nairobi Club “on or about 3 January 2008”) (emphasis added).

⁴⁴ *Compare* ICC-01/09-02/11-382-Conf, para 342 *with* ICC-01/09-02/11-596-Conf-AnxD-Red-Corr, para 31. While the PTB relies upon evidence other than that of Witness 4, the account of the meeting is largely the same: that its purpose was to mobilise Mungiki members for the retaliatory attacks, and that the Accused provided the Mungiki attendees with instructions and logistical advice to carry out the attacks. *See also* ICC-01/09-02/11-596-Conf-AnxD-Red-Corr, para 31 and evidence cited therein. The PTB does

28. *Second*, the Defence's "substantial differen[ce]" analysis misreads the Pre-Trial Chamber's decision. The Defence cites differences with respect to two meetings (the 26 November 2007 State House meeting and the January 2008 Nairobi Club meeting) that the Pre-Trial Chamber deemed to be significant, while ignoring the remainder of the Pre-Trial Chamber's findings with respect to Mr Kenyatta's alleged role in the violence.⁴⁵ The result is an analysis that fails to capture accurately the Pre-Trial Chamber's findings, by ignoring the findings listed above in paragraph 23 regarding Mr Kenyatta's role at the Nairobi State House meeting on or about 30 December 2007,⁴⁶ his payments to Maina Njenga,⁴⁷ local coordinators and Mungiki leaders,⁴⁸ his instructions regarding recruitment for the attacks,⁴⁹ and his use of intermediaries to establish links between the PNU and the Mungiki.⁵⁰ While the 26 November 2007 State House meeting and the January 2008 Nairobi Club meeting were important components of the Pre-Trial Chamber's analysis, they were not the beginning and end of that analysis, as the Defence suggests.

29. The Defence analysis also mistakenly complains that the Prosecution has dropped altogether its allegations regarding another event – the alleged 17 November 2007 meeting at the Yaya Centre⁵¹ – thus further departing from the confirmed case. But the Pre-Trial Chamber did not consider that meeting in its decision confirming the charges. So the PTB's silence regarding that

not employ the Pre-Trial Chamber's language of "3 January 2008" because the witnesses who will testify to this meeting at trial provide evidence that the meeting was held in early January, rather than specifying the precise date.

⁴⁵ ICC-01/09-02/11-622, paras 22-31.

⁴⁶ ICC-01/09-02/11-382-Red, paras 333-336.

⁴⁷ ICC-01/09-02/11-382-Red, paras 363-365.

⁴⁸ ICC-01/09-02/11-382-Red, paras 385-386, 389, 393, 395.

⁴⁹ ICC-01/09-02/11-382-Red, para 396.

⁵⁰ ICC-01/09-02/11-382-Red, paras 302-303, 406.

⁵¹ ICC-01/09-02/11-622, para 24.

meeting is consistent with the confirmation decision, not “substantially different”.⁵²

30. In sum, a fair comparison of the confirmation decision, the UDCC, and the PTB demonstrates that the Prosecution’s case at trial is, in all material respects, the same as that confirmed by the Pre-Trial Chamber. There is no “substantial difference” that would require the confirmation decision to be sent back to the Pre-Trial Chamber for reconsideration.

b. The failure to disclose Witness 4’s previous inconsistent statement prior to the confirmation hearing does not require Mr Kenyatta’s case to be referred back to the Pre-Trial Chamber for reconsideration.

31. While the Prosecution acknowledges and regrets its error in not disclosing Witness 4’s asylum affidavit prior to confirmation, this error does not undermine the confirmation decision to such an extent that it needs to be referred back to the Pre-Trial Chamber for reconsideration. Had the affidavit been disclosed, it would have at most permitted the Defence to contest the credibility of Witness 4 and to argue that his evidence regarding the January meeting was hearsay and not direct evidence. Neither challenge is sufficient to demonstrate that the confirmation decision can no longer stand. Equally important, even if the Pre-Trial Chamber had discarded Witness 4’s evidence in its entirety, the remaining evidence was sufficient to confirm the charges. The relevant facts are as follows.

