Corrigendum of Concurring Separate Opinion of Judge Eboe-Osuji

1. I concur in the decision of the Chamber rejecting the request to send this case back to the Pre-Trial Chamber. I concur also in the rejection of the alternative request to terminate or stay the case. I agree that the only appropriate remedies implicated in this litigation are:

> (1) admonition of the Prosecution for the manner that they handled one aspect of this case—the disclosures concerning one prosecution witness whose evidence was used at the confirmation proceedings—in the manner that understandably triggered the anxiety on the part of the Defence; and,
>
> (2) grant of more preparation time to the Defence, as a consequence of post-confirmation investigations.

2. I align myself with much of the reasoning of the Trial Chamber indicated in the decision; except as regards post-confirmation investigations. I write separately to amplify more fully certain aspects of the decision with which I concur, as well as to explain my inability to join my highly esteemed colleagues in their reasoning in the aspect that concerns post-confirmation investigations.

I—INTRODUCTORY

3. It is not unusual for high profile criminal cases to generate highly charged dynamics. Prosecutorial mistakes may be made. Allegations of wrong-doing and bad faith may be traded between counsel. There will be much tendency towards confusion. And each of these elements and more will be fuel to the furnace of litigation—generating more heat and torque to the already tense centrifugal forces already at work in the circumstances of the particular process. But, the judicial eyes must at all times remain on the ball, in spite of it all. In the circumstances of the present case, the ball comprises these matters for inquiry: many lives were lost in the post-election violence that was perpetrated in Kenya at the end of 2007 and the beginning of 2008; much trauma was occasioned to many more bodies and minds; and, the violence had a deliberate purpose of malevolence. The processes of this Court have come to be the only known penal judicial inquiry into the events, for purposes of individual accountability for any resulting crimes within the jurisdiction of this Court. True justice requires these considerations to be kept upper-most in the mind at all times. Many of these considerations are borne out by the pronouncement of the Supreme Court of Illinois in *People v Jones*. As here, the question was considered whether the interests of justice are furthered by permitting defendants to challenge indictments on grounds that the particular indictment was

founded on inadequate or incompetent evidence. In answering that question in the negative, the Court said as follows:

> The law favors promptness in the dispatch of criminal business of the courts when in harmony with the effective protection of the rights of the accused and the interests of the public. The delay is great when an accused can assail an indictment on this ground and cause the trial court to review all the evidence presented to the grand jury, as was done in this case. Such procedure adds nothing to the assurance of a fair trial to which the accused is entitled.[1]

4. It should be accepted, on the other hand, that 'harmony with the effective protection of the rights of the accused' may require that prosecutorial mistakes and acts of proven bad faith, of such egregious character as to generate miscarriage of justice for the accused in the real sense of the idea, do legitimately result in the abortion of the judicial process. That, too, must be kept upper-most in the mind at all times. In my opinion, the foregoing is a necessary thematic backdrop against which the particular litigation entailed in the present Defence application and related requests are to be viewed. But, first, a brief look at the background.

II—A BRIEF BACKGROUND TO THE PRESENT LITIGATION

5. The Prosecution's theory of Mr Kenyatta's alleged criminal responsibility is that he was engaged in a common criminal plan as an indirect perpetrator of crimes against humanity allegedly committed in the Kenya post-election violence of 2007-2008. In the beginning, the theory had also comprised Mr Muthaura as an 'indirect co-perpetrator'. But the Prosecution withdrew the charges against him on 11 March 2013, leaving Mr Kenyatta as the sole subject of the judicial inquiry on this theory of criminal responsibility.

6. According to the theory, members of the Mungiki militia were the direct perpetrators of the actual violence, but the accused was one of those that put them up to it. To support the theory, the Prosecution relied on the statement of Prosecution Witness No 4 (hereafter 'PW-4') also known as 'OTP4' or simply 'P4', during the charges confirmation hearing that took place between 21 September 2011 and 5 October 2011. The operative narrative was that PW-4 was a reluctant Mungiki member. As such, he had attended at least two meetings of interest. One was on 26 November 2007 and the other was on 3 January 2008. According to him, these meetings brought together in the common plan, as it evolved, Mungiki members and members of the accused's political party (including those in government). In the meeting of 3 January 2008, as PW-4 had alleged, perpetration of violence had actually been discussed and some enabling understandings reached for that purpose. And the accused was among those present and participating in the discussions and in the agreed plan of violent action. In reaching the decision to confirm the charges (the 'CD'), the Pre-Trial Chamber accepted this

[1] *People v Jones* (1960) 166 NE 2d 1 at 4—5 [Supreme Court of Illinois].

evidence in support of the conclusion that there was sufficient evidence to establish substantial grounds to believe that the accused committed the crimes as charged. Whether or not the Pre-Trial Chamber's findings in support of the CD rested critically on the evidence of PW-4 is a matter centrally in contention. But it is fair to say that the evidence of PW-4 enjoyed prominence in the CD that the Pre-Trial Chamber rendered on 23 January 2012 confirming the charges of crimes against humanity against the accused, on the basis of the Prosecution theory mentioned earlier.

7. On 29 March 2012, the Presidency transferred the case to this Trial Chamber.

8. In the ensuing period, ahead of the commencement of trial, a number of things happened that resulted in the current litigation. One was that in the course of the process of disclosures, the Prosecution fully disclosed to the Defence a 28-page affidavit (of 66 paragraphs) sworn by PW-4 on 27 May 2009, which he had used at the time to support his application for asylum in a different country. It was thus that the Defence learnt that in paragraph 33 of that Asylum Affidavit, PW-4 invited the very reasonable inference (though he did not explicitly state the proposition) that he had not attended the meeting of 3 January 2008. What he indicated in that paragraph is that '[a named third person] attended the meeting and told me [PW-4] that Uhuru Kenyatta, who later became Deputy Prime Minister in the Kibaki Government ... were also present at the meeting as well as other Kikuyu elite. At the meeting, the government officials directed the Mungiki to go to the Rift Valley to defend Kikuyus in the ongoing clashes.'[2] [The distinction between a reasonable inference and an explicit assertion in this regard is important, in light of the discussion below concerning what amounts to a contradiction in a witness's testimony and how to treat apparent contradictions.]

9. It is to be clearly noted that in his statement to the Prosecution—tendered at the confirmation hearing and relied upon by the Pre-Trial Chamber in confirming the charges—PW-4 had left no doubt at all that he was a participant at the 3 January 2008 meeting and had personally observed the accused's own participation.[3] He had testified to this in great detail. This led the Pre-Trial Chamber to find as follows: 'The occurrence of this meeting is established, to the requisite threshold, by the testimony of Witness OTP-4, who was present therein as a Mungiki representative and who provides a detailed account thereof. … The witness specifically mentions the presence of Mr Muthaura, Mr Kenyatta and Mr George

[2] Doc No KEN-OTP-0043-0083 at para 33.
[3] See Doc No KEN-OTP-0043-0002 at pp 37—38.

Saitoti on the side of the PNU Coalition and [REDACTED], Maina Diambo and [REDACTED] on the side of the Mungiki.'[4]

10. It so happened that the Asylum Affidavit was at all material times in the possession of the Prosecution[5]—specifically during the confirmation process: they had withheld disclosure of it to the Defence, including paragraph 33; in the process—twice—of successively requesting and receiving authorisation to withhold the disclosure to the Defence, the Prosecution had on both occasions fully disclosed the entire affidavit to the Single Judge of the Pre-Trial Chamber, but had failed to draw her attention specifically to paragraph 33.

11. The second thing that happened was that on 25 May 2012, PW-4 gave another statement to the Prosecution. In that statement, numbering 26 pages and 154 paragraphs, PW-4 retracted his previous averment of having attended the meetings of 26 November 2007 and an earlier meeting at the Yaya Centre. But he maintained both that the meetings had indeed occurred and that the accused was present and participating. But, now, he said that he had learnt all that from a fellow Mungiki who had attended the meetings. In that statement, he had devoted only a few paragraphs to these retractions. A greater part of the statement was devoted to the revelation of alleged efforts to pressure, bribe and threaten him, for purposes of recanting his earlier implication of the accused in the violence. Notably, in the 25 May 2012 interview, he maintained (contrary to what he had said in paragraph 33 of the Asylum Affidavit) that he was a participant at the meeting of 3 January 2008, effectively restating what he had said in his evidence to the Prosecution used at the confirmation hearing.

12. The third thing that happened was that the Prosecution withdrew PW-4 from their line-up of witnesses for trial.

13. In view of the foregoing events, the Defence brought their motion now under consideration. The Defence requests that (i) this case be referred back to the Pre-Trial Chamber, in order that it may reconsider the CD, or failing that; (ii) the Trial Chamber should itself declare the CD invalid and terminate the proceedings. As part of what appeared to have been continually evolving prayers for relief,[6] the Defence also added a prayer for stay of proceedings; but without much argument in support.[7]

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[4] *Prosecutor v Muthaura, Kenyatta and Ali (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute)*, dated 23 January 2012, para 342.
[5] A record of the witness's delivery of the Asylum Affidavit to the Prosecution appears at para 336 of the statement of 27 September 2010 [KEN-OTP-0043-0002].
[6] It is noted that the Defence complained against the 'shifting sands' of the Prosecution case. There may be good reason for that complaint. But it must be said that the Defence approach to relief seeking in this particular litigation has not been the model of litigation that was stood on granite floor.
[7] Notably, the Defence filed two documents on the same day, in which they raised the stay of proceedings: Defence 'Written Submissions following 18 March 2013 Status Conference' dated 28 March 2013; and,

14. After a series of written submissions and oral hearings, the Defence was permitted, at its request, to revise its submissions on the basis of further disclosure of more documents made late in the course of deliberations on the application. In the revised submissions, the Defence emphasised its case for a stay of proceedings, on grounds that the new disclosures indicated further reasons against the reliability of the evidence of PW-4 for the confirmation of the charges.[8] According to the Defence, the 'recent disclosure of these documents provides yet further evidence that the conduct of the investigation, and the way in which information has been managed and disclosed (or otherwise) to the Defence, has rendered the product of the investigation manifestly unreliable. The Defence submits that any proceedings, eventual trial, or decisions based upon the Prosecution's investigation are thus necessarily unsound. The Defence remains concerned as to the extent to which the disclosure obligations of the Prosecution have been fulfilled with respect to other aspects of the case and with respect to those witnesses relied upon by the Prosecution for trial.'[9]

15. The initial reason for the challenge to the validity of the CD is, in sum, that it was based upon perjured information—i.e. based 'upon on a lie'—condoned by the Prosecution.[10] Notably, the arguments in this regard are almost entirely focused on PW-4. The Defence contends in sum that the CD was 'based upon fraudulent evidence',[11] for the following reasons: (i) the 'essential facts underpinning the CD are no longer relied upon by the Prosecution … in support of the charges, as they are now known to have been falsely alleged by a witness relied upon for [the confirmation] proceedings'[12]; (ii) the CD and the hearing that generated it have been rendered unfair because (a) the Prosecution did not specifically draw the attention of the Pre-Trial Chamber to paragraph 33 of PW-4's Asylum Affidavit, and (b) the Single Judge had authorised non-disclosure of the Asylum Affidavit or a summary of it, without properly satisfying herself as to the true significance of paragraph 33 of PW-4's Asylum Affidavit.[13]

'Defence Observations regarding the Impact of the Withdrawal of the Charges against Mr Muthaura on the Case against Mr Kenyatta pursuant to the "Order requesting written submissions following 18 March status conference"' dated 28 March 2013. They cross-referenced the two documents for purposes of the submissions in support of stay of proceedings.

