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Date: **28 August 2011**

PRE-TRIAL CHAMBER II

Before: **Judge Ekaterina Trendafilova, Single Judge**

SITUATION IN KENYA

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

PUBLIC
URGENT

Corrigendum to "Defence Preliminary Motion Alleging Defects in the Document Containing the Charges (DCC) and List of Evidence (LoE) and Request that the OTP be ordered to re-file an Amended DCC & LoE"

Sources: **Defence Team of Ambassador Francis Kirimi Muthaura**

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

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I. Introduction

1. Pursuant to Article 67(1)(a) and (b) of the Rome Statute ('Statute"), Rule 121(3) of the Rules of Procedure and Evidence ("Rules") and Regulation 52 of the Regulations of the Court ("Regulations"), the Defence for Ambassador Muthaura ("Defence") hereby submits this motion alleging defects in the form of the Document Containing the Charges ("DCC") and accompanying List of Evidence ("LoE") filed by the Office of the Prosecutor (OTP) on 19 August 2011 in this case.[1] More specifically, the Defence challenge the DCC as defective in seven material respects namely:-

   (i) The impermissible charging of rape in Counts 5 and 6 in relation to Naivasha in breach of the Chamber's Decision Issuing Summons[2] and Article 58(6) of the Statute;

   (ii) The impermissible charging of other forms of sexual violence in breach of the Chamber's Decision Issuing Summons and Article 58(6) of the Statute;

   (iii) The impermissible expansion of the temporal scope of all counts from 24th to 31st January 2008 as was approved by the Chamber to 30th December 2007 to 29th January 2008 without the express approval of the Chamber;

   (iv) The impermissible expansion of the locations covered in all counts in breach of the Decision Issuing Summons and without the express approval of the Chamber;

   (v) The imprecise and vague pleading of alleged preparatory meetings without specifically identifying details such as dates, specific locations, times and the identity of the participants in these preparatory meetings;

   (vi) The imprecise pleading of a common plan without particulars as to the identity of the members and participants in the common plan;

[1] ICC-01/09-02/11-257-AnnexA
[2] ICC-01/09-02/11-01, para. 26

(vii) The imprecise pleading of the identity of the victims in a generalised manner as "perceived ODM supporters".

II. Applicable Law

2. Article 67(1) of the Statute provide that:

In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to fair hearing conducted impartially, and to the following minimum guarantees, in full equality;

(a) To be informed promptly and in detail of the nature, cause, and content of the charge, in a language which the accused fully understands and speaks;"

(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence.

3. Rule 121(3) provides that: *"The Prosecutor shall provide to the Pre-Trial Chamber and the person, no later than 30 days before the date of the confirmation hearing, a detailed description of the charges together with a list of evidence which he or she intends to present at the hearing."*

4. Regulation 52 (b) provides that the DCC shall include: *"A statement of the facts, including the time and place of the alleged crimes, which provides a sufficient legal and factual basis to bring the person or persons to trial, including relevant facts for the exercise of jurisdiction by the Court."*

5. The purpose of the DCC has been explained in several previous cases before the Court. For example in the *Lubanga* case the Pre-Trial Chamber held that:

"[…] the OTP shall make available to the Defence and file in the record of the case against Thomas Lubanga Dyilo, pursuant to rule 121 (3) of the Rules, a

comprehensive document ("the OTP's Charging Document and List of Evidence") containing a detailed description of the changes together with the list of evidence which the OTP intends to present at the hearing. The OTP shall ensure that it is organised so that:

(i) each item of evidence is linked to the factual statement it intends to prove; and

(ii) each factual statement is linked to a specific element of the crime, a mode of liability or both;"[3]

6. The Appeals Chamber of the ICC has further elaborated on the core function and purpose of the DCC when it found that: *"[…] in the confirmation process, the facts as defined above [factual allegations which support each of the legal elements of the crimes charged] must be identified with sufficient clarity and detail meeting the standard in Article 67(1)(a) of the Statute."*[4]