32. Witness 4 provided three Rule 111 written statements to the Prosecution – in September 2010,⁵³ in June 2011,⁵⁴ and in May 2012.⁵⁵ In the first two statements, Witness 4 said he attended the 26 November 2007 State House

⁵² ICC-01/09-02/11-622, para 20.

⁵³ KEN-OTP-0043-0002.

⁵⁴ KEN-OTP-0051-1045.

⁵⁵ KEN-OTP-0067-0604.

meeting, a 17 November 2007 meeting with Mr Kenyatta at the Yaya Centre, and a meeting at the Nairobi Club on 3 January 2008 also attended by Messrs Muthaura and Kenyatta.⁵⁶

33. In Witness 4's third ICC statement, he said that he had lied in his first two statements with respect to the 26 November 2007 State House meeting and the Yaya Centre meeting.⁵⁷ However, Witness 4 maintained that his account of the Nairobi Club meeting was accurate.⁵⁸ Witness 4 also revealed in the third statement that he had been bribed by individuals holding themselves out as representatives of the Accused to withdraw his testimony regarding the PEV.

34. Witness 4 also made a fourth, non-ICC, statement: a 28-page affidavit, prepared for asylum proceedings in another country.⁵⁹ The Prosecution obtained the affidavit from Witness 4 on 27 September 2010.

35. In paragraph 33 of the affidavit, Witness 4 discussed the Nairobi Club meeting. He stated that the meeting occurred, but whereas Witness 4's ICC statements explained that he attended the meeting in person, paragraph 33 of the affidavit stated that he was told about the meeting by a Mungiki member who claimed to have attended.⁶⁰ The inconsistency between paragraph 33 of the affidavit and Witness 4's three ICC statements constitutes information that is subject to disclosure under Article 67(2).⁶¹

36. The Prosecution did not disclose the affidavit to the Defence before the confirmation hearing. Rather, the Prosecution made two applications to the

⁵⁶ KEN-OTP-0043-0002, at 0030-36, 0038-42; KEN-OTP-0051-1045, at 1057-58.

⁵⁷ KEN-OTP-0067-0604, at 0606-07.

⁵⁸ KEN-OTP-0067-0604, at 0608.

⁵⁹ The Affidavit bears ERN KEN-OTP-0043-0083.

⁶⁰ KEN-OTP-0043-0083, at 0096 (para 33); *see also* KEN-OTP-0043-0083, at 0101 (para 47). Contrary to the Defence argument, the witness did not "admit" or "clearly state" that he was not present. ICC-01/09-02/11-622, para 28 n.76.

⁶¹ The Prosecution notes that other evidence it will offer at trial suggests that the Nairobi Club meeting took place and had the same essential elements as stated in Witness 4's statements. *See infra*, n. 79.

Pre-Trial Chamber to authorise the document's non-disclosure on the basis that disclosing it could reveal Witness 4's place of residence, which in turn could endanger the safety of the witness.⁶² In decisions dated 8 July 2011⁶³ and 15 August 2011,⁶⁴ the Single Judge granted the Prosecution's applications and authorised the affidavit's non-disclosure.⁶⁵

37. The Prosecution acknowledges that it erred in not disclosing the affidavit at the pre-trial stage and in not alerting the Single Judge to the specific impeaching component of the document in its non-disclosure applications. With the benefit of hindsight, the affidavit could and should have been disclosed to the Defence prior to the confirmation hearing, with redactions to information that could have revealed Witness 4's place of residence.⁶⁶ The Prosecution acknowledges that the reasoning contained in its redactions application was insufficient in light of the potential significance of paragraph 33 and provided the Single Judge with inadequate information. The reality is, however, that a review of the relevant records demonstrates that the potential significance of paragraph 33 was not discovered until after the confirmation hearing, many months after the Prosecution had submitted its redactions application to the Pre-Trial Chamber.