[8] See 'Defence Submissions regarding the Prosecution's 11 April 2013 Disclosure of Material relating to its Initial Contact with OTP-4, with Confidential Annexes A-E', dated 18 April 2013, paras 9—25.

[9] *Ibid*, para 27.

[10] See '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', dated 5 February 2013 [the 'Defence Application'], para 25.

[11] *Ibid*, para 2(c).

[12] *Ibid*, para 2(a).

[13] *Ibid*, para 2(b).

III—FRAUD-ON-THE-COURT ARGUMENT

16. As noted above, a central submission of the Defence is that the CD 'was decided by the PTC based upon fraudulent evidence.'[14] It may be more convenient to deal with that submission first.

17. The submissions in support of that aspect of the complaint are based as much on PW-4's own eventual retraction (in his 25 May 2012 interview to the Prosecution) of his earlier statement that he was an eye-witness to the meeting of 26 November 2007, as on the Prosecution's failure specifically to draw the attention of the Pre-Trial Chamber to paragraph 33 of the Asylum Affidavit in which the witness had indicated—though he did not explicitly assert—that he had not attended the meeting of 3 January 2008, but that a third person had attended it and informed him about the accused's participation. But the Defence contends that the Prosecution's wrongdoing in this regard goes even further. It includes the fact that the Prosecution had deliberately applied to the Single Judge for authorisation to withhold the entirety of the Asylum Affidavit from the Defence, during the confirmation hearing, on the justification that the revelation of any part of the Asylum Affidavit to the Defence would compromise the security of the witness by revealing his location at the time. In the Defence argument, paragraph 33 of the Asylum Affidavit, set out alone, says nothing about the location of the witness. It would then have been possible to disclose even that much to the Defence without compromising the security of the witness. In the circumstances, the Prosecution failure in that regard was an act of bad faith, in the order of fraud on the Court.

18. In their response, the Prosecution admitted that paragraph 33 of the Asylum Affidavit should have been disclosed to the Defence or, at the minimum, specifically drawn to the attention of the Single Judge of the Pre-Trial Chamber and to the Pre-Trial Chamber itself, respectively during the application for authorisation to withhold disclosure to the Defence of certain of the documents used in the confirmation process and during the confirmation hearing itself. That is to say, the Prosecution admitted the error of non-disclosure of paragraph 33 of the Asylum Affidavit. But they rejected the Defence contention that bad faith, let alone fraud, had been implicated in the error.

19. According to the Prosecution, the error was entirely innocent and wholly explained by the fact that their unnamed staff members entrusted with the review and analysis of the document had failed to appreciate the significance of paragraph 33 of the Asylum Affidavit, relative to PW-4's statement to the Prosecution claiming that he had been at the meeting in question. To counter the Defence allegation of bad faith and fraud on the Court, the Prosecution submitted that there is nothing to suggest a systematic scheme on the

[14] *Ibid*, para 2(c).

Prosecution's part to hide the document from the Court or from the Defence. In this connection, they pointed out that during the confirmation hearing, they had twice provided the Asylum Affidavit with no redaction to the Single Judge of the Pre-Trial Chamber on the two occasions that they had applied for authorisation to withhold its disclosure; although they now admit the error of failing specifically to point out the significance of paragraph 33 to the Single Judge on either of those occasions. Furthermore, following the CD, they had fully disclosed the document to the Defence. These facts, the Prosecution submit, are inconsistent with bad faith and fraud alleged by the Defence.

20. In my view, more is required to prove fraud than the mere inferences urged by the Defence to be drawn, however understandable their anxieties and frustrations may be, resulting from the Prosecution failings in this regard. Indeed, the fact of disclosure of the entire document on two occasions to the Single Judge of the Pre-Trial Chamber should be enough to dissuade the Defence allegation of bad faith and fraud. Also, that the Single Judge had indicated privity, at least, to the assessment of the content of the document and an 'individual analysis' of it,[15] compose a factor not to be ignored in evaluating the allegation of prosecutorial bad faith and fraud on the Court. Of course, basic considerations of good taste and professionalism may not permit the Prosecution to put too fine a point on that factor, in defending the allegation of fraud made against them, and they did not. For, they should also, notably according to their own admission, have specifically directed the attention of the Pre-Trial Chamber and the Single Judge to paragraph 33 of the Asylum Affidavit.

21. But, the view that the allegation of bad faith and fraud was not made out in the present instance affords the Prosecution no refuge from censure from what may be, in other circumstances, a grave error indeed. I note, for instance, their following sobering admission: '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.'[16] [Emphasis added.] A prosecution office system that presents the unnerving danger that lurks behind that admission earnestly calls for a thorough review by the Prosecutor to ensure the fitness of the system for the desired purpose. The Prosecution submissions do not reveal that such manner of systems review has been done, in order to avoid a repeat of the error here in issue. In the circumstances, there is justification for the concerns of the Defence 'as to the extent to which the disclosure obligations of the Prosecution have been fulfilled with respect to other aspects of the case and with respect to

[15] See *Prosecutor v Muthaura, Kenyatta and Ali (Fifth Decision on the Prosecutor's Request for Redactions)* dated 18 August 2011 [Pre-Trial Chamber II, Single Judge] para 23.
[16] See 'Consolidated Prosecution response to the Defence applications under Article 64 of the Statute to refer the confirmation decision back to the Pre-Trial Chamber' dated 25 February 2013, para 37.

those witnesses relied upon by the Prosecution for trial.'[17] But the extent of the remedy urged by the Defence as a result remains another matter. While more remains to be done to restore confidence in full in the matter of the Prosecution's disclosure obligations, it is nevertheless encouraging that the Prosecution continued to reveal and admit lapses in their disclosure compliance as they discovered them. It is also encouraging to note that the Prosecution saw fit, with neither an application from the Defence nor a hint from the Chamber, to withdraw charges against Mr Muthaura (who was originally a co-accused in this case) on grounds of insufficient evidence or the prospect of it. These actions implicate reassuring elements of integrity, professionalism and trust that the right thing will be done as the circumstances arise.

22. In the circumstances, I share the view that only admonition of the Prosecution is warranted for the failure to disclose the Asylum Affidavit. The reasons for it, in my view, are the Prosecution's own admission that the affidavit should have been disclosed and their explanation for the mistaken failure to disclose. In my view, the 'serious concerns' alluded to in the Chamber's decision[18] in relation to the rights of the accused and the integrity of the proceedings are anchored in the worrisome question reasonably provoked whether similar failings have not occurred in the past in this case or may not recur in the future. It is for that reason that I support the requirement of the Prosecutor and her deputy to certify against these risks as a confidence-building measure. But, for reasons that will become apparent in the course of this opinion, I am not convinced that the mistaken failure to disclose the Asylum Affidavit itself has been established as having already violated the rights of the accused in a manner that caused material prejudice or already undermined the integrity of the judicial process. There is a threshold that must be met before the forces of the law are unleashed substantively against a mistake. Whether such a threshold is captured in the maxim *de minimis non curat lex* or in the rule of 'harmless error' is not as important as the general idea itself.

IV—TWO PATHS TO A DECISION CONCERNING PW-4's EVIDENCE

23. There are two paths that may be followed to the decision in this motion. One of them is the path through public policy. The other is, of course, the path of avoidance of miscarriage of justice. But the paths do cross.

[17] See 'Defence Submissions regarding the Prosecution's 11 April 2013 Disclosure of Material relating to its Initial Contact with OTP-4, with Confidential Annexes A-E', *supra*, para 27.
[18] See paragraph 95 of the Chamber's Decision.

The Path through Public Policy

24. 'The life of the law', Oliver Wendell Holmes Jr once famously declared, 'has not been logic: it has been experience.' The conception and settling of the legal rules that govern human conduct in society did not mostly result from 'syllogism'. They have had more to do with the 'felt necessities of the time', with the 'prevalent moral and political theories', with 'intuitions of public policy, avowed or unconscious', and, with 'even the prejudices' that judges share with their fellow citizens. It would be wrong, he continued, to approach the law in its embodiment of the story of the development of society, 'as if it contained only the axioms and corollaries of a book of mathematics.'[19]

25. It must be stressed that Holmes was not seeking to banish logic from the province of the law. He knew that logic has its proper place. He insists only that is not as the tyrant of the realm.

26. The public policy that he had identified as a major determinant of legal rules is indeed, in Holmes' further view, a critical ingredient in the formation of those rules through the case law. As he put it: 'Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy ...'.[20]

27. The directive role of public policy in solving legal problems in the courtroom is distinctly identifiable in substance-oriented rules, like the one requiring criminal cases to be conducted on their merits and not on mere technicalities. It discourages judges from

[19] Oliver Wendell Holmes Jr, *The Common Law* [Boston: Little, Brown and Company, 1881] p 1. Some who know that Holmes declared these views in his book entitled *The Common Law*, and whose stated object was to 'present a general view of the Common Law', [*ibid*] may be tempted to confine their relevance only to the principal legal system known by that name. But that would be mistaken. Friedrich Karl von Savigny, the titanic German jurist that wrote before Holmes, had expressed the view that law is an expression of the *Volksgeist*. By that, he meant that law derives its meaning and content from the spirit of a people, to be found in their particular characteristics and customs, and not from general principles of universal application. [See R W M Dias, *Jurisprudence*, 5th edn [London: Butterworths, 1985] pp 376—378.] The relevance of Savigny in this discussion calls for some caution. His focus was not the role of logic. He was joining issue with the idea of moral authority of the natural law theory and the sovereign command of imperial enactments as the proper explanation for the content of law. We are not concerned with that particular dispute now. He is cited here merely to link his view in some confluence with that of Holmes, to trace the kernel of a certain thought identifiable in both common law and civil law systems. Indeed, both Voltaire and Montesquieu are also reported to have maintained that law was shaped by social, geographical and historical considerations. [*Ibid*, p 377; and Herman Kantorowicz, 'Savigny and the Historical School of Law' (1937) 53 *LQR* 326 at p 335.] That confluence may be found on the plane of abstraction that unites the respective views in the proposition that law is not merely an expression of an unbending rational standard that applies to all at all times—be it logic (for Holmes) or universal principles (for Savigny)—to the exclusion of all other considerations. In other words, certain non-rational elements, also valued by society, also play a part in the formation of the law. Surely, Savigny would agree that the *Volksgeist* that he had visualised would be imbued in its evolution with all those attributes that Holmes had identified as having 'a good deal more to do than the syllogism in determining the rules by which men [and women] should be governed.' [Holmes, *supra*, p 1.] Hence, Holmes's observations are not peculiar to the common law. So, we may beckon his guidance with more temerity.