7. The jurisprudence of the *ad-hoc* tribunals also recognises the core function of charging documents to provide proper and sufficient notice so as to enable the Defendant to prepare for trial and respond effectively to the allegations raised against an Accused.[5] For this reason, prosecutors at the *ad-hoc* tribunals have been required by Chambers to plead material facts with the "greatest precision" possible when preparing charging documents.[6] The Defence submit that the jurisprudence of the *ad-hoc* Tribunals, in this respect, is consistent with the rationale identified by the Chambers of the ICC in the preceding paragraphs. The principles identified above should, it is submitted, inform consideration of the present application. In the paragraphs below, the

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[3] DECISION ON THE POSTPONEMENT OF THE CONFIRMATION HEARING AND THE ADJUSTMENT OF THE TIMETABLE SET IN THE DECISION ON THE FINAL SYSTEM OF DISCLOSURE", 24 May 2006 ICC-01/04-01/06-126

[4] *Prosecutor v. Lubanga*, ICC-01/04-01/06-2205 OA15 OA16, 8 December 2009, footnote 163 (to para. 90), Judgment on Regulation 55 Appeal.

[5] *Prosecutor v. Gotovina et al*, ICTY Case No. IT-06-90-PT, Decision on Ante Gotovina's Preliminary Motion Alleging Defects in the form of the Joinder Indictments, (19 March 2007) at paras. 7 & 8.

[6] Although the cases cited in this footnote relate to an Indictment, the Defence submits that the same principle applies. *Prosecutor v. Gotovina et al*, ICTY Case No. IT-06-90-PT, Decision on Ante Gotovina's Preliminary Motion Alleging Defects in the form of the Joinder Indictments, (19 March 2007) at paras. 7 & 8. *See also; Prosecutor v. Kvocka et al*, ICTY Case No. IT-38-90-PT, Decision on Defence Preliminary Motions on the Form of the Indictment (12 April 1999) at paras. 17 &18.

Defence will detail certain material respects in which the DCC and LoE are deficient to the extent that prejudice is occasioned to the Defence justifying the relief requested, namely the refilling of the DCC and LoE with necessary changes and the provision of the requested information.

III. Impermissible Charging of Rape in Counts 5 and 6 in relation to Naivasha

8. In the Decision Issuing Summons ("Summons Decision"), the Chamber found that: "there are no reasonable grounds to believe that rape as an act constituting crimes was committed in Naivasha."[7]

9. Notwithstanding this clear finding, the OTP has included allegations of rape in Naviasha in the DCC publicly filed on 19 August 2011 in paragraph 74 and counts 5 and 6. The Defence submit that this is wholly improper and its retention, in the face of the finding of the Chamber, significantly prejudices the Defence. Accordingly, the Defence request that the Single Judge order the OTP to expunge the allegation of rape for Naivasha contained in paragraph 74 and Counts 5 and 6 of the DCC and that the OTP be further ordered to file a new DCC reflecting the summons actually issued by the Chamber.[8]

IV. Impermissible Charging of Other Forms of Sexual Violence in Counts 5 and 6

10. In the Summons Decision, the Chamber rejected the OTP's charge of "other forms of sexual violence" and instead re-characterised the underlying conduct alleged as "other inhumane acts."[9] Notwithstanding this finding, the OTP has continued to characterise the alleged conduct as amounting to "other forms of sexual violence" in counts 5 and 6 of the DCC. This is in clear disregard of the Chamber's decision issuing the summons in this case. Accordingly, the Defence request that the Single Judge order the OTP to

[7] ICC-01/09-02/11-01, para. 26, last sentence.
[8] *Ibid.*, para. 27.
[9] ICC-01/09-02/11-01, para. 27.

expunge reference to "other forms of sexual violence" from the charges and that the OTP be further ordered to file a new DCC reflecting the summons actually issued by the Pre-Trial Chamber.

V. Impermissible Expansion of the Temporal Scope of all Counts Alleged in the DCC

11. In the Summons Decision, the Chamber determined that the temporal scope for crimes in respect of which summons to appear was issued was from "on or about 24 January 2008 until 31 January 2008."[10] Despite this finding, the DCC purports to expand the temporal period for all crimes alleged in Counts 1 to 10 of the DCC to "on or about 30 December 2007 to 29 February 2008."[11]

12. The expanded temporal scope is unwarranted and occasions clear prejudice to the Defence. The Defence has an obvious interest in the counts reflecting the summons issued and the wider temporal scope included in the DCC militates against the requirements of certainty[12] and fair notice[13] and is also contrary to the Article 67 rights guaranteed to suspects before the court. Accordingly, the Defence request that the Single Judge order the OTP to re file its DCC amending the counts contained therein so as to reflect the summons actually issued by the Pre-Trial Chamber.