38. The Prosecution's Ringtail records reveal that the affidavit was reviewed for relevance and disclosure by at least two Prosecution staff prior to the confirmation hearing.⁶⁷ In these reviews, the affidavit was identified as

⁶² ICC-01/09-02/11-101-Conf-Exp-AnxE2, page 4; ICC-01/09-02/11-241-Conf-Exp-AnxA1, page 48. [REDACTED].

⁶³ ICC-01/09-02/11-165-Conf-Exp.

⁶⁴ ICC-01/09-02/11-254-Conf-Exp.

⁶⁵ ICC-01/09-02/11-165-Conf-Exp, paras 50-54 and page 40 (disposition, at (i)); ICC-01/09-02/11-254-Conf-Exp, para 23 ICC-01/09-02/11-254-Conf-Exp-Anx, pages 85-86.

⁶⁶ The witness security concerns that caused the Prosecution to apply for non-disclosure of the Affidavit have proven to be well-grounded. In his second and third ICC statements, Witness 4 reveals that he was tracked down in [REDACTED] by individuals holding themselves out as representatives of the Accused who bribed him to withdraw his testimony regarding the PEV. *See* KEN-OTP-0067-0604, at 0609-0628, paras 25-146.

⁶⁷ The metadata indicates that the reviews were conducted on 1 October 2010 and 24 May 2011.

containing both incriminating and potentially exonerating information. Paragraph 33 was identified as potentially exonerating due to the final sentence of the paragraph, which states that “government officials directed the Mungiki to go to the Rift Valley to *defend* Kikuyus in the ongoing clashes”.⁶⁸ The reviewer incorrectly identified this sentence as potentially exonerating on the basis that the verb “defend” might be used to support a self-defence theory. The significance of the other sentence at issue – Witness 4’s statement that someone told him about the Nairobi Club meeting – was not recognized. One must be familiar with Witness 4’s statements that he attended the Nairobi Club meeting to spot the apparent inconsistency, and through an oversight, the inconsistency was not identified during the disclosure review.⁶⁹

39. The failure to identify the inconsistency between the witness’ statements and his affidavit meant that the Prosecution did not highlight that fact in its application to withhold the affidavit.

40. The Prosecution also acknowledges that, had it been disclosed, the inconsistent statement in paragraph 33 of the affidavit might have caused the Pre-Trial Chamber to evaluate Witness 4’s evidence in a different light, to regard Witness 4’s evidence regarding the Nairobi Club meeting as hearsay, or even to reject Witness 4’s evidence entirely.⁷⁰ However, none of these possibilities is sufficient to undo the confirmation decision. The Defence does not, and cannot, argue that the affidavit would have affected

⁶⁸ KEN-OTP-0043-0083, at 0096 (emphasis added).

⁶⁹ The Affidavit’s account of the Nairobi Club meeting actually appears incriminatory when viewed in isolation, which is how paragraph 33 was analysed by the reviewer, who made the following note in the review metadata: “*INCRIM PNU ordering: although it is hearsay to the witness, he describes that at a meeting at Nairobi Club where a.o. Uhuru Kenyatta was present, the government officials directed the Mungiki to go to Rift Valley to defend the Kikuyu’s in the ongoing clashes. After about two weeks, the Mungiki started killing people in Rift Valley (Nakuru and Naivasha). (p. 0096, 0097)*”.

⁷⁰ Even this is questionable because at the time of the confirmation hearing, there was no indication that Witness 4 may recant some of his evidence. He admitted to providing false evidence only in May 2012, seven months after the confirmation hearing.

the Pre-Trial Chamber's assessment of the rest of the evidence presented by the Prosecution at confirmation. Even viewed in the light most favourable to the Defence, the impact of the affidavit's non-disclosure is limited to Witness 4. And as discussed above, had the Pre-Trial Chamber discarded Witness 4's evidence, the remaining evidence was sufficient to confirm the charges against Mr Kenyatta. Thus, the disclosure error does not call into question the confirmation decision.⁷¹

c. The failure to disclose the affidavit was not done in "bad faith".

