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Pénale
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**International
Criminal
Court**

Original: English

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

Date: **11 July 2012**

TRIAL CHAMBER V

Before:

**Judge Kuniko Ozaki, Presiding
Judge Christine Van den Wyngaert
Judge Chile Eboe-Osuji**

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
*THE PROSECUTOR v. FRANCIS KIRIMI MUTHAURA AND
UHURU MUIGAI KENYATTA***

**Public
With Public Annex A**

**Defence Request for Specific Relief in Respect of
Prosecution Witnesses 4, 11 and 12**

Source: Defence for Uhuru Muigai Kenyatta

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

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Detention Section

**Victims Participation and Reparations
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Other

I. INTRODUCTION

1. The Defence for Uhuru Muigai Kenyatta (“the Defence”) seeks specific relief in respect of Prosecution Witnesses 4 (“OTP-4”), 11 (“OTP-11”) and 12 (“OTP-12”) at this stage in the proceedings. In particular, the Defence requests the following:
 - a. Confirmation from the Prosecution that it intends to rely upon OTP-4, OTP-11 and OTP-12 at trial, and confirmation of the identities of OTP-11 and OTP-12;
 - b. Permission from the Trial Chamber to use confidential identifying information, visual and/or non-textual documents for the sole purpose of Defence investigations in respect of OTP-4, OTP-11 and OTP-12; and
 - c. Disclosure of Prosecution evidence arising from all investigations and all other material including direct or indirect communications to date in respect of OTP-4, OTP-11 and OTP-12 which tends to show the innocence of the Accused, or which may affect the credibility of these Prosecution witnesses.

II. PROCEDURAL BACKGROUND

2. On 23 January 2012, Pre-Trial Chamber II (“PTC”) issued its decision (“the Confirmation Decision”) confirming for trial those charges set out therein against Ambassador Muthaura and Mr. Kenyatta.¹
3. On 29 March 2012, the full record of proceedings before the PTC was transmitted to Trial Chamber V (“the Chamber”), including the Confirmation Decision.² Judge Kuniko Ozaki was appointed as the Presiding Judge of the Chamber on 26 April 2012.³
4. On 12 June 2012, the Chamber presided over a Status Conference, in which it directed, *inter alia*, “the parties and legal representatives of victims to jointly

¹ “Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, ICC-01/09-02/11-382.

² *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, “Decision Referring the Case of *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* to Trial Chamber V”, 29 March 2012, ICC-01/09-02/11-414.

³ ICC-01/09-02/11-420.

consult with the Registry with a view to coming up with a workable protocol”⁴ regulating contact with witnesses of opposing parties and the communication of non-public information to the public, and requested the Registry to file a report to the Chamber with a draft protocol for the Chamber’s consideration.⁵

5. On 13 June 2012, the Prosecution served on the Defence two items of potentially exculpatory evidence and 17 items under Rule 77, pursuant to Article 67(2).⁶
6. On 14 June 2012, the Registry’s Victims and Witnesses Unit (“VWU”) communicated via email the initial “Draft Protocol on contacts with the witnesses of opposing parties and on communication of non-public information to the public in the course of the parties and participants’ investigations”.⁷
7. Pursuant to the Chamber’s order, consultations took place via email between the Registry and the participants between 14 June and 22 June 2012.
8. On 21 June 2012, the Prosecution served on the Defence 11 items of potentially exculpatory evidence.⁸ Prior to 13 June 2012, the last batch of Prosecution evidence was served on 21 September 2011, and contained four documents disclosed under Rule 77.⁹
9. On 25 June 2012, the Registry submitted to the Chamber the “Draft Protocol on contacts with the witnesses of opposing parties and on communication of non-public information to the public in the course of the parties and participants’ investigations” (the “Draft Protocol”).¹⁰

⁴ ICC-01/09-02/11-T-18-ENG, p. 59, lines 14-20.

⁵ ICC-01/09-02/11-T-18-ENG, p. 59, lines 14-20.

⁶ *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, “Prosecution’s Communication of the Disclosure of Potentially Exculpatory Evidence pursuant to Article 67(2) of the Rome Statute and Rule 77 Materials to the Defence”, 15 June 2012, ICC-01/09-02/11-435.

⁷ The email, which contained one attachment, was entitled “Protocol on contacts with the opposing parties’ witnesses and on communication of non-public information to the public” and was communicated to the parties and participants 17:21 GMT.

⁸ ICC-01/09-02/11-443.

⁹ ICC-01/09-02/11-344-Conf.

¹⁰ ICC-01/09-02/11-440-Anx1.

III. APPLICABLE LAW

10. The applicable law, namely Articles 54(1)(a)-(c), 64(2)-(3), 67(1)(a)-(c), 67(2) of the Rome Statute and Rule 84 of the Rules of Procedure and Evidence, is set out at Annex A.

