

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11
Date: 7 February 2013

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

Public Redacted Version of "Defence Application pursuant to Article 64(4) for an order to refer back to Pre-Trial Chamber II or a Judge of the Pre-Trial Division the Preliminary issue of the Validity of the Decision on the Confirmation of Charges or for an order striking out new facts alleged in the Prosecution's Pre-Trial Brief and Request for an extension of the page limit pursuant to Regulation 37(2)"

Sources: Defence for Francis Kirimi Muthaura

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

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I. INTRODUCTION

1. Ambassador Muthaura has been called to answer to a case which bears no resemblance to the one that was confirmed against him. This is manifestly unfair. A fair and objective review of the Prosecution's Pre-Trial Brief dated 10 January 2013 ("Pre-Trial Brief")¹ reveals that the case advanced by the Prosecution bears no resemblance to either the case it presented at the Confirmation of charges hearing² or the case that was ultimately confirmed by the Pre-Trial Chamber ("PTC").³ The Pre-Trial Brief contains new allegations that were not previously made against Ambassador Muthaura. The Pre-Trial Brief is based upon new and untested evidence obtained by the Office of the Prosecutor ("OTP") post-confirmation. In tandem with this "new evidence", the Pre-Trial Brief sees the OTP jettisoning much of its "core evidence" relied upon at the confirmation stage. On any view, the case now advanced by the OTP has undergone a metamorphosis from that confirmed by the PTC in January 2012. The attendant re-characterisation of the allegations raises a raft of issues that go to the heart of the rights of the accused, the purpose of confirmation as envisaged by the drafters of the Rome Statute and the exercise of ethical responsibilities by the ICC Prosecutor and counsel appearing on her behalf.

2. The new allegations raised by the OTP are vigorously denied. The purpose of the present application, however, is for the Trial Chamber ("Chamber") to review the circumstances of this case and to determine whether it is fair and consistent with the object and purpose of the Rome Statute for Ambassador Muthaura to be asked to proceed to trial and defend himself on allegations that have never been subjected to any form of considered judicial scrutiny.

¹ ICC-01/09-02/11-596-Conf-AnxD-Red.

² See Prosecutor's Application Pursuant to Article 58 as to Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09-02/11-35-Red2; Amended Document Containing the Charges, ICC-01/09-02/11-280-AnxA; Pre-Trial Brief, ICC-01/09-02/11-596-Conf-AnxD-Red.

³ ICC-01/09-02/11-382-Conf.

Furthermore, the OTP has breached its statutory duty of disclosure and ethical duties of candour to the Court.

3. In order to safeguard the integrity of the present proceedings and the fair trial of Ambassador Muthaura, the Defence of Ambassador Muthaura ("Defence") hereby requests the Trial Chamber, pursuant to Article 64(4), refer the following preliminary issues back to the PTC or another available judge of the Pre-Trial Division: (i) Whether non disclosure by the OTP of potentially exonerating evidence (PEXO) which was in its possession at the time of the confirmation hearing vitiates the validity of the confirmation decision itself? (ii) Whether this case can or should properly proceed to trial when the OTP has decided to drop the core planning meeting alleged at confirmation and, additionally, no longer seeks to rely upon the only witness it presented to prove that meeting at the confirmation stage? and (iii) Additionally, or in the alternative, whether new facts recently alleged in the Pre-Trial Brief and not alleged or previously disclosed at the time of confirmation, and not subjected to any judicial scrutiny, require a new confirmation of charges hearing before a Trial Chamber is required or authorised to determine them?
4. In the alternative, and in the event that the relief requested at paragraph 3 above is rejected, the Defence respectfully prays that the Chamber order the Prosecutor to remove from the Pre-Trial Brief all the new allegations detailed in this application that have not been subject to judicial scrutiny by the PTC.
5. The Defence submits that these requests are justified and necessary, *inter alia*, because:
 - (i) Critical exonerating evidence in the possession of the OTP was not disclosed to the Defence prior to the confirmation of charges hearing. The material non-disclosure by the OTP deprived the Defence the opportunity of placing that evidence before the Trial Chamber, making submissions on

it and using that evidence to controvert other OTP evidence that was ultimately accepted by the Pre-Trial Chamber. This material non-disclosure deprived the Chamber of crucial evidence that was central to the fair determination of the issues falling for adjudication at confirmation. The evidence which was in the possession of the OTP and not disclosed to the Defence would have had the effect of casting significant doubt on the veracity and reliability of other OTP evidence ultimately relied upon by the PTC in the Confirmation Decision. The non-disclosure violated Ambassador Muthaura's right to a fair confirmation hearing and, the Defence submits, vitiated the validity of the Confirmation Decision and/or otherwise rendered the Confirmation Decision manifestly unsound;

