



Original: **English**

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

Date: **3 February 2012**

PRE-TRIAL CHAMBER II

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

SITUATION IN THE REPUBLIC OF KENYA

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

Public Document

**Prosecution's Consolidated Response to Uhuru Kenyatta and Francis Muthaura
Applications for Leave to Appeal the Decision on the Confirmation of Charges
(ICC-01/09-02/11-384-Red and ICC-01/09-02/11-385)**

Source: The Office of the Prosecutor

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

The Office of the Prosecutor	Counsel for Francis Kirimi Muthaura Karim A. Khan and Kennedy Ogetto
	Counsel for Uhuru Muigai Kenyatta Steven Kay and Gillian Higgins
Legal Representatives of Victims	Legal Representatives of Applicants
Unrepresented Victims	Unrepresented Applicants for Participation/Reparation
The Office of Public Counsel for Victims	The Office of Public Counsel for the Defence
States Representatives	Amicus Curiae

REGISTRY

Registrar Silvana Arbia	Counsel Support Section
Victims and Witnesses Unit	Detention Section
Victims Participation and Reparations Section	Other

Introduction

1. The Defence of Mr Muthaura and Mr Kenyatta (the “Defence”) seek leave to appeal¹ the Decision on the Confirmation of Charges Pursuant to article 61(7)(a) issued by Pre-Trial Chamber II with a dissenting opinion of Judge Kaul (the “Decision”).² The Prosecution opposes these Applications.
2. Mr Muthaura (“Muthaura”) raises eight issues and Mr Kenyatta (“Kenyatta”) identifies five issues. The Prosecution jointly responds³ to the 13 issues in the following categories:
 - (1) Issues involving what the Prosecution submits is the Defence’s mere disagreement with the Chamber’s assessment of the evidence. Specifically, the following issues are addressed within this section:
 - 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) and shifting the onus of rebuttal onto the Defence (Kenyatta, First Issue and Muthaura, First Issue);
 - b. 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 (Kenyatta, Third Issue);
 - c. Whether the Majority’s exercise of discretion was so irrational, unfair and unreasonable as to constitute an abuse of discretion in assessing evidence in relation to the meeting on 26 November 2007 at State House with members

¹ ICC-01/09-02/11-384-Red (Kenyatta) and ICC-01/09-02/11-385-Corr (Muthaura). The parties are litigating the admissibility of Muthaura’s corrigendum. See ICC-01/09-02/11-389 (Prosecution’s Request that the Pre-Trial Chamber Disregard the Corrigendum), and Muthaura’s response: ICC-01/09-02/11-392.

² ICC-01/09-02/11-382-Red. The Prosecution will refer indistinctively to “Pre-Trial Chamber”, “Chamber” or “Majority”.

³ The Pre-Trial Chamber authorised the Prosecution to file a consolidated response to the two Applications and granted an extension to 40 pages. See ICC-01/09-02/11-391.

of the Mungiki, attended allegedly by Kenyatta, Muthaura, President Kibaki and others (Kenyatta, Fourth Issue);

- d. Whether the Majority erred in law and abused its discretion by using anonymous witnesses and indirect evidence from unreliable sources, which also required significant corroboration, as evidence of material corroboration of key witnesses' evidence that key meetings took place (Kenyatta, Fifth Issue);
- e. Whether in evaluating evidence pursuant to article 61(7) a Chamber may depart from the evidence and draw conclusions on the basis of speculation (Muthaura, Sixth Issue);
- f. Whether the Majority applied different criteria or considerations in evaluating Defence evidence as compared to Prosecution evidence (Muthaura, Eight Issue).

(2) Issues that the Prosecution submits are not appealable "issues" within the terms of article 82(1)(d), in which the Defence premises its arguments on misrepresentations of the Decision and jurisprudence. These include:

- a. Whether admission of statements obtained by non-judicial bodies, without the consent of the persons who provided the information for their statements to be used in ICC proceedings, contravenes the established jurisprudence and practice of the Court (Muthaura, Second Issue);
- b. Whether the Majority's conclusion at paragraph 415 that the suspects knew rape was a virtually certain consequence of the implementation of the common plan to attack is legally and factually permissible (Muthaura, Third Issue);
- c. Whether the Confirmation Decision may re-characterise the Prosecution's allegations against a suspect, as set out in the DCC, without first providing

the suspect an opportunity to be heard on the re-characterised allegations (Muthaura, Fourth Issue);

- d. Whether NGO and other reports become credible simply because they are corroborated by like evidence (NGO and other reports) (Muthaura, Fifth Issue);
 - e. Whether the Majority erred in law by determining that alleged failures of the Prosecution 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) (Kenyatta, Second Issue and Muthaura, Seventh Issue).
3. The Prosecution will respond to each of these issues in turn. Reference to the merits of the Decision will only be made when necessary to demonstrate that it does not meet the criteria of article 82(1)(d).

Whether the Issues satisfy the test under Article 82(1)(d)

- 4. The Appeals Chamber has held that "only an issue may form the subject-matter of an appealable decision. An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement of a conflicting opinion. [...] An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination. It may be legal or factual or a mixed one."⁴
- 5. The Prosecution submits that none of the issues raised by the Defence are identifiable issues within the terms of article 82(1)(d).

⁴ ICC-01/04-01/06-168OA3, paras.9-10. See also, ICC-01/04-01/06-1433 OA11 (Dissenting Opinion of Judge Song), para.4, specifying that "[a] decision 'involves' an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made".

