Cour
Pénale
Internationale

International
Criminal
Court

Original: **English**

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

Date: **30 January 2012**

PRE-TRIAL CHAMBER II

Before: **Judge Ekaterina Trendafilova, Presiding Judge**

Judge Hans-Peter Kaul, Judge

Judge Cuno Tarfusser, Judge

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

THE PROSECUTOR v. FRANCIS KIRIMI MUTHAURA, UHURU MUIGAI KENYATTA AND MOHAMMED HUSSEIN ALI

Public Document

Defence Application for Leave to Appeal the "Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute"

Source: **Defence for Francis Kirimi Muthaura**

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

The Office of the Prosecutor
Mr. Luis Moreno-Ocampo, Prosecutor
Ms. Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Counsel for Francis Kirmi Muthaura
Mr. Karim A. A. Khan QC, Mr. Essa Faal, Mr. Kennedy Ogetto & Ms. Shyamala Alagendra
Counsel for Uhuru Muigai Kenyatta
Steven Kay QC and Gillian Higgins
Counsel for Mohammed Hussein Ali:
Mr. Evans Monari, Mr. Gershom Otachi, Mr. Gregory Kehoe & Mr. John Philpot

Legal Representatives of the Victims
Mr. Morris Anyah

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants (Participation/Reparation)

The Office of Public Counsel for Victims

The Office of Public Counsel for the Defence

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Ms. Silvana Arbia, Registrar
Deputy Registrar
Mr. Didier Daniel Preira, Deputy Registrar

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I. INTRODUCTION

1. On 23 January 2012, the Majority of the Pre-Trial Chamber confirmed the charges against Ambassador Muthaura ("Majority Decision").[1] The Defence submits this application for leave to appeal the Majority Decision pursuant to Article 82(1)(d) of the Rome Statute. The Defence seeks leave to appeal the following issues: (i) Whether the Majority, in its assessment of the evidence, reversed the burden of proof and shifted the onus of rebuttal to the Defence; (ii)Whether admission of statements obtained by non-judicial bodies, without the consent of the persons who provided the information for their statements to be used in ICC proceedings, contravenes the established jurisprudence and practice of the Court; (iii) Whether the Majority's conclusion at paragraph 415 that the suspects knew rape was a virtually certain consequence of the implementation of the common plan to attack is legally and factually permissible; (iv) Whether the Confirmation Decision may re-characterise the Prosecution's allegations against a suspect, as set out in the DCC, without providing the suspect an opportunity to be heard on the re-characterised allegations; (v) Whether NGO and other reports become credible simply because they are corroborated by like evidence (NGO and other reports); (vi) Whether in evaluating evidence pursuant to Article 61(7) a Chamber may depart from the evidence and draw conclusions on the basis of speculation; (vii) Whether allegations of investigative failings of the Prosecution in discharging its responsibilities under Article 54 are matters that fall within the scope of issues for consideration in a confirmation of charges decision; and (viii) Whether the Majority applied different criteria/consideration to the evaluation of Defence evidence as compared to Prosecution evidence.

2. The Defence submits that the issues raised herein satisfy the criteria for leave to appeal and go beyond mere disagreements[2] with factual findings or the

[1] Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382.
[2] Appeals Chamber, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, para. 9.

correctness of the decision. The Defence makes reference to factual findings of the Majority in order to show that the issues raised are indeed appealable.

II. PROCEDURAL BACKGROUND

3. The Confirmation Hearing took place from 21 September to 5 October 2011. On 21 November, the Defence filed its Final Written Observations.[3] On 23 January 2012, the Pre Trial Chamber ("PTC") issued its "Decision on the Confirmation of Charges" wherein the Majority confirmed the charges against Francis K. Muthaura and Uhuru Kenyatta, and declined to confirm the charges against Gen. Mohammed Ali.[4] His Honour Judge Kaul dissented,[5] finding that the crimes charged did not amount to crimes within the jurisdiction of the ICC.

III. SUBMISSIONS OF THE DEFENCE ON INDIVIDUAL ISSUES

(i) FIRST ISSUE: Whether the Majority, in its assessment of the evidence, reversed the burden of proof and shifted the onus of rebuttal to the Defence

4. The Defence submits that at all stages of criminal proceedings the onus to prove the allegations to the required standard rests with the prosecutor. It is a basic right of an accused not to have imposed on him any reversal of the burden of proof or onus of rebuttal.[6] In order to meet its burden at the confirmation stage, it is the Prosecutor that is required to "offer concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations".[7]

5. The Defence submits that in assessing the evidence, the Majority adopted an approach that amounted to a reversal of the burden of proof and a shifting of the onus to the Defence. The Appeals Chambers of the ICTR and ICTY have consistently held that the language employed by a Chamber is an accurate barometer as to how a Chamber has assessed evidence before it. The Appeals

