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**International
Criminal
Court**

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PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul, Judge
Judge Cuno Tarfusser, Judge

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
*THE PROSECUTOR v. FRANCIS KIRIMI MUTHAURA, UHURU MUIGAI
KENYATTA AND MOHAMMED HUSSEIN ALI***

Public

Public Redacted Version of Defence Application for Leave to Appeal the “Decision on the Confirmation of Charges” (ICC-01/09-02/11-384-Conf, 31 January 2012)

Source: Defence for Uhuru Muigai Kenyatta

Document to be notified in accordance with regulation 31 of the *Regulations of the Court***to:****The Office of the Prosecutor**Mr. Luis Moreno-Ocampo, Prosecutor
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I. INTRODUCTION

1. On 23 January 2012, the Pre-Trial Chamber (the "PTC") issued its "Decision on the Confirmation of Charges" (the "Confirmation Decision").¹ The PTC, by majority (the "Majority"), confirmed the charges against Uhuru Kenyatta, Francis Muthaura, and declined to confirm the charges against Mohammed Ali. Pursuant to Article 82(1)(d) of the Rome Statute (the "Statute"), the Defence for Uhuru Kenyatta requests leave to appeal against the Majority's decision. The Defence files this application for leave to appeal pursuant to Article 82(1)(d) of the Statute.²

III. THE APPEALABLE ISSUES

2. The following issues of appeal arise from the Confirmation Decision:
 - a. Whether the Majority erred in law in assessing the evidence at confirmation by reversing the burden of proof contrary to Article 67(1)(i) ["First Issue"];
 - b. Whether the Majority erred in law by determining that alleged failures of the OTP to investigate exculpatory issues or issues of reliability had no consequences for the Confirmation Hearing and did not fall within the scope of the Chamber's determination pursuant to Article 61(7) of the Statute ["Second Issue"];
 - c. Whether the Majority's exercise of discretion was so irrational, unfair and unreasonable so as to constitute an abuse of discretion by attributing significant weight to Prosecution Witnesses 11 and 12, and failing to attribute any weight to the substantial Defence evidence challenging the credibility of these witnesses ["Third Issue"];
 - d. Whether the Majority's exercise of discretion was so irrational, unfair and unreasonable so as to constitute an abuse of discretion in assessing evidence in relation to the allegation of a meeting on 26 November 2007 at State House with members of the Mungiki, at which it is alleged Uhuru Kenyatta, Mr Muthaura, President Kibaki and others attended ["Fourth Issue"];³ and
 - e. Whether the Majority erred in law and abused its discretion by using anonymous witnesses and indirect evidence from unreliable sources, which also required

¹ The Decision of the Majority PTC (the "Majority Decision") is found at, ICC-01/09-02/11-382-Conf, pp.1-155; His Honour Judge Kaul's dissenting opinion (the "Dissenting Opinion") is found at pp.156 – 193.

² See also Rule 155 of the Rules, and Regulation 65 of the Regulations of the Court. In respect of the law, see ICC-01/04-01/07-108, p. 3; ICC-01/04-01/07-116, p. 4.

³ See Prosecutor v. Joseph Kony et al, "Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009", 16 September 2009, ICC-02/04-01/05-408, para. 80.

significant corroboration, as evidence of material corroboration for key witnesses to establish that key meetings took place [“Fifth Issue”]

(i) **First Issue**

3. This issue concerns the Majority’s error of law in reversing the burden of proof when assessing the evidence at confirmation. The examples set out herein concern evidence at the heart of this case – namely meetings that were alleged to have been attended by Uhuru Kenyatta:

- a. The Majority reversed the burden of proof in respect of the meeting on **26 November 2007**: Notwithstanding the *viva voce* evidence from Uhuru Kenyatta as to his precise whereabouts on 26 November 2007, and Defence evidence in support, the Majority failed to provide any assessment of Mr Kenyatta’s evidence or his credibility, and engaged in a reversal of the burden of proof stating that “The Chamber **does not find conclusive** any of these pieces of evidence **in order to exclude** Mr Kenyatta’s attendance at the meeting with Mungiki members at State House”.⁴ The Majority also held that it did not “**find conclusive**” media materials referred to in paragraph 330;⁵ that certain Defence witnesses, including the President of Kenya, cannot be regarded as “**decisive**” in the determination of this fact”;⁶ and that video and photographic evidence of the meeting at State House on 26 November, did not “**exclude** that a meeting with Mungiki members took place as alleged by Witness 4.”⁷ In the circumstances, the Majority erred in law by reversing the burden and abused its discretion by dismissing the Defence evidence adduced in relation to this meeting.⁸
- b. The Majority reversed the burden of proof in respect of the alleged meeting on **30 December 2007**, stating that the video relied on in support did “**not in any way exclude** that Mr Kenyatta met with Mungiki members at State House on 30 December 2007, since it only shows that Mr Kenyatta was also at the KICC on that day.”⁹ In assessing the evidence of D13-20, the Chamber noted that the witness was “extremely vague on the timing of Mr Kenyatta’s movements and that his assertions **do not exclude** Mr Kenyatta meeting some Mungiki members at State House on 30

⁴ Majority Decision, ICC-01/09-02/11-382-Conf, para 330.

⁵ Majority Decision, ICC-01/09-02/11-382-Conf, para 331.

⁶ See Majority Decision, para 322; The PTC also dismissed the evidence of Defence witness D12-47 (KEN-D12-0013-0013), para 323; see also dismissal of the evidence of D12-37 (KEN-D12-0001-0412) at para 324.

⁷ Majority Decision, para 327.

⁸ The Majority’s dismissal of the Defence evidence adduced in relation to the alleged meeting on 26 November 2007 at State House is found at paragraphs 320 to 332, Majority Decision, ICC-01/09-02/11-382-Conf.

⁹ Majority Decision, ICC-01/09-02/11-382-Conf, para 339.

December 2007.¹⁰ The Majority failed to provide any assessment of Mr Kenyatta's evidence or his credibility notwithstanding his *viva voce* evidence denying his presence, and the production of a video in support.