I. The Defence's Disagreement with the Majority's assessment of the evidence

6. The Prosecution recognizes that the correctness of the legal standard identified and applied by a Chamber in assessing evidence and the proper scope of its examination under the applicable legal provisions can constitute appealable issues justifying the granting of leave to appeal. For instance, the Prosecution recently sought leave to appeal a decision rejecting confirmation of the charges in a different case before this Court. In the Prosecution's view, the Majority of the Pre-Trial Chamber in that case applied an erroneous evidentiary standard for the purposes of the confirmation of charges under article 61.⁵
7. However, this is not the case here. The standards adopted by the Pre-Trial Chamber are not in issue. The Defence does not challenge the legal principles adopted by the Pre-Trial Chamber for the purpose of evaluating the evidence – principles that were, in fact, in line with the Defence's legal arguments -- but rather complains of the outcome of the Chamber's reasoning. This also transpires with clarity from the Defence arguments that the Chamber's assessment of the evidence is flawed, including its approach to the evidence of Witnesses OTP-4, OTP-11 and OTP-12, the conflicting evidence presented by the Defence, and the resulting factual findings.⁶ Thus, the issues raised by the Defence are actually nothing but "a mere disagreement" with the Chamber's factual findings stemming from its evaluation of the evidence before it. This has been held not to amount to an appealable issue under article 82(1)(d) of the Statute.⁷ On this basis alone, the Applications should be rejected.

⁵ ICC-01/04-01/10-480.

⁶ See paras. 8 - 28 below.

⁷ ICC-02/05-02/09-267, paras.11,25; ICC-01/04-168, para.9

A - Error in the Chamber's assessment of evidence and reversal of the burden of proof (Kenyatta, First Issue and Muthaura, First Issue)

8. Muthaura argues that the Majority, in assessing the evidence, adopted a standard that placed the evidentiary burden on the Defence and thereby amounted to a reversal of the burden of proof. Muthaura further submits that, had the Chamber applied the correct legal standard, the charges against him would have not been confirmed.⁸
9. Kenya similarly argues that the Majority erred in law by reversing the burden of proof.⁹ According to Kenya, 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". He further argues that "[i]f 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".¹⁰
10. None of the Defence's assertions present an appealable issue arising from the Decision. The above-stated arguments simply demonstrate that Muthaura and Kenya do not agree with the Chamber's assessment of the evidence.¹¹ In brief, the Majority did not reverse the burden of proof. To the contrary, the Chamber applied the evidentiary standard advocated by the Defence¹² and, in so doing, carefully assessed the relevance and the probative value of the evidence presented by the parties.
11. In the examples provided,¹³ Muthaura confuses the Prosecution's burden of proof to establish substantial grounds to believe that the suspect persons committed the crimes, with the burden placed on any party (prosecution or defence) to support the factual propositions advanced by that party with evidence. The Majority stated that the propositions advanced by Muthaura were not supported by the

⁸ Muthaura Application, para.6.

⁹ Kenya Application, para.3.

¹⁰ Ibid., para.4.

¹¹ ICC-01/04-168, para.9; ICC-02/05-02/09-267, para.11.

¹² ICC-01/09-02/11-374-Red, para.10 (Muthaura); ICC-01/09-02/11-372, paras.3-8 (Kenya).

¹³ Muthaura Application, para.5.

evidence, and that the evidence presented in rebuttal did not negate the Prosecution's proposition.¹⁴

12. Kenyatta, on the other hand, errs when he submits that in a case of competing evidence, the Chamber should rule for the Defence if "the Defence may or might be correct".¹⁵ This is not the standard to be applied at the confirmation of charges. Kenyatta effectively calls for the application of the evidentiary standard of "beyond reasonable doubt" that only applies at trial stage. At this stage, and as noted by the Appeals Chamber,¹⁶ the Prosecution's propositions do not need to be the only reasonable inference;¹⁷ it suffices that the inferences are proved to the required standard at confirmation stage.
13. Since the issue as framed in the Applications does not arise from the Decision, there is no need to analyze whether the requirements set out in the different limbs of article 82(1)(d) have been met. In any event, the purported impact of this issue on the fairness and expeditiousness (i.e., if the Chamber had assessed differently the evidence, the charges would have not been confirmed)¹⁸ is hypothetical – which does not suffice to impact on the fairness or expeditiousness of proceedings.¹⁹

B – Majority's abuse of its discretion in assessing the evidence (Kenyatta, Third, Fourth and Fifth issues).

14. Kenyatta argues that 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

¹⁴ Ibid., para.5(i)-(iii).

¹⁵ Kenyatta Application, para.4.

¹⁶ ICC-01/04-01/07-475OA, para.68.

¹⁷ ICC-02/05-01/09-73OA, para.33.

¹⁸ Muthaura Application, para.6; Kenyatta Application, paras.5-6.

¹⁹ ICC-01/04-01/07-1958, para.20 ; ICC-02/04-01/05-367, para.22.

witnesses” (Third Issue).²⁰ He further argues that the Majority was irrational, unfair and unreasonable “in assessing evidence in relation to the allegation of a meeting on 26 November 2007 at State House with members of the Mungiki” by giving too much weight to witness OTP-4 (Fourth Issue).²¹ Kenyatta additionally states that the Majority’s findings on three meetings (26 November 2007, 30 December 2007 and 3 January 2008) are irrational because the Majority relied on “evidence that had serious issues as to reliability” (Fifth Issue).²²

15. These three issues are – again – clear examples of Kenyatta’s disagreement with the manner in which the Chamber assessed the evidence.²³ According to Kenyatta, the Chamber should not have relied on witnesses OTP-11 and OTP-12 (Third Issue), on witness OTP-4 (Fourth Issue) or on witnesses OTP-4, OTP-6, OTP-11 and OTP-12 (Fifth Issue), but instead, should have endorsed the factual propositions advanced by Kenyatta.
16. In all instances Kenyatta attempts to portray such disagreement as an appealable issue and enters into the merits alleging that the Chamber “applied a presumption of credibility to both [OTP] witnesses”,²⁴ exercised “its discretion irrationally”²⁵ or conducted an “irrational assessment of the evidence”²⁶ and an “unreasonable and irrational exercise of discretion”.²⁷ While recognizing that the correctness of the Decision is not to be discussed here, the Prosecution further submits that the Chamber correctly and reasonably exercised its discretion.
17. With respect to the Third Issue, the Chamber expressly addressed Kenyatta’s arguments challenging the credibility of witnesses OTP-11 and OTP-12. See in particular paragraphs 95 to 100 of the Decision where the Chamber provided detailed reasoning on why the evidence of those two witnesses should not be

²⁰ Kenyatta Application, paras.11-26.