41. The Prosecution acknowledges its disclosure error. As explained above, the reviewer who initially identified paragraph 33 as potentially exculpatory based that assessment on something that, on second review, was rightly determined not to be exculpatory. Since the value of paragraph 33 to the Defence was not appreciated and the reasons for non-disclosure – that the document, if disclosed, could reveal the location of the witness – were substantial, the Prosecution decided to seek judicial authorization to withhold the document. Of course, the Prosecution at the time also failed to appreciate that the affidavit contained an inconsistent statement and was thus disclosable as impeachment material. But we unequivocally deny the Defence assertion that we deliberately withheld the affidavit "as a litigation strategy to increase artificially the strength of its case".⁷² There was no "bad faith".⁷³

⁷¹ It would be incorrect to hold that whenever a decision is based on evidence that, in retrospect, appears to have been wrongly evaluated (by a Pre-Trial or a Trial Chamber), the remedy is to refer the case back to the original Chamber to redo the proceedings without the questioned evidence. Rather, if the Chamber hearing the challenge can assess whether the record, absent the evidence, is sufficient to uphold the decision, it should resolve the issue itself. *See, e.g., ICTY, The Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Appeal Judgment, 21 July 2000, para 107.

⁷² ICC-01/09-02/11-622, para 36.

⁷³ ICC-01/09-02/11-622, para 41.

- d. Referral of the confirmation decision would not be in the interests of justice and would merely serve to delay proceedings with respect to Mr Kenyatta.

42. Sending the confirmation decision back to the Pre-Trial Chamber for reconsideration would serve no purpose with respect to Mr Kenyatta. Assuming new confirmation proceedings were ordered, the evidence cited in the Prosecution PTB and list of evidence would comfortably surpass the “substantial grounds” threshold required to send a case to trial.⁷⁴ A complete analysis of the Prosecution’s evidence exceeds the scope of this response, but by way of non-exhaustive summary, it includes:

- Direct evidence that at the meeting held in Nairobi State House on or about 30 December 2007, Mr Kenyatta appointed coordinators to mobilise Mungiki and pro-PNU youth for the retaliatory attacks and gave them large sums of money for that purpose.⁷⁵
- Direct evidence that Mr Kenyatta’s coordinators distributed funds, weapons and uniforms to Mungiki attackers and stated that they (the coordinators) acted on behalf of Mr Kenyatta, who had supplied the money.⁷⁶
- Direct evidence that at a January 2008 meeting at the Kenyatta family’s Blue Post Hotel in Thika, Mr Kenyatta told a group of Kikuyu elders that he had obtained a commitment from the Mungiki to participate in retaliatory attacks.⁷⁷

⁷⁴ Article 61(7) of the Statute.

⁷⁵ P-0012, KEN-OTP-0060-0112, at 0115-17, KEN-OTP-0060-0299, at 0313-14, KEN-OTP-0060-0426, at 0428-32, KEN-OTP-0074-0590, at 0597-98.

⁷⁶ [REDACTED].

⁷⁷ P-0152, KEN-OTP-0062-0316, at 0322-23, KEN-OTP-0062-0379, at 0382-84.

- [REDACTED] evidence that Mungiki members and local coordinators obtained a large sum of cash from Mr Kenyatta's residence and distributed it to Mungiki members for the retaliatory attacks.⁷⁸
- Testimony that at the January 2008 Nairobi Club meeting, Mr Kenyatta urged Mungiki members to mobilise for the attacks and directed them to his agent, [REDACTED], if they needed assistance.⁷⁹
- Testimony that Mr Kenyatta telephoned Maina Njenga in prison, and sent intermediaries to make cash payments, to secure his approval for the Mungiki's involvement in the retaliatory attacks.⁸⁰
- Testimony that Mr Kenyatta gave large sums of money to Mungiki leaders Njoroge Gichere⁸¹ and Anthony Mwangi, AKA "Noriega",⁸² both of whom were forcibly disappeared after the PEV.