[3] Final Written Observations of the Defence Team of Ambassador Francis K. Muthaura on the Confirmation of Charges Hearing, 21 November 2011, ICC-01/09-02/1174-Conf. Pursuant to the Decision of Pre-Trial Chamber II in ICC-01/09-02/11-378-Conf, the responses have been reclassified as "confidential".
[4] Majority Decision, p. 154.
[5] Hereinafter "Dissenting Opinion".
[6] Article 66 (1) and (2) and Article 67(i) of the Rome Statute; *Prosecutor v. Lubanga*, Dissenting Opinion of Judge Pikis, Judgment on Appeal against Oral Disclosure, 11 July 2008, ICC-01/04-01/06-1433 OA11, para. 14.
[7] ICC-01/04-01/06-803-tEN, para. 39; see also, ICC-01/04-01/07-717, para. 65; ICC 01/05-01/08-424, para. 29; ICC-02/05-02/09-243-Red, para. 37.

Chambers have recognized that language, similar to that used by the Majority, which suggests, *inter alia*, that an accused must "negate" the Prosecution's evidence, "exonerate" himself, that the evidence "*does not contradict* the Prosecution evidence", that the Defence evidence is "*inconclusive"* or that the Defence evidence does not *"refute the possibility"* that the suspect participated in a crime, is indicative that the Chamber has misapplied the burden of proof.[8] The Defence refer, *inter alia*, to the instances below from the Majority Decision, which clearly demonstrate that this issue arises from the Impugned Decision:

(i) At paragraph 128 the Majority held that the evidence of Defence Witness D12-9 "[…] ***does not in itself negate*** either the participation of mungiki in the attack or the planned nature of such attack […]"

(ii) At paragraph 172 the Majority held, with respect to the evidence of Defence witness D12-17, that "the chamber does ***not*** consider the generic statement provided by the witness to be ***capable of negating*** the specific evidence presented by the Prosecutor on the matter at issue."

(iii) At paragraph 185 the Majority found that "the statement of Witness OTP-11 when read in its entirety, ***does not support the argument of the Defence*** of Mr. Muthaura". By so holding, the Majority has effectively required that Defence submissions be corroborated by Prosecution evidence.

(iv) The Majority Decision is replete with examples of such reversals of the burden of proof. Other examples can be found at paragraphs 306, 321, 327, and 355 to name a few. In the event leave to appeal is granted, the Defence, in its appeal brief, will identify all the relevant instances and demonstrate how they effectively reversed the burden of proof to the Suspect.

6. The Defence submits that appellate review is justified in relation to this issue as it clearly arises from the Majority Decision. It constitutes an appealable issue as it establishes a subject or topic which requires a decision. It also affects the fair and expeditious conduct of the case. If the correct legal approach had been

[8] *Limaj et al.*, Appeal Judgement, IT-03-66-A, 27 September 2007, para. 65; *Kamuhanda*, Appeal Judgement, ICTR-99-54A-A, 19 September 2005, para. 39; *Musema*, Appeal Judgement, ICTR-96-13-A, 16 November 2001, para. 295; *Zigiranyirazo*, Appeal Judgement, ICTR-01-73-A, 16 November 2009, paras 40-41.

applied to the evidence before the PTC, the case against Ambassador Muthaura would not have been confirmed. On, *inter alia,* this same basis the Single Judge (the Presiding Judge in this case) has previously granted leave to appeal.[9] Accordingly, appellate intervention could lead to a reversal of the decision of the Majority which would expedite proceedings in this case, and avoid the risk that lengthy and costly trial activities are nullified at a later stage.[10] The immediate resolution of this issue would advance proceedings as it could obviate the necessity of Trial.

(ii) SECOND ISSUE: Whether admission of statements obtained by non-judicial bodies, without the consent of the persons who provided the information for their statements to be used in ICC proceedings, contravenes the established jurisprudence and practice of the Court

7. The Majority decided that the summaries or statements provided by individuals who had not been interviewed by the Prosecution, and who had not provided their consent to the use of such statements in ICC proceedings, were admissible, holding that the *"Chamber does not find any grounds in the statutory documents precluding the use of such documentary evidence, nor is there any indication that this evidence is otherwise inadmissible"*.[11]

8. The Confirmation Hearing *"is designed to protect the rights of the Defence against wrongful and wholly unfounded charges"*.[12] As acknowledged by Judge Kaul, if "after the confirmation of the charges it turns out as impossible to gather further evidence to attain the decisive threshold of 'beyond reasonable doubt', the case in question may become very difficult or may eventually collapse at trial, then with many serious consequences, including for the entire Court and the victims