²¹ Ibid., paras.27-29.

²² Ibid., paras.30-31.

²³ ICC-01/04-168, para.9; ICC-02/05-02/09-267, para.11.

²⁴ Kenyatta Application, para.12.

²⁵ Ibid., para.14. See also para.30 (a) and (c).

²⁶ Ibid., para.15.

²⁷ Ibid., paras.26,27. See also paras.20-21, 28.

disregarded in its totality, as requested by Kenyatta. Kenyatta is using his Application to repeat the same arguments already presented before the Chamber at the confirmation hearing and to express his disagreement with the Chamber's conclusion.²⁸

18. Similarly, on the Fourth Issue, the Chamber considered Kenyatta's submissions on witness OTP-4 and, notwithstanding Kenyatta's disagreement with the witness's statement, exercised its discretion to not completely disregard this evidence.²⁹ Kenyatta's disagreement with the Chamber's assessment of the evidence does not make the Decision "irrational".³⁰
19. On the Fifth Issue, Kenyatta challenges the fact that the Majority relied on certain witnesses (OTP-4, -6, -11 and -12) to determine that three meetings took place and that Kenyatta was present.³¹ According to Kenyatta, these witnesses are unreliable and need "significant and substantial corroboration".³² Kenyatta proposes a non-statutory requirement that goes beyond the evidentiary threshold at the confirmation stage. In addition, the purported unreliability of the four witnesses is grounded only in Kenyatta's own submissions, which were considered by the Chamber in detail and finally disregarded.³³ As with the previous three issues, the fact that the Majority did not agree with Kenyatta's account does not give rise to an appealable issue.
20. As such, it is not necessary to analyze whether the other requirements under article 82(1)(d) are met.

²⁸ Compare ICC-01/09-02/11-T-10 ENG, p.15,ln.11 to p.21, ln.8 with Kenyatta Application, paras.12-25.

²⁹ See Decision, paras.188, 320-321, 23, 326, 327, 349, 353, 355, 356, 358. The Chamber also seeks corroboration of witness OTP-4 evidence and duly considers the Defence evidence, see paras.119, 135, 151, 173 (fn.295), 195, 200, 202, 210 - 213, 215, 217, 218, 219, 266, 301, 304, 307, 312, 317, 318, 324-5, 332, 360, 366, 367, 368, 383.

³⁰ Kenyatta Application, paras.27-28.

³¹ Kenyatta Application, para.30. The Prosecution notes that Kenyatta does not refer to all the evidence relied upon by the Majority: with respect to the State House meeting on 26 November 2007, the Majority relied upon the evidence of Witnesses 1, 4, 6, 11 and 12, as well as documentary evidence (Decision, paras. 313-14). With respect to the Nairobi Club meeting on 3 January 2008, the Chamber relied upon the evidence of Witness 1, together with that of Witness 4, and documentary evidence (Decision, paras.343-44).

³² Kenyatta Application, para.30(a).

³³ Decision, paras.309-398.

C - Whether in evaluating evidence pursuant to Article 61(7) a Chamber may depart from the evidence and draw conclusions on the basis of speculation (Muthaura; Sixth Issue)

21. Muthaura argues that the Majority departed from the evidence before it and made certain findings without any evidentiary support by relying solely on “personal belief, or other extraneous facts, opinion or speculation”.³⁴ In particular, Muthaura refers to the Chamber’s findings regarding meetings held on 26 November 2007 at the State House, on 3 January 2008 at the Nairobi Members Club, and the distribution of weapons before the attacks in Nakuru secured by the intervention of Muthaura.³⁵
22. The Prosecution submits that Muthaura – yet again - is expressing a mere disagreement with the Majority’s assessment of the evidence presented. Each of the findings challenged by Muthaura was a reasonable conclusion based on the totality of the evidence. As an illustration, Muthaura argues that the Majority, in paragraph 320 of the Decision, “speculated” that Defence witnesses were referring to another meeting than that mentioned by witness OTP-4, due to inconsistencies in the time.³⁶ However, the Majority’s findings were a reasonable conclusion based on the evidence adduced by the parties: the Prosecution asserted that a meeting took place at the State House at around 11.45 am on 26 November 2007, involving Muthaura, Kenyatta, President Kibaki and Mungiki representatives, in which the Mungiki demanded concessions in exchange for their support. In support, the Prosecution relied on the account of witness OTP-4, which was corroborated by those of witnesses OTP-11, OTP-12, OTP-6 and OTP-1, as well as indirect evidence. The Defence contested that Mungiki were in attendance and argued that it was a meeting with youth leaders who were supporting President Kibaki’s campaign.³⁷ The Majority considered the parties’

³⁴ Muthaura Application, para.30.

³⁵ Ibid., para.28.

³⁶ Ibid.

³⁷ Decision, paras.316-319.

arguments and evidence, including that of two Defence witnesses, who indicated that a meeting with the PNU youth and without Mungiki took place earlier in the morning (9:45/10:00 am according to D12-11 and 10:30 am according to D13-23) of 26 November, and reasonably found that “no conclusion could be drawn from these witnesses’ statements as to the unreliability of the evidence provided by Witness OTP-4, since they seem to refer to a meeting other than that with the Mungiki mentioned by Witness OTP-4”.³⁸

23. While recognizing that the correctness of the Decision is not to be discussed here, the Prosecution submits that, given the differing times of the meetings, it was reasonable for the Majority to infer that Defence and Prosecution witnesses referred to separate meetings. Far from speculation, the Majority’s rejection of the Defence proposition was premised upon a reasonable factual inference rooted in the evidence presented.
24. In sum, and as in the above issues, Muthaura simply disagrees with the Chamber’s assessment of the evidence. On these grounds, Muthaura’s Sixth Issue should be dismissed without further entertaining whether the other limbs under article 82(1)(d) are met. In any event, Muthaura fails to demonstrate that the issue affects the fairness and expeditiousness of the proceedings;³⁹ and no argument is provided on how its resolution issue may materially advance the proceedings.⁴⁰

D - Whether the Majority applied different criteria/ consideration to the evaluation of Defence evidence as compared to Prosecution evidence (Muthaura, Eighth Issue)

25. Muthaura argues that “[i]n its assessment of evidence, the Majority has adopted an approach that favours the Prosecution [...]” and that “[r]egarding Defence witness statements, the Majority applies a more stringent standard, finding fault in each and every Defence witness statement”.⁴¹ As a result, “like witnesses have

³⁸ Decision, para.320.