- (ii) The Prosecutor has withdrawn the principal witness (and indeed only witness to the alleged [REDACTED] meeting) and has also withdrawn the core facts and circumstances that underpinned the case confirmed by the PTC. The effect of this is that if the case proceeds to trial, Ambassador Muthaura will be required to defend himself against a fundamentally new case and one that has never been subject to judicial scrutiny in its core and material particulars; and
 - (iii) The OTP is now relying on wholly new material facts that have not been subjected to judicial scrutiny through the confirmation hearing procedure.
6. The Defence submits this application as confidential as it contains the names of witnesses and other confidential material.

II. REQUEST FOR EXTENSION OF THE PAGE LIMIT

7. Pursuant to Regulation 37(2) of the Regulations of the Court, the Defence hereby respectfully requests the Trial Chamber extend the page limit of this filing by 2 pages given the critical nature of its content and the necessity of examining factual issues pertaining to the case in detail. The Defence submits

that these exigencies constitute “exceptional circumstances”, as required by Regulation 37(2).

III. PROCEDURAL HISTORY

8. PTC II issued a decision confirming the charges against Ambassador Muthaura and Mr Kenyatta on 23 January 2012.⁴
9. The OTP disclosed PEXO Package 8 on 21 June 2012. This package contained a significant amount of materials pertaining to OTP Witness 4⁵ (“Witness 4”). The OTP also disclosed an Article 67(2) exculpatory [REDACTED] from Witness 4⁶ in PEXO Package 10 on 22 August 2012. The OTP disclosed Incriminatory Evidence Package 18 on 19 October 2012.⁷ This disclosure package contained a [REDACTED] from OTP Witness 4.⁸ On 9 January 2013, the OTP disclosed the “Prosecution’s Provision of Materials Pursuant to Decision ICC-01/09-02/11-451” including Confidential Annexes A, B and C. These Annexes contained the list of witnesses for trial, the main facts to which the witnesses would testify and the Pre-Trial Brief.⁹

IV. LEGAL BASIS OF APPLICATION

10. The Defence makes this application pursuant to Articles 21(1)(b), 21(2), 61(11), 64(2), 64(4), 64(6)(a) and 64(6)(f) of the Rome Statute and Rule 134(1) of the Rules of Procedure and Evidence.
11. Article 61(1) of the Statute authorises the Trial Chamber to perform all the functions of the PTC. The Trial Chamber also has a responsibility to ensure that a trial is fair and expeditious.¹⁰ Additionally, Article 64(4) permits the Trial

⁴ ICC-01/09-02/11-382-Conf. In this decision the PTC declined to confirm charges against Major General Ali.

⁵ ICC-01/09-02/11-443 and ICC-01/09-02/11-443-Conf-AnxA.

⁶ KEN-OTP-0067-0604.

⁷ ICC-01/09-02/11-512 and ICC-01/09-02/11-512-Conf-Anx1.

⁸ [REDACTED].

⁹ ICC-01/09-02/11-596.

¹⁰ Article 64(2), Rome Statute.

Chamber to “refer preliminary issues to the Pre-Trial Chamber” “if necessary for [the] effective and fair functioning” of proceedings.

12. What constitutes a preliminary issue has not been defined in the Statute. However, the Defence submits that questions such as: (a) whether the non-disclosure of critical PEXO information at the pre-trial stage was wrongful and affects the validity of a confirmation decision; and (b) whether new facts and circumstances introduced at the trial stage render the case so materially different from the one confirmed for trial that a new confirmation hearing is required in order to subject them to legal scrutiny thereby upholding the purpose of confirmation hearings and the rights of accused persons, qualify as preliminary issues which may properly be referred back to the PTC. In this context, the Defence respectfully submits that the Trial Chamber has the authority to refer the issues at hand back to PTC II or another available judge of the Pre-Trial Division.

V. GROUND FOR ARTICLE 64(4) REFERRAL

(i) Non-disclosure