IV. SUBMISSIONS

(a) Confirmation that the Prosecution intends to rely on OTP-4, OTP-11 and OTP-12 at trial, and confirmation of the identities of OTP-11 and OTP-12

11. Pursuant to Article 64(2), 64(3)(a) and (c), in accordance with the duty of the Trial Chamber to ensure that a trial is fair and expeditious, conducted with full respect for the rights of the Accused and due regard for the protection of victims and witnesses, the Defence submits that it is entitled to know as soon as practicable whether or not the Prosecution intends to rely upon OTP-4, OTP-11 and/or OTP-12 at trial.
12. The Defence submits that it is in the interests of justice and a fair trial that this information is provided as soon as practicable to ensure adequate preparation by the Defence for trial and the efficient organisation of future Defence investigations. The witnesses that are the subject of this motion provide clear and obvious grounds for the Defence to be given the right to institute immediately thorough investigations in respect of their credibility.
13. In respect of the identities of OTP-11 and OTP-12, the Defence indicated prior to¹¹ and during¹² the confirmation hearing that it had become aware of the names of these individuals during the course of Defence investigations, as both witnesses had contacted the Defence with exculpatory accounts,¹³ before

¹¹ ICC-01/09-02/11-281, ICC-01/09-02/11-281-Conf-Anx1, ICC-01/09-02/11-281-Conf-Anx2.

¹² ICC-01/09-02/11-T-10-ENG, p. 15, line 11 to p. 21, line 8.

¹³ 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-

contacting the Prosecution.¹⁴ Notwithstanding the notice given to the PTC and to the Prosecution of the identifying information in the possession of the Defence, neither organ confirmed the identity of these individuals to the Defence.¹⁵ The Defence submits that given the exceptional and particular circumstances surrounding OTP-11 and OTP-12, the Defence is entitled to have confirmed the veracity of the information it collected in respect of their identities. The Chamber is directed to the fact that the Defence conclusions in respect of the identifying information concerning OTP-11 and OTP-12 were supported by conclusions made by independent counsel Mr. Gary Summers.¹⁶

14. The Defence submits that confirmation of the identities of OTP-11 and OTP-12 must be provided in order to uphold the fair trial rights of the Accused as this information impacts directly upon the credibility of these individuals and the core of the Defence investigations at this stage. Article 67(2) compels the Prosecution to disclose evidence "which *may* affect the credibility of prosecution evidence" (emphasis added). Identification of OTP-11 and OTP-12 in order to enable the Defence to establish whether they are in fact individuals who have made previous inconsistent statements, and been involved in crimes themselves, clearly passes this test.

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 OTP-12: "He was categorical Uhuru made no approach or request to them".

¹⁴ The Defence interviewed OTP-11 on 9 February 2011 (see KEN-D13-0007-0001) and 24 March 2011 (see KEN-D13-0007-0052) and OTP-12 on 7 February 2011 (see KEN-D13-0006-0013) and 21 March 2011 (see KEN-D13-0006-0039).

¹⁵ The PTC stated merely that the Defence had "contact with two individuals whom it alleges to be anonymous witnesses OTP-11 and OTP 12.", Majority Decision, ICC-01/09-02/11-382-Conf, para. 93.

¹⁶ ICC-01/09-02/11-281-Conf-Anx1, pp. 212-214, paras 21-28.

(b) Permission from the Trial Chamber to use Confidential Identifying Information, visual and/or non-textual documents with public individuals for the sole purpose of Defence investigations in respect of OTP-4, OTP-11 and OTP-12

15. The Draft Protocol requires the Defence to seek permission from the Chamber to use confidential identifying information in visual and/or non-textual form with members of the public during the course of its investigations.¹⁷ The Draft Protocol is currently under consideration by the Chamber. Notwithstanding the fact that the final protocol has yet to be issued by the Chamber, given the necessity for Defence investigations to continue immediately, the Defence seeks permission to use such material in relation to OTP-4, OTP-11 and OTP-12 for the sole purpose of legitimate Defence investigations, as there are clear grounds established herein that it would be fair and in the interests of justice to do so. It is essential for the Defence to be able to use such material with selected interviewees in order to seek to establish the truth, and challenge the veracity of the differing accounts these witnesses have provided to the Prosecution.
16. In respect of OTP-4, the Defence requires the use of confidential identifying information in the form of visual and/or non-textual documents, including photographs, in order to investigate his background and credibility and to establish the truth in respect of the inconsistent accounts he has provided to the Prosecution and others over an extended period of time. For ease of reference, these inconsistencies are set out herein at paragraphs 21-25.
17. In respect of OTP-11 and OTP-12, the Chamber may already be aware that both witnesses provided exculpatory accounts to the Defence before approaching the Prosecution for, *inter alia*, financial reasons, as clearly demonstrated by evidence available to the Chamber.¹⁸ The contact of OTP-11 and OTP-12 with the Defence and details of their extortion attempts upon Mr. Kenyatta, his legal team and a witness called by the Defence, Lewis Nguyai, are provided herein at paragraphs 27-38.

¹⁷ “Use of visual and/or non-textual material”, para. 4.3, Draft Protocol.

¹⁸ See footnote 13 above.

18. The Defence requires the use of the confidential identifying information in order to seek to establish the truth behind the allegations made to the Prosecution, which were the subject of challenge at confirmation and which are fundamentally undermined by evidence demonstrating the unreliability of these witnesses. For ease of reference, the inconsistencies in the evidence of OTP-11 and OTP-12 and the Defence evidence undermining their accounts are provided herein at paragraphs 39-40.