[9] Decision on the "Prosecution's Application for Leave to Appeal the 'Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence (ICC-01/09-02/11-185)", 18 August 2011, ICC-01/09-02/11-253, para. 29.
[10] *Situation in Uganda*, Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest Under Article 58, 19 August 2005, ICC-02/04-01/05-20-US-Exp, para. 36 (unsealed pursuant to Decision ICC-02/04-01/05-52 of 13 October 2005).
[11] Majority Decision, para. 78.
[12] *Prosecutor v. Lubanga*, Decision on Confirmation of Charges, 29 January 2007, ICC-01/04-01/06-803-tEN, para. 37. This was reiterated with approval in ICC-01/04-01/07-717, para.63 and ICC-01/04-01/07-611.

who have placed great hopes in this institution."[13] It would therefore be entirely unfair to commit a case to trial on the basis of evidence, which could not, as a matter of law, satisfy the standard of beyond reasonable doubt due to the fact that it would be inadmissible or otherwise unavailable. Article 61(5) does not give the Prosecution licence to rely on statements of persons whom the Prosecution has no *reasonable expectation* will testify at trial. This is consistent with the finding of the Single Judge in the *Katanga and Ngudjolo* case.[14]

9. Without the consent of the persons who initially provided the statements to Kenyan investigators, there is no reasonable expectation their evidence will be available for the trial stage. Furthermore, the jurisprudence of this court makes clear that these statements would not otherwise be admissible at the trial stage. The Appeals Chamber has definitively ruled in the *Bemba* case that Trial Chambers cannot circumvent the principle of orality set out in Article 69(2), and the particular requirements for the admission of prior testimony laid down by Rule 68.[15] Also applicable in this instance is the *Katanga* Trial Chamber's delineation of the criteria for determining which categories of statements should be considered as 'testimony' for the purposes of Rule 68.[16] In the present case, it is clear that the requirements of Rule 68 would not be satisfied if the Prosecutor were to seek to rely upon these statements at the trial stage.

10. The issue clearly arises from the decision. It concerns applicability of Rule 68 to statements obtained from non-ICC witnesses. The Defence submits that the issue affects the fairness of the proceedings as the Majority deprived the defence of a fundamental procedural safeguard – that they should not be committed to trial on the basis of evidence, which would otherwise be unavailable or

[13] *Prosecutor v. Katanga & Ngudjolo*, Confirmation Decision, ICC-01/04-01/07-717, 30 September 2008, para. 52.
[14] *Prosecutor v. Katanga & Ngudjolo*, Decision on the admissibility for the confirmation hearing of the transcripts of interview of deceased Witness 12, 18 April 2008, ICC-01/04-01/07-412, p. 6; see also Defence oral submissions, ICC-01/09-02/11-T-4-ENG ET, p. 33, line 14 to p. 37, line 10.
[15] *Prosecutor v. Bemba*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", 3 May 2011, ICC-01/05-01/08-1386, paras 75-77.
[16] *Prosecutor v. Katanga & Ngudjolo*, Decision on the Prosecutor's Bar Table Motions, 17 December 2010, ICC-01/04-01/07-2635, para. 47.

inadmissible at the trial stage. It will therefore require the Prosecution to conduct additional investigations to meet this evidentiary lacuna which would delay proceedings. An immediate decision of the Appeals Chamber on this issue will also provide immediate direction to the Prosecution concerning the status of this evidence, which will advance its investigative strategy, and ultimately ensure the defendant's right to an expeditious trial.

(iii) **THIRD ISSUE: Whether the Majority's conclusion at paragraph 415 that the suspects knew rape was a virtually certain consequence of the implementation of the common plan to attack is legally & factually permissible**

11. The basis on which the Majority found that there were grounds to believe that the suspects posessed the requisite *mens* rea for rape is that "*the evidence shows that Mr. Muthaura and Mr. Kenyatta directed a group of armed Mungiki members to revenge against civilian residents of Nakuru and Naivasha, in the knowledge of and exploiting the ethnic hatred of the attackers towards their victims. In these circumstances, the Chamber considers that Mr. Muthaura and Mr. Kenyatta knew that rape was a virtually certain consequence of the implementation of the common plan*."[17]

12. The Majority has therefore made a finding, as a matter of fact and law, that if the defendants are aware that the physical perpetrators will attack civilians for ethnically related reasons, then they must also be aware that rape is a 'virtually certain consequence' of such an attack. In essence, the Majority determined that rape is a virtually certain consequence of any ethnically motivated attack, even in the absence of any indication or evidence that the perpetrators possessed a propensity to rape, or had discussed rape. This issue therefore arises directly from the decision.