VI. Impermissible Expansion of the Locations Included in All Counts Alleged in the DCC

13. The summons issued by the Pre-Trial Chamber was confined to crimes allegedly committed in Nakuru and Naivasha.[14] Despite this, the OTP has drafted the counts in the DCC in a manner that significantly and, it must be

[10] ICC-01/09-02/11-01, para. 56.
[11] ICC-01/09-02/11-257-AnxA, counts 1 to 10.
[12] *Prosecutor v. Lubanga*, ICC-01/04-01/06-2205 OA15 OA16, 8 December 2009, footnote 163 (to para. 90), Judgment on Regulation 55 Appeal.
[13] *Prosecutor v. Martic*, No. IT-95-11-PT, Decision on Preliminary Motion Against the Amended Indictment (2 June 2003) at para. 31.
[14] ICC-01/09-02/11-01, para. 56 and see also; paras. 25 to 28.

said, wholly impermissibly, expands the summons issued. Left unchecked, this will severely prejudice the Defence.

14. The counts included in the DCC employ the same formulation throughout, namely, that "in or around locations **including** Nakuru Town (Nakuru District, Rift Valley Province) and Naivasha Town (Naivasha District, Rift Valley Province)" crimes were allegedly committed.[15] This formulation suffers from numerous defects. Not only is it unauthorised, it is also imprecise and leads to uncertainty. The OTP's formulation in the DCC would allow it to include evidence in relation to any location in Kenya, including Nakuru and Naivasha. Whereas, the crimes alleged (which the Defence intend to challenge at the confirmation hearing) are **confined** to only Nakuru and Naivasha and not other locations in Kenya. Accordingly, the Defence request that the Single Judge order the OTP to re-file its DCC amending the counts contained therein so as to remove uncertainty and vagueness and to reflect the summons actually issued by the Chamber.

VII. Imprecise and vague pleading of alleged preparatory meetings

15. Throughout the DCC, the OTP allege that the common plan was forged in a series of preparatory meetings.[16] As noted by the Appeals Chamber in *Lubanga*,[17] the Defence has a fundamental right to be informed of the exact dates, times and places of the alleged preparatory meetings. Such notice is required in order that the Defence can prepare for the confirmation hearing and in order that the Defence would be in a position to respond competently and efficiently to each allegation being made by the OTP. The importance of this issue is made apparent when one turns to the issue of *alibi*. It is simply not possible for the Defence to raise a defence of *alibi* without precise

[15] *Ibid*. (emphasis added)
[16] DCC, paras 20, 21, 44, 46, 50, 51, 54, 56, 78, 82, 83, 85, 89, 92.
[17] *Prosecutor v. Lubanga*, ICC-01/04-01/06-2205 OA15 OA16, 8 December 2009, footnote 163 (to para. 90), Judgment on Regulation 55 Appeal.

knowledge of the dates, exact locations and times of the alleged preparatory meetings. These allegations are central to the OTP's case and the Defence is entitled to proper details in order to challenge and rebut the same. The Defence highlights below, the various references to the alleged preparatory meetings referred to in the DCC and provides appropriate comment:

- In paragraph 20 of the DCC, the OTP allege that: "*KENYATTA […] facilitated a series of meetings from November 2007 involving MUTHAURA, other senior PNU Government officials, politicians […].*" The OTP fail to specify the dates, times, exact location as well as the other participants in these series of meetings. This allegation is vague and imprecise and does not enable the Defence to plead for instance an *alibi* or such other defences, or to otherwise effectively challenge the factual allegations and charges against Ambassador Muthaura.

- Similar observations are made in relation to "meetings" alleged in paras. 21, 44 and 46, of the DCC.