³⁹ ICC-01/04-103, para.37.

⁴⁰ Muthaura Application, paras.23,32.

⁴¹ Muthaura Application, para.34.

not been assessed in a like manner” thus “requiring the defence to prove more than the OTP”.⁴² This is incorrect. The Majority applied to all parties the same evidentiary standard – a standard advocated by the Defence in the confirmation hearing and disputed by the Prosecution. For this reason, Muthaura fails in his attempt to present his disagreement with the Chamber’s assessment of the evidence as an appealable issue.⁴³

26. The Prosecution urged in its pre-confirmation submissions that the Chamber, at the confirmation stage, should assume the credibility of Prosecution evidence unless it is incredible on its face.⁴⁴ The Chamber disagreed, accepting instead the Defence position⁴⁵ that the Chamber should make credibility assessments particularly whenever confronted with contradictory Defence evidence.⁴⁶ The Majority accepted the Defence position and performed this task, assessing all of the evidence offered by the parties and determining, based on the totality of the evidence, whether the Prosecution had met the evidentiary burden placed on it at the confirmation stage. In other words, it accepted the Defence standard and made an evidence-by-evidence, fact-by-fact assessment of Prosecution and Defence evidence.
27. For example, the Majority concluded that defence witness D12-47 did not exclude the facts established by the consistent statements of witnesses OTP-11 and OTP-12, based on the common sense observation that D12-47 - an individual alleged to have acted as an intermediary between Muthaura and Kenyatta and the Mungiki - “is naturally motivated to deny his involvement”.⁴⁷ Contrary to Muthaura’s argument, this was not a “speculative conclusion”⁴⁸ or an instance of “like witnesses [...] not be[ing] assessed in a like manner”.⁴⁹ Rather, it was a classic

⁴² Ibid., para.41.

⁴³ ICC-01/04-168, para.9; ICC-02/05-02/09-267, para.11.

⁴⁴ ICC-01/09-02/11-361, paras.5-8.

⁴⁵ ICC-01/09-02/11-374-Red, para.10 (Muthaura); ICC-01/09-02/11-372, paras.3-8 (Kenyatta).

⁴⁶ Decision, paras.53,73-75,79-81,92.

⁴⁷ Decision, para.306.

⁴⁸ Muthaura Application, para.35.

⁴⁹ Muthaura Application, para.41.

example of a finder of fact critically evaluating the evidence to determine its probative value vis-à-vis other evidence on the same topic. The same is true of the other examples challenged by Muthaura.⁵⁰

28. As in the above-listed issues, as this issue does not arise from the Decision, there is no need to assess whether it meets the other requirements under article 82(1)(d).

II. The Defence raises non-appealable issues within the terms of article 82(1)(d)

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

29. At the confirmation hearing, the Defence challenged the Prosecution's reliance on witness statements taken by persons outside the Office of the Prosecutor and submitted without the expressed consent of the interviewees. The Chamber rejected this argument, holding that the statutory framework of the Court does not prevent the admission or use of this type of documentary evidence. In addition, the Chamber noted that the jurisprudence relied on by the Defence (requiring the witness' consent before his or her testimony in the Court) referred to trial proceedings.⁵¹ Muthaura argues in his Application that the Chamber's

⁵⁰ Ibid., paras.35-40. The Prosecution further notes that the ICTY *Prlic* Appeals Chamber decision cited by Muthaura in fn.64 is not applicable to the instant scenario. In the *Prlic* case the Chamber excluded video exhibits proposed by the Defence because the Defence had failed to provide date and source information, when it had previously admitted Prosecution videos with the same deficits, and continued to exclude the videos even after the Defence cured the omission and provided date and source information. It thus irrationally imposed different and irreconcilable evidentiary requirements. That is vastly different than the complaint here, that the Chamber wrongly believed Prosecution evidence instead of Defence evidence.

⁵¹ Decision, paras.77-78.

ruling contravenes the “established jurisprudence and practice of the Court” and that this purported contravention is an appealable issue.⁵²

30. The Prosecution submits that there is no “issue” within the terms of article 82(1)(d), and that Muthaura raises “an abstract question or a hypothetical concern”,⁵³ which is premised on an erroneous interpretation of the relevant jurisprudence. In particular, Muthaura argues that the issue “concerns the applicability of Rule 68 to statements obtained from non-ICC witnesses”.⁵⁴ However, rule 68 governs the admissibility of “prior recorded testimony” at trial and does not constitute a restriction to the admissibility of other documentary evidence by the Pre-Trial Chamber at the confirmation stage.⁵⁵ In addition, while the Trial and Appeals Chambers have indicated that rule 68 governs the admissibility of witness statements taken by the Prosecution,⁵⁶ they have not found that rule 68 applies to all out-of-court statements, as Muthaura suggests. On the contrary, Trial Chambers have held that rule 68 does *not* extend to all out-of-court statements and have admitted non-ICC statements on this basis.⁵⁷ Trial Chamber I has even admitted witness statements and transcripts of interviews taken by the Office of the Prosecutor outside the framework of rule 68.⁵⁸ Moreover, the authorities relied upon by Muthaura do not support his

⁵² Muthaura Application, paras.8-9.

⁵³ ICC-01/05-01/08-532, para. 17.

⁵⁴ Muthaura Application, para.10.