- c. In relation to the alleged meeting on **3 January 2008**, notwithstanding the *viva voce* evidence given by Uhuru Kenyatta denying that he attended any meeting with Mungiki members at the Nairobi Club on 3 January 2008, and the production of two witness statements in support (D13-20 and D13-6), the Majority PTC did not provide any assessment of Mr Kenyatta's evidence or his credibility, and engaged in a reversal of the burden of proof by stating that the evidence of D13-20 did not **"exclude in itself the possibility that Mr Kenyatta left the house briefly to attend the meeting at the Nairobi Club early in the morning"** and that D13-6 did **"not exclude his attendance at the meeting at the Nairobi Club referred to by Witness OTP-4."**¹¹

4. The language used by the Majority demonstrates that it has erred in law by reversing the burden of proof, contrary to Article 67(1)(i), an issue necessitating the granting of leave to appeal. The correct approach is for the PTC to determine whether the evidence of the Prosecution is "sufficient" given the entirety of the evidence produced by the Defence. If the evidence of the Defence may or might be correct then the Prosecution fails in the discharge of its burden of proving substantial grounds with sufficient evidence.
5. The issue of the reversal of the burden of proof set out in paragraphs 3-4 herein significantly affects the fair conduct of the proceedings. Reversal of the burden directly impacts upon the crucial assessment of the evidence at the confirmation stage. This erroneous approach permeates the decision-making process and impacts upon the expeditious conduct of subsequent proceedings, as a proper assessment of the evidence adduced by the Defence on the critical issue of meetings allegedly attended by Uhuru Kenyatta, and a correct application of the burden of proof would have led a reasonable PTC not to confirm the charges against Uhuru Kenyatta.
6. Further, this issue will significantly affect the outcome of the trial, as a correct application of the burden of proof would lead a reasonable PTC to determine that the Prosecution did not meet the requisite threshold of substantial grounds with sufficient evidence in respect of the case against Uhuru Kenyatta at the confirmation stage. Hence, there would be no trial. The proceedings may be materially advanced in the event the

¹⁰ Majority Decision, ICC-01/09-02/11-382-Conf, para 340.

¹¹ Majority Decision, ICC-01/09-02/11-382-Conf, para.348.

Appeals Chamber agrees with the Defence in which case it is empowered to reverse or amend the decision, which may in turn impact upon the decision to confirm the charges against Uhuru Kenyatta.

(ii) Second Issue¹²

7. The Defence submits that the Majority PTC erred in law for the following reasons:
 - a. Article 54(1)(a) states that: “The Prosecutor shall in order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally”.
 - b. This is a compulsory function of the Prosecutor to establish the truth and his duty must cover all facts and evidence in order for the Court to assess the matter of criminal responsibility. Article 54(1)(c) requires the Prosecutor to fully respect the rights of all persons arising under the Statute.
 - c. The Court in deciding at the confirmation hearing under Article 61(7) whether there are substantial grounds to believe that the person committed each of the offences charged, performs that function having received evidence from the Prosecutor, supposedly in conformity with his statutory duty under Article 54(1)(a).
 - d. The restrictions imposed by the PTC on the manner in which the Defence could present evidence at the confirmation hearing¹³ and the disclosure of evidence regime¹⁴ was predicated upon the duty of the Prosecutor to provide an investigation in conformity with Article 54(1)(a).
 - e. The Prosecutor’s duty under Article 54(1)(a) is also related to his entitlement to serve disclosure of his evidence up to 30 days before hearing, giving the Defence only 15 days thereafter to respond.¹⁵
 - f. At the confirmation hearing, the PTC determines the sufficiency of the Prosecutor’s investigations and has the power under Article 61(7)(c) to adjourn the proceedings and request the Prosecutor to consider providing further evidence and conducting further investigation with respect to a particular charge. This authority of the PTC to determine investigative failures at this stage clearly contradicts its ruling that these alleged failures were outside the scope of its functions at this stage.

¹² Majority Decision, ICC-01/09-02/11-382-Conf, para 63.

¹³ ICC-01/09-02/11-226.

¹⁴ ICC-01/09-02/11-64.

¹⁵ The key prosecution witnesses OTP-4, OTP-11 and OTP-12 were disclosed in pursuance of this late time limit, only 30 days before the start of the confirmation hearing.

g. Defence evidence presented on behalf of Uhuru Kenyatta, 'clearly produced matters relating to the reliability of key Prosecution witnesses¹⁶ and matters of a significant exculpatory nature¹⁷ none of which had formed the subject of the Prosecutor's investigations. All these matters should have been discovered by the Prosecutor in the proper pursuance of his duty. Furthermore, the Prosecutor failed at any stage to seek to establish the whereabouts of Uhuru Kenyatta on significant dates¹⁸ essential to the charges in order to satisfy himself of the truthfulness of the accounts of his witnesses who alleged meetings, transfers of money and occasions when Uhuru Kenyatta had allegedly acted in furtherance of the crimes. Nor did he investigate from other sources the true whereabouts of his witnesses¹⁹ in order to establish their truthfulness. This failure to investigate such matters was a significant dereliction of duty to investigate exonerating evidence. Such measures are routine in national investigation bodies in respect of serious crime. As the Majority made findings relating to the whereabouts of Uhuru Kenyatta on the significant dates, in respect of which they discounted Defence evidence proving he was more likely than not elsewhere,²⁰ this failure to ensure the Prosecutor's discharge of his duty has resulted in the proceedings being unfair.

8. There is an overarching duty upon the PTC to ensure fairness in the proceedings.²¹ Failure to take cognizance of this issue in determining the scope of their authority over the Prosecutor's investigative failures, has caused an important aspect of the ICC's procedures to be neglected. The duty of the PTC to ensure this issue is within the scope of its authority is particularly important when the Prosecution is relying upon anonymous witnesses whose evidence is of critical importance to the determination of the issue and disclosed at the latest stage of the proceedings.²² The restriction upon the Defence in their ability to deal with such evidence in the normal manner, requires even more so that the PTC ensures fairness in the investigation and that the Prosecution has effectively discharged its duty to investigate exculpatory evidence. The PTC needs to be

¹⁶ OTP-4, OTP-11, OTP-12.

¹⁷ These include the participation by Uhuru Kenyatta in fundraising events aimed at assisting the victims of post-election violence, as well as his involvement in public pleas for peace and political compromise; see for example ICC-01/09-02/11-372, paras 102-110.

¹⁸ Namely, 26 November 2007, 30 December 2007, 3 January 2008.

¹⁹ In particular OTP-4, OTP-11, OTP-12.