- In para. 50 of the DCC entitled "Preparatory Meetings," the OTP allege that: "*From on or about 30 December 2007 to the end of January 2008, MUTHAURA, KENYATTA and other members of the common plan participated in a series of meetings, including preparatory meetings […]. The key preparatory meetings include those held in Nairobi on or about 30 December 2007, and in early, mid and late January 2008. There were also preparatory meetings in Central Province on or about 30 December 2007, in Nakuru and in early to mid-January 2008 and in Naivasha in late January 2008.*" No details are provided as to dates, times, locations within these large cities and Provinces as well as the identification of the other participants by group or by category. Clearly, the Defence is prejudiced and cannot respond efficiently to such broad allegations.

- Paras. 51, 54, 56, 78, 82, 83, 85, 89 and 92 suffer from the same defects noted above. The mere mention of the existence of meetings without further and better particulars prejudices the Defence to the extent that the Defence is not able to accurately identify the dates, times and exact locations where such meetings were held. As such, the Defence would not be in a position to respond effectively to these broad allegations.

16. For these reasons, the Defence respectfully requests that the Single Judge order the OTP to re-file an Amended DCC setting out precisely the particulars of such meetings, including dates, times, specific locations as well as the participants in order to enable the Defence to duly submit its response to the factual allegations and the charges.

VII. Imprecise Pleading of the Common Plan

(a) Lack of Specificity of Participants

17. The identity of participants in these meetings are material facts that must be pleaded at least by category or group.[18] The OTP has alleged the existence of a common plan in this case.[19] Whilst it has sought to develop this concept, it has failed to properly specify who the members of the alleged common plan were. In attempting to cure this deficiency the OTP has instead compounded the issue by stating the membership of the common plan to be: "*The Principal Perpetrators, together with ALI, prominent PNU supporters and Mungiki leaders.*"[20]

18. This broad categorisation by the OTP is unacceptable because it fails to identify with any sufficient degree of precision, the identity of the members of the common plan. As formulated, the references to Mungiki leaders and prominent PNU Supporters are wholly insufficient to put the defence on proper notice as to who exactly are members of the alleged common plan. This situation is further exacerbated by the OTP's own admission in its DCC that the Mungiki membership runs into 500,000 persons[21] (other OTP evidence states that the Mungiki members are between 1.2 to 2 million individuals) and prominent PNU Supporters could include any prominent Kenyan supporting the PNU Party. The OTP fails to define what constitutes

[18] *Prosecutor v.Pavkovic et al, No.IT-30-70-PT, Decision on Vladimir Lazarevic'sPreliminary Motion on Form of Indictment (8 July 2005) at para.7; Prosecutor v. Krnojelac, No.IT-97-25-PT, Decision on Form of Second Amended Indictment ("Second Krnojelac Decision"), (11 May 2000) at para.16.*
[19] ICC-01/09-02/11-257-AnxA, para.77
[20] Ibid, para. 78
[21] ICC-01/09-02/11-257-AnxA, para. 42

"prominent" with regards to these individuals to qualify them as such. Without the requisite degree of specificity, the Defence is severely prejudiced and obstructed from responding to these broad allegations by reason of the OTP's failure to provide specific details. Accordingly, the Defence requests that the Single Judge order the OTP to re-file its DCC to cure this deficiency.

(b) Lack of specificity on the identity of the alleged Victims

19. The DCC alleges that the victims were "perceived ODM supporters",[22] without more. The Chamber cured this defect which beset the OTP's Article 58 Application by noting in paragraph 17 of its Decision that individuals who were perceived as being ODM supports were those who "mostly belong[ed] to [the] Luo, Luhya and Kalenjin ethnic groups in Nakuru and Naivasha". The OTP's failure to include this description of victims in its DCC severely prejudices the defence as the category is left vague and imprecise.

20. The jurisprudence clearly requires at least this minimum level of specificity in indentifying victims, information which is core to the factual allegations supporting the crimes charged.[23] As noted by the ICTY Appeals Chamber in the *Gotovina* case, *"since the identity of the victim is information that is valuable to the preparation of the defence case, if the Prosecution is in a position to name the victims, it should do so."*[24]

21. Accordingly the Defence requests the Single Judge to order the OTP to amend its DCC in this respect.

IX. The OTP's List of Evidence (LoE) does not serve its Statutory Purpose

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[22] For instance in paragraphs 60, 62, 66, 68 and 70.