⁵⁵ ICC-01/05-01/08-1386OA5OA6, para.80: the Appeals Chamber has ruled that “[p]ursuant to article 61(5) of the Statute, for the purposes of the confirmation hearing, the Prosecutor ‘may rely on documentary or summary evidence and need not call the witnesses expected to testify at the trial’. At the trial, however, the Trial Chamber must respect article 69(2). Witness statements may only be introduced under rule 68 [...] if the strict conditions of that rule are met.”

⁵⁶ ICC-01/04-01/07-2362, para.13 (“Generally speaking, statements provide to representatives of the Office of the Prosecutor, which at the time the witness knew might be used in proceedings before the Court, will be considered testimony”); ICC-01/04-01/07-2635, para.47; ICC-01/04-01/06-1399-Corr, para.18; ICC-01/05-01/08-1386OA5OA6, paras.74-81.

⁵⁷ ICC-01/04-01/07-2635, paras.44-45. See in particular, para.15: “There are no automatic grounds for exclusion in the Statute or the Rules. Instead, the Chamber has the discretion to weigh the probative value of each particular item of evidence against the potentially prejudicial effect of its admission. This is a balancing test which must be carried out on a case-by-case basis”. ICC-01/04-01/07-2362, para.12 (“not every assertion made by a person outside the courtroom can be considered testimony for the purposes of Rule 68, even if it relates to the subject-matter of the case”).

⁵⁸ ICC-01/04-01/06-1399-Corr, paras.3,42; ICC-01/04-01/06-2595-Red-Corr, paras.42-52.

argument.⁵⁹ Thus, the Court's legal framework and existing jurisprudence permits the Prosecution to seek the admission into evidence of the challenged non-ICC statements at the trial stage. As the Majority correctly noted "[there are no] grounds in the statutory documents precluding the use of documentary evidence, nor is there any indication that this evidence is otherwise inadmissible".⁶⁰

31. Muthaura further refers to an isolated extract of a decision issued by Pre-Trial Chamber I in the *Katanga* case to argue that the Prosecution cannot rely on statements of persons whom the Prosecution has no reasonable expectation will testify at trial.⁶¹ Muthaura's reliance on this decision is misplaced and the extract cited should be read in the full context of the decision, whereby the Chamber admitted – upon the Prosecution's request - transcripts of an interview conducted under article 55(2) of a deceased witness for the purposes of the confirmation hearing. In doing so, the Chamber distinguished between the confirmation stage and the trial proceedings, noting that "the competence to decide on the admissibility of the evidence given by a witness at trial lies with the Trial Chamber".⁶² Thus, if the Prosecution decides to seek the admission into evidence of these statements at trial, it will be for the Trial Chamber to rule upon their admissibility. In sum, the Majority's admission of, and limited reliance upon, non-ICC witness statements does not "contravene the established jurisprudence and practice of the Court".⁶³ On the contrary, the Majority's treatment of this type of evidence is consistent with the Court's still-evolving jurisprudence on this issue. For this reason, Muthaura's Second Issue does not arise from the Decision.

⁵⁹ Muthaura Application, para.9, referring to ICC-01/05-01/08-1386OA5OA6 and ICC-01/04-01/07-2635. In the *Bemba* O5 OA6 Appeals Judgement, the Appeals Chamber's ruling indicated only that rule 68 applies to Prosecution witness statements because those documents constitute "testimony" (paras 75-81). The Appeals Chamber did not address the question of the admissibility of non-ICC witness statements, and certainly not "definitively rule" on that issue, as Muthaura suggests. In *Katanga*, Trial Chamber II did not suggest that all non-ICC statements constitute "testimony" for the purposes of rule 68. On the contrary, it made clear that "not every communication of information by an individual outside of the courtroom is testimony in this sense". ICC-01/04-01/07-2635, para.45.

⁶⁰ Decision, para.78.

⁶¹ Muthaura Application, para.8.

⁶² ICC-01/04-01/07-412, p.6, last para.

⁶³ Muthaura Application, para.1(ii); p.6.

32. In any event, such issue does not meet the requirements for leave to appeal under article 82(1)(d). The Chamber's reliance on non-ICC statements was extremely limited. They were only ever referred to as corroboration for other items evidence, most often statements taken by Prosecution investigators.⁶⁴ Notably, the Chamber did not rely on non-ICC witness statements at all in relation to the individual criminal responsibility of the accused. Thus, Muthaura's argument that the charges would not be confirmed had the Chamber not admitted the reports is purely hypothetical. Equally speculative and irrelevant is Muthaura's argument that non-ICC statements will not be admitted at trial and the Prosecution will have to conduct further investigations.⁶⁵ Finally, since the Prosecution is aware of the evidentiary regime applicable to out-of-court testimony at the trial stage, and the regime is in any event overseen by the Trial Chamber and not the parties, there is no need for an immediate ruling by the Appeals Chamber to "provide direction to the Prosecution".⁶⁶

B - Whether the Majority's conclusion that the suspects knew rape was a virtually certain consequence of the implementation of the common plan to attack is legally and factually permissible (Muthaura, Third Issue)

33. Muthaura argues that the Majority established a "new presumption"⁶⁷ whereby "rape is a virtually certain consequence of any ethnically motivated attack, even in the absence of any indication or evidence that the perpetrators possessed a propensity to rape, or had discussed rape".⁶⁸ According to Muthaura, the Majority introduced a "new mode of liability" "[b]y introducing a presumption that the intent to commit one crime can be inferred from the intent to commit a different crime".⁶⁹

⁶⁴ See Decision, paras. 86, 120, 137, 177, 225, 239, 244, 245, 247, 250, 258, 259, 272, 275, 276.

⁶⁵ See ICC-01/04-01/07-1958, para.20. Muthaura Application, para.10.

⁶⁶ Muthaura Application, para.10.

⁶⁷ Ibid., para.16.

⁶⁸ Ibid, para.12.

⁶⁹ Ibid., para.14.