(c) Disclosure of Prosecution evidence arising from investigations and other material including direct or indirect communications to date in respect of OTP-4, OTP-11 and OTP-12 which tends to show the innocence of the Accused, or which may affect the credibility of these Prosecution witnesses pursuant to Article 67(2)

19. At the confirmation hearing, the Defence presented evidence attacking the credibility of OTP-4, OTP-11 and OTP-12.¹⁹ The Defence maintains the position that the Prosecution failed to fulfil its duty under Article 54(1)(a) to investigate either the accounts given or exonerating evidence in respect of these witnesses prior to confirmation.²⁰

20. Notwithstanding the Prosecution's failure to discharge its duties adequately or at all for the confirmation hearing, the Defence submits that the interests of a fair trial require that it should not be prevented from doing so and it is entitled to receive as soon as practicable all disclosure arising from any subsequent investigations, which tends to show the innocence of the Accused, or which may affect the credibility of these Prosecution witnesses pursuant to Article 67(2). The basis for the properly founded concerns about the credibility and truthfulness of OTP-4, OTP-11 and OTP-12 and the proper discharge by the Prosecution of its duties under Article 54(1)(a) is set out below. Permitting the Prosecution to delay disclosure on these issues that disadvantage the Defence is not in the interests of justice, particularly as the Defence clearly establishes

¹⁹ ICC-01/09-02/11-T-10-ENG ET at p. 15, line 11 to p. 25, line 3.

²⁰ ICC-01/09-02/11-384, paras 7-10.

serious grounds to justify it being permitted to carry out proper and effective investigations in this regard.

(i) OTP-4

Internal inconsistencies

21. Given the central and fundamental inconsistencies underlying OTP-4's evidence which could indicate he has not given truthful statements, the Kenyatta Defence submits that the Prosecution was put on notice at the outset *vis-à-vis* this witness' credibility, and was duty bound to conduct investigations into the veracity of his allegations pursuant to Article 54(1)(a) of the Rome Statute. The Defence assumes that Prosecution investigations have since taken place and acknowledges receipt of relevant disclosure made in respect of OTP-4 on 21 June 2012. Notwithstanding this recent batch of disclosure, the Defence requests immediate service of all other outstanding disclosure under Article 67(2) in respect of this individual.
22. The Defence request for exculpatory material in respect of OTP-4 does not constitute a 'fishing expedition'. The request is based on the fact that different accounts have been given by OTP-4 on several occasions with little, if any, explanation, which should have necessitated further investigations by the Prosecution in the proper discharge of its obligations under Article 54. In outline, OTP-4's first unsolicited statement, provided to Open Society East Africa, does not refer at all to Mr. Kenyatta.²¹ In this account, one of the two undated meetings OTP-4 refers to concerns the Nairobi Members' Club.²² The first-person account he gives reveals that he was not present at either of the undated meetings he alleges.²³
23. OTP-4's second account was provided to the Waki Commission in September 2008.²⁴ In this statement, OTP-4 claims that on 25 November 2007 he met with

²¹ KEN-OTP-0009-0532_R01.

²² ICC-01/09-02/11-T-10-ENG, at p. 22, lines 6-11.

²³ ICC-01/09-02/11-T-10-ENG at p. 22, lines 2-5.

²⁴ KEN-OTP-0005-0484_R01.

Mr. Kenyatta, his personal assistant and Mungiki members, including D12-37,²⁵ in the downstairs cafe at the Yaya Centre in Nairobi. OTP-4 claimed that Mr. Kenyatta informed them that he had set up a meeting for them with the President the next day at State House on 26 November 2011.²⁶ Crucially, he abandons the date of this meeting in the third account he provides, without explanation. In this second account, OTP-4 states for the first time that on 3 January 2008, a meeting took place at the Nairobi Safari Club, as opposed to the Nairobi Members' Club, as stated in his first account. Notwithstanding the more detailed account he now provides of this alleged meeting, there is no mention of the presence of Mr. Kenyatta.

24. In the 64-page account he provides to the Prosecution in 2010,²⁷ OTP-4 changes the date and location of the meeting he alleged took place on 25 November to 17 November and situates this meeting on the second floor of the Yaya Centre.²⁸ He maintains that D12-37 and D12-48 were present with him at this alleged meeting with Mr. Kenyatta and his personal assistant whom he names.²⁹ It is only in this third account that OTP-4 also alleges that Mr. Kenyatta was present at a meeting on 26 November 2007 at State House in a tent, with himself, D12-37 and D12-48, Mr. Muthaura, President Mwai Kibaki, and other individuals.³⁰ OTP-4 changes once again the location of the meeting he alleges took place on 3 January, back to the Nairobi Members' Club, and for the first time alleges that Mr. Kenyatta was present.³¹ The fourth account of 23 pages is heavily redacted.³²

Substantial and significant Defence evidence undermining OTP-4

25. The Defence request for exculpatory material in respect of OTP-4 is also founded on the fact that the Defence adduced a significant amount of evidence

²⁵ KEN-OTP-0005-0484_R01 at 0490-0491.

²⁶ KEN-OTP-0005-0484_R01 at 0490.

²⁷ KEN-OTP-0043-0002_R01.

²⁸ KEN-OTP-0043-0002_R01 at 0030, para. 144.

²⁹ ICC-01/09-02/11-T-10-ENG, at p. 24, lines 19-25; KEN-OTP-0043-0002_R01 at 0030-0031.

³⁰ KEN-OTP-0043-0002_R01 at 0031-0037.

³¹ KEN-OTP-0043-0002_R01 at 0038-0042.