[23] *Prosecutor v. Lubanga*, ICC-01/04-01/06-2205 OA15 OA16, 8 December 2009, footnote 163 (to para. 90), Judgment on Regulation 55 Appeal.

[24] *Prosecutor v. Gotovina et al*, Case No. IT-06-90-AR-73.3, Decision on Joint Defence Interlocutory Appeal Against Trial Chamber's Decision on Joint Defence Motion to Strike the Prosecution's Further Clarification of identity of Victims, 26 January 2009, para. 18.

22. The OTP's LoE[25] accompanying its DCC does not serve its statutory purpose of facilitating the reading of the DCC.[26] As Chambers of this Court have held:

"In relation to incriminating evidence on which the Prosecutor intends to rely at the confirmation hearing, the Prosecutor shall be ordered to ensure that the detailed description of the charges (Document Containing the Charges) together with the list of the aforementioned evidence (List of Evidence) which he shall provide pursuant to Rule 121(3) of the Rules, are organised in such a manner that: (i) each item of evidence is linked to the factual statement it intends to prove; and (ii) each factual statement is linked to a specific element of crime, a mode of liability or both."[27]

23. The LoE filed in this case does not meet any of the minimum standards stated above. Crucially, the obligation on the OTP to link each item of evidence to the factual statement/allegation it intends to prove has not been adhered to. Simply put, the OTP have failed to do that which they have deemed fit and necessary to do in *all* other cases before the ICC. Furthermore, there is no explanation or justification for the OTP's adoption of different approaches in relation to identical issues in this case. Whilst it is acknowledged that Pre-Trial Chamber decisions do not create binding precedent on other Pre-Trial Chambers, for reasons such as judicial comity and the principle that like cases should be treated alike, prior decisions and practices should not be lightly departed from especially when the consequences of such departure result in severe prejudice to the Defence and are contrary to the trite principles of fair administration of justice as explained above.[28]

X. The OTP's In-depth Analysis Chart does not serve its intended purpose

[25] ICC-01/09-02/11-257-Conf-AnxB
[26] Rule 121(3) of the Rules of Procedure and Evidence
[27] ICC-01/04-01/10-87, para. 13, Pre-Trial Chamber I citing the practice in Abu *Garda* and *Banda and Jerbo*.
[28] See ICC-01/04-01/06-1084, paras. 5 & 6.

24. The manner in which the OTP has prepared its in-depth analysis charts has exacerbated the above-mentioned difficulties encountered by the Defence. The OTP's approach is in stark contrast to the purpose identified for such charts by other Chambers of the Court. In *Bemba*, Trial Chamber III adopted with approval the definition of the in-depth analytical chart when it stated:

> *"Trial Chamber II defined the Table as "[…] being nothing more than a procedural tool to make clear and accessible to the Defence and the Chamber the exact evidentiary basis of the OTP's case" and "[…] a tool to structure the presentation of the evidence and to ensure that the OTP's evidentiary case is easily accessible and comprehensible."*[29]

25. The in-depth analysis charts accompanying the OTP's DCC fail to meet the minimum standards enunciated by Trial Chambers II and III. To give one of numerous examples, in the portion of the analysis chart contained in Annex C5, at page 263 last row, the source document is listed as "KEN-OTP-0051-1045" and the following language excerpted: "I was asked to read my initial statement at KEN-OTP-0043-0017 and to clarify […]." In order for the Defence to identify the witness, the Defence had to search by ERN number in the LoE (which has 107 items listed in the "Witness Statements" section alone), where it can then ascertain that the statement belongs to the LoE category "Witness materials # 4", and specifically to an identified witness. It is only then that the Defence can locate the initial statement of the witness containing the specific page citation the witness quotes. This time consuming process could have been avoided with the assignment – and use in the DCC and LoE – of witness identification numbers/pseudonyms. The Defence request that the same is ordered.