34. This is incorrect. The Decision does not establish such a presumption, nor does it create a new mode of liability outside the terms of article 30. Therefore, there is no appealable issue arising from the Decision that merits the intervention of the Appeals Chamber.
35. First, the Majority found that Muthaura and Kenyatta “knew” that rape was a consequence of the implementation of the common plan in light of the specific characteristics of this case,⁷⁰ namely, the underlying ethnic tension in the Rift Valley, the widespread and escalating retaliatory violence between the various political factions and ethnic groups and the hands-off approach of the Kenya Police during the PEV. The Majority expressly indicated that its ruling was issued in light of “these circumstances”.⁷¹
36. Second, the Majority’s ruling in paragraph 415 of the Decision should be read together with paragraph 411, where the Chamber set out the requisite *mens rea* within the terms of article 30. In application of this provision and in light of the evidence before it, the Majority concluded that Muthaura and Kenyatta fulfilled the required *mens rea* (intent and knowledge) for the charges of rape as they “knew” that rape was a consequence of the implementation of the common plan.
37. Therefore, Muthaura’s Third Issue does not arise from the Decision. In addition, the requirements under article 82(1)(d) are not met. As the Decision does not set out a new mode of liability outside the basic texts of the Court, Muthaura does not need to conduct additional investigations to rebut any presumption arising from the Decision.⁷² Similarly, the intervention of the Appeals Chamber is not required to provide clarity on the *mens rea* requirements because the Chamber abided to the terms of the Statute.⁷³

⁷⁰ Decision, para.415.

⁷¹ Decision, para.415.

⁷² Muthaura Application, para.16.

⁷³ Ibid., para.17.

C - Whether the Confirmation Decision re-characterised the Prosecution's allegations against a suspect, as set out in the DCC, without first providing the suspect with an opportunity to be heard on the re-characterised allegations (Muthaura, Fourth Issue)

38. Muthaura argues that the Amended DCC alleged that he acted only in his official capacity when implementing the common plan and that there was no reference to Maina Njenga (Mungiki leader) as a member of the common plan.⁷⁴ According to Muthaura, the Chamber improperly re-characterised the Prosecution's allegations in finding that (1) he possessed "sufficient *de facto* authority [...] to secure the institutional support for the commission of the crimes", and (2) Njenga agreed to the common plan.⁷⁵ Muthaura submits that he was not on notice of these factual allegations and was not provided with an opportunity to be heard on the Chamber's new characterisation.⁷⁶ In Muthaura's view, this issue affects the fairness of the proceedings, as he was not able to adequately present his case and their expeditiousness, as the charges would have not been confirmed if he had been given the opportunity to be heard.⁷⁷ Muthaura also argues that the intervention of the Appeals Chamber would materially advance the proceedings.⁷⁸

39. These submissions are grounded on an incorrect and selective reading of the Amended DCC, which in fact provided Muthaura with sufficient and timely notice of the nature, cause and content of the charges against him, including his authority and Njenga's part to the common plan. The Chamber confirmed the charges against Muthaura on the basis of these charges as laid out in the DCC. There is therefore no merit to Muthaura's argument that the Chamber "re-characterized" the Prosecution's allegations in the Confirmation Decision.

⁷⁴ Muthaura Application, paras.19-21.

⁷⁵ Ibid.

⁷⁶ Muthaura Application, para.22.

⁷⁷ Ibid.

⁷⁸ Ibid., paras.22-23.

(i) Muthaura's authority

40. Muthaura's argument is premised on the assertion that the DCC alleges that Muthaura acted only in his official capacity when implementing the common plan. This is incorrect. Of the four paragraphs of the DCC cited by Muthaura in support of his argument,⁷⁹ only paragraph 25 refers to Muthaura acting in his "official" capacity when implementing the common plan. The others do not specify the capacity in which Muthaura acted and do not limit the Prosecution's ability to demonstrate Muthaura's actions in furtherance of the common plan. Indeed, paragraph 38 (which is also cited by Muthaura) explicitly refers to both Muthaura's "*de jure* and *de facto* authority over the various Kenyan security agencies", providing Muthaura with sufficient notice that his contribution to the common plan could be proven by reference to his *de facto* authority, as ultimately accepted by the Chamber.

41. In sum, Muthaura's identification of the issue is factually unfounded. It relies upon a strained and selective reading of the DCC rather than a fair and comprehensive analysis of the document. The DCC must be read as a whole to determine whether Muthaura was provided with adequate notice regarding his alleged contributions to the implementation of the common plan.⁸⁰ Then, it is clear that the charges are not limited to actions Muthaura took in his official

⁷⁹ Ibid., para.19, fn.21.

⁸⁰ Jurisprudence of the *ad hoc* Tribunals, while not binding, is instructive in this regard. See, e.g., ICTR, *The Prosecutor v. Rutaganda*, Appeals Chamber, Judgment, Case No. ICTR-96-3-A, 26 May 2003, paragraph 304 (holding that the paragraph of the indictment challenged by the defence "cannot be read in isolation from the rest of the document. Indeed, this paragraph must be read in the context of the other paragraphs of the Indictment relating to genocide and extermination as crime against humanity."); ICTR, *The Prosecutor v. Nsengiyumva*, Trial Chamber, Decision on the Defence Motion Raising Objections on Defects in the Form of the Indictment and to Personal Jurisdiction on the Amended Indictment, 12 May 2000, Case No. ICTR-96-12-I, paragraph 3 ("It is misleading to raise the question of defects in the amended indictment on the basis of isolated paragraphs. The amended indictment must be considered in its totality and it would be incorrect to make a conclusion as to any defect in it upon a selective reading of only certain of its paragraphs."); ICTY, *The Prosecutor v. Todović and Rašević*, Trial Chamber, Decision on Todović Defence Motion on the Form of the Joint Amended Indictment, 21 March 2006, IT-97-25/1-PT, paragraph 10 ("As a general principle of pleading, it is well recognized that each paragraph of an indictment should not be read in isolation from the rest of the indictment, but rather should be considered in the context of the other paragraphs therein."); ICTY, *The Prosecutor v. Tolimir*, Trial Chamber, Decision on Accused's Preliminary Motion Pursuant to Rule 72 (A) (ii), IT-05-88/2-PT, 10 February 2010, paragraph 13 (holding that the allegations at issue were "adequately pleaded given the context of the Indictment as a whole").

capacity, as the defence claims. For instance, paragraphs 18-23, 35-36, 44, 50-51, 58, 77-78, 89, 91 refer to actions undertaken by Muthaura without alleging that they were undertaken in his official capacity.