³² KEN-OTP-0051-1045_R01.

to undermine and contradict fundamental aspects of OTP-4's accounts during the Confirmation Hearing before the PTC on 28 September 2011, which must have necessitated further investigation by the Prosecution, including evidence in respect of the following key allegations:

- a. Allegation that Mr. Kenyatta was present at the Yaya Centre with Mungiki on 17 November 2007.³³ This is contradicted by significant and credible Defence evidence available to the Trial Chamber, including the evidence of D13-06,³⁴ D13-15,³⁵ and D12-48.³⁶
- b. Allegation that Mr. Kenyatta was present at the Yaya Centre with Mungiki on 25 November 2007.³⁷ This is contradicted by significant and credible Defence evidence available to the Trial Chamber, including the evidence of D13-06,³⁸ D13-15,³⁹ D13-12,⁴⁰ D13-23,⁴¹ D13-07,⁴² D13-08,⁴³ and D12-48.⁴⁴
- c. Allegation that Mr. Kenyatta was present at a meeting at Nairobi State House on 26 November 2007, the purpose of which was to discuss Mungiki support for the PNU's presidential campaign in exchange for Mungiki demands.⁴⁵ This allegation is contradicted by significant and credible Defence evidence available to the Trial Chamber, including the evidence of D13-23,⁴⁶ D13-07,⁴⁷ D13-08,⁴⁸ D13-24,⁴⁹ D13-06,⁵⁰ D12-11,⁵¹ D12-13,⁵²

³³ KEN-OTP-0043-0002 at 0030-0031.

³⁴ KEN-D13-0005-0408 at 0428-0429.

³⁵ KEN-D13-0005-0722 at 0723-0724.

³⁶ KEN-D12-0010-0072 at 0075.

³⁷ KEN-OTP-0005-0484 at 0490.

³⁸ KEN-D13-0005-0408 at 0430.

³⁹ KEN-D13-0005-0722 at 0725.

⁴⁰ KEN-D13-0005-0688 at 0689, KEN-D13-0005-0679, KEN-D13-0005-0685.

⁴¹ KEN-D13-0005-0779 at 0798.

⁴² KEN-D13-0005-0475 at 0481, KEN-D13-0005-0455.

⁴³ KEN-D13-0005-0524 at 0533.

⁴⁴ KEN-D12-0010-0072 at 0075.

⁴⁵ KEN-OTP-0009-0532 at 0052-0053, KEN-OTP-0005-0484 at 0491-0493, KEN-OTP-0043-0002 at 0031-0037, KEN-OTP-0051-1045 at 1057.

⁴⁶ KEN-D13-0005-0779 at 0799-0807, KEN-D13-0005-0179, KEN-D13-0005-0182, KEN-D13-0005-0187, KEN-D13-0005-0195, KEN-D13-0005-0197, KEN-D13-0005-0188, KEN-D13-0005-0190, KEN-D13-0005-0192.

⁴⁷ KEN-D13-0005-0475 at 0482-0487, KEN-D13-0005-0468, KEN-D13-0005-0470, KEN-D13-0005-0458, KEN-D13-0005-0473, KEN-D13-0005-0461, KEN-D13-0005-0463, KEN-D13-0005-0465.

⁴⁸ KEN-D13-0005-0524 at 0532-0543, KEN-D13-0005-0512, KEN-D13-0005-0515, KEN-D13-0005-0517, KEN-D13-0005-0520, KEN-D13-0005-0521.

⁴⁹ KEN-D13-0005-0815 at 0820 and 0822.

⁵⁰ KEN-D13-0005-0408 at 0430-0431.

⁵¹ KEN-D12-0001-0276 at 0282-0287, KEN-D12-0001-0289.

⁵² KEN-D12-0010-0444 at 0047-0048.

D12-37,⁵³ D12-46,⁵⁴ D12-48,⁵⁵ D12-53,⁵⁶ and other media documents and footage from 26 November.⁵⁷

- d. Allegation that Mr. Kenyatta was present at a meeting at the Nairobi Members' Club on 3 January 2008, the purpose of which was to secure the participation of the Mungiki in retaliatory attacks against ODM supporters in the Rift Valley.⁵⁸ This allegation is contradicted by significant and credible Defence evidence, including evidence from D13-06,⁵⁹ D13-20,⁶⁰ D12-41,⁶¹ D12-51,⁶² witness statements and judgments from domestic defamation proceedings in Kenya.⁶³

The Defence produced this evidence within the limited time allotted for Defence preparation.

(ii) OTP-11 and OTP-12

26. In respect of OTP-11 and OTP-12, the Defence presented evidence to the PTC to demonstrate that these witnesses were self-confessed Mungiki members and sect leaders whose motives for giving evidence and integrity had to be treated with particular caution.⁶⁴ Although no investigation was conducted by the Prosecution into the exculpatory evidence adduced by the Defence for the purpose of the confirmation hearing in respect of OTP-11 and OTP-12, the Defence makes the reasonable assumption that such investigations have since taken place.

⁵³ KEN-D12-0001-0412 at 0419.

⁵⁴ KEN-D12-0010-0001 at 0012-0015.

⁵⁵ KEN-D12-0010-0072 at 0076.

⁵⁶ KEN-D12-0016-0001 at 0004-0005.

⁵⁷ KEN-D13-0001-0358, KEN-D13-0001-0356, KEN-D13-0001-0357.

⁵⁸ KEN-OTP-0009-0532 at 0533, KEN-OTP-0005-0484 at 0493-0494, KEN-OTP-0043-0002 at 0038-0040, KEN-OTP-0051-1045 at 1057-1058.