[20] Holmes, *supra*, p 35.

disposing of cases on grounds of technicality and from allowing questions of technicality to frustrate a case in the substance. In the specific context of the Rome Statute, these rules of public policy possess power play in the courtrooms of the ICC, in light of the imperatives of accountability that entirely explain the Court's creation.

28. Mohamed Shahabuddeen is a jurist emeritus of the modern era whose pre-eminence in the field of international criminal law transcends the ages. In a recently published retrospection of his time on the Appeals Chamber of the ICTY, he had occasion to engage the age-old debate among jurists, concerning the occasional tension between law and policy. After a brief review of some nuances of the issue, and with the disclaimer that 'the variations of the policy oriented approach are many' and his commentary does not cover all of them, he concluded as follows: 'It is the law, specific or general, which governs. There is difficulty in agreeing that the judge has any kind of liberty to decide otherwise than in accordance with the law existing as an objective set of legal principles.'[21]

29. Put that simply, the conclusion is readily accepted. The trouble, however, is that when the so-called tension between law and policy arises, it is not always in a shape so stark. It often concerns tensions between policy, on the one hand, and, on the other, the urge of logical deductions or extrapolations from 'the law existing as an objective set of legal principles' but not those principles themselves at the immediate level of objective appreciation. Matters become more complex when the extrapolation urged from an objective set of legal principles demands the immediate action of the decision maker, in circumstances that also invite care for another set of objective legal principles that may not be immediately engaged but are sufficiently visible and are certain to be encountered down the road being travelled in the proceedings. Further still, the complex becomes more interesting when the immediate outcome being urged on the force of logic of the existing law is a procedural outcome, while the policy argument against the urge appears only in a holding brief for the more remotely located legal norm that is substantive; for instance, should an indictment be dismissed on legal technicality, when such an outcome will frustrate the victims' right to the truth and to justice?

30. When the outcome of the policy position is merely to preserve the eventual duel between competing interests at the level of the substantive type of objective sets of legal principles, without serious interlocutory prejudice to either interest (such as when the case is not dismissed on mere technicality, so that guilt or innocence is determined on the merits), it is difficult to accept an argument which insists that policy must always yield ground in every

[21] Mohamed Shahabuddeen, *International Criminal Justice at the Yugoslav Tribunal: A Judge's Recollection* [Oxford: OUP, 2012] p 84 [Kindle edition].

clash with what is urged as objective principles of existing law. This, in my view, is the key to resolving the seemingly complex puzzles presented in the current litigation, concerning the questions whether the Trial Chamber should either (i) refer the CD to the Pre-Trial Chamber for reconsideration or (ii) decide itself to reconsider that decision without the requested reference to the Pre-Trial Chamber.

The Question of Referral Back to the Pre-Trial Chamber

31. Public policy is also implicated in procedural principles of efficiency in the administration of justice. Some of these principles of efficiency include the rule that encourages an end to litigation while discouraging its undue prolongation or complication. I am not convinced that these considerations of public policy would condone the referral of this case back to the Pre-Trial Chamber. First, it is notable that counsel had cited no precedent, from national jurisdictions or the other international criminal courts, to show where a trial court referred a criminal case back to the preliminary hearing judge (in national criminal practice) or the indictment confirmation judge (in international criminal practice). Could it really be that this is the first case ever to present questions—before trial on the merits—concerning the reliability of evidence used to confirm an indictment? Or is there something truly peculiar about the processes of the ICC that occasion this sort of litigation as a preliminary issue to be settled before commencement of the trial? Defence Counsel suggests the latter proposition. But I am not persuaded. The explanation for the dearth of precedent may lie more with the fact that such questions usually merge with the trial on the merits, where a truly weak prosecution case is quickly interred on the merits by a competent defence counsel before she is called upon to make her own.[22] The outcome serves the public policy of ending litigation on the merits. The 'unique' features of the ICC are in no way inconsistent with that approach to the conduct of criminal litigation.

32. Second, the logic is attractive on its face to the extent that the argument is that the CD is the only basis for the conduct of trial: therefore, its possible vitiation would negate the basis to proceed to trial. But, that logic would similarly hold that the discrediting of the case for the prosecution in the course of the trial, in a manner that negates the evidential basis for the CD, would also require the trial to be stopped in mid-stream and the case sent back to the

[22] It may be noted that in national practice in adversarial systems that allow preliminary hearings or committal proceedings, defence counsel do not usually employ that opportunity to attack the prosecution case with the aim of defeating committal of the case for trial. Defence counsel seldom call their own witnesses for purposes of the preliminary hearing. The reason for all that is because the achievement of discharge at that stage of preliminary hearing does not rank as an acquittal that engages the plea of double jeopardy. The Prosecution may bring back the same charges later, either with more evidence or by way of what is known in some jurisdictions as 'preferred indictment' that by-passes the preliminary hearing altogether. Hence, defence counsel's strategy is usually to seize the opportunity presented by the preliminary hearing to discover the evidential strength of the prosecution case to the extent possible and set up prosecution witnesses for impeachment at the merits phase of the case.

Pre-Trial Chamber in order for it to reconsider the CD. Here, logic breaks down in the face of good sense. Defence Counsel, presumably realising the problem during oral arguments when that dilemma was put to him, replied that pragmatism would require that the matter be dealt with in the stream of the trial, and not returned to the Pre-Trial Chamber. But if pragmatism would recommend that approach, one sees no rational wall that blocks a similar operation of pragmatism in the period close to commencement of the trial.

33. And, third, it can readily be seen that the 'unique' features of the ICC Statute, so suggested, hold a real possibility of prolongation of the litigation. This is in light of (a) the power of the Pre-Trial Chamber to invite the Prosecution to conduct more investigation for purposes of tendering more evidence tending to establish reasonable grounds to believe that the accused committed the offences charged; and (b) the right of the Prosecution to bring back for confirmation (with new evidence) a case in respect of which a Pre-Trial Chamber had earlier denied confirmation of charges. In the circumstances, sending the case back to the Pre-Trial Chamber would not be consistent with the public policy requirement that there must be an end to litigation.

34. It is notable also that the Defence in this case has, as it were, already complained that the Prosecution strategy has already 'led to the postponement of the commencement of trial, and infringed Mr Kenyatta's right to an expeditious trial.'[23] But there is no need to compound such a complaint, if justified upon its own particular inquiry (not engaged now), by acceding to a Defence request that runs the risk of greater delay.

35. In view of the foregoing, it is correct to deny the request to send the case back to the Pre-Trial Chamber. It now remains to consider the matter from the perspective of the Chamber itself invalidating the CD.

The Path of Avoidance of Miscarriage of Justice

36. Although Defence Counsel make several arguments to support their request to reconsider the CD and invalidate it, their entire request boils down to this basic proposition: the CD should be '[reconsidered] in order to avoid a serious miscarriage of justice in the present case.'[24]

37. The question is thus engaged whether failure to reconsider the CD and declare it invalid will result in 'a serious miscarriage of justice in the present case.' That now sets us on

[23] See Defence 'Written Submissions Following 18 March 2013 Status Conference,' dated 28 March 2013, Doc No ICC-01/09-02/11-706, para 42.
[24] *Ibid*, para 1.

our path of avoidance of miscarriage of justice that was identified earlier as a path to decision in this litigation.

38. In my view, the answer to the question thus engaged is a very simple and straight-forward 'No'. There will be no *serious miscarriage of justice* 'in the present case' if we do not reconsider the CD and declare it invalid.

39. It helps to begin with a view of the meaning of 'miscarriage of justice'? *Black's Law Dictionary* provides assistance: 'a grossly unfair outcome in a judicial proceeding, as when a defendant is convicted despite lack of evidence on an essential element of the crime.' We cannot *possibly* take that view of 'the present case'. First, the assessment of 'miscarriage of justice *in the present case*' must necessarily take into account whether justice 'in the present case' has run its course, with no other opportunity for the accused to vindicate himself in that course of justice. Here, we must consider that the trial 'in the present case' has not even started. And the findings of the Pre-Trial Chamber cannot possibly be seen as a conviction 'in the present case', such as engages the risk of 'miscarriage of justice' let alone the 'serious' brand of it. Hence, any serious fear of 'serious miscarriage of justice' can only arise after the trial—it need not also be seen that the appeal—process has run its course 'in the present case'.

40. The merits phase of the present case is yet to come. The opportunity remains large and undiminished for the Defence to destroy the weak case that they see in the prosecution. And, it may be observed—though not as a critical factor—that the defence counsel are some of the most experienced in the practice of international criminal law. It is difficult to envision better counsel for the accused. They will, no doubt, represent their client well in that regard. As a practical matter then, I see no fear of 'serious miscarriage of justice in the present case', merely because of refusal to reconsider the CD and declare it invalid.

41. Second, if we are to accept (purely for purposes of argument and nothing more) that 'miscarriage of justice *in the present case*' may be assessed at the level of Pre-Trial Chamber hearings only, even so, then the charge of miscarriage of justice is not sustainable merely because of the forensic events involving PW-4. The Defence Counsel's submission in this respect is this: 'Had the PTC been aware of the true nature of OTP-4's evidence at the time of its deliberation, the Defence submits that the PTC would not have confirmed the present case for trial.'[25] But, the fortitude of that proposition does not overcome the essential difficulties in its path. The first is that the proposition is speculative. It is as such an inadequate basis for a judicial decision.

[25] Defence Application, para 31.