²⁰ Majority Decision, ICC-01/09-02/11-382-Conf, at paras 330 (alleged meeting at State House on 26 November 2007), 339 (alleged meeting at State House on 30 December 2007) and 358 (alleged meeting at Nairobi Members' Club on 3 January 2008).

²¹ Prosecutor v. Lubanga, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81, ICC-01/04-01/06-773, 14 December 2006, at para 51; Prosecutor v. Katanga and Ngudjolo,

²² In particular, Prosecution Witnesses OTP-4, OTP-11 and OTP-12.

able to determine the sufficiency of the evidence in light of the effective discharge of this duty by the Prosecutor.

9. This issue affects the fair and expeditious conduct of the proceedings or the outcome of the trial. In the performance of the correct discharge of this duty, the Prosecutor may determine the unreliability of his witnesses and establish further evidence of Uhuru Kenyatta's innocence. The discovery of such evidence could cause the proceedings against the accused to be discontinued. The discontinuance of the proceedings and prevention of a trial upon a misconceived basis will hasten justice. There is a duty upon the Court to investigate to seek the truth. Derogation from the provisions of Article 54(1)(a) – which sets out “fundamental requirements for proper investigation” – necessarily impacts negatively on the expeditiousness of the proceedings, and “any investigation meeting these standards only partially and unsatisfactorily will probably lead to problems and difficulties not only for an effective prosecution but also for the work of the Chamber concerned and for the Court in general.”²³
10. An immediate resolution by the Appeals Chamber may materially advance the proceedings given that the issue is of fundamental importance and may prevent a miscarriage of justice.

(iii) Third Issue

11. The PTC exercised its discretion irrationally in the assessment of evidence in the determination of key issues in the confirmation hearing. This issue cannot be reduced to a mere disagreement with the PTC's free assessment of evidence at confirmation.²⁴ The extent of the irrationality and abuse of the exercise of the Majority's discretion in this instance constitutes a serious error, which necessitates the granting of leave given the following particulars set out below.
12. In abusing its discretion, the Majority failed to take into account the fact that Witnesses 11 and 12 were **self-confessed members and leaders of a criminal gang** (the Mungiki) whose motives for giving evidence and integrity had to be treated with particular caution.²⁵ Instead, the Majority applied a presumption of credibility to both witnesses. Caution should have been exercised in circumstances where the Defence presented evidence that these witnesses have a self-serving interest or motive (e.g. obtaining

²³ Dissenting Opinion, ICC-01/09-02/11-382-Conf, para 51.

²⁴ ICC-02/05-02/09-267, paras 11-12.

²⁵ A cursory reference to Witness 12 being associated with the Mungiki and having been involved in the events in question does not constitute an appropriate direction as to the caution that must be exercised when dealing with this category of witness and his probative value: Majority Decision, ICC-01/09-02/11-382-Conf, para 236.

money),²⁶ which when not provided, was followed by the same individuals becoming Prosecution witnesses, having been first in touch with the Defence and having provided exculpatory accounts.²⁷ The lack of caution applied by the Majority is in distinct contrast to the caution erroneously applied and the dismissal of Defence evidence from witnesses who had no known criminal convictions or behaviour external to the events of the case.²⁸ The Majority has applied a presumption of credibility to Prosecution witnesses.

13. In attributing significant weight to Witnesses 11 and 12, the PTC committed an error by failing to confirm that these individuals were in fact the individuals who had been identified by name and interviewed first by the Defence. The PTC stated merely that the Defence had “contact with two individuals whom it **alleges** to be anonymous witnesses OTP-11 and OTP 12.”²⁹ If the Defence were correct in their assessment,³⁰ this fact should have been confirmed expressly by the Chamber in the interests of fairness so as not to mislead the Defence in their challenges, and not referred to as a mere “allegation”, given that the material adduced by the Defence goes to the heart of the credibility of these identified individuals. If the PTC had any concerns or doubts about the veracity of the information from the Defence concerning the identity of Witnesses 11 and 12, it should have held a hearing on the matter at the time the material underpinning this identification was served on the Chamber.³¹
14. In exercising its discretion irrationally, the Majority erred by (i) concluding that the accounts provided by OTP Witnesses 11 and 12 were not fully exculpatory as they provided evidence **“directly of Mr Kenyatta’s involvement in the crimes”**³² and (ii) that **“no such extortion attempt occurred, since neither request of money or other**

²⁶ See the evidence references and explanation provided concerning the attempted extortion attempt on Uhuru Kenyatta, and threats contained in emails to the Defence and those assisting the Defence at paras 14-18 herein.

²⁷ See for example KEN-D13-0006-0003 at 0011, KEN-D13-0006-0013 at 0015 and 0018; KEN-D13-0006-0039 at 0039-0040 and 0043-0044; KEN-D13-0007-0015 at 0015-0016; KEN-D13-0007-0017; KEN-D13-0007-0027 at 0045 and 0048; KEN-D13-0007-0081 from 00:32 to 01:47; see KEN-D13-0007-0075 at 0080: referring to Witness 12: “He was categorical Uhuru made no approach or request to them”.

²⁸ Examples of the caution applied and the dismissal of Defence evidence can be identified at 320 to 332, Majority Decision, ICC-01/09-02/11-382-Conf.

²⁹ Majority Decision, ICC-01/09-02/11-382-Conf, para 93.

³⁰ ICC-01/09-02/11-281-Conf-Anx1, pp. 212-214.

³¹ The information in relation to Prosecution Witnesses 11 and 12 was first served on the PTC on 2 September 2011 as “Confidential *Ex Parte* Annexes 1 and 2” to the Defence’s “Application by the Defence for Uhuru Kenyatta under Articles 61(3) and 67(1)(a) for an Adjournment of the Confirmation Hearing Scheduled for 21 September 2011 and Request for Alteration to their Selected *Viva Voce* Witnesses”, ICC-01/09-02/11-281. The underlying evidence in Annex 1 relating to the lack of credibility of Witnesses 11 and 12 ran to 218 pages. Following the Defence’s 2 September Request to reclassify the filing and its annexes as “Confidential” on 2 September (ICC-01/09-02/11-283), the PTC initially reclassified Annex 1 as “Confidential *Ex Parte* Prosecution and Defence of Uhuru Kenyatta only” and Annex 2 as “Confidential” on 5 September (ICC-01/09-02/11-291). Pursuant to the PTC’s 12 September Decision, Annex 1 was reclassified reclassified as “Confidential”.