⁵⁹ KEN-D13-0005-0408 at 0409-0417, 0431.

⁶⁰ KEN-D13-0005-0755 at 0760-0761.

⁶¹ KEN-D12-0008-0039 at 0041.

⁶² KEN-D12-0012-0001 at 0003.

⁶³ KEN-D13-0005-0235, KEN-D13-0005-0238, KEN-D13-0005-0246.

⁶⁴ ICC-01/09-02/11-T-10-ENG, p. 15, line 11 to p. 21, line 8.

The 12 March 2011 Extortion Attempt

27. The Defence evidence adduced at confirmation includes:
- a. Background to the extortion attempt relating to requests for KSh 377,000 from Mr. Kenyatta on 16 February 2011 by D12-47, a colleague of OTP-11 and OTP-12, in relation to an event due to take place in Thika on 12 March 2011 (the “12 March 2011 Extortion Attempt”);⁶⁵
 - b. An email dated 1 March 2011 from D12-47 to an individual assisting the Defence attaching an amended version of the requests for KSh 377,500 from Mr. Kenyatta;⁶⁶ and
 - c. A document signed by OTP-11 and OTP-12 with the stamp date of 25 February 2011 and a handwritten date of 10 March 2011, referring extensively to D12-47 and that he was with OTP-11 and OTP-12 “in this process”.⁶⁷
28. The “process” suggested in the document signed by OTP-11 and OTP-12 establishes that these individuals were for hire to affect the outcome of this case. Seeking payment of over KSh 2.3 million, the authors assert that:
- a. “Platoons” should be used to make sure that “detractors” - i.e. individuals who have given statements to the Prosecution - stop their on-going “propaganda”;
 - b. The “platoons” know the names and plans of “our rivals”; and
 - c. The “platoons” know all those who have given statements and the witnesses who have been interviewed - implicitly, those individuals interviewed by the Prosecution.⁶⁸
29. Although not specifically addressed to any recipient, there is evidence that OTP-11 and OTP-12 intended this document for Mr. Kenyatta:
- a. When the Defence confronted OTP-11 with the document on 24 March 2011, OTP-11 stated, “The doc is no longer needed. Now we know we can’t see UK, it’s no longer an issue”;⁶⁹

⁶⁵ KEN D13-0007-0012 at 0012-0014.

⁶⁶ KEN-D13-0007-0007 at 0007-0011.

⁶⁷ KEN-D13-0007-0021 at 0021-0025.

⁶⁸ KEN-D13-0007-0021 at 0021-0022; ICC-01/09-02/11-T-10-ENG, p. 18, lines 9-18.

- b. When the Defence confronted OTP-12 with the document on 21 March 2011, he explained that he and OTP-11 had “set out how we can dig, handle and bring them to our side” (referring to the Prosecution witnesses),⁷⁰ 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”,⁷¹ and
 - c. D12-47 gave the document to a member of the Defence on 10 March 2011.⁷²
30. On 21 March 2011, in interview with the Defence, OTP-12 stated that he wanted to relocate and be given security and that “after that” he “would be very much able to co-operate”.⁷³
31. Both OTP-11 and OTP-12 were engaged in an attempt to pervert the course of justice and extort money from Mr. Kenyatta. This issue was not investigated by the Prosecution prior to or during the confirmation of charges.

Evidence corroborating the 12 March 2011 Extortion Attempt

32. The Gary Summers Report⁷⁴ contains information about the failure of the 12 March 2011 Extortion Attempt, when the monies requested of Mr. Kenyatta by D12-47 on 16 February 2011 were not paid and access to Mr. Kenyatta was not granted to individuals, including OTP-12.⁷⁵ This information is corroborated by a memorandum dated 12 March 2011 from a member of the Defence which details an agitated phone call made by OTP-12 stating that he was not being given “financial assistance” or “access to Uhuru”.⁷⁶
33. On 12 March 2011, the same member of the Defence advised OTP-12 to address his concerns to an individual who was assisting the Defence (named in

⁶⁹ KEN-D13-0007-0052 at 0057.

⁷⁰ KEN-D13-0006-0039 at 0042.

⁷¹ KEN-D13-0006-0039 at 0042.

⁷² KEN-D13-0007-0075 at 0077.

⁷³ He further stated, “If I can be provided with what I am looking for, I can assist”, KEN-D13-0006-0039 at 0043.

⁷⁴ ICC-01/09-02/11-281-Conf-Anx1.

⁷⁵ ICC-01/09-02/11-281-Conf-Anx1, pp. 216-217, paras 36-31.

⁷⁶ KEN-D13-0007-0075 at 0078, para. 7.

the memorandum).⁷⁷ On 13 March 2011, OTP-11 sent seven subsequent emails, the first of which was sent to the individual OTP-12 had been referred to the day before.⁷⁸

OTP-11 and OTP-12 evidence given prior to the 12 March 2011 Extortion Attempt

34. Prior to the 12 March 2011 Extortion Attempt, OTP-11 and OTP-12 had provided exculpatory evidence to the Defence. On 9 February 2011,⁷⁹ OTP-11 had told the Defence that he had never met Mr. Kenyatta on a one-to-one basis.⁸⁰ OTP-11 did not give any evidence inculcating Mr. Kenyatta in the post-election violence.
35. On 7 February 2011,⁸¹ OTP-12 had provided an account to the Defence which included explanations that Mr. Kenyatta was a man who was preaching peace at the time of the post-election violence,⁸² that he was “a very good guy” who was “helping people”⁸³ and that he was neither a member of the Mungiki, nor did he work with them.⁸⁴ OTP-12 stated that Mr. Kenyatta did not fund post-election violence,⁸⁵ and that he had only met him once in a group with others in 2002.⁸⁶ He also stated that he wanted to be relocated from his home in Kenya.⁸⁷ He told a member of the Defence team that he was “categorical Uhuru made no approach or request to them”.⁸⁸ OTP-12 confirmed again on 21 March 2011 that he had information exonerating Mr. Kenyatta.⁸⁹

⁷⁷ KEN-D13-0007-0075 at 0078, para. 7.