42. But even accepting (again for purposes of argument) the reasonableness of a Chamber admitting a speculation as a basis for decision, a persuasive view of this particular speculation begins to recede very quickly when matched against certain pronouncements of the Pre-Trial Chamber. Specifically, the Pre-Trial Chamber accepted that there was a meeting held on 30 December 2007, at the State House in Nairobi: Mungiki members and Mr Kenyatta were among the participants;[26] he allegedly said he had the capability to organise his people and mobilise them for any eventuality; he gave some MPs and Mungiki coordinators KSh3.3 million each; [REDACTED] 'was among recipients of money to coordinate the Mungiki attack in Naivasha; also, 'money distributed at this meeting was later spent in part to buy the guns that were used in the attack in Nakuru.'[27] The Pre-Trial Chamber did not base these findings on the evidence of PW-4. It based them on the evidence of PW-11, and the evidence of PW-12 and PW-6 that corroborated the evidence.[28]

43. Similarly, the Pre-Trial Chamber did not base their findings on the evidence of PW-4, but on the evidence of PW-11 and PW-12, when they found as follows: 'Maina Njenga received a significant amount of money on at least two occasions in order for him to agree to the common plan and make available the services of the Mungiki to the PNU Coalition for the commission of crimes.'[29] In this connection, the Pre-Trial Chamber found that Mr Kenyatta allegedly gave Maina Njenga sums of money on two occasions—KSh8 million[30] and KSh20 million.[31] The Pre-Trial Chamber also found that Mr Kenyatta had allegedly given KSh6 million to a person named [REDACTED], to engage in fresh enlistments in order to replenish the ranks of the Mungiki from Thika for purposes of the Naivasha attack.[32]

44. So, too, did the Pre-Trial Chamber rely on PW-11 and PW-12 for the findings that enlistment into the ranks of the Mungiki was done from among local Kikuyu youth of Thika, Limuru and Naivasha, 'for the specific purpose of participation in the commission of the crimes in Naivasha.' [REDACTED] was the Mungiki leader responsible for these enlistments and he administered the oaths—and 'was directly answerable to Mr Kenyatta, who had specifically entrusted him with the task of recruiting "as many people as possible for retaliatory attacks".'[33]

[26] *Prosecutor v Muthaura, Kenyatta and Ali (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute)*, dated 23 January 2012, para 333.
[27] *Ibid*, para 334.
[28] *Ibid*, paras 334—336.
[29] *Ibid*, para 363.
[30] *Ibid*, para 363.
[31] *Ibid*, para 364.
[32] *Ibid*, para 395.
[33] *Ibid*, para 396.

45. These findings, in my view, do seriously upstage the Defence submission saying: 'Had the PTC been aware of the true nature of OTP-4's evidence at the time of its deliberation, the Defence submits that the PTC would not have confirmed the present case for trial.'[34]

46. This difficulty is not overcome by the subsequent attacks that the Defence Counsel now make against the findings of the Pre-Trial Chamber[35] based on the evidence of PW-11, PW-12 and PW-6—often alleging that the findings were based on hearsay.[36] This is because the stated purpose of the Defence motion to invalidate the CD was on the thesis that, as the CD now stands, the charges would not have been confirmed had the Pre-Trial Chamber 'been aware of the true nature of OTP-4's evidence at the time of its deliberation.' The entire commitment of that thesis to PW-4 is all too clear from the grounds of the Defence motion stated as follows:

- 'Essential facts underpinning the Confirmation Decision by the PTC are no longer relied upon by the Prosecution as evidence in support of the charges, as they are now known to have been falsely alleged by a witness relied upon for those proceedings.'
- 'The Confirmation Decision and the hearing on the confirmation of charges … have been rendered unfair by reason of the Prosecution's failure to draw the attention of the PTC to crucial evidence undermining its case …'.
- 'In the circumstances, the Confirmation Decision was decided by the PTC based upon fraudulent evidence.'[37]

47. On the basis of that stated purpose and its thesis, the Defence may not now freely change the original foundations of their article 64(4) application by attacking the Pre-Trial Chamber in its findings that are independent of the evidence of PW-4. For purposes of the present exercise, it does not matter that the Pre-Trial Chamber may indeed have been wrong in making these findings that they made independent of the evidence of PW-4. What matters is whether those findings would have led them to confirm the charges regardless of the evidence of PW-4. The answer to that question is not assumed by the Defence's attack against those findings.

48. Nor, as a matter of policy, the legal authority of which is reviewed shortly, should such post-confirmation attacks against the findings of the Pre-Trial Chamber be receivable as a legitimate strategy to reopen a confirmation decision. It is necessarily a backdoor strategy,

[34] Defence Application, para 31.
[35] See generally 'Defence Observations regarding the Impact of the Withdrawal of the Charges against Mr Muthaura on the Case against Mr Kenyatta pursuant to the "Order requesting written submissions following 18 March status conference"' dated 28 March 2013, ['Defence Observations of 28 March 2013'].
[36] For instance, see *ibid*, para 28(a).
[37] *Ibid*, para 2.

the implications of which, from the perspective of judicial precedent will be truly inimical to the administration of justice in this Court. It will be the rare case indeed in which an accused will be unable to find reasons to disagree with the findings of a Pre-Trial Chamber in a confirmation decision. But it will be disastrous for the administration of justice in this Court, to permit the development of practice, besides the permitted appeals process, according to which confirmation decisions are reopened because a party has found legal arguments that it can make against the findings of the Pre-Trial Chamber, in the manner here now engaged.[38] The proper approach should be one which maintains that an accused that disagrees with the findings of the Pre-Trial Chamber, on the basis that the confirmed case was weak, will have ample opportunity at trial to demonstrate the weakness. He will eminently succeed in that endeavour if the case is truly weak. In the circumstance, miscarriage of justice would not have resulted.

49. It is, perhaps, opportune now to address a latent argument that may on a casual view appear as supportive of the Defence application to refer the CD back to the Pre-Trial Chamber or to invalidate the CD in this Chamber. The argument is this: Why proceed to trial and have the Defence definitively destroy a possibly weak prosecution case, when that course has obvious implications of costs to the accused (in the case of fee-paying accused) or to the legal aid system (in the case of indigent accused)? This argument, in my view, is inadequate a reason for the relief urged. First, the *primary* objective of the processes of this Court is to do justice substantively. Cost-consciousness in the administration of justice is but an ancillary consideration. Therefore, in the event of a conflict between the two objectives, doing justice substantively must always prevail. And, secondly, the assumption is unfounded that it is less costly to refer the case back to the Pre-Trial Chamber or to invalidate the CD, than to proceed to trial on the merits in earnest. There will be far more costs thrown away, if the Pre-Trial Chamber re-validates the CD following a referral back. So, too, will the costs be great indeed if the Prosecution would bring back the charges with further evidence were the CD to be invalidated by either Pre-Trial Chamber or the Trial Chamber as the case may be.

[38] Notably, the Pre-Trial Chamber found, as regards the 30 December 2007 meeting: 'The evidence placed before the Chamber also provides substantial grounds to believe that, on 30 December 2007, there was a second meeting at State House with Mungiki members and a number of MPs, where Mr Kenyatta was also present. This is established to the requisite threshold by the testimony provided by Witness OTP-11, corroborated by Witness OTP-12 and Witness OTP-6' (Confirmation Decision, para 333.) As part of their submissions in the present litigation, Defence counter-argues with the Pre-Trial Chamber in the following ways: 'The Defence submits that the factual determinations made by the PTC in respect of the 30 December meeting are not supported to the requisite standard of "substantial grounds to believe"' (Defence Observations of 28 March 2013, para 28), with the repeated assertion: 'the PTC failed to assess properly the evidence in this case, and reveals … fundamental deficiencies in this confirmation process …' (Defence Observations of 28 March 2013, paras 27, 28(g)). Clearly, such arguments with a Pre-Trial Chamber on its findings are a wholly inadequate basis to warrant a Trial Chamber or indeed the Pre-Trial Chamber to reopen a confirmation decision.

50. In this connection, a line of jurisprudence of senior appellate courts in the United States lends highly persuasive authority. In *Costello v United States*, for instance, the US Supreme Court observed as follows:

> In *Holt v United States*, 218 US 245, this Court had to decide whether an indictment should be quashed because supported in part by incompetent evidence. Aside from the incompetent evidence, "there was very little evidence against the accused." The Court refused to hold that such an indictment should be quashed, pointing out that *"[t]he abuses of criminal practice would be enhanced if indictments could be upset on such a ground."* 218 US at 248. The same thing is true where, as here, all the evidence before the grand jury was in the nature of "hearsay." *If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that, before trial on the merits, a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury*.[39]

51. Similarly, in *People v Jones*, an excerpt from which is set out in the opening paragraphs of this opinion, the principle was confirmed more broadly, by the Supreme Court of Illinois, that an indictment may not be challenged on grounds of insufficiency of the evidence supporting its confirmation, unless *all* of the evidence adduced before the grand jury was incompetent.[40] In this regard, the Court made it clear, as a matter of policy, that once some evidence exists in support of an indictment in addition to other evidence attacked as incompetent, the indictment is not open to challenge on grounds that what is left as competent evidence will be insufficient in value to support the indictment. In the words of the Court: '[I]t is neither necessary nor proper, in ruling upon a motion to quash an indictment, to consider the evidence before the grand jury.' It is in those circumstances that the Court made the pronouncement quoted in the third paragraph of this opinion. It bears repeating the quote more fully:

> The question then is whether it will further the administration of justice to permit defendants to challenge indictments on [the ground that an indictment was not supported by adequate or competent evidence.] The law favors promptness in the dispatch of criminal business of the courts when in harmony with the effective protection of the rights of the accused and the interests of the public. The delay is great when an accused can assail an indictment on this ground and cause the trial court *to review all the evidence presented to the grand jury*, as was done in this case. Such procedure adds nothing to the assurance of a fair trial to which the accused is entitled. *We are of the opinion that the trial court should not inquire into the adequacy and competency of the evidence before the grand jury*.[41] [Emphasis added.]

52. *Jones* was followed by the Appellate Court of Illinois in *People v Moore*,[42] a case with aspects that bear striking similarities with the matter here under consideration, particularly as regards allegations of prosecutorial misconduct in failing to direct the attention

[39] *Costello v United States* 350 US 359 (1956) [US Supreme Court] at p 363 (emphasis added).
[40] *People v Jones*, *supra*, p 3.
[41] *Ibid*, pp 4—5.
[42] *People v Moore* (1990) 557 NE 2d 537 [Ill App Ct, 1 Dist].

of the indictment confirming authority to other evidence that contradicted aspects of the prosecution case. The accused had been convicted of sexual assault of an 11-year old girl. One of his grounds of appeal was that the indictment was invalidated by perjured information, because the Prosecution did not reveal to the preliminary hearing judge the report of the first doctor (an emergency room doctor) who had performed a general physical and pelvic examination of the victim on the date of the alleged rape. According to that doctor, he had been told (among other things) that the assailant had used a gun; that the victim had been pushed to the ground and bumped her head and was subjected to a consummated vaginal rape. As part of his examination of the victim, the doctor had taken samples for the rape kit as well as slides which he had examined for the presence of spermatozoa. He reported that he did not find the presence of spermatozoa. He also reported that the victim exhibited no signs of trauma and that her hymen was intact. But he noted that these did not mean that sexual intercourse had not occurred. Three days later (following an intervening weekend), a second doctor (the hospital's director of cystology) examined three smear slides taken from the victim on the day of the rape, using a different testing procedure. This second test revealed the presence of spermatozoa, which indicated the occurrence of sexual intercourse. The prosecution counsel who handled the case at the preliminary hearing testified that he did not bring the first medical report to the attention of the preliminary hearing judge, because he did not feel an obligation to do so, as the accused was then represented by a public defender that had all the medical reports.