³² Majority Decision, ICC-01/09-02/11-382, para 96.

demand, nor any form of threat emerges from the evidence presented.”³³ Defence counsel had referred in their oral submissions to threats to an individual assisting the Defence team in relation to Uhuru Kenyatta,³⁴ and a further sinister email sent to a member of the Defence team on the same day, **13th March 2011**.³⁵ The Defence had also referred to the report and conclusions of Mr. Gary Summers,³⁶ (which along with the supporting evidence was submitted to the PTC on 2 September 2011, released to the Prosecution on 5 September and all other parties on 12 September)³⁷, which determined that Witnesses 11 and 12 were knowing and willing parties to an extortion attempt on Uhuru Kenyatta in 2011.³⁸ The Chamber failed to properly examine or understand the evidence produced at confirmation, in respect of which the report of Mr. Summers was a guide.

15. The irrational assessment of the evidence is demonstrated by the wholly erroneous reliance the Chamber put on a four line email sent by Witness 11 to a member of the Defence team on **13th March 2011** which stated that the “3 were directly involved”.³⁹ Rather than evidence of Uhuru Kenyatta’s direct involvement in crimes, this single email relied upon constitutes part of the evidence of threats emanating from Witness 11 on **13th March** after a failed extortion attempt on Uhuru Kenyatta the day before on **12th March** by **D12-47**, to which Witnesses 11 and 12 were knowing parties.
16. The relevant context of the Defence evidence shows (i) the background to the extortion attempt relating to requests for money (377, 000 KSH) from Uhuru Kenyatta on **16 February 2011** by **D12-47**⁴⁰, a colleague of Witness 11 and 12, in relation to an event due to take place in Thika on **12 March 2011**; (ii) an email dated **1 March 2011** from **D12-47** to an individual assisting the Defence attaching an amended version of the same letter addressed to Uhuru Kenyatta requesting 377,500 KSH in relation to the event due to take place in Thika on **12 March 2011**;⁴¹ and (iii) a document signed by Witnesses 11 and 12 with the stamp date of **25 February 2011** and a handwritten date of **10th**

³³ Majority Decision, ICC-01/09-02/11-382, para 97. It should be noted that the Chamber did not footnote the evidence it reviewed in determining that there had been no extortion attempt: see Majority Decision, para 97, top of page 41.

³⁴ “What Uhuru Kenyatta will lose, we hold you responsible”; KEN-D13-0007-0027 at 0027; ICC-01/09-02/11-T-10-ENG, page 17, line 21.

³⁵ “We promised our guys in the ground on what is cooking, and it is risk to promise things to such guys and fail to honour the arrangements, especially noting the fact some leaders after the post election violence crisis disappeared or were killed, that was betrayal of the highest order”: KEN-D13-0007-0027 at 0033; ICC-01/09-02/11-T-10-ENG, page 18, lines 1-5.

³⁶ ICC-01/09-02/11-281-Conf-Anx1, pp. 208-218; ICC-01/09-02/11-T-10-ENG, page 17, lines 5-15.

³⁷ See footnote 31 above.

³⁸ ICC-01/09-02/11-281-Conf-Anx1, pp. 29-47.

³⁹ KEN-D13-0007-0027 at 0029.

⁴⁰ KEN-D13-0007-0012 at 0012 to 0014.

⁴¹ KEN-D13-0007-0007 at 0007 to 0011.

March 2011, referring extensively to **D12-47** and that he was with them “in this process”.⁴² This “process” suggests that platoons of men should be used to make sure that detractors (contextually, those individuals who have given statements to the Prosecution) stop their ongoing propaganda. The document refers to platoons knowing the names and plans of individuals they refer to as “our rivals” and that they know all those who have already given their statements and the witnesses who have been interviewed, the implication being those individuals interviewed by the Prosecution of the ICC.⁴³ This document seeks payment of over **2.3 million KSH**. Although it is not addressed to any particular recipient, there is clear evidence that this document was intended by **Witnesses 11 and 12** for Uhuru Kenyatta. When **Witness 11** was confronted with the document in interview by the Defence on **24th March 2011**, he stated that “The doc is no longer needed. Now we know we cant see UK, its no longer an issue”.⁴⁴ When **Witness 12** was confronted with the same document in interview on **21 March 2011**, he explained that he and **Witness 11** had “set out how we can dig, handle and bring them to our side” (referring the Prosecution witnesses)⁴⁵ and that an individual assisting the Defence was “supposed to meet and give it to the relevant authorities, i.e. UK and his clique: Kibaki, Muthaura”.⁴⁶ It is also highly relevant that this document was given to a member of the Defence team by **D12-47** on **10 March 2011**.⁴⁷ This evidence establishes that these individuals were for hire to affect the outcome of the case. Indeed, on **21 March 2011**, in interview with the Defence, **Witness 12** stated that he wanted to relocate and be given security and that “after that”, he “would be very much able to co-operate”. He stated “If I can be provided with what I am looking for, I can assist.”⁴⁸ Both were engaged in an attempt to pervert the course of justice. This issue was never confronted by the Majority and goes to the core of the irrationality of their conclusions.

17. The Gary Summers report contains information about the failure on **12th March 2011** of the planned extortion attempt when the monies requested of Uhuru Kenyatta by **D12-47** on **16th February 2011** were not paid and access to Uhuru Kenyatta was not granted to individuals including **Witness 12**.⁴⁹ This information is corroborated by a dated memo from a member of the Defence team which details the very agitated phone call made to him by **Witness 12** on **12th March** stating that he was not being given “financial

⁴² KEN-D13-0007-0021 at 0021 to 0025.

⁴³ ICC-01/09-02/11-T-10-ENG, p.18, lines 9-18.

⁴⁴ KEN-D13-0007-0052 at 0057.

⁴⁵ KEN-D13-0006-0039 at 0042.

⁴⁶ KEN-D13-0006-0039 at 0042.

⁴⁷ KEN-D13-0007-0075 at 0077.

⁴⁸ KEN-D13-0006-0039 at 0043.