13. Whilst the formulation that rape was a 'virtually' certain consequence adheres to the *dolus directus* legal standard, the Majority has rendered this standard meaningless by creating a presumption that rape is a 'virtually certain' consequence of any ethnically motivated attack. The Majority has not cited any

[17] Majority Decision, para. 415.

evidence or law in support of such a causal theory. This presumption has eliminated the need for the OTP to adduce evidence that the defendant knew or could have known that rape would be a virtually certain consequence of the attacks in question, and in so doing, has unfairly impacted on the presumption of innocence, and the right of the defence under Article 67(1)(i) not to have imposed upon him any reversal of the burden of proof or onus of rebuttal.

14. By introducing a presumption that the intent to commit one crime can be inferred from the intent to commit a different crime, which has completely different elements, the Majority has also effectively introduced a new mode of liability, which is even more deleterious to the rights of the defence than *dolus eventualis*. The introduction of such a new form of implied intent significantly impacts on the principle of legality – as there is no legal or factual precedent for incorporating such an implied intent in the current case.

15. The approach of the Majority in the current case is at odds with its approach in the Bemba case[18] and the approach of other Tribunals.[19] In fact, in the *Ruto et al.* case, while the majority found that the ODM committed ethnically oriented attacks against the Kikuyus, it **did not** find that rape was a virtually certain consequence of the attacks. Furthermore, the Prosecution's own evidence in this case is that the Mungiki criminal gang do not rape under any circumstances.[20] No evidence was led at the Confirmation Hearing that such crimes were a virtually certain consequence of Mungki involvement.

16. This decision will have a bearing on the length of pre-trial preparation and the resultant trial proceedings. It will require defence investigations to disprove this

[18] *Prosecutor v. Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, para. 396 (in which the Pre-Trial Chamber held that *"the Chamber cannot infer that, in sending his troops to the CAR in 2002, Mr. Jean-Pierre Bemba was aware that, in the ordinary course of events, the commission of rape would be the virtually certain consequence of his action."*).

[19] At the ICTR, where the lower *dolus eventualis* threshold is employed, the Trial Chamber found in the *Kajelijeli* case that although the accused had given orders to exterminate Tutsi, in the absence of any evidence concerning the fact that he had given orders to rape or that he was present when rapes occurred, the accused could not be convicted for committing rapes under Article 6(1) of the ICTR Statute (*Prosecutor v. Kajelijeli*, Trial Judgement, ICTR-98-44A-T, 1 December 2003, paras 917-923). The OTP did not appeal this holding.

[20] ICC-01/09-02/11-T-15-ENG, p. 48, lines 16-17; EVD-PT-OTP-00665, p. 0398, lines 486-491; EVD-PT-OTP-00662, at p. 0343, lines 671-674.

new presumption, apparently now enshrined in law. The issue will therefore significantly impact upon the expedtiousness of the proceedings.

17. An immediate decision of the Appeals Chamber is required to provide clarity in relation to the evidential and legal standard and burden for ascertaining whether intent to commit rape can be inferred from intent to commit an ethnically motivated attack. This issue has important consequences for the evidential and legal standard to be met at the trial stage, and the extent to which the Prosecution will need to rely on crime base witnesses to establish the factual matrix of rape and its linkage to the common plan. The Appeals Chamber's immediate intervention will also ensure that vulnerable witnesses are not unnecessarily forced to recount their experiences, and would enable the parties to focus their time and resources to the matters that are properly at issue at trial.

(iv) FOURTH ISSUE: Whether the Confirmation Decision may re-characterise the Prosecution's allegations against a suspect, as set out in the DCC, without first providing the suspect an opportunity to be heard on the re-characterised allegations

18. Article 67(1)(a) of the Statute provides that a suspect be informed "in detail of the nature, cause and content of the charge[s]" against him. At confirmation this right is given effect through Rule 122(3), which mandates that the Prosecution provide the suspect with "a detailed description of the charges" – the "DCC".

19. With respect to Ambassador Muthaura, the Amended DCC alleges that he: 1) was "Secretary to the Cabinet Security Committee, the highest decision making body of the Kenyan security and intelligence machinery"; 2) exercised "*de jure* and *de facto* authority over the […] Kenya Police […] [and] therefore exercised direct authority over ALI;" 3) acted "in his capacity as Chairman" of NSAC to "provid[e] safe passage for the attacks to be carried out" and ensure the "Police did not intervene"; 4) "instruct[ed]" General Ali to ensure the movement of pro-PNU youth would not be barred and "ordered" him not to arrest Mungiki; and

5) "fail[ed] to punish the main perpetrators of the attacks,"[21] which implies that he had official responsibility to do so.