53. Notably, the basis of the judgment of the Appellate Court of Illinois (in dismissing the accused's attack against the validity of the indictment as founded upon perjured information) was not on the reasoning that the public defender was in possession of the first medical report. Instead, the Court reasoned as follows: indictments do not require the degree and quality of proof that are required for a conviction, and if valid on their face will suffice to require a trial of the charges on the merits; generally, an indictment will not be quashed unless the accused can show 'grave injustice'; and, as was confirmed in *Jones*, an indictment will not be suppressed unless *all* the evidence upon which it is based was subject to suppression.[43] The Court further reasoned that an indictment may be based upon hearsay or other testimony 'because its validity depends not upon the character of the evidence but upon its competence,' unless the witness is legally disqualified, his testimony is considered competent. Hence, the evidence of the prosecution counsel was competent to sustain the indictment, thus making the indictment a proper one.[44]

54. *People v Moore* necessarily supports the reasoning that the claim of 'grave injustice' or 'miscarriage of justice' will be unsustainable for purposes of quashing an indictment,

[43] *Ibid*, p 549.
[44] *Ibid*.

where there is other evidence on the record of the confirmation hearing that could sustain the indictment, despite the possibility that prosecutorial error or perjured evidence of a particular witness might result in the exclusion of some other item(s) of evidence used to support confirmation of the indictment. And, as was held in *Jones*, the presence of such other evidence precludes a retrospective inquiry into its sufficiency to support the indictment in the absence of the evidence attacked as incompetent or corrupt. In *People v JH*, the Supreme Court of Illinois held that '[t]here need only be "some evidence" to connect defendant to the offense charged.'[45] As long as that is the case, the accused could not validly complain of prejudice.[46]

55. The obvious rationale for this principle is that there cannot be a credible case of 'miscarriage of justice' or 'grave injustice' occasioned by reason of insufficient evidence to support confirmation of indictment, as long as the trial that lies ahead retains intact the full opportunity for the Defence to expose a truly weak prosecution case for what it is on the merits. As the Illinois Supreme Court observed in *JH*, 'The most important protection for an accused in our system of law is a fair trial itself.'[47]

56. The overriding policy considerations thus favour that cases move promptly to the trial stage where weak cases will be exposed and disposed of, rather than be delayed by extended litigation as to the sufficiency of evidence used to support confirmation of the indictment, upon the wrong approach to the confirmation hearing as if it were 'a "kind of preliminary trial"'.[48]

57. At the ICC, and in the case at bar, the prospect of such extended litigation is very real, in light of, first, the power of the Pre-Trial Chamber, or presumably of the Trial Chamber in exercising the powers of the Pre-Trial Chamber,[49] to invite the Prosecutor to conduct further investigation in support of the charges.[50] Secondly, the Prosecution has a right to return with renewed charges supported by additional evidence against persons against whom confirmation of charges was declined on the first try on grounds of insufficient evidence.[51] And, thirdly, one complaint of the Defence engaged in the present litigation is that disproportionate investigation (possibly resulting in a case of larger scope) was conducted during the period following confirmation of charges. It must be presumed then that any resulting invalidation of the current charges would foreseeably result in the reinstitution of charges against the accused in a new case in which all the further evidence will be included

[45] *People v JH* (1990), 554 NE 2d 961 at p 968.
[46] *Ibid.*
[47] *Ibid*, 966.
[48] *Ibid.*
[49] See Rome Statute, article 61(11).
[50] See *ibid* article 61(7)(c)(i).
[51] See *ibid* article 61(8).

as additional evidence. Any resulting confirmation of the charges as a result of the fresh confirmation exercise would have rendered entirely pointless—perhaps in a very negligent way, in view of the time and costs thrown away in the case so far—a decision of this Chamber that paved the way for such an outcome.

58. The connection of the foregoing legal and policy considerations with the fact of the evidence of witnesses other than PW-4 indicated in the CD affords an ample basis to dispose of the Defence argument that the Pre-Trial Chamber 'would not have confirmed the present case for trial' but for the evidence of PW-4. But the difficulties with that speculation do not end there.

59. Besides those direct findings that the Pre-Trial Chamber made with no evidential connection to PW-4's testimony, there is also the matter of the value of hearsay evidence. For instance, feeling called upon to comment on the value of 'indirect evidence' as regards confirmation of charges, the Pre-Trial Chamber observed as follows:

> With respect to indirect evidence, the Chamber is of the view that, *as a general rule*, such evidence must be accorded a lower probative value than direct evidence. The Chamber highlights that, although indirect evidence is commonly accepted in the jurisprudence of the Court, the decision on the confirmation of charges cannot be based solely on *one* such piece of evidence.[52]

60. Notably, the Pre-Trial Chamber had indicated a view that 'hearsay evidence' is encompassed within the meaning of 'indirect evidence'.[53] In light of the Pre-Trial Chamber's own predisposition against confirmation 'based solely on one' piece of indirect evidence, it is certainly arguable that confirmation based on more than one piece of indirect evidence remained a possibility for the Pre-Trial Chamber. That the Defence—or indeed another ICC judge—may dispute the wisdom of that possibility does not revive the fate of the Defence assertion that the Pre-Trial Chamber 'would not have' confirmed the present case for trial had it known of the true nature of PW-4's evidence.

61. It might also be useful to consider the following related observation of the Pre-Trial Chamber:

> In considering indirect evidence, the Chamber follows a two-step approach. First, as with direct evidence, it will assess its relevance and probative value. Second, it will verify whether corroborating evidence exists, *regardless of its type* or source. The Chamber is aware of rule 63(4) of the Rules, but finds that *more than one piece of indirect evidence*, which has a low probative value, *is preferable to prove an allegation to the standard of substantial grounds to believe*. In light of this assessment, *the Chamber will then determine whether the piece of indirect evidence in question, when viewed within the totality of evidence, is to be accorded a*

[52] Confirmation Decision, para 86.
[53] *Ibid*, para 82.

> *sufficient probative value to substantiate a finding of the Chamber for the purposes of the decision on the confirmation of charges*.[54]

62. It follows from the foregoing observations of the Pre-Trial Chamber itself that it was open to it to confirm the charges upon the basis of indirect or hearsay evidence supplied by PW-4, provided it was corroborated by other pieces of indirect or hearsay evidence. Indeed, upon that hypothesis, the Pre-Trial Chamber might not even require any evidence from PW-4. Strictly speaking, two pieces of hearsay evidence would do.

63. In the circumstances, it is to be considered that the Defence complaint may be taken to be that—objectively viewed, without the Defence's tinted lens of PW-4's credibility (to be discussed later)—the '*true* nature' of PW-4's evidence amounted to no more than hearsay evidence as regards the allegation that Mr Kenyatta was present and participating at one or more meetings contemplated in the Prosecutor's theory of common criminal plan. I must immediately note that the Defence complains, of course, that the fact that PW-4 had asserted (in what he recanted after the confirmation to be) a lie that he was an eye-witness to the meetings in question tasks his credibility in a manner so fundamental as to cut deep into even any hearsay value of his statement. I shall return to the credibility argument later. In the meantime, it is also to be noted that during the hearing of 18 March 2013, the Defence Counsel himself submitted that the evidence of PW-11 and PW-12, upon whom the Pre-Trial Chamber had also relied for the CD, provided only hearsay evidence. The mere possibility then that it was open to the Pre-Trial Chamber to accept PW-4's evidence as hearsay evidence is sufficient to negate the Defence speculation that the charges would not have been confirmed but for the evidence of PW-4 whom the Pre-Trial Chamber had accepted as an eye-witness to the meetings. This is because it was open to the Pre-Trial Chamber to rely upon the hearsay evidence of PW-4, corroborated by the two pieces of what according to the Defence Counsel was hearsay evidence from PW-11 and PW-12. Indeed, strictly speaking, it was open to the Pre-Trial Chamber to discount the evidence of PW-4 and yet confirm the charges against Mr Kenyatta purely on the hearsay evidence of PW-11 and PW-12. Notably, the roster of corroborating evidence relied upon by the Pre-Trial Chamber was not limited to PW-11 and PW-12; there are also PW-1 and PW-6 upon whose evidence the Pre-Trial Chamber had also relied.[55]

64. It is notable in this regard that in some jurisdictions that allow for preliminary hearings, a procedure generally similar in purpose and format to the ICC confirmation proceedings, an indictment may be confirmed on the basis of hearsay evidence alone. In this connection, it has been noted, for instance, that in the US Federal Court, the 'finding of

[54] *Ibid*, para 87.
[55] See, for instance, Confirmation Decision, *supra*, para 314.

probable cause may be based on hearsay in whole or in part.'[56] To a similar effect, the US Supreme Court held in *Costello v United States*[57] that a grand jury indictment was valid notwithstanding that 'all the evidence before the grand jury was in the nature of "hearsay".'[58]

65. The foregoing should be enough to dispose of the Defence speculation that the Pre-Trial Chamber 'would not have confirmed the present case for trial' had it 'been aware of the true nature of [PW-4's] evidence at the time of its deliberations'.

66. But, it is also possible to consider the matter from the perspective of the credibility challenge raised by the Defence against PW-4's evidence, in the submission that the evidence had been impaired beyond its hearsay value because he had lied about being an eye-witness to the meetings. The submission also confronts certain impediments along its way.

PW-4's Credibility regarded as of the Period up to the Confirmation Decision

67. The view of the PW-4's lack of credibility will necessarily be limited, in its assessment, to the period up to the rendering of the Confirmation Decision—not beyond. It should not capture the later retraction made by the witness in the statement of 25 May 2012. This is because the Defence argument is based on the proposition that the Pre-Trial Chamber *would not have confirmed the case for trial* had it known the true nature of PW-4's evidence. Upon this view, the credibility challenge must be limited to the inconsistency between the witness's statement to the Prosecution used at the confirmation hearing (in which he claimed to have attended the meeting of the morning of 3 January 2008), in contradistinction to the Asylum Affidavit (at paragraph 33 of which he asserted to have not been an eye-witness to that meeting but had only heard about the meeting from his close associates in the Mungiki society who claimed to have attended the meeting with Mr Kenyatta).