XI. The timing and manner of the OTP's Disclosure do not assist the Defence in its preparation

[29] ICC-01/05-01/08-682, para. 23

26. Timely and adequate disclosure is essential to providing the Defence with sufficient notice of the evidentiary basis of the OTP's case. Time limits on disclosure should be interpreted in a manner that promotes the rights of the Defence in accordance with Article 21(3) of the Statute. In this regard, Pre-Trial Chamber III explained in *Bemba* that:

> *"The relevant provisions on disclosure constitute a vital mechanism in the Court's criminal procedure for guaranteeing the fundamental right of every person to a fair and expeditious trial. They must be interpreted in a manner with, inter alia; the right of the person to be informed promptly and in detail of the nature, cause and content of the charges and with his or her right to have adequate time and facilities for the preparation of the defence."*[30]

27. The manner and timing of the OTP's disclosure in this case fails to provide the Defence with adequate notice of the evidentiary basis of the OTP's case in time for the upcoming confirmation hearing. The latest batch of disclosed incriminatory materials amounting to more than 6,000 pages was served on the Defence on 19 August 2011 together with the DCC, LoE and the in-depth analysis chart.[31] The timing of this last tranche of disclosures comprising transcripts of witness interviews, summaries and statements to coincide with the deadline of the filing of the DCC does not allow the orderly and efficient conduct of proceedings and risks rendering the confirmation process meaningless and ineffective.

28. The Defence raise another issue. The OTP have disclosed a very significant amount of information including 72 individual items constituting witness statements, summaries or transcripts at the last possible moment – 19th August 2011. It is regrettable that the requirements of the Statute and Rules

[30] ICC-01/05-01/08-55, para. 20
[31] ICC-01/09-02/11-259-Conf

which enjoin disclosure of evidence as soon as possible and in a manner to allow effective defence preparation has not been heeded by the OTP.[32]

29. The issue has been compounded because a great number of transcripts have been disclosed. These are also heavily redacted rendering it virtually incomprehensible. Whilst the Defence has not completed its review of these transcripts, but is wading through the same as best it can, untimely disclosure of the same, when combined with the type of evidence disclosed and its form causes significant prejudice. In the *Katanga* case, the Trial Chamber held:

> *"**Para. 16**: However, regarding the transcripts of the two interviews with W-219, the Chamber is concerned about the <u>sheer volume</u> of the information, which <u>exceeds one thousand pages</u>. Even though the OTP asserts that the questions dealt with in these interviews are not unfamiliar to the Defence, the Chamber is of the view that it would be unfair to impose upon the Defence the <u>burden of having to analyse such a great mass of new information</u> **two months** <u>before the start of the trial</u>. Indeed, the Chamber considers that it is an arduous and time-consuming process to identify which parts of the transcripts contain the most pertinent information.*
>
> ***Para. 17**: "The Chamber therefore considers that it is <u>preferable for the OTP to produce a signed witness statement</u>, containing a <u>synthesis of what the witness declared during the interview</u>, rather than providing the transcripts of the interview that contain large amounts of unessential information. As the witness will be called to testify in person, it will be the testimony during trial that will be in evidence. It should therefore be sufficient for the Defence to have a signed witness statement in order to prepare for the examination of W-219. However, if the*

[32] See Article 67(1)(b); Rule 121(3). At the Status Conference held on 18 April 2011, Lead Counsel put the OTP on notice, that the 30 day final deadline "is not a licence for the Prosecution to ride rough shod over the Defence Article 67 rights," and noted "the proclivity so far in the various cases before this Court [...] for the Prosecution to take a very restrictive view; namely, that they are entitled [...] to leave disclosure until the last moment, 30 days before the hearing, very often the very most important, the very most meaningful evidence [...]" (ICC-01/09-02/11-T-2-ENG at pages 12 to 14). In response, the Single Judge reiterated that the Chamber's first decision on the disclosure process "made a special point that 30 days <u>does not</u> mean that 30 days before the commencement of the confirmation hearing the Prosecutor should come with a DCC and a list of evidence and with the disclosure of the evidence that it relies upon, it intends to rely upon during the confirmation hearing" (ICC-01/09-02/11-T-2-ENG, p. 14, lines 7-13).

Defence insists on receiving the actual transcripts, it may direct a request to the Chamber to that effect."[33]

30. The Defence submit that the same reasoning applies in the present case. Indeed, the present case is *a fortiori* the *Katanga* decision detailed above. In the present case, the Defence have less than ten days remaining before it has to submit the evidence it seeks to rely upon at the Confirmation Hearing and less than a month before the hearing itself. It has half the time and the same number of pages of transcripts to review and analyse.[34] The Defence submit that following these transcripts is made all the more difficult by the heavy use of redactions. In these circumstances, and following the reasoning of the *Katanga* Chamber, it is submitted that the OTP should be ordered to prepare witness statements and to disclose the same without delay to the Defence.