43. The confirmation hearing is "designed to protect the rights of the Defence against wrongful and wholly unfounded charges".⁸³ As the brief summary above demonstrates, the charges against Mr Kenyatta are well-founded. If another confirmation hearing were held, the charges would be confirmed on the basis of the above evidence, as well as other evidence contained in the Prosecution's PTB and list of evidence. The parties would end up in the same position as now, having spent months of Court time on an unnecessary diversion. In light of the evidence presented to the Pre-Trial Chamber at confirmation, and the evidence that will be presented at trial,

⁷⁸ [REDACTED].

⁷⁹ P-0219, KEN-OTP-0087-0793, at 0797, KEN-OTP-0087-0727, at 0732-34 (indirect account of meeting).

⁸⁰ P-0152, KEN-OTP-0062-0264, at 0266-0267, 0271, KEN-OTP-0062-0316, at 0323-0325, KEN-OTP-0062-0337, at 0343 (indirect account); P-0428, KEN-OTP-0081-0988, at 0994 (indirect account); P-0012, KEN-OTP-0060-0325, at 0332-0335 (indirect account).

⁸¹ P-0494, KEN-OTP-0085-1897, at 1909-1912 (indirect account).

⁸² P-0012, KEN-OTP-0060-0405, at 0408-0413, KEN-OTP-0074-0516, at 0524 (indirect account).

⁸³ *Prosecutor v. Lubanga*, ICC-01/04-01/06-803-tEN, para 37; *Prosecutor v. Katanga & Ngudjolo*, ICC-01/04-01/07-717, para 63.

there is nothing unfair about Mr Kenyatta standing trial. In these circumstances, the Court's Article 64(2) duty to ensure that proceedings are both "fair and expeditious", demands that his trial proceed.

III. The Prosecution does not object to the Muthaura Application.

44. The situation with respect to Mr Muthaura is different. Unlike Mr Kenyatta, Witness 4 was the principal source of evidence that supported the Prosecution's charges against Mr Muthaura at the confirmation stage. Unlike Mr Kenyatta, there would not have been sufficient evidence to confirm the charges against Mr Muthaura without Witness 4's evidence. Unlike Mr Kenyatta, the Prosecution's disclosure error could conceivably have affected the Pre-Trial Chamber's decision to commit Mr Muthaura to trial. In sum, Mr Muthaura presents the extremely rare case where it is appropriate to contemplate sending the case back to the Pre-Trial Chamber for reconsideration on the basis of the withheld Affidavit, and to consider the impact that the inconsistent statement might have on the confirmation decision.

45. On the basis of these particular facts, and because Mr Muthaura appears to prefer to waive his Article 67(1)(c) right to be tried without undue delay in favour of sending his case back to the Pre-Trial Chamber for reconsideration, the Prosecution does not oppose the same,⁸⁴ should the Trial Chamber determine that there is a legal basis to grant such relief.

Conclusion

46. For the foregoing reasons, the Prosecution respectfully requests that the Chamber dismiss the Kenyatta Application. The Prosecution does not

⁸⁴ The Prosecution disagrees with the Muthaura Defence's arguments regarding the scope of the Prosecution case and the assertion that it has "undergone a metamorphosis from that confirmed by the PTC". ICC 01/09-02/11-628-Red, para 1. However, the prospect that the Pre-Trial Chamber may be called upon to reconsider its confirmation decision with respect to Mr Muthaura makes it unnecessary to address those arguments in this document.

oppose the confirmation decision being referred back to the Pre-Trial Chamber for reconsideration with respect to Mr Muthaura, should the Trial Chamber determine that there is a legal basis to grant such relief.



Fatou Bensouda,
Prosecutor

Dated this 25th of February 2013
At The Hague, The Netherlands