68. One obstacle to the Defence's attack against PW-4's credibility from this point of view is that he did not give oral testimony at the confirmation hearing. It is difficult to see the correctness of a procedure that allows an absent witness to be wholly discredited successfully on account of inconsistent statements. In the adversarial criminal justice system cross-examiners are required to ask a witness whether the previous inconsistent statement was his own, prior to putting the contradiction or using other evidence to prove the statement as that of the witness (in case of the witness's denial of authorship of the previous statement). Also of significance is the requirement to put the inconsistency to the witness and give him or her fair opportunity to explain the apparent inconsistency. Did the witness clearly lie? Or is the

[56] Wayne LaFave *et al*, *Criminal Procedure*, 5th edn [St Paul, Minn: West Publishing, 2009] p 761.
[57] *Costello v United States* 350 US 359 (1956) [US Supreme Court].
[58] *Ibid*, p 363.

inconsistency better explained by innocent confusion on his or her part or on the part of the actual recorder of the document when not in the hand of the witness himself or herself? Was there a typographical error? Etc. To be noted in this regard are the observations of an ICTR Trial Chamber in *Prosecutor v Nchamihigo* saying, 'Discrepancies attributable to the lapse of time or the absence of record keeping, *or other satisfactory explanation*, do not necessarily affect the credibility or reliability of the witness. In [evaluating the testimony of a witness], the Chamber will consider whether the testimony was inconsistent with prior statements made by the witness and, *if so, the cause of the inconsistency*.'[59]

69. Credibility is effectively challenged only where the witness proves either wholly unable to explain the inconsistency or unable to explain it convincingly. Hence, it would have been highly questionable that the credibility of the witness might have been properly challenged by counsel during the confirmation hearing in his absence.

70. Indeed, it is notable that the Pre-Trial Chamber had itself observed as follows:

> [T]he Chamber underlines that an oral testimony can have a high or low probative value in light of the Chamber's assessment, *inter alia as a result of the questioning, of the witness' credibility, reliability, accuracy, trustworthiness and genuineness*. The final determination on the probative value of the live testimony will thus depend on the Chamber's assessment on a case-by-case basis and in light of the evidence as a whole.[60] [Emphasis added.]

71. For its part, the Appeals Chamber has noted that while the Pre-Trial Chamber may evaluate credibility of witnesses in the course of the charges confirmation process, 'the Pre-Trial Chamber's determinations will necessarily be presumptive, and *it should take great care in finding that a witness is or is not credible*.'[61]

72. All this is not, of course, to say that the Pre-Trial Chamber would have properly found it wholly insignificant, in its appraisal of the evidence before it, that there might have existed a contradiction that was obvious on the face of two or more statements from the same witness. But, then, that might have been a concern that the Pre-Trial Chamber would have been free to resolve at the level of the particular factual point that the contradiction concerned, as a divisible matter that might or might not have affected the general credibility of the witness as regards other facts to which that particular witness would also have testified. Even as regards the particular factual matter that was contradicted by paragraph 33 of the Asylum Affidavit—i.e. whether or not PW-4 was in attendance at the meeting of 3 January 2008—it would be open to the Pre-Trial Chamber to consider whether the witness had a

[59] *Prosecutor v Nchamihigo (Judgment)* dated 12 November 2008 [ICTR Trial Chamber] para 15 (emphasis added).
[60] Confirmation Decision, *supra*, para 85.
[61] *Prosecutor v Mbarushimana (Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the Confirmation of Charges")* dated 30 May 2012, para 48 (emphasis added).

motive to distance himself, in his asylum application, from a meeting involving the apparent planning of violence in the possible order of crimes against humanity; mindful that article 1F of the Convention relating to the Status of Refugees permits denial of asylum to 'any person with respect to whom there are serious reasons for considering that ... he has committed a crime against peace, a war crime, or a crime against humanity ...'. Hence, it is not to be assumed that the Pre-Trial Chamber would *automatically* have found PW-4 to have lacked credibility in whole or in part had the Chamber's mind been specifically directed to paragraph 33 of the Asylum Affidavit.

73. Indeed, the foregoing analysis is wholly consistent with the views correctly expressed by the Pre-Trial Chamber itself concerning the effect of inconsistencies:

> The Chamber is aware of possible inconsistencies within one or amongst several pieces of evidence and considers that inconsistencies may have an impact on the probative value to be accorded to the evidence in question. *However, inconsistencies do not lead to an automatic rejection of the particular piece of evidence and thus do not bar the Chamber from using it. The Chamber will assess whether potential inconsistencies cast doubt on the overall credibility and reliability of the evidence and, therefore, affect the probative value to be accorded to such evidence. The said assessment must be conducted with respect to the nature and degree of the individual inconsistency as well as to the specific issue to which the inconsistency pertains. In fact, inconsistencies in a piece of evidence might be so significant as to bar the Chamber from using it to prove a specific issue, but might prove immaterial with regard to another issue, which, accordingly, does not prevent the Chamber from using it regarding that issue.*[62]

74. The Pre-Trial Chamber's view regarding the incidence of inconsistencies, as quoted above, is eminently borne out by the jurisprudence of the ICTR Appeals Chamber. In *Prosecutor v Ntakirutimana*, the Appeals Chamber observed as follows: 'An appellant who wishes a court to draw the inference that a particular witness cannot be credited at all on the grounds that a particular portion of that witness's testimony is wrought with irredeemable inconsistencies has a high evidentiary burden: he or she must explain why the alleged inconsistencies are so fatal to the witness's overall credibility that they permeate his entire testimony and render all of it incredible.'[63] [Notably, the Defence has made no such demonstration for purposes of the application now before this Trial Chamber.] And in *Prosecutor v Muvunyi*, the ICTR Appeals Chamber held that 'it is not unreasonable for a trier of fact to accept some, but reject other parts of a witness's testimony.'[64] In *Prosecutor v Kamuhanda*, for instance, the ICTR Appeals Chamber upheld the credibility finding in favour

[62] Confirmation Decision, *supra*, para 92 (emphases added).
[63] *Prosecutor v Ntakirutimana and Ntakirutimana (Judgment)* dated 13 December 2004 [ICTR Appeals Chamber] para 254.
[64] *Prosecutor v Muvunyi (Judgment)* dated 29 August 2008 [ICTR Appeals Chamber] para 128. See also *Prosecutor v Seromba (Judgment)* dated 12 March 2008 [ICTR Appeals Chamber] para 110; *Prosecutor v Simba (Judgment)* dated 27 November 2007 [ICTR Appeals Chamber] para 212; *Prosecutor v Kamuhanda (Judgment)* dated 19 September 2005 [ICTR Appeals Chamber] para 248.

of a witness despite inconsistencies in her testimony because the witness 'was unwavering' as regards 'the critical elements of her testimony against the Appellant.'[65]

75. The same considerations would also perturb the question whether the apparency of the particular contradiction at issue establishes an objective truth of lack of credibility of this particular witness, such as entirely nullifies all value out of his evidence as it was employed to support the CD, in a manner that legitimises the claim of 'miscarriage of justice'. In this connection, one prosecutor is certainly entitled to take the position that it does; and, may, in the result, withdraw the witness—and provoke the manner of litigation here now engaged. But, that may not settle the objective question. For, a different prosecutor may have taken the opposite view and insisted on retaining the witness on the list and calling him to testify, even possibly treating him as a hostile witness, in light of the possible motives for asserting and retracting his presence at the meetings, as part of the entire narrative of the case; hence possibly avoiding the present interlocutory litigation. Hence, the objective truth of lack of credibility resulting from the contradiction may be an open question, after all. As such, it necessarily lacks the capacity of *invalidating* the CD: as opposed to merely raising questions—even serious questions—about its validity. But those questions, however serious, will not amount to 'miscarriage of justice' or 'grave injustice', as long as the opportunity remains at the trial to expose the weakness of a prosecution case made vulnerable by those questions.

76. On a related note, it is to be considered that in the course of this application, Defence Counsel made a fulsome complaint that the Pre-Trial Chamber had confirmed the charges notwithstanding the Defence's robust attack on the credibility of PW-4 notably on grounds of inconsistencies in his testimony. Indeed, the Defence had filed before the Pre-Trial Chamber a table of 38 pages of analysis of the inconsistencies they argued to have existed in PW-4's evidence.[66] As they put it: 'we warned the Pre-Trial Chamber, about the quality of evidence, and we were ignored quite considerably.'[67] And, indeed, the Pre-Trial Chamber did clearly acknowledge that the Defence teams did 'on several occasions' draw the attention of the Pre-Trial Chamber to 'alleged inconsistencies in specific items of evidence relied upon by the Prosecutor at the confirmation of charges hearing, in particular with respect to Witness OTP-4.'[68]

77. But these considerations have significance in at least two respects. First, it necessarily underscores the fact that the Defence's attacks on the credibility of PW-4 on grounds of inconsistencies in his evidence are nothing new. And, second, it raises a serious question

[65] *Prosecutor v Kamuhanda*, *supra*, para 138.
[66] See ICC-01/09-02/11-374-Conf-AnxB.
[67] Transcript of the status conference of 18 March 2013, p 10.
[68] Confirmation Decision, *supra*, para 91.

whether the CD should be declared invalid on the basis of the speculative possibility that the Pre-Trial Chamber would not have confirmed the charges had one more inconsistency in the witness's evidence been brought to their attention.

78. It may, therefore, not so readily be assumed that had the Defence been afforded the disclosure, during the confirmation proceedings, to enable it to attack the credibility of PW-4 by pointing out to the Pre-Trial Chamber the contradiction of paragraph 33 of the Asylum Affidavit, the Chamber would have found PW-4 wholly without credibility and disregarded his evidence in its entirety. That is yet, another obstacle to the Defence's assertion that the Pre-Trial Chamber would not have confirmed the case for trial had it known of the true nature of the evidence of PW-4.