⁷⁸ The seven emails on 13 March 2011 can be located at KEN-D13-0007-0027 at 0027-0033.

⁷⁹ KEN-D13-0007-0001 at 0001 to 0006. This interview with OTP-11 was dated as shown on the first page. It took place on 9 February 2011.

⁸⁰ D13-0007-0001 at 0002.

⁸¹ See KEN-D13-0006-0013 at 0013-0018. This interview with OTP-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 0003-0012.

⁸² KEN-D13-0006-0003 at 0011.

⁸³ KEN-D13-0006-0013 at 0017.

⁸⁴ KEN-D13-0006-0013 at 0018.

⁸⁵ KEN-D13-0006-0039 at 0040.

⁸⁶ KEN-D13-0006-0003 at 0007; KEN-D13-0006-0013 at 0015.

⁸⁷ KEN-D13-0006-0039 at 0043.

⁸⁸ KEN-D13-0007-0075 at 0080, para. 3.

⁸⁹ D13-0006-0039 at 0044.

Further Defence contact with OTP-11 and OTP-12

36. The last contact Defence Counsel had with OTP-11 and OTP-12 was on 25 March 2011 when both individuals delivered information concerning threats to their security⁹⁰ to the Defence office following interviews with Counsel on 21 and 24 March 2011,⁹¹ where both had separately been asked about the threatening emails and the document requesting over KSh 2.3 million which appeared to constitute a plan to intimidate witnesses.⁹²
37. Notwithstanding the cordial nature of the interviews conducted with OTP-12 on 21 March 2011⁹³ and with OTP-11 on 24 March 2011,⁹⁴ the Defence remained concerned about the nature of the emails received, the former background of these individuals, and the apparent plan to intimidate witnesses.⁹⁵ Contrary to the PTC's finding in the Confirmation Decision, these individuals had been used to facilitate meetings with other potential Mungiki insiders before 25 March, and at no time thereafter.⁹⁶
38. On 1 April 2011, OTP-11 told a member of the support team for Defence Counsel that there had been "an attempt by ODM to induce the two witnesses to cross over and testify for the OTP".⁹⁷ This information is recorded in the Gary Summers Report.⁹⁸ The name of the contact person relevant to this ODM attempt is also provided in the report.⁹⁹

⁹⁰ KEN-D13-0007-0059 (for OTP-11) and KEN-D13-0006-0056 (for OTP-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.

⁹¹ KEN-D13-0007-0052 at 0052 to 0058 (OTP-11); KEN-D13-0006-0039 at 0043 to 0044 (OTP-12). It was in interview with OTP-11 that he handed over a document dated 20 April 2011 that purported to organise a prayer meeting to support Mr. 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.

⁹² KEN-D13-0007-0021 at 0021-0026.

⁹³ KEN-D13-0006-0039 at 0039-0044.

⁹⁴ KEN-D13-0007-0052 at 0052-0058.

⁹⁵ KEN-D13-0007-0021 at 0021-0026.

⁹⁶ 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 (OTP-12) and KEN- D13-0007-0052 at 0052 to 0058 (OTP-11).

⁹⁷ ICC-01/09-02/11-281-Conf-Anx1, pp. 217-218, para. 43.

⁹⁸ CC-01/09-02/11-281-Conf-Anx1, pp. 217-218, para. 43.

⁹⁹ CC-01/09-02/11-281-Conf-Anx1, pp. 217-218, para. 43.

Further substantial and significant Defence evidence undermining OTP-11

39. The Defence request for exculpatory material in respect of OTP-11 is also founded on the fact that the Defence adduced a significant amount of information to undermine and contradict fundamental aspects of OTP-11's accounts, which must have necessitated further investigation by the Prosecution, including evidence in respect of the following key allegations:
- a. Allegation that a meeting took place at Nairobi State House which OTP-11 *believes* happened on 26 November 2007,¹⁰⁰ the purpose of which was to discuss Mungiki support for the PNU's presidential campaign in exchange for the Mungiki being given a "green light" to carry out their activities.¹⁰¹ This allegation is contradicted by significant and credible Defence evidence available to the Trial Chamber, including the evidence of D13-06,¹⁰² D13-07,¹⁰³ D13-08,¹⁰⁴ D13-23,¹⁰⁵ D13-24,¹⁰⁶ D12-11,¹⁰⁷ D12-13,¹⁰⁸ D12-37,¹⁰⁹ D12-46,¹¹⁰ D12-48,¹¹¹ D12-53,¹¹² and other media documents and footage from 26 November 2007.¹¹³
 - b. Allegation that Mr. Kenyatta distributed funds to Members of Parliament and Mungiki coordinators¹¹⁴ at a meeting at Nairobi State House on either the day before or the day of the election results, the purpose of which was

¹⁰⁰ From the transcript of interview, the Associate Analyst responds to OTP-11's allegation that he believes the meeting took place on 26 November 2007 by stating "*So basically you don't know if it happened on the 26 November 2007 but [REDACTED] is that correct?*", KEN-OTP-0052-1506_R01 at 1513.