20. It is in response to these core allegations – *namely, that the Ambassador acted in his official capacity as Chairman of NSAC when commanding the Police and when otherwise implementing the common plan* – that the Defence focused its investigations, selected which *viva voce* witnesses to call and prepared its oral submissions for the confirmation hearing. The Dissenting Opinion confirms that the Prosecution does allege that Ambassador Muthaura acted to implement the common plan in his *official capacity* as NSAC Chairman.[22] When initially discussing the Prosecution's allegations the Majority Decision likewise quotes the relevant portions of the Amended DCC regarding Ambassador Muthaura's alleged implementation of the plan "in his capacity as Chairman" of NSAC.[23]

21. However, in making its determinative finding that the Ambassador had the capability to commit the crimes alleged, the Majority states: "the Prosecutor does not aver that Mr. Muthaura [acted] through an exercise of his official position as Chairman of the NSAC […]"[24] Instead, the Majority concludes that he possessed "sufficient *de facto* authority […] to secure the institutional support for the commission of the crimes".[25] Further, while the Prosecution never asserted in the Amended DCC that Maina Njenga was a party to the alleged common plan,[26] the Majority Decision recasts him as a player, alleging "Njenga was approached with, and eventually agreed to the common plan with Mr. Muthaura and Mr. Kenyatta […]".[27]

22. The re-characterisation of these core allegations against the Ambassador without providing him notice of and an opportunity to be heard[28] on the re-

[21] Amended DCC, paras 25, 26, 38, 54.
[22] Dissenting Opinion, para. 6.
[23] Majority Decision, para. 25.
[24] Majority Decision, para. 381 (emphasis added).
[25] Majority Decision, para. 383.
[26] The Amended DCC merely notes that the Mungiki "is under the leadership of […] Maina Njenga" (para. 39).
[27] Majority Decision, para. 362.
[28] The Presiding Judge, as part of an Appeals Chamber dissenting opinion, cited to national law as well as international treaties and jurisprudence in holding that the "right to be heard" is a fundamental component of an

characterised case is therefore an issue arising out of the Majority Decision. The issue will also significantly impact the fairness of the proceedings. As this Chamber has explained, the notion of fairness "concerns the ability of a party […] to adequately make its case, with a view to influencing the outcome of the proceedings in its favour."[29] As submitted above, the re-characterisation of the case in the Majoirty Decision has prevented the Defence from doing exactly this with respect to the core allegations against him. The expeditiousness of proceedings may likewise be significantly affected as the charges against the Ambassador Muthaura may not have been confirmed had he been provided an opportunity to be heard on the re-characterised allegations. Also, the Prosecution will have to be given the opportunity to conduct additional lengthy investigations to support the re-characterised allegations.[30]

(v) FIFTH ISSUE: Whether NGO and other reports become credible simply because they are corroborated by like evidence (NGO and other reports)

23. The Majority correctly identified NGO reports as indirect evidence.[31] In evaluating indirect evidence, the Majority's approach was to use one public report to corroborate other public reports.[32] In particular, the Majority held that more than one piece of indirect evidence which has low probative value is ***preferable*** to prove an allegation to the standard of substantial grounds to believe.[33] It forms a basis for the Majority's evaluation of the sufficiency of indirect evidence and is an issue which arises directly from the Decision. The

---

accused's right to a fair trial. *Prosecutor v. Katanga & Ngujolo*, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled 'Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings', Dissenting Opinion of Judge Erkki Kourula & Judge Ekaterina Trendafilova, 28 July 2010, ICC-01/04-01/07-2297 OA 10, paras 55-56.

[29] Situation in Uganda, Decision on Prosecutor's application for leave to appeal in part Pre-Trial Chamber II's Decision on the Prosecutor's applications for warrants of arrest under Article 58, 19 August 2005, para. 30, ICC-02/04-01/05-20-US-Exp (unsealed pursuant to ICC-02/04-01/05-52) (internal citations omitted).

[30] In this regard, the caution of Honourable Judge Kaul concerning post confirmation investigations by the Prosecution is most relevant and pertinent (Dissenting Opinion, paras 48-57).

[31] Majority Decision, para. 82.

[32] Examples of the Majority's use of NGO and other public reports to corroborate other NGO reports and enter findings include: (i) at para. 259 the Majority was satisfied that rape in Naivasha by Mungiki was established to the requisite threshold by relying on a video recording produced by a Kenyan NGO, corroborated by other NGO reports; (ii) at paragraphs 262-263, the Majority relied on a KNHCR report corroborated by CIPEV and HRW reports to find that Mungiki carried out acts of forcible circumcision and penile amputation in Nakuru.