PW-4's Credibility regarded as of the Period following the Charges Confirmation Process

79. The Defence would also understandably desire an assessment of the credibility of PW-4 in a manner that encompassed the period following the charges confirmation process—that is, up to and including the 25 May 2012 when he gave a further statement to the OTP. In that statement, PW-4 recanted being a participant at two meetings: the 26 November 2007 meeting[69] and an earlier meeting in which he had also claimed to have participated.[70] But, he maintained his original story that he was a participant at the 3 January 2008 meeting.[71] It is to be recalled that in his statement dated 2 September 2008, given to the Commission of Investigation into the Post-Election Violence (CIPEV), he said he participated in the 3 January 2008 meeting.[72] But, as has already been seen, in his Asylum Affidavit, he asserted that someone else who had attended the meeting had told him about who else was there and what was said.[73] And in his statement to the OTP dated 27 September 2010, he asserted once more, and with great details provided, that he was at the 3 January 2008 meeting.[74]

80. There is no doubt that all these apparent vacillations about his own participation in the 3 January 2008 meeting and the other meetings are a matter of great concern as to his credibility. But it does not necessarily follow that his credibility has been so irremediably impaired as to result in the invalidation of the CD—especially given the existence of evidence other than his that would reasonably support the CD. This is because a judge, obligated to assess his credibility from the perspective of the 25 May 2012 statement and all his previous statements, is entitled to have careful regard to the circumstances of those

[69] See KEN-OTP-0067-0604, paras 10 and 11.
[70] *Ibid*, para 7.
[71] *Ibid*, paras 14 and 15.
[72] KEN-OTP-0005-0484, pp 10 and 11.
[73] KEN-OTP-0043-0083, para 33.
[74] KEN-OTP-0043-0002, paras 188—196.

variations, the reasons offered for them, as well as the possibility of latent self-serving motives that might have explained the variations. As noted earlier with particular regard to the variations concerning his participation in the 3 January 2008 meeting, the assessor would need to consider whether the exclusion norm stipulated in article 1F of the Refugee Convention might have explained the witness's denial of participation.

81. These considerations may, in the end, raise reasonable doubt against the reliability of the witness as to the purport of his incriminating evidence. Still, such lingering doubt would be insufficient to invalidate the CD automatically. This is mainly because the Appeals Chamber has observed that the 'Pre-Trial Chamber need not be convinced beyond a reasonable doubt', for purposes of confirmation of the charges.[75] Hence, a confirmation decision may still stand as valid, notwithstanding that a Pre-Trial Chamber may have reason to accept the evidence of a witness as contributing to a matrix of factual elements in support of the conclusion that an accused has a case to answer on the merits, despite elements of contradiction attending the evidence of the particular witness viewed as a whole.

The Paradox of Assessing Credibility during the Confirmation Process

82. As a further matter, the submissions of the Defence may yet, from the perspective of general principles, involve a certain manner of systemic incongruity that should not be ignored in the processes of this Court. The incongruity lies in attracting to the confirmation decision what may be viewed as a disproportionate probative value that is beyond its intended purpose. It is to be recalled that the purpose is, in the words of article 61(5) and (7), to 'establish substantial grounds to believe' that the indictee committed the crime charged. That is to say, the *belief* in question must be grounded upon evidential reality, not the mysteries of faith. It may not then be that the drafters of the provisions in question had intended such evidential reality to be appreciated at a level that is possibly confused with the standard of proof beyond a reasonable doubt. But the insistence that the Pre-Trial Chamber must conduct credibility of the witness on whose evidence reliance is placed for confirmation decisions carries with it reasonable risk of such possible confusion.

83. In *Prosecutor v Mbarushimana*, the Appeals Chamber rightly rejected the suggestion that the Pre-Trial is legally disabled from assessing the weight of evidence tendered by the Prosecution at confirmation hearings. It was a question of law—as to existence of that discretion in the Pre-Trial Chamber—that the Appeals Chamber was called upon to answer on that occasion. But having answered that question, the Appeals Chamber went to great length to point out the necessary limitations of the 'ability' of the Pre-Trial Chamber to

[75] *Mbarushimana* Appeal Judgment, para 47.

engage in evaluation of evidence; especially in comparison to the Trial Chamber.[76] As noted earlier, the caveats that the Appeals Chamber observed as regards the powers of the Pre-Trial Chamber to assess evidence relates to the limited power as to findings of credibility. It is a significant caveat.

84. It is, of course, an understandable strategy that Defence Counsel may, in particular cases, attack a confirmation decision on grounds associated with such a credibility assessment, where to do so, may, in their view, result in the invalidation of a confirmation decision. But this may generate a certain pressure that may lead to a practice in which such assessments are a necessary feature of the confirmation process. Alas, the crystallisation of such a practice is something that defendants may find eventually inconvenient in cases not dismissed at the confirmation stage. Even for purposes of the trial of such cases, the practice may encourage the Trial Chamber to presumptively view as credible a witness whom the Pre-Trial Chamber had already found credible in the proceedings before it. This is especially the case, should the witness be unavailable for any reason to testify at trial.

85. And outside the courtroom, the practice in question will also lead to inevitable confusion in the lay public's perceptions of the criminal responsibility of accused persons against whom charges have been confirmed, but who should enjoy presumption of innocence until pronounced guilty by a Trial Chamber upon the proper proof. The presumption may be eroded in the eyes of the lay public were they to be left with the impression that the Pre-Trial Chamber had specifically assessed favourably the credibility of the witnesses upon whom it relied to find substantial grounds to believe that the accused committed the crimes as charged.

V—THE COMPLAINT CONCERNING POST CONFIRMATION INVESTIGATIONS

86. A notable twist that evolved in this litigation is that what came to be viewed as an error of 'disproportionate' post-confirmation investigations managed to engage the Chamber's attention in a prominent way. This is particularly remarkable because the Defence's complaint in that regard had been initially raised with no deliberate focus on suppressing the fruits of the post-confirmation investigations complained against as disproportionate. Rather, the Defence's original complaint on the matter had been oriented towards the idea that the incidence of the post-confirmation investigations be reflected fairly in the scheduling of the trial commencement date. To wit, allow the Defence more preparatory time to meet the additional investigation demands upon them resulting from the Prosecution's post-confirmation investigations.[77] In my view, that idea is wholly consistent

[76] *Ibid*, paras 47 and 48.
[77] See transcript of status conference of 14 February 2013, pp 22 *et seq*.

with the standard relief for the sort of complaint engaged here. Specifically, the typical relief is to grant more preparatory time to the prejudiced party, by way of an appropriate adjournment to a trial in progress or an adjustment of a date set for a trial that is yet to start.

87. I fully concur in the outcome of the Chamber's decision that contemplates adjustment of the date set for the commencement of the trial, in order to afford the Defence more preparation time reasonably to contend with the incidence of the Prosecution's post-confirmation investigations. I regret, however, my inability to share much that my highly esteemed colleagues have had to say in their reasoning along the way. There is a concern that my colleagues' pronouncements amount largely to the beginnings of drips of dicta that will presently undermine the Prosecutor's confidence in conducting post-confirmation investigations when she sees the need; while possibly crystallising in the future into a hard limitation that will forbid post-confirmation investigations, as a general rule, permitting them only in 'exceptional circumstances.' Such a development is unjustifiable as a matter of law and inhospitable to substantive justice. Additionally, its sustainability is highly questionable as a matter of policy and practical implementation.

88. As a matter of law, the reasoning of my colleagues is not easily reconciled with jurisprudence of the Appeals Chamber. Remarkably, my colleagues would prefer the view that the controlling law is signalled in the following statement of the Appeals Chamber in *Mbarushimana*: 'As previously indicated by the Appeals Chamber, investigation should largely be completed at the stage of the confirmation of charges hearing.'[78] With respect, that is not the controlling law. It is only a normative statement—what 'should', 'largely' be done—made in an *obiter dictum*. Its *obiter* character is amply demonstrated by the consideration that the Appeals Chamber was neither called upon to address—nor was it addressing—the matter of the Prosecutor's right to conduct post-confirmation investigations. Rather, the Appeals Chamber uttered the *obiter* in a collateral reaction—not an inexorable answer—to an argument made by the Prosecutor on a different subject. The Prosecutor's argument on that occasion was this: since the Pre-Trial Chamber would not have seen all the Prosecution evidence during the confirmation process, the Pre-Trial Chamber should not decline to confirm charges as a function of assuming the discretion to assess credibility and weight of the prosecution evidence presented at the confirmation hearing such as would result in a decision declining to confirm charges. It is in that context—not in the context of the Prosecutor's right to conduct post-confirmation investigations—that the Appeals Chamber uttered the *obiter* in *Mbarushimana* that my colleagues now embrace with fervour as the controlling law on the permissibility of post-confirmation investigations. But that *obiter* was not inevitable even for the argument that provoked it. For, the Appeals Chamber could have

[78] *Prosecutor v Mbarushimana*, *supra*, para 44.

very clearly avoided it upon the alternative reasoning that the Prosecution was always free to offer the most compelling evidence that it had for purposes of confirmation or failing that to seek confirmation of charges afresh (as the Appeals Chamber actually reminded the Prosecution) with all the evidence that it has but did not present or that it obtained upon further investigation.

89. Actually, a closer look at the *obiter* in *Mbarushimana* will show that it may not readily be seen as saying more than an earlier *obiter* in *Lubanga* that the Appeals Chamber was reiterating in the main text and footnote 89 of the *Mbarushimana* judgment. And that earlier *obiter* in *Lubanga* was this: '*ideally*, it would be *desirable* for the investigation to be complete by the time of the confirmation hearing.'[79] [Emphasis added.] So, what was effectively expressed in the *obiter* in *Mbarushimana* is no more than a reiteration of the continuing *desirability* of that *ideal* situation. That *desirability* and the *ideal* that it sponsors do not, of course, easily attract variant opinion. The difficulty arises mainly when such desirability of the ideal is sought now to be converted—through the backdoor—into a hard norm that is clearly aimed at limiting prosecutorial investigations conducted after confirmation of the indictment: a limitation that was already clearly considered and clearly rejected by the Appeals Chamber, as will be seen next.

90. Indeed, the limitation that my colleagues seek to foster is not easily achieved as a matter of law. It has been specifically considered and rejected—by the Appeals Chamber. This is seen in the pointed *ratio decidendi* of the Appeals Chamber in the *Lubanga* case. There, an appeal had been engaged against the following specific ruling of the Pre-Trial Chamber, saying: 'the investigation in the current case must be brought to an end by the time the confirmation hearing starts, barring exceptional circumstances that might justify later isolated acts of investigation.'[80] In a straightforward reversal of that ruling, the Appeals Chamber held as follows: 'the Pre-Trial Chamber erred in finding that the Prosecutor's investigation in respect of Mr Lubanga Dyilo must be brought to an end before the confirmation hearing, barring exceptional circumstances that might justify later isolated acts of investigation.'[81] To be clear, the Appeals Chamber held that the Pre-Trial Chamber's ruling was improper: whether as regards conduct of post-confirmation investigations outside

[79] *Ibid*, footnote 89 referring to *Prosecutor v Lubanga (Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence")* dated 13 October 2006 [Appeals Chamber], para 54.
[80] *Prosecutor v Lubanga (Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 (2) and (4) of the Rules of Procedure and Evidence)* dated 19 May 2006 [Pre-Trial Chamber I], para 39.
[81] *Prosecutor v Lubanga (Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence"), supra*, para 49.

the frame-work of the charges in the particular case under consideration, or as regards post-confirmation investigations relating to the prosecution of the charges in that case.[82] As regards the latter in particular, the Appeals Chamber observed as follows: 'The duty to establish the truth is not limited to the time before the confirmation hearing. Therefore, the Prosecutor must be allowed to continue his investigation beyond the confirmation hearing, if this is necessary in order to establish the truth. This is confirmed by article 61(9) of the Statute, which stipulates inter alia that the charges may be amended before the trial has begun. As the Prosecutor rightly pointed out, this indicates that the investigation does not have to stop before the confirmation hearing.'[83] Such a clear statement in a *ratio decidendi* of the Appeals Chamber is not readily overridden by the mere fortuity of a non-essential *obiter* in *Mbarushimana* addressing a question quite different in orientation.