⁴⁹ ICC-01/09-02/11-281-Conf-Anx1, pp. 216-217, paras 36-31.

assistance” or “access to Uhuru”.⁵⁰ **Witness 12** was advised by the same member of the Defence team to address his concerns to an individual who was assisting the Defence (named in the memo).⁵¹ Seven subsequent emails from **Witness 11** were sent the following day on 13th March, the first of which was sent to the individual **Witness 12** had been referred to the day before, by a member of the Defence team.⁵² The third of the seven emails sent that day by **Witness 11** was the four line email relied on by the Majority PTC.⁵³ This email was only one of a series of mails that included a threat to an individual assisting the Defence.⁵⁴ [REDACTED] The previous month on 9th February 2011,⁵⁵ **Witness 11** had told the Defence that he had never met Uhuru Kenyatta on a one-to-one basis.⁵⁶ Neither did he give any evidence inculpating Uhuru Kenyatta in the post election violence. Exculpatory evidence was also given by **Witness 12**, who on 7 February 2011⁵⁷ provided an account to the Defence which included explanations that Uhuru Kenyatta was a man who was preaching peace at the time of the post-election violence⁵⁸ and that he was “a very good guy” who was “helping people”⁵⁹ and that he was not a member of the Mungiki, and neither did he work with them.⁶⁰ He stated that Uhuru Kenyatta did not fund post-election violence.⁶¹ He told the Defence that he had only met UK once in a group with others in 2002.⁶² He also stated that he wanted to be relocated from his home in Kenya.⁶³ He told a member of the Defence team that “he was categorical Uhuru made no approach or request to them”,⁶⁴ and confirmed again on 21 March 2011 that he had information which exonerated Uhuru Kenyatta.⁶⁵ These exculpatory accounts were irrationally ignored by the Majority PTC.

18. Following the failed extortion attempt, a member of the Defence team was told by **Witness 11** on 1 April 2011 that there had been “an attempt by ODM to induce the two witnesses to cross over and testify for the OTP”.⁶⁶ This information is recorded in the

⁵⁰ KEN-D13-0007-0075 at 0078, para 7.

⁵¹ KEN-D13-0007-0075 at 0078, para.7.

⁵² The seven emails on 13 March 2011 can be located at KEN-D13-0007-0027 at 0027 to 0033.

⁵³ KEN-D13-0007-0027 at 0029.

⁵⁴ KEN-D13-0007-0027 at 0027.

⁵⁵ KEN- D13-0007-0001 at 0001 to 0006. This interview with witness 11 was dated as shown on the first page. It took place on 9 February 2011.

⁵⁶ D13-0007-0001 at 0002.

⁵⁷ See KEN-D13-0006-0013 at 0013 to 0018. This interview with witness 12 was dated as shown at the top of the first page. It took place on 7 February 2011. A second set of notes was produced at KEN-D13-0006-0003 at 0003 to 0012.

⁵⁸ KEN-D13-0006-0003 at 0011.

⁵⁹ KEN-D13-0006-0013 at 0017

⁶⁰ KEN-D13-0006-0013 at 0018;

⁶¹ KEN-D13-0006-0039 at 0040.

⁶² KEN-D13-0006-0003 at 0007; KEN-D13-0006-0013 at 0015.

⁶³ KEN-D13-0006-0039 at 0043.

⁶⁴ KEN-D13-0007-0075 at 0080, para 3.

⁶⁵ D13-0006-0039 at 0044.

⁶⁶ ICC-01/09-02/11-281-Conf-Anx1, pp. 217-218, para 43.

report of Gary Summers,⁶⁷ which was in the possession of the PTC before the confirmation hearing. The name of the contact person relevant to this ODM attempt is also provided in the report.⁶⁸ The last contact Defence Counsel had with Witnesses 11 and 12 was on **25 March 2011** when both individuals delivered information concerning threats to their security⁶⁹ to the Defence office following interviews with Counsel on 21 and 24 March 2011⁷⁰ where both had separately been asked about the threatening emails, [REDACTED] and the document requesting over 2.3 million KSH which appeared to constitute a plan to intimidate witnesses.⁷¹

19. Notwithstanding the cordial nature of the interviews conducted with **Witness 12 on 21st March 2011**⁷² and with **Witness 11 on 24th March 2011**,⁷³ the Defence team remained concerned about the nature of the emails received, the former background of these individuals, and the document which appeared to constitute a plan to intimidate witnesses.⁷⁴ Contrary to the assertion of the PTC, these individuals had been used to facilitate meetings with other potential insider Mungiki meetings, **before 25 March, and at no time thereafter.**⁷⁵
20. The Majority's irrational exercise of discretion is further evidenced by an incorrect interpretation of a line in an Ex Parte, Confidential motion,⁷⁶ which referred to "exculpatory statements"⁷⁷ made by Witnesses 11 and 12. The Majority improperly attributed to the Defence an assertion that it had in its possession "previous fully exculpatory statements which it attributes to Witnesses OTP-11 and OTP-12", but chose to rely on undated notes (which were in fact print-dated). The word "statements" in the quotation above refers to statements made orally to the Defence in interview. The Chamber has erroneously misinterpreted this word and unfairly criticized the Defence in

⁶⁷ CC-01/09-02/11-281-Conf-Anx1, pp. 217-218, para 43.

⁶⁸ CC-01/09-02/11-281-Conf-Anx1, pp. 217-218, para 43.

⁶⁹ KEN-D13-0007-0059 (for Witness 11) and KEN-D13-0006-0056 (for Witness 12); see also travel reimbursement receipt for 25 March 2001 when the documents were delivered to the office at D13-KEN-D13-0007-0062 at 0065.

⁷⁰ KEN-D13-0007-0052 at 0052 to 0058 (Witness 11); KEN-D13-0006-0039 at 0043 to 0044 (Witness 12). It was in interview with Witness 11 that he handed over a document dated 20 April 2011 which purported to organise a prayer meeting to support Uhuru Kenyatta (KEN-D13-0007-0073 at 0073 to 0074) which he had referred to in his interview with Counsel see KEN-D13-0007-0052 at 0058.

⁷¹ KEN-D13-0007-0021 at 0021 to 0026.

⁷² KEN-D13-0006-0039 at 0039 to 0044.

⁷³ KEN-D13-0007-0052 at 0052 to 0058.

⁷⁴ KEN-D13-0007-0021 at 0021 to 0026.