[33] Majority Decision, para. 87.

decision of the Majority in fact undermines its own stated position that it would consider factors such as: the nature of the evidence, its credibility, reliability, voluntariness, trustworthiness, source, the context in which it was made as well as its nexus to the case when evaluating evidence.[34]

24. This approach is flawed because unreliable evidence does not become credible simply because it is corroborated by other unreliable evidence, a submission which finds support in academic commentary and judicial decisions.[35] Whilst reviewing the place of NGO evidence in criminal proceedings within the framework of the Dutch Court of Appeal findings in the *Kouwenhoven* case, Huisman and van Sliedregt stated: *"A first observation pertains to the role of NGOs as 'evidence-gatherers'. As appears from Kouwenhoven, there are risks in relying on information provided by NGOs. The National Police Agency, which conducted the criminal investigation, and the public prosecutor seemed to have relied too much on the information supplied by the NGO Global Witness. The Court of Appeal rebuked the prosecution for failing to test the dependability and accuracy of the witness statements and for having uncritically adopted the information provided by Global Witness. Because of the lack of transparency with regard to witness selection, there was a risk of manipulation of the investigation.*"[36] Furthermore, there is a real risk that NGO reports, such as those the Majority has relied on so heavily, may not even be admissible at a trial given that the evidence contained in them "*is so pivotal to the Prosecution's case and so proximate to the Accused that its admission in the absence of an opportunity to cross-examine on the evidence would unfairly prejudice the accused*", as was the case of the Amnesty International Report, among other NGO reports, in the *Charles Taylor* case before the SCSL.[37]

[34] Majority Decision, para. 81.
[35] Huisman and van Sliedregt, "Rogue Traders, Dutch Businessmen, International Crimes and Corporate Complicity", Journal of International Criminal Justice, 8 (2010), p. 813, para. 4. See also Court of Appeal, Case No. BC7373 (English translation available online at http://ljn.rechtspraak.nl).
[36] Huisman and van Sliedregt, "Rogue Traders, Dutch Businessmen, International Crimes and Corporate Complicity", Journal of International Criminal Justice, 8 (2010), p. 813, para. 4.
[37] *Prosecutor v. Charles Taylor*, Decision on Prosecution Motion for Admission of Certain Non-Governmental Organisations and Associated Press Releases, SCSL-03-01-T-742-3, 23 February 2009.

25. The issue arises from the decision as it concerns the legal question of relying on indirect evidence to corroborate other indirect evidence. It also affects the fairness of the proceedings. Use of such evidence impacts the defence's ability to respond to allegations from unreliable and untested sources. Furthermore, as stated above, there is a real risk that such evidence may otherwise not be available at a trial given the likelihood of it not being admissible.

26. The resolution of this issue by the Appeals Chamber will also provide timely and necessary direction to the Prosecution concerning the status of this evidence, which will advance its investigative strategy, and ultimately ensure the Defendant's right to an expeditious trial. The Defence incorporates by reference its submissions in paragraph 23 above.

(viii) SIXTH ISSUE: Whether in evaluating evidence pursuant to Article 61(7) a Chamber may depart from the evidence and draw conclusions on the basis of speculation

27. In considering the evidence on numerous factual issues the Majority departed from the available evidence and relied on speculation in drawing many of its core conclusions. For instance: (a) in paragraph 320, the Majority, while considering which meeting defence witnesses were talking about because of inconsistencies in the time mentioned, speculated that "*they refer to a meeting other than that with the Mungiki mentioned by Witness OTP-4*"; (b) in paragraph 351, while considering the information on the NSAC minutes about the commencement of its meeting of 3rd January 2008, and Ambassador Muthaura's whereabouts in the morning that day, the Chamber speculated that it was *possible* for Ambassador Muthaura to have attended the meeting at Nairobi Members Club; (c) in paragraph 355, the Chamber speculated that it is possible that Ambassador Muthaura "*would use other phone numbers*" because the phone was not registered in Mr. Muthaura's name and the relatively low number of phone calls registered to that phone. This is despite evidence that Ambassador Mutahura has one mobile phone and defence submissions at the confirmation hearing detailing the relevance and importance of who was called on

Ambassador Muthaura's telephone in order to bolster the Defence submissions that he had only one mobile phone which he used for both private and professional telephone calls;[38] and (d) the conclusions at paragraphs 174 and 175 that uniforms were distributed under the "directions" of Muthaura and that guns were "secured by his intervention" are also without any evidential basis. If leave is granted a detailed list of other instances will be provided.

28. The conclusions drawn on each of these issues was not borne out of the evidence, but from speculation by the Majority. This issue therefore arises out of the decision. The issue constitutes an appealable issue pursuant to Article 82(1)(d). It concerns whether in the assessment of the evidence, the Chamber may depart from the evidence and enter the realm of speculation to justify its findings. It is an identifiable subject or topic that requires a decision.