(ii) Maina Njenga as a party to the common plan

42. Similarly, Muthaura's assertion that he was provided with insufficient notice that Maina Njenga was a party to the common plan is without merit as the DCC stated that: (i) Mungiki leaders agreed on the common plan and (ii) Maina Njenga held the chief position within the Mungiki. See in particular: paragraph 77 of the DCC, which expressly states that the plan was agreed between the "Principal Perpetrators, together with Ali, *Mungiki leaders* and other prominent PNU supporters ..."; paragraph 78, which states that "The Principal Perpetrators, together with Ali, prominent PNU supporters and *Mungiki leaders*, shared the policy". (emphasis added); paragraph 39, which alleges that the "Mungiki ...is under the leadership of its founder and patron, Maina Njenga".

43. Together, these provisions provide adequate notice that Njenga was a party to the common plan.

44. For these reasons, Muthaura's Fourth Issue does not arise from the Decision. Further, because the Chamber's findings are consistent with the allegations in the DCC, Muthaura is unable to demonstrate that his Fourth Issue significantly affects the fairness of proceedings or the outcome of the trial, or that its resolution would materially advance the proceedings. The DCC provided Muthaura with fair notice of the charges against him and did not limit the Prosecution's allegations to acts undertaken in Muthaura's official capacity. As a result, there was nothing unfair about the Chamber's findings in relation to Muthaura, and he was not in any way deprived of his article 67(1)(a) right to be informed of the nature, cause and content of the charges against him, or to contest those charges and present his case. With respect to the outcome of trial and material

advancement of proceedings, the Chamber's findings in the Decision did not extend beyond the charges set out in the DCC. As a result, the trial will proceed not on the basis of newly crafted charges that may necessitate delays, but on the basis of the charges initially pleaded by the Prosecution. Muthaura's Fourth Issue therefore does not significantly affect the outcome of the trial and its immediate resolution by the Appeals Chamber will not materially advance the proceedings.⁸¹

D - Whether NGO and other reports become credible simply because they are corroborated by like evidence (NGO and other reports) (Muthaura, Fifth Issue)

45. The Chamber stated that NGO reports are indirect evidence.⁸² It then noted that indirect evidence must be accorded lower probative value than direct evidence.⁸³ The Chamber further indicated that in considering indirect evidence, it follows a two-step approach: first, it will assess its relevance and probative value (as with direct evidence); and second, it will consider whether corroborating evidence exists.⁸⁴ The Chamber further added that "more than one piece of indirect evidence, which has low probative value, is preferable to prove an allegation to the standard of substantial grounds to believe", and that "[i]n 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 sufficient probative value to substantiate a finding of the Chamber for the purposes of the decision on the confirmation of charges".⁸⁵
46. Muthaura agrees with the Chamber's finding that NGO reports are indirect evidence,⁸⁶ but he argues that the Majority erred by using NGO reports as

⁸¹ A contrario, Muthaura Application, paras.22-23.

⁸² Decision, para.82.

⁸³ Decision, para.86.

⁸⁴ Decision, para.87.

⁸⁵ Ibid.

⁸⁶ Muthaura Application, para.24.

corroboration for other NGO reports.⁸⁷ Against this backdrop, Muthaura seeks leave to appeal “the legal question of relying on indirect evidence to corroborate other indirect evidence”.⁸⁸ According to Muthaura, this issue affects the fairness of the proceedings due to the “unreliable and untested” nature of indirect evidence and because such evidence may not be available at trial.⁸⁹ He also argues that intervention by the Appeals Chamber will materially advance the proceedings as it will provide guidance to the Prosecution’s investigative strategy.⁹⁰

47. No appealable issue arises from the Decision. Muthaura’s arguments are grounded upon (i) a misrepresentation of the Majority’s Decision; and (ii) the erroneous assumption that indirect evidence is – by definition – unreliable, and its reliability cannot be bolstered by other indirect evidence.⁹¹ First, the Majority stated that it assessed the relevance and probative value of indirect evidence and that probative value was determined in light of the totality of the evidence.⁹² Thus, Muthaura’s simplistic argument that the Majority merely relied and referred to NGO reports to corroborate other NGO reports without assessing their probative value is misplaced. To the contrary, the Majority evaluated NGO reports in the context of other evidence offered to prove or disprove a given factual proposition; through this process, the Chamber determined the reliability and probative value of each piece of evidence.⁹³

48. It is equally wrong to presume that, *ab initio*, all indirect evidence is unreliable. “Indirect” is just another way of identifying evidence as hearsay or circumstantial evidence. Neither category is presumptively excludable on reliability grounds.

⁸⁷ Muthaura Application, paras.24-25. In para.24, Muthaura refers to Decision, para.81 without quoting the complete sentence and omits the Chamber’s explanation of the factors that it assesses to determine the relevance and probative value of each piece of evidence.

⁸⁸ *Ibid.*, para.26.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*, paras.26-27.

⁹¹ Muthaura Application, para.25-26.

⁹² Decision para.87.

⁹³ The examples advanced by Muthaura in fn.33 show the correct Chamber’s reasoning.

Because the mixed factual and legal assumption underlying this issue is incorrect, the issue does not arise from the Decision.

49. In addition, the authorities and jurisprudence cited by Muthaura do not support his argument.⁹⁴ Therefore, as no issue as defined by Muthaura arises out of the Decision, there is no need to assess whether the other limbs under article 82(1)(d) are met.

E - Whether the Majority erred in law by determining that alleged failures of the OTP to investigate exculpatory issues or issued 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) (Kenyatta, Second Issue and Muthaura, Seventh Issue).