31. To the best of the Defence's knowledge and pursuant to its ongoing review of the newly disclosed material as well as the accompanying metadata fields, during the disclosure process the OTP disclosed witness identification numbers/pseudonyms for only two witnesses: KEN-WWWW-0013 and KEN-WWWW-0014. For the remainder of the witnesses upon whose statements and summaries the OTP intends to rely on, no specific witness identification number/pseudonym were communicated to the Defence during the disclosure process. The Defence understands that the OTP assigns witness identification numbers/pseudonyms to all witnesses as distinct from the ERNs assigned to the statements or summaries of each witness, which to the best of the Defence's knowledge has not been undertaken in the normal fashion in this case. For example, in the *Abu Garda, Banda and Jerbo* and *Bemba*

[33] Decision on the disclosure of evidentiary material relating to Witness 219, 13 August 2009, ICC-01/04-01/07-1364 (emphasis added).
[34] To the best of the Defence's assessment, the **last incriminatory package of disclosure**, received on <u>19 August</u>, is comprised as follows: The total page count (Incrim packages 11, 12, 13) is **<u>1,401</u> pages** (**<u>1,332</u>** pages excluding cover pages to the transcripts in Pre-Trial Incrim 11). In particular, Pre-Trial Incrim 11 comprises **1,223** pages of transcripts. The **LoE**, also submitted on 19 August, comprises **<u>11</u> pages**. The accompanying analysis chart ("Annex C" to the submission of the DCC and LOE) comprises **<u>6,637</u> pages** total, broken down as follows: <u>C1</u>: 1190 pages; <u>C2</u>: 1317 pages; <u>C3</u>: 836 pages; <u>C4</u>: 1792 pages; <u>C5</u>: 1502 pages.

cases, the OTP assigned witness identification codes (such as DAR-OTP-WWW-0446 and CAR-OTP-WWWW-0065) to all witnesses it relied on for the confirmation hearing on an *ongoing basis*, and communicated such to the Defence *well in advance* of the filing of the DCC and LoE.[35]

32. In light of the difficulty encountered, the Defence wrote an e-mail to the OTP requesting clarification on this issue on 22 August 2011. The OTP's emailed response of 23 August explained that the first section of the LoE, pertaining to OTP witnesses, was divided into 12 "Witness materials" categories, and that the items under each category are "provided by the same witness". No such explanation was provided in the OTP's cover filing of 19 August[36] or in the LoE itself. Hence, it was only on 23 August that the Defence was able to identify the number of OTP witnesses and the materials pertaining to each.

33. Even if the label "Witness materials X" can properly be considered a pseudonym, the OTP's assignment and communication of such to the Defence only in the LoE is far too late to be of proper use to the Defence in its preparations. Had the OTP followed its best practices in the cases mentioned in paragraph 31 above, and provided these pseudonyms *during* the disclosure process, the Defence would have been able to properly organize and analyse disclosed witness materials on an ongoing basis. This is, of course, essential with respect to anonymous witnesses.

34. Further, and as already detailed at paragraph 25 above, the OTP has failed to make use of these purported pseudonyms in the DCC and more than 6,000 pages of analysis chart, forcing the Defence to undertake, for each and every witness-related ERN cited, the time consuming and burdensome process of

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[35] Counsel notes that disclosure materials are filed confidentially and would therefore not disclose in a public filing those confidential disclosure filings without the permission of the Chambers which authorized those summaries. Counsel states this assertion from his knowledge as well as his involvement in those three cases before the Court.
[36] ICC-01/09-02/11-257

searching the LoE to ascertain which witness, and what particular item related to that witness, is being referenced.

35. The Defence's review is ongoing, and it anticipates further difficulties which it shall bring to the Chamber's attention, as and when these difficulties arise, in order to preserve its rights in accordance with Article 67(1) of the Statute.