¹⁰¹ KEN-OTP-0052-1276 at 1283; KEN-OTP-0052-1506_R01 at 1513; KEN-OTP-0052-1506_R01 at 1519.

¹⁰² KEN-D13-0005-0408 at 0430-0431.

¹⁰³ KEN-D13-0005-0475 at 0482-0487, KEN-D13-0005-0468, KEN-D13-0005-0470, KEN-D13-0005-0458, KEN-D13-0005-0473, KEN-D13-0005-0461, KEN-D13-0005-0463, KEN-D13-0005-0465.

¹⁰⁴ KEN-D13-0005-0524 at 0532-0543, KEN-D13-0005-0512 KEN-D13-0005-0515, KEN-D13-0005-0517, KEN-D13-0005-0520, KEN-D13-0005-0521.

¹⁰⁵ KEN-D13-0005-0779 at 0799-0807, KEN-D13-0005-0179, KEN-D13-0005-0182, KEN-D13-0005-0187, KEN-D13-0005-0195, KEN-D13-0005-0197, KEN-D13-0005-0188, KEN-D13-0005-0190, KEN-D13-0005-0192.

¹⁰⁶ KEN-D13-0005-0815 at 0820 and 0822.

¹⁰⁷ KEN-D12-0001-0276 at 0282-0287, KEN-D12-0001-0289.

¹⁰⁸ KEN-D12-0010-0444 at 0047-0048.

¹⁰⁹ KEN-D12-0001-0412 at 0419.

¹¹⁰ KEN-D12-0010-0001 at 0012-0015.

¹¹¹ KEN-D12-0010-0072 at 0076.

¹¹² KEN-D12-0016-0001 at 0004-0005.

¹¹³ KEN-D13-0001-0358, KEN-D13-0001-0356, KEN-D13-0001-0357.

¹¹⁴ OTP-11 alleges that each coordinator received KSh 3.3 million, KEN-OTP-0052-1506 at 1514.

for the PNU to retain power.¹¹⁵ This allegation is contradicted by significant and credible Defence evidence available to the Trial Chamber, including the evidence of D13-06,¹¹⁶ D13-20,¹¹⁷ D13-25,¹¹⁸ D12-02,¹¹⁹ D12-46,¹²⁰ and other media documents and footage from 30 December.¹²¹

Further substantial and significant Defence evidence undermining OTP-12

40. The Defence request for exculpatory material in respect of OTP-12 is also founded on the fact that the Defence adduced a significant amount of information to undermine and contradict fundamental aspects of OTP-12's accounts, which must have necessitated further investigation by the Prosecution, including evidence in respect of the following key allegations:

- a. Allegation in which OTP-12 is led by the interviewer to conclude that a number of Mungiki members went to Nairobi State House on 27 November 2007.¹²² This allegation contradicts the Prosecution's own case on the basis of the evidence of OTP-4 who claimed that such a meeting took place on 26 November 2007. Aside from this reference by OTP-12, there is no other evidence to support the occurrence of such a meeting on 27 November 2007. The Defence evidence contradicts the allegation of Mungiki members attending a meeting at State House on 26 November, as alleged by the Prosecution, including the evidence of D13-06,¹²³ D13-07,¹²⁴ D13-08,¹²⁵

¹¹⁵ OTP-11 alleges that Mr. Kenyatta said, "*They are not ready to hand over power and he has the capability of organising his people for any eventuality*". From the transcript of interview, it is clear that OTP-11 was not at this meeting, and neither is he clear about the date, KEN-OTP-0052-1506 at 1514.

¹¹⁶ KEN-D13-0005-0408 at 0431.

¹¹⁷ KEN-D13-0005-0755 at 0759.

¹¹⁸ KEN-D13-0005-0859 at 0866-0868.

¹¹⁹ KEN-D12-0008-0024 at 0026.

¹²⁰ KEN-D12-0013-0001 at 0003-0004.

¹²¹ KEN-D13-0001-0151, KEN-D13-0004-0015, KEN-D12-0009-0006. In the Confirmation Decision, the PTC Majority mistakenly characterises the evidence at KEN-D12-0009-0006 referred to by the Kenyatta Defence as irrelevant: see ICC-01/09-02/11-382-Conf at para. 339. This mischaracterisation stems from an erroneous assessment as to the disclosing party. The evidence in question bears the reference EVD-PT-D12-00191 or KEN-D12-0009-0006, but the Majority incorrectly cites the reference EVD-PT-D13-00191 or KEN-D13-0001-0348. The transcript of the Kenyatta Defence's submissions clearly refers to the video evidence of 30 December 2007 disclosed by the Muthaura Defence: see ICC-01/09-02/11-T-10-ENG at p. 81, line 18.

¹²² In the transcript, the Interviewer leads OTP-12 in relation to the date of 27 November: KEN-OTP-0060-0426 at 0449. In contradiction to the Prosecution's case, it should be noted that this witness gives no evidence in relation to the alleged meeting on 26 November, the date given by OTP-4.