50. Kenyatta and Muthaura seek leave to appeal the issue of whether the Pre-Trial Chamber should assess the manner in which the Prosecutor discharged his obligations under article 54(1) at the confirmation stage. The Prosecution notes that Muthaura incorporates Kenyatta's submissions by reference. This practice has been expressly censured by the Appeals Chamber, which indicated that: "[t]he arguments of a participant to an appeal must be fully contained within that participant's filing in relation to that particular appeal. The filing must, in itself, enable the Appeals Chamber to understand the position of the participant on the appeal, without requiring reference to arguments made by that participant elsewhere. The practice followed by the appellant in this appeal could also lead, in reality, to a circumvention of the page limits that are stipulated in the

⁹⁴ See Muthaura Application, para.25. First, the Dutch *Kouwenhoven* case does not support Muthaura's argument as – in addition to being non-binding on this Court - the case is factually distinguishable. In *Kouwenhoven*, the fundamental error identified by the court of appeals was not that the lower court relied on information obtained from NGOs or foreign law enforcement agencies, but that entire evidentiary record was devoid of material that could support a conviction. This is not the case here, as the Chamber relied upon NGO reports only when they were corroborated by, or corroborative of, other evidence in the record. Second, the *Taylor* SCSL case is inapposite because that decision turned on the application of a specific evidentiary rule (92bis) of the SCSL's RPE, which is inapplicable at this Court. Moreover, while Muthaura quotes a paragraph of the decision where a NGO report was not admitted, he ignores the fact that elsewhere in the decision, the Chamber admitted several other NGO reports, either in their whole or in part.

Regulations of the Court.”⁹⁵ Muthaura’s Seventh Issue should be dismissed on this basis alone. Still, the issue remains before the Court as Kenyatta’s Second Issue.⁹⁶

51. Kenyatta challenges the Chamber’s “ruling that [...] alleged [investigative] failures were outside the scope of its functions at this stage”⁹⁷ and then refers to certain matters that, according to him, should have been investigated and “discovered” by the Prosecution.⁹⁸ This issue presented by Kenyatta does not arise from the Decision. An accurate reading of the Decision confirms this fact:⁹⁹ the Chamber never refused to consider the Prosecution’s investigative failures or stated that such failures would have “no consequences”. On the contrary, the Chamber emphasised that any Prosecution failure “to investigate properly would have a bearing on the quality and sufficiency of the evidence presented and the matter will be finally decided by way of an examination of the said evidence pursuant to article 61(7).”¹⁰⁰ The Chamber further referred to and endorsed the Confirmation Decision in the *Abu Garda* case and reiterated that “the Defence’s objections to the manner in which the investigations were conducted can only be viewed in the context of the purpose of the confirmation hearing, and should thus be regarded as a means of seeking a decision declining to confirm the charges”.¹⁰¹ Therefore, the Chamber indicated that it would consider any alleged departure from the Prosecution’s duties under article 54(1) when assessing the evidence presented.

52. In addition, there is no merit to Kenyatta’s argument that supposedly exculpatory evidence presented by the defence “should have been discovered by the

⁹⁵ ICC-01/04-01/06-774 OA6, para.29.

⁹⁶ In the event that the Chamber wishes to entertain Kenyatta’s submissions for the purpose of Muthaura’s Application, the Prosecution requests that its response below be considered for both Applications.

⁹⁷ Kenyatta Application, para. 7(f).

⁹⁸ Ibid., para.7(g).

⁹⁹ Decision, paras.63-64.

¹⁰⁰ Decision, para.63.

¹⁰¹ Decision, para.64 quoting ICC-02/05-02/09-243-Red, para.48.

Prosecutor in the proper pursuance of his duty”.¹⁰² The Prosecution’s statutory duty to investigate incriminatory and exculpatory circumstances equally, does not require it to conduct its investigations in the exact manner advocated by the Defence. Even leaving aside the obvious practical reality that the Defence has access to certain evidence that the Prosecution does not, Kenyatta’s argument would, if accepted, enable every suspect to claim that the Prosecution has failed to properly exercise its investigative function simply by presenting evidence not presented by the Prosecution.

53. In the event that the Chamber finds that Kenyatta’s Second Issue does arise from the Decision, leave to appeal is still unwarranted because the issue does not significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial. The Prosecution complied with its statutory duties and did in fact investigate potentially exonerating evidence as required by article 54(1)(a). As a result, there has been no unfairness, nor a negative impact on the outcome of the proceedings. This fact is apparent from the transcripts of prosecution witness interviews submitted during the confirmation process, where investigators questioned witnesses at length regarding possible inconsistencies in their accounts.¹⁰³
54. Similarly, there is no merit to Kenyatta’s argument that the Prosecution’s reliance on anonymous witnesses affected his ability to present the case.¹⁰⁴ Over the Prosecution’s contrary position on this legal question, including its position on the correct scope of the defence case at confirmation, the Chamber agreed with the Defence that reliance on anonymous witnesses could adversely affect the defence case and compensated by affording lower probative value to anonymous witness statements and summaries relied upon by the Prosecution.¹⁰⁵ At trial, the

¹⁰² Kenyatta Application, para.7(g).

¹⁰³ This was recognized by the Chamber in paragraph 236 of the Decision, where the Chamber noted the “direct prompting by the OTP investigator” on matters that related to the consistency and veracity of Witness 12’s account.

¹⁰⁴ Kenyatta Application, para.8.

¹⁰⁵ Decision, paras.89-90.

Defence will have at trial a full opportunity to challenge the evidence gathered in the course of Prosecution's investigation. Thus, the resolution of the defence's challenge at this stage would not materially advance the proceedings.

Relief sought

55. For the reasons set out above, the Prosecution requests that the Trial Chamber reject the Defence's Applications.

A handwritten signature in blue ink, appearing to read 'Luis Moreno-Ocampo', is positioned above a horizontal line.

Luis Moreno-Ocampo,
Prosecutor

Dated this 3rd day of February, 2012
At The Hague, The Netherlands