⁷⁵ The notes thank the individuals for having arranged meetings with other Mungiki members in the past. These are the notes of the last interview conducted with each individual: KEN- D13-0006-0039 at 0039 to 0044. (Witness 12) and KEN- D13-0007-0052 at 0052 to 0058 (Witness 11).

⁷⁶ The PTC incorrectly states that the Defence alleged that it was in possession of previous fully exculpatory statements which it attributes to Witnesses 11 and 12, and criticises the Defence for relying on notes of interviews conducted, Majority Decision, ICC-01/09-02/11-382, para 96. See ICC-01/09-02/11-281-Conf-Anx1.

⁷⁷ Paragraph 3 of the Defence's Annex 1 which states that "[t]he content of the transcripts was surprising given the exculpatory statements made by those persons to the Defence team in February 2011", ICC-01/09-02/11-281-Conf-Anx1, para 3.

this regard. Further, in the irrational exercise of its discretion, the Majority determined erroneously that the Defence “did not confront these witnesses”.⁷⁸ The notes of interview conducted on **21 and 24 March 2011** with Witnesses 12 and 11 respectively, demonstrate clearly that both were confronted about the threatening emails, [REDACTED], and the document that came into the hands of the Defence intended for Uhuru Kenyatta seeking over 2.3 million KES.⁷⁹

21. In the irrational exercise of its discretion, the Majority erroneously concluded that the intention of the Defence to continue cooperating with these individuals in question emerges from the notes of a meeting held between the Defence of Kenyatta and the VWU on **14 April 2011**.⁸⁰ A proper reading of this document reveals that the Defence of Kenyatta had **not** decided whether they would be using these individuals as witnesses. The note states that they would consider further what to do and whether to provide further individual information about the two interviewees to VWU. An undertaking to raise the issue of the security concerns of **Witnesses 11 and 12** with VWU had been made to them in the last interviews the Defence conducted on **21 and 24 March 2011**. This was not because the Defence accepted their alleged security concerns. Furthermore, the Majority’s assessment was incorrect in stating that “it was not the Defence who broke contact.”⁸¹ No further contact after 25 March 2011 was had with these individuals by Defence Counsel, following discussions concerning their conduct. The Defence took a positive decision in this regard.
22. The Majority erroneously concludes that as there were references in the evidence submitted by the Defence from **Witnesses 11 and 12** informing them of their knowledge of **Mungiki implication in the crimes** under consideration and of **Mungiki links with Mr Kenyatta**, the information they provided was not “fully exculpatory”.⁸² As a corrective, the description used by Defence Counsel was “exculpatory”.⁸³ The description used by Gary Summers was “wholly exculpatory”.⁸⁴
23. In relation to the issue of **Mungiki implication in crimes**, the reference relied on by the Majority is information from Witness 12 that the Mungiki were involved in Nakuru.⁸⁵ However, this information does not render the account non-exculpatory in respect of Uhuru Kenyatta, particularly given the other evidence from Witness 12 that Uhuru

⁷⁸ Majority Decision, ICC-01/09-02/11-382, at para 98.

⁷⁹ KEN-D13-0007-0021 at 0021 to 0025

⁸⁰ Majority Decision, ICC-01/09-02/11-382, at para 98.

⁸¹ Majority Decision, ICC-01/09-02/11-382, at para 98.

⁸² Majority Decision, ICC-01/09-02/11-382, at para 96.

⁸³ ICC-01/09-02/11-T-10-ENG, page 19, line 9.

⁸⁴ ICC-01/09-02/11-T-10-ENG, page 19, line 13-15.

⁸⁵ KEN-D13-0006-0065 at 0070.

Kenyatta was not a member of the Mungiki and neither did he work with them.⁸⁶ This is a serious defect of reason, particularly when the same page also contains a line stating that Witness 12 was “categorical Uhuru made no approach or request to them.” Of great significance is the fact that neither stated that they had been involved in any violence in Nakuru or Naivasha. This contradicts the undetailed assertion to the Prosecution of Witness 12 that he was in Nakuru.⁸⁷

24. In relation to the allegation that the Defence evidence from **Witnesses 11 and 12** reveals **Mungiki links with Mr Kenyatta** – a proper analysis of the evidence relied on reveals no more than (i) there were rumours of Uhuru Kenyatta’s links to Mungiki the aim of which was “to bring down UK”; (ii) that in 2002 in a stadium in Afraha, a group of more than 20 youth leaders present spoke with Uhuru Kenyatta; (iii) that witness 12 did not have a one-on-one with Uhuru Kenyatta; (iv) that witness 12 would not have used the word Mungiki during discussions at the stadium meeting of youth in 2002; (v) that witness 11 never met with UK on a one-on-one; and (vi) there is a reference to “[REDACTED] met UK” around 2001, with no explanation of whether Uhuru Kenyatta knew he was meeting Mungiki members, and that “they agreed that they’d support KANU” – again, with no explanation as to whether “they” were in the guise of Mungiki, or general youth. It is a further defect of reason to attempt to use this evidence to state that it reveals probative Mungiki links with Mr Kenyatta relevant to the post-election violence in 2008.
25. The Majority erred by not attributing weight to the evidence of Lewis Nguyai who received threatening text messages from Witness 12. It was an error to restrict the analysis of his evidence to whether or not an extortion attempt had been carried out “vis-à-vis the Defence of Mr Kenyatta”⁸⁸ as his evidence went to the issue of Witness 11 and 12’s credibility. This evidence was not accorded any proper weight by the PTC.
26. This issue, the particulars of which have been set out above in paragraphs 12 to 25, affects both the fair and expeditious conduct of the proceedings and the outcome of trial, as the unfair, unreasonable and irrational exercise of discretion in the assessment of two key Prosecution witnesses, directly affects the decision to confirm these charges. A rational exercise of discretion would have led the PTC to have discounted the evidence of these witnesses, and determined that no probative value should have been attributed to their accounts given the Defence evidence adduced at confirmation concerning their lack of credibility; their engagement in an attempt to pervert the course

⁸⁶ See the exculpatory extracts cited above in relation to Witness 12.

⁸⁷ Majority Decision, ICC-01/09-02/11-382, at para 119.

⁸⁸ Majority Decision, ICC-01/09-02/11-382, at para 97.

of justice, their criminal status as former members of the Mungiki and their involvement in an attempt to extort money from Uhuru Kenyatta in 2011. An immediate resolution of this issue may materially advance the proceedings given that a correct exercise of discretion would have led to the dismissal of the case against Uhuru Kenyatta at confirmation.