XV. Request for a Status Conference pursuant to Rule 121(2) (b) of the Rules

36. Given the centrality of these issues to the confirmation hearing and their critical importance to the fairness of the proceedings as a whole, and in light of the real difficulties encountered in relation to the unsatisfactory manner in which disclosure has taken place thus far, the Defence respectfully requests the Single Judge, pursuant to Her authority under Rule 121(2)(b), to convene the Full Chamber for a status conference as soon as practicable, preferably in the week commencing 29 August 2011. The status conference would be aimed at resolving the fundamental difficulties highlighted and to be further highlighted upon conclusion of the Defence's review of the OTP's disclosures. In this regard, the Defence recalls that in the *Banda and Jerbo* case, the Single Judge, His Honour, Judge Cuno Tarfusser, informed the parties at the conclusion of a status conference that:

> *"If there is nothing else, you know that at any time you can come to the Chamber, to the Single Judge, to ask for a status conference, in ex parte or not."*[37]

37. Convening a status conference as requested before the commencement of the confirmation hearing would serve to enhance the orderly and efficient conduct of the proceedings and make sure that difficulties on matters in relation to disclosure are properly resolved in advance of the hearing. It would also allow the Chamber to ensure that confirmation does not devolve

[37] *Prosecutor v. Abdallah Banda and Saleh Jerbo*, Status Conference, 13 July 2010, ICC-02/05-03/09-T-6-ENG, p. 19, lines 15 to 17.

into a merely "cosmetic exercise"[38], something that the Pre-Trial Chamber in *Abu Garda* has demonstrated is certainly not the case. More specifically, convening a status conference now would materially advance and streamline the upcoming confirmation hearing in the following manner:

- Would resolve in advance all preliminary objections relating to disclosures and ensure that disclosure takes place in a satisfactory manner, thus expediting the proceedings;
- Would enable the Chamber to issue necessary orders as may be required to the OTP to fulfil its statutory disclosure obligations;
- Would ensure equality of arms by addressing sufficiently in advance of confirmation Defence concerns in relation to the last tranche of disclosure, constituting more than 1,300 pages, and the DCC, LoE and analysis chart, constituting more than 6,000 pages, all received on 19th August 2011;
- Would enable the Chamber to fully take consider the concerns of the parties before issuing a decision on the conduct of confirmation; and
- Would also afford the Chamber the opportunity of assessing the difficulties encountered by the Defence in its preparations and ensure the preservation of its rights in accordance with Article 67(1) of the Statute.
- In addition, it would ensure that the Chamber is properly appraised of all relevant evidence to be presented by the OTP and to be countered and challenged at the confirmation of charges hearing and not deny the Chamber the opportunity to properly review the more than 6,000 pages of additional OTP submissions in the form of the DCC, LoE and analysis chart, the volume of which in itself requires adequate time for review.

38. For these reasons, the Defence submit that convening a status conference now, before the hearing, serves the purpose of necessity and expediency. It is necessary for the Defence to fully articulate its concerns in relation to the effect of late disclosures on its preparation that will deny adequate and timely

[38] *Prosecutor v. Abu Garda*, Status Conference, 3 September 2009, ICC-02/05-02/09-T-8-ENG, p. 29, lines 6-7.

preparation of the Defence. This would on the other hand expedite the proceedings by eliminating matters of disclosure from the substantive debate at the confirmation hearing. As demonstrated in the preceding paragraphs, the Defence is prejudiced and is severely handicapped on account of a defective DCC, an incomplete LoE and late and improper disclosures. The Defence is instructed to inform the Chamber that Ambassador Muthaura has waived his right to attend any status conference scheduled as requested herein. It is hoped that such a status conference can be listed without delay.

Relief Requested

For the reasons set out above and pursuant to Article 67(1)(a) and (b) of the Statute, Rule 121(3) of the Rules and Regulation 52 of the Regulations, the Defence respectfully requests that the Single Judge order the OTP to file an amended DCC, LoE and in-depth analysis chart in the manner set out herein by 29th August 2011.

For similar reasons detailed above, the Defence requests that the Single Judge grants its request and schedule a status conference for the week commencing 29th August 2011 before the fully constituted Pre-Trial Chamber.

Respectfully Submitted,

Mr. Karim A. A. Khan QC

Dated this 28th Day of August 2011

At Nairobi, Kenya