91. To be sure, the view that the *obiter dictum* in *Mbarushimana* signals a change in the jurisprudence in a manner that reverses the *ratio decidendi* in *Lubanga* is made more implausible by the persuasive authority of the jurisprudence in international criminal law regarding the expectation that an Appeals Chamber will follow its previous judgments, barring exceptional circumstances clearly articulated in ample reasoning. In *Prosecutor v Aleksovski*, the ICTY Appeals Chamber held that it should only 'depart from a previous decision after the most careful consideration has been given to it, both as to the law, including the authorities cited, and the facts.'[84] In coming to that conclusion, the ICTY Appeals Chamber recognised that 'the principles which underpin the general trend in both the common law and civil law systems, whereby the highest courts, whether as a matter of doctrine or of practice, will normally follow their previous decisions and will only depart from them in exceptional circumstances, are the need for consistency, certainty and predictability.'[85] Clearly, the circumstances and terse content of the discussion implicated in the *obiter* in *Mbarushimana*—certainly its lack of any advertence to the *ratio decidendi* in *Lubanga*—reveal nothing at all about 'the most careful consideration' given to the reversal of the clear *stare decisis* of the Appeals Chamber in *Lubanga* declining the idea of limitation of the Prosecutor's right to conduct post-confirmation investigations.

92. In the end, the Appeals Chamber's *ratio decidendi* in *Lubanga* remains the controlling law—and sensibly so. According to an epistemological observation from Stanley Fish: 'Technical knowledge, divorced from what it is supposed to be knowledge of, yields only the illusion of understanding.'[86] Although not made in the specific context of Professor Fish's

[82] *Ibid*, paras 50—52.
[83] *Ibid*, para 52.
[84] *Prosecutor v Aleksovski (Judgment)* dated 24 March 2000 [ICTY Appeals Chamber] para 109. See also *Prosecutor v Perišić (Judgment)* dated 28 February 2013 [ICTY Appeals Chamber] para 34.
[85] *Aleksovski*, para 97.
[86] Stanley Fish, *How to Write a Sentence and How to Read One* [New York: Harper, 2011] p 19.

legal profession, the thought has parallel value to the work of judges and particular relevance to the present discourse. For, it may be readily observed that technical knowledge of discrete legal precepts, divorced in their application from the real or the human purposes of the law, yields merely the illusion of justice. The judicial enterprise is chiefly the search for the truth: in this Court it is the search for the truth about 'unimaginable atrocities that deeply shock the conscience of humanity.'[87] The requirements of substantive justice do not then easily permit a Trial Chamber of this Court to reject the fruits of an investigation in the judicial *search for the truth*, mainly because of when the investigation was conducted.

93. Indeed, the wisdom of the *ratio decidendi* in *Lubanga* that sensibly trains focus primarily on the importance of the search for the truth is amply borne out by the further consideration that it will presumably be a development to be welcomed by the Defence if the post-confirmation investigations produced exculpatory evidence that induces the Prosecutor to withdraw charges against an accused. But it is not easy to accept a rationalisation that would encourage post-confirmation investigations for purposes of exculpatory evidence, but discourage it for purposes of incriminatory evidence in a manner that is not clearly connected to any prejudice to the accused that the grant of more time could not cure.

94. The right remedy then will seldom be to forbid the use of the further evidence resulting from the impugned investigation, where no clear prejudice to the Defence has been shown such as is beyond reasonable cure by the grant of more time. It must specifically be stressed that the correct remedy is hardly dictated properly by mere feelings of judicial displeasure, with little or no *bona fide* connection to proven prejudice to the Defence. Indeed, as a matter of substantive justice, judicial displeasure that is allowed to run with speed in circumstances such as those now in consideration runs the undesirable risk of just as quickly outpacing both the actual evidence of prejudice to the accused; and, ironically, possible forensic advantages for him or her, were the case law to discourage the Prosecutor from conducting post-confirmation investigations that may well result in exculpatory evidence. True justice then quickly, too, becomes the real casualty. The table below may illustrate the point.

	PERIOD 1	PERIOD 2	PERIOD 3	PERIOD 4	PERIOD 5
CASE A	Investigation	DCC filed	Charges confirmed	Investigation continued	Trial starts
CASE B	Investigation	Investigation continued	DCC filed	Charges confirmed	Trial starts

[87] See the preamble to the Rome Statute.

95. The illustration above depicts the progression of prosecutorial and judicial activities in two cases, prior to commencement of trial. The investigations in both cases begin in the same time period (Period 1). Both trials also start in virtual tandem, in Period 5. But, the difference in the progression of both cases occurs between Period 1 and Period 5. For Case A (the impugned case), the Document Containing the Charges is filed immediately after Period 1—that is, in Period 2, when the Prosecution feels it has received sufficient evidence to obtain confirmation. Hence, the charges are confirmed in Period 3. But the Prosecution feels a need for further and better evidence, and so continues investigation during Period 4, after confirmation of charges.

96. In contrast, in Case B (the model that my colleagues may consider the 'ideal' case), the Prosecution does not file the DCC during Period 2, though there is sufficient evidence to confirm the charges. Instead, the Prosecution uses Period 2 to continue investigating for further and better evidence. Having obtained such further and better evidence, it finally files the DCC in Period 3. Charges are confirmed in Period 4. And the trial is promptly scheduled to start in Period 5—the same period that Case A is scheduled to start.

97. Without a doubt, the picture shows Case B as much the tidier case in its progression, purely for purposes of judicial case management.[88] And it would be inconceivable to contemplate suppressing the product of 'Investigation continued' in Period 2 in Case B. But that picture, as it were, presents no compelling view of a substantive reason that the product of 'Investigation continued' should be considered for suppression in Case A, merely because it was obtained in Period 4, in violation of judicial sensibilities as to a tidier manner of conducting a prosecution.

98. Quite naturally, objection may be registered against the foregoing argument: to the effect that the reason for desiring to suppress the product of 'Investigation continued' in Case A may not be 'merely' because the further evidence was obtained in Period 4 in an untidy way, rather than in Period 2. Still, the objection will not diminish the force of the argument against suppression of the evidence, for the following reasons. First, unless a clear demonstration of prejudice is shown, nothing compels a change in the view that the suppression results 'merely' from the fact that the further evidence was obtained in Period 4, rather than in Period 2 as the period considered preferable to the judges for purposes of further investigation. And, second, even when clear prejudice to the Defence is established, the suppression may still remain unjustifiable, unless a compelling reason is shown that the trial commencement date must remain immovable in Period 5, rather than suitably adjusted to

[88] But the model of Case A may have other salutary values that are not as readily achieved in a Case B scenario, such as the need for an earlier judicial intervention in an effort to arrest deteriorating peace and security.

a later period in order to provide the Defence the further time they may reasonably need as an incident of the Prosecution 'Investigation continued' in Period 4.

99. It is further to be considered, as a matter of policy and practicality, that a rule of limitation that engages the question whether the post-confirmation investigations in particular circumstances had resulted from what my esteemed colleagues describe as lack of 'proper' or 'thorough' or 'full' investigation is not easily implemented. Contrary to public policy, it will merely invite needless interlocutory litigation, especially as to what amounts to 'proper' or 'thorough' or 'full' investigation. The determination of the question will necessarily require a judicial inquiry as to the proper standards of prosecutorial investigations; and, whether those standards were complied with in the complex and varied circumstances of particular cases. The question is necessarily provoked as to what should inform the judicial appreciation of the correct standards. Will it be judges' own proven experience as expert investigators of serious crimes? Or will it be the views of opposing parties? Or will it be the views of expert witnesses specially called to answer the question? An expert witness will necessarily have to review precisely all that the Prosecution did in their investigation and will write an expert witness's report to be considered by the Chamber. Apart from the complexity alone of such an inquiry, and the question whether it enhances or hinders efficiency in the judicial process, there is also the matter concerning whether the inquiry can even be conducted properly amidst questions that will inevitably arise as regards protection of the legal professional privilege that may prevent such an inquiry from being conducted meaningfully. This is all to say, the 'new' legal regime that my colleagues might like to see in place is easier to write on paper in conclusory judicial dicta than to implement in practice.

100. In the final analysis, it is readily accepted that prejudice to the accused may be occasioned where an overwhelming tranche of the fruits of late prosecutorial investigation is dumped upon the Defence. The prejudice will speak for itself if there is inadequate time—reasonably considered—for the Defence to take the new information into the stride of its case. And the limitation on the Prosecutor's ability to use the new material is self-evidently engaged, if provision of more time to the Defence is neither reasonably possible nor in the interest of justice. Beyond those constraints, one sees little justification in limiting the prosecutorial right to post-confirmation investigations as a matter of general principle that would permit such investigations only in 'exceptional circumstances'.

CONCLUSION

101. In conclusion, the complaints of the Defence are wholly understandable. They are not brushed aside as merely fanciful. The right recourse, however, is not to refer the confirmation decision back to the Pre-Trial Chamber or to invalidate it or to stay the proceedings. In

particular, the complaints do not implicate miscarriage of justice or impossibility of a fair trial, given the remedial ability of the trial process to deal with such matters within its own remit. In this connection, we must heed the counsel of the Illinois Supreme Court in their following observation: 'The most important protection for an accused in [the adversarial] system of law is a fair trial itself,' and not protracted litigation about the confirmation proceedings. It is a counsel of efficiency and good policy that is not prejudicial to an accused person in any real sense of the idea of prejudice.

102. I believe that a reprimand to the Prosecution is warranted and sufficient for the disclosure failings revealed. But, the application and related requests are rightly dismissed in all other respects.

Dated 2 May 2013, at The Hague

Chile Eboe-Osuji
Judge