(iv) Fourth Issue⁸⁹

27. In the unreasonable and irrational exercise of its discretion, the Majority attributed excessive weight to the account of Witness 4⁹⁰ and erroneously dismissed the evidence of Defence witnesses which “seem to refer to a meeting other than that with the Mungiki mentioned by Witness OTP-4.”⁹¹ The PTC applied no caution to the probative value of the evidence of Witness 4 given his status as a member of a criminal gang, namely the Mungiki, and attributed insufficient weight to the significant inconsistencies as between the different accounts he gave, as submitted by all defence teams at the confirmation hearing. The particulars of this irrational exercise of discretion are set out below.
28. Having accepted the presence of Defence Witness D12-37 at the relevant meeting,⁹² the Chamber erred in the exercise of its discretion by irrationally dismissing his evidence that Witness 4 did not attend, and his evidence of the legitimate substance of the meeting.⁹³ The exercise of discretion was irrational particularly as his evidence of the location, aim and content of the meeting was extensively corroborated by many Defence witnesses, including D13-23,⁹⁴ D13-8,⁹⁵ D13-7,⁹⁶ D12-11,⁹⁷ D12-13,⁹⁸ video evidence,⁹⁹ and D12-5,¹⁰⁰ none of whom are members of the Mungiki or have known criminal records. It was an irrational exercise of discretion to dismiss this wide-ranging, multiple source corroboration evidence of the account given by D12-37, whose presence at a meeting at State House that day was accepted by the Chamber. The Majority erred by irrationally failing to assess and compare substantive indicators in the account of OTP Witness 4 as against the accounts provided by Defence witnesses. The

⁸⁹ Majority Decision, ICC-01/09-02/11-382, para, 310.

⁹⁰ The Majority PTC concluded that the evidence of Witness 4 “established” the occurrence, purpose and subject of this meeting, who it determined was present at this meeting as a Mungiki representative, Majority Decision, ICC-01/09-02/11-382, para 311.

⁹¹ Majority Decision, ICC-01/09-02/11-382, para 320.

⁹² Majority Decision, ICC-01/09-02/11-382, para 324.

⁹³ Majority Decision, ICC-01/09-02/11-382, para 324.

⁹⁴ KEN-D13-0005-0779 at 0800 to 0807, paras 74-102.

⁹⁵ KEN-D13-0005-0524 at 0534 to 0543, paras 74-34.

⁹⁶ KEN-D13-0005-0475 at 0482 to 0487, paras 29-51.

⁹⁷ KEN-D12-0001-0276 at 0282 to 0287, paras 25-56.

⁹⁸ KEN-D12-0001-0444 at 0447 to 0448, paras 14-17; at 0450, para 25.

⁹⁹ KEN-D13-0005-0187.

¹⁰⁰ KEN-D12-0002-0001 at 0006, paras 23-25; at 0007, para 31.

coincidence of these substantive indicators supports the Defence submission that there was **only one meeting**, the correct account of which has been set out by the Defence, and purposefully misrepresented by OTP Witness 4. **Indicator One:** Notwithstanding the difference in authorship and content of a document handed to the President of Kenya in the meeting on 26 November 2007, many accounts refer to this having occurred, including the account of Witness 4.¹⁰¹ **Indicator Two:** The account of the meeting by Witness 4 states that there was no mention of Mungiki.¹⁰² Defence witnesses agree.¹⁰³ This is significant, as if there had been a separate closed meeting of Mungiki with the President of Kenya in a tent, with Muthaura and Kenyatta in attendance, it is beyond belief that the word Mungiki would not have been openly used. The fact that all accounts agree that the word Mungiki was not used supports the Defence case that there was only one meeting at that time. **Indicator Three:** The account of the meeting by Witness 4 makes particular reference to the handing over of a “brown envelope” containing money for “tea”, at the meeting. Importantly, the evidence of D12-37, who the Chamber accepts was present at a meeting that day, also confirms this detail. Crucially, as previously stated, his account of what was said and who attended, is corroborated by a range of Defence witnesses, who also corroborate the handing over of money in the meeting for the purpose of food and expenses.¹⁰⁴ This third coincidence of detail supports the Defence account that there was in fact one meeting that day, not two as the Majority has irrationally determined, a meeting not attended by Witness 4.

29. In relation to how this issue affects the fair and expeditious conduct of the proceedings and the outcome of the trial, the Defence adopts the arguments it raised at paragraph 26 herein. In respect of how an immediate resolution of this issue may materially advance the proceedings, the Defence also relies upon its submissions at paragraph 26.

(v) Fifth Issue

30. This issue concerns three key meetings upon which the Decision to confirm the charges was made. Each meeting was found to have taken place by the Chamber upon evidence that had serious issues as to reliability. The Majority found as a fact that witness OTP-4

¹⁰¹ OTP-4, KEN-OTP-0043-0022 at 0033, paras 157-159; D13-8, KEN-D13-0005-0524 at 0540, para 56; D13-23, KEN-D13-0005-0779 at 0802, para 82; D13-7, KEN-D13-0005-0475 at 0483, para 34.

¹⁰² OTP-4, KEN-OTP-0043-0022 at 0032, para 155.

¹⁰³ D13-8, KEN-D13-0005-0524 at 00540, para 61; D13-23, KEN-D13-0005-0779 at 0807, para 102; D12-11, KEN-D12-0001-0276 at 0285, para 49; D12-37, KEN-D12-0001-0412 at 0418, para 32.

¹⁰⁴ OTP-4, KEN-OTP-0043-0022 at 0034, para 163; D12-13, KEN-D12-0001-0444 at 0448, para 17; D13-23, KEN-D13-0005-0779 at 0805, para 90; D13-7, KEN-D13-0005-0475 at 0485, para 39; D12-5, KEN-D12-0002-0001 at 0006, para 25; D12-11, KEN-D12-0001-0276 at 0285, para 52; D12-37, KEN-D12-0001-0412 at 0418, para 34.

was a member of the criminal gang known as the Mungiki.¹⁰⁵ The evidence of OTP-4 had been contained in four statements in respect of which there were inconsistencies and significant omissions that were submitted to the PTC by all the Defence teams at the confirmation hearing and in final briefs.¹⁰⁶ These issues went to his reliability and credibility as a witness as to meetings on 26 November 2007 and 3 January 2008 and in respect of which the PTC should have required reliable evidence to corroborate his account. In fact, the PTC used other unreliable evidence from sources also in need of substantial corroboration as support for his evidence. Conversely, in respect of the meeting of 3 January, OTP-4's account had no corroboration and his evidence was preferred as against a plethora of independent, cogent and untainted Defence evidence for no rational reason. Furthermore, in relation to OTP-11 also a leading member of the Mungiki and an anonymous witness, who gave evidence relating to 30 December meeting, the PTC corroborated his statement from other anonymous witnesses providing hearsay evidence.