¹²³ KEN-D13-0005-0408 at 0430-0431.

D13-23,¹²⁶ D13-24,¹²⁷ D12-11,¹²⁸ D12-13,¹²⁹ D12-37,¹³⁰ D12-46,¹³¹ D12-48,¹³² D12-53,¹³³ and other media documents and footage from 26 November 2007.¹³⁴

- b. Allegation in which OTP-12 is led in respect of the date¹³⁵ by the investigator to conclude that Mr. Kenyatta and other politicians attended a meeting on 30 December 2007, the purpose of which was to mobilise people on the ground.¹³⁶ This allegation is contradicted by significant and credible Defence evidence available to the Trial Chamber, including the evidence of D13-06,¹³⁷ D13-20,¹³⁸ D13-25,¹³⁹ D12-02,¹⁴⁰ D12-46,¹⁴¹ and other media documents and footage from the day.¹⁴²

V. RELIEF

41. For the aforementioned reasons, the Defence respectfully requests that the Chamber:

- a. Order the Prosecution to confirm whether it intends to rely upon OTP-4, OTP-11 and OTP-12 at trial;
- b. Order the Prosecution to confirm the identities of OTP-11 and OTP-12;

¹²⁴ KEN-D13-0005-0475 at 0482-0487, KEN-D13-0005-0468, KEN-D13-0005-0470, KEN-D13-0005-0458, KEN-D13-0005-0473, KEN-D13-0005-0461, KEN-D13-0005-0463, KEN-D13-0005-0465.

¹²⁵ KEN-D13-0005-0524 at 0532-0543, KEN-D13-0005-0512 KEN-D13-0005-0515, KEN-D13-0005-0517, KEN-D13-0005-0520, KEN-D13-0005-0521.

¹²⁶ KEN-D13-0005-0779 at 0799-0807, KEN-D13-0005-0179, KEN-D13-0005-0182, KEN-D13-0005-0187. KEN-D13-0005-0195, KEN-D13-0005-0197, KEN-D13-0005-0188, KEN-D13-0005-0190, KEN-D13-0005-0192.

¹²⁷ KEN-D13-0005-0815 at 0820 and 0822.

¹²⁸ KEN-D12-0001-0276 at 0282-0287, KEN-D12-0001-0289.

¹²⁹ KEN-D12-0010-0444 at 0047-0048.

¹³⁰ KEN-D12-0001-0412 at 0419.

¹³¹ KEN-D12-0010-0001 at 0012-0015.

¹³² KEN-D12-0010-0072 at 0076.

¹³³ KEN-D12-0016-0001 at 0004-0005.

¹³⁴ KEN-D13-0001-0358, KEN-D13-0001-0356, KEN-D13-0001-0357.

¹³⁵ At KEN-OTP-0060-0405 at 0419, OTP-12 alleges that politicians were given KSh 3.3 million in State House to mobilise people from the ground. However, it is clear from the transcript of interview that it is the investigator that in fact introduces the date of 30 December, and OTP-11 simply agrees with a sequence of extremely leading questions: KEN-OTP-0060-0405_R01 at 0418.

¹³⁶ KEN-OTP-0060-0405 at 0418, KEN-OTP-0060-0405 at 0408.

¹³⁷ KEN-D13-0005-0408 at 0431.

¹³⁸ KEN-D13-0005-0755 at 0759.

¹³⁹ KEN-D13-0005-0859 at 0866-0868.

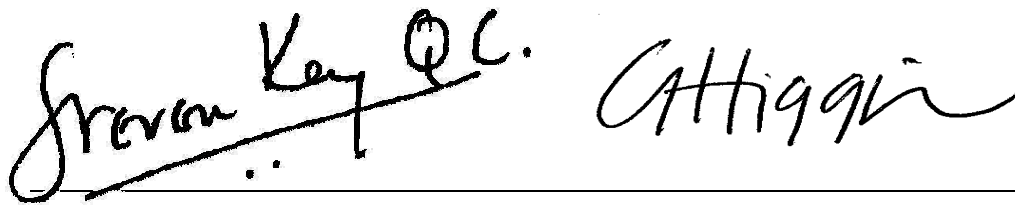
¹⁴⁰ KEN-D12-0008-0024 at 0026.

¹⁴¹ KEN-D12-0013-0001 at 0003-0004.

¹⁴² KEN-D13-0001-0151; KEN-D13-0004-0015; KEN-D12-0009-0006. With regard to KEN-D12-0009-0006, see footnote 121 above.

- c. Permit the Defence to use confidential identifying information, visual and/or non-textual documents for the sole purpose of Defence investigations in respect of OTP-4, OTP-11 and OTP-12; and
- d. Order the Prosecution to disclose to the Defence evidence arising from all investigations and all other material including direct or indirect communications to date in respect of OTP-4, OTP-11 and OTP-12 which tends to show the innocence of the Accused, or which may affect the credibility of these Prosecution witnesses pursuant to Article 67(2).

Respectfully submitted,

The image shows two handwritten signatures in black ink. The first signature, on the left, is 'Steven Kay QC.' and the second, on the right, is 'G Higgins'. Both signatures are written in a cursive, flowing style. A horizontal line is drawn across the page below the signatures.

Steven Kay QC and Gillian Higgins
On behalf of Uhuru Muigai Kenyatta

Dated this 11 July 2012
London, England