29. Although the Statute provides for the principle of free assessment of evidence, Judges must ground their conclusions on evidence, and not personal belief, or other extraneous facts, opinion or speculation. The ICTR Appeals Chamber in *Prosecutor v. Ntagerura* cited with approval domestic case law (*Nadeau v. The Queen*) concerning the impermissibility of basing evidential findings on speculation,[39] and emphasized that the "duty of the Trial Chamber to consider all the evidence does not relieve it from the duty to apply the required standard of proof to any particular fact."[40] The obligation to ensure that each evidential finding is supported by proof to the requisite standard is intrinsically linked to the Chamber's duty to provide a reasoned opinion[41] and the suspect's right to know both the facts upon which the Chamber based its decision, and how the Chamber applied the law to the facts.[42] This is a fundamental element of the

[38] ICC-01/09-02/11-T-7-ENG ET, p. 30, line 24 to p. 31, line 11.
[39] Appeals Judgement, 7 July 2006, *Nadeau v. The Queen* [1984] 2 S.C.R. 570, at p. 571, *per* Judge Lamer (emphasis added), cited at para. 169.
[40] *Ibid.*, para. 172.
[41] *Ibid.*, para. 169. See also *Prosecutor v. Lubanga*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81, 14 December 2006, ICC-01/04-01/06-773, para. 20.
[42] Majority Decision, para. 21.

right to a fair trial.[43] The use of speculation by the Chamber to draw inferences significantly impacts on the fairness of the decision. It deprived Ambassador Muthaura of both the protections of the burden of proof, and the right to a reasoned decision.

30. The Chamber based its conclusions regarding key aspects of the common plan – *the 26 November meeting at State House, the 3rd January meeting at Nairobi Club, and Ambassador Muthaura's communications with members of the alleged common plan* – on speculative findings. The confirmed charges were very much shaped by this issue, and as such, they significantly affected the outcome of the proceedings.

31. Given that significant aspects of the confirmed charges rest on speculation, an immediate decision by the Appeals Chamber is required to determine if, and if so in which circumstances, the PTC can make speculative findings against the suspect. Moreover, if the use of speculation is arbitrary and antithetical to the rule of law, it would be contrary to the interests of justice and the legitimacy of the ICC for a case to proceed to trial on such basis. An immediate appellate resolution of this issue would therefore "remove doubts about the correctness of [the] decision", which in turn "provides a safety net for the integrity of the proceedings".[44] The Defence also incorporates by reference its submissions in paragraph 23 above.

(vii) SEVENTH ISSUE: Whether allegations of investigative failings of the Prosecution in discharging its responsibilities under Article 54 are matters that fall within the scope of issues for consideration in a confirmation of charges decision

32. The Defence refers to the submissions in the Application for Leave to Appeal ("LTA") filed by the Kenyatta Defence and adopts the submissions therein on the "Second Issue" at page 6 of the LTA in order to substantiate this ground.

[43] Majority Decision, para. 20.
[44] *Situation in the DRC*, Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 15.

(viii) EIGHTH ISSUE: Whether the Majority applied different criteria/ consideration to the evaluation of Defence evidence as compared to Prosecution evidence

33. Although the PTC enjoys wide discretion in evaluating evidence as provided for under Rule 63, this is subject to the principle that any assessment of evidence should exhibit an even handed approach and reflect the elements of fairness as contemplated by Article 69(4). The ICTR Appeals Chamber has held that: "[A] Trial Chamber should not apply differing standards in its treatment of evidence of the Prosecution and the Defence."[45] In its assessment of evidence, the Majority has adopted an approach that favours the Prosecution even where its evidence suffers from material deficiencies. Regarding Defence witness statements, the Majority applies a more stringent standard, finding fault in each and every Defence witness statement. The following are a few examples.

34. Regarding alleged contacts between Mungiki and Ambassador Muthaura and the Ambassador's alleged role in securing the release of arrested Mungiki in Muranga,[46] the Majority accepts unsubstantiated hearsay evidence of witnesses OTP-11 and OTP-12, but rejects the evidence of D12-47 based on the speculative conclusion that D12-47 would deny his role as an intermediary with Mungiki.[47]

35. Regarding the Statehouse meeting of 26 November 2007, the Chamber relies on the statement of OTP-4 and anonymous hearsay statements of OTP-11 and OTP-12, despite several deficiencies including internal inconsistencies and anonymous hearsay in their accounts.[48] It rejects D12-8's statement on the ground that he was not present at Statehouse on the morning of the meeting and is a junior officer,[49] even though the witness explained the basis for his knowledge of the events of that day.[50] The rejection of this evidence on account of his absence at Statehouse on the morning of the meeting sharply contrasts

[45] *Prosecutor v Elizaphan Ntakirutimana and Gerard Ntakirutimana*, Appeals Judgment, ICTR-96-10-A and ICTR-96-17-A, 12 December 2004, para. 133.
[46] Majority Decision, paras 302-308.
[47] The Majority failed to consider corroborative statements of D12-14 (KEN-D12-0001-0301, at 0303, para. 12).
[48] Majority Decision, paras 312, 318.
[49] *Ibid.*, para. 328.
[50] KEN-D12-0002-0202, at 0207.

with the acceptance of the evidence of witnesses OTP-11 and OTP-12 whose unsubstantiated hearsay accounts[51] are used to corroborate Witness OTP-4.