- a. **Meeting at State House 26 November 2007:** The Majority used the evidence of OTP-11 and OTP-12 to corroborate OTP-4's account¹⁰⁷ (the sole alleged direct witness), that this meeting took place with Uhuru Kenyatta in attendance. OTP-11 and OTP-12 were leading members of the Mungiki criminal gang and extensively challenged by the Defence as to their reliability and credibility.¹⁰⁸ Neither of these witnesses were present at State House on 26 November and their accounts are not based on direct knowledge of their own. The Chamber erred in exercising its discretion by using these witnesses, who were themselves in need of significant and substantial corroboration, to corroborate OTP-4, based on evidence not of their direct knowledge. In doing so, the PTC rejected irrationally a substantial amount of cogent and credible evidence from the Kenyatta and Muthaura defence cases.¹⁰⁹
- b. **Meeting at State House 30 December 2007:**¹¹⁰ The Majority found as a fact that on 30 December 2007, Uhuru Kenyatta was present in State House at a meeting with the Mungiki and handed over large sums of cash.¹¹¹ The evidence relied upon by the PTC is from OTP-11 a member of the Mungiki who is an anonymous witness, who did not give direct evidence of this event from his own knowledge. The PTC found he was corroborated by OTP-12 and OTP-6 who also were not

¹⁰⁵ Majority Decision, ICC-01/09-02/11-382, para 188.

¹⁰⁶ ICC-01/09-02/11-372 at paras 26-32; ICC-01/09-02/11-T-10-ENG at page 21, line 15 to page 25, line 3. See also points as detailed in the Majority Decision, ICC-01/09-02/11-382, paras 346-359.

¹⁰⁷ Majority Decision, ICC-01/09-02/11-382, paras 312, 318.

¹⁰⁸ ICC-01/09-02/11-372 at paras 21-25; CC-01/09-02/11-T-10-ENG page 15, line 11 to page 21, line 8.

¹⁰⁹ Majority Decision, ICC-01/09-02/11-382, paras 316-332.

¹¹⁰ Majority Decision, ICC-01/09-02/11-382, paras 333 et seq.

¹¹¹ Majority Decision, ICC-01/09-02/11-382, para 333, 335.

giving direct evidence of this event from their own knowledge. Again the PTC have used anonymous and unreliable sources in need of substantial corroboration as stated above, to corroborate a witness with substantial issues surrounding his reliability and credibility. OTP-12 and OTP-6 were not speaking from direct knowledge of the event.¹¹² This was an error of law,¹¹³ “one anonymous summary cannot corroborate another anonymous summary or statement” a rule of universal application.¹¹⁴

- c. **Meeting at Nairobi Club 3 January 2008:**¹¹⁵ The PTC found that Uhuru Kenyatta met Mungiki members at this club and directed them to commit the crimes charged.¹¹⁶ The sole witness for this finding was OTP-4¹¹⁷ in respect of whom the PTC had sought corroborative evidence in (a) above, but did not require it in respect of this meeting, notwithstanding the plethora of Defence evidence challenging its existence and the numerous inconsistencies in the accounts of OTP-4 which were brought to the attention of the PTC by Defence counsel. The decision to accept that there were substantial grounds to believe this event took place notwithstanding the lack of direct corroboration upon such a crucial issue was irrational.

31. Resolution of this issue by the Appeals Chamber at this stage would significantly affect (i) both the fair and expeditious conduct of the proceedings; or (ii) the outcome of the trial as the evidence relied upon was crucial in satisfying the court of the sufficiency of the evidence for the confirmation of charges. The proceedings would be materially advanced by a proper and reasonable consideration of the evidence as these meetings are challenged by the Defence and relied upon by the Prosecution to found the case.

IV. THE APPEALABLE ISSUES RAISED ON BEHALF OF MR MUTHAURA

32. The Defence adopts issues 2, 3, 5 and 8 from the Muthaura Defence’s Application for Leave to Appeal the Confirmation Decision.

V. RELIEF

¹¹² Majority Decision, ICC-01/09-02/11-382, para 335.

¹¹³ ICC-01/04-01/06-803 29 January 2007, para 106.

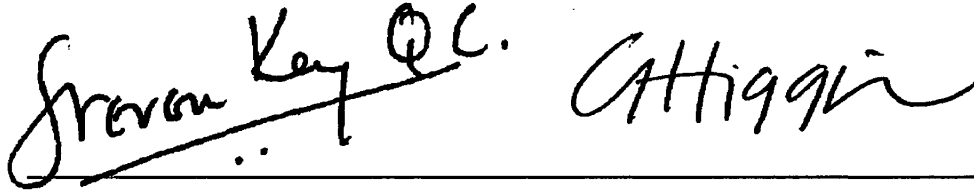
¹¹⁴ ICC-01/04-01/06-803 29 January 2007, para 102, as followed in Katanga, Decision on the Confirmation of Charges, ICC-01/04-01/07-717, 30 September 2008, paras 119, 140, 160.

¹¹⁵ Majority Decision, ICC-01/09-02/11-382, para 341 et seq.

¹¹⁶ Majority Decision, ICC-01/09-02/11-382, para 341.

¹¹⁷ Majority Decision, ICC-01/09-02/11-382, para 342.

33. The Defence requests the Pre-Trial Chamber to grant leave to appeal on the issues set out above pursuant to Article 82(1)(d).

The image shows two handwritten signatures in black ink. The first signature, on the left, is 'Steven Kay QC.' and is written over a horizontal line. The second signature, on the right, is 'Gillian Higgins'.

Steven Kay QC and Gillian Higgins
on behalf of Uhuru Kenyatta

Dated this 1 February 2012

At London, England