36. The Majority rejects the evidence of Michael Gichangi, the Head of the NSIS,[52] because it found the evidence to be unsubstantiated and speculative,[53] but relied extensively on unsubstantiated speculative reports of the NSIS.[54]

37. The Majority rejected wholesale the Defence evidence about the absence of authority of Ambassador Muthaura on the basis that the evidence was "provided by persons currently or previously affiliated with the Kenyan Government, with a natural interest in the outcome of the case." Despite the fact that it was these witnesses who possessed the requisite firsthand knowledge and expertise about the structure of government in Kenya, the Majority preferred to base its decision on the evidence of two Mungiki witnesses – OTP-4 and OTP-11 – even without any evidence that they have any knowledge or understanding of the issue in question.[55]

38. Regarding the alleged 3 January Nairobi Club meeting, the Majority relied on OTP-4, supported by a vague summary of the statement of anonymous witness OTP-1.[56] The inconsistencies in OTP-4's account pointed out by the Defence were judged inconsequential.[57] This treatment is not afforded defence witnesses D12-39, D12-41 and D12-51 each of whom gave details of the events of 3 January at their work place and despite their categorical assertions that they knew the suspects well and that neither suspect was present at the Club on this day.[58]

39. The Chamber unfairly dismisses the testimony of D12-16 and D12-22,[59] who are government officials charged with Ambassador Muthaura's security and

[51] Majority Decision, para. 312.
[52] *Ibid.*, para. 329.
[53] *Ibid.*
[54] *Ibid.*, paras 154-156.
[55] *Ibid.*, paras 382-383.
[56] Majority Decision, paras 342, 344.
[57] *Ibid.*, para. 346.
[58] KEN-D12-0008-0039, at 0041, para. 11; KEN-D12-0012-0001, at 0002, para. 3.
[59] Majority Decision, para. 354.

transport requirements,[60] by concluding that they couldn't possibly be aware of all of his movements,[61] in complete disregard of their official capacities. The generalized hearsay evidence of OTP-11, who is used to corroborate OTP-4, is not subjected to this rigorous standard. The Majority failed to consider important Defence evidence in its totality, which is a further material error which requires leave to be granted.[62]

40. This issue clearly arises from the Chamber's Decision, and the outcome of the Chamber's approach is that like witnesses have not been assessed in a like manner. Evidence ought to be evaluated in a manner that is consistent with the presumption of innocence: it cannot be presumed from the fact that the OTP has alleged something that any defence witnesses who testify to the contrary are lacking in credibility or reliability. This issue impacts on the burden of proof by requiring the defence to prove more than the OTP. This is an issue which has been considered on appeal, and so serious is the prejudice to the defence that it is was characterized by the Appeals Chamber as an "abuse of discretion". The ICTY Appeals Chamber found that "*In this case, although the Trial Chamber may not have been in error in excluding the videos due to insufficient information, by maintaining a different standard of admission for Prosecution and Defence evidence [...] the Trial Chamber abused its discretion warranting intervention.*"[63]

41. The production of further evidence in order to meet the standard espoused by the Majority would affect the expeditiousness of the proceedings.[64] If the evidential standard was applied in an incorrect and discriminatory manner, it would taint both the outcome itself and the integrity and impartiality of the proceedings. It would be contrary to the interests of justice to commit such a

[60] KEN-D12-0002-0026, at 0026; KEN-D12-0002-0031, at 0031.
[61] Majority Decision, para. 354.
[62] The Majority did not consider the supplementary statement of D12-22 (KEN-D12-0002-0031) and based their decision solely on first statement of D12-22 referenced in paragraph 382 of the Majority Decision.
[63] *Prosecutor v. Prlic* et al., Decision on Jadranko Prlic's Interlocutory Appeal against the Decision on Prlic Defence Motion for Reconsideration of the Decision on Admission of Documentary Evidence, IT-04-74-AR73.16, 3 November 2009, para. 44.
[64] *Prosecutor v. Al Bashir*, Decision on the Prosecutor's Application for Leave to Appeal the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir", 24 June 2009, ICC-02/05-01/09-21, p. 7.

case to trial ; an immediate decision of the Appeals Chamber would eliminate the appearance of such taint, or ensure that the defendant is not committed to a lengthy and unnecessary trial on the basis of unfair evidential findings. The Defence incorporates by reference its submissions in paragraph 23 above.

IV. Conclusion

1. For all the reasons detailed in the paragraphs above, the Defence request that the application for leave to appeal the Majority Decision be allowed.

Respectfully Submitted,

Karim A. A. Khan QC
Lead Counsel for Ambassador Francis K. Muthaura

Dated this 30th Day of January 2011

The Hague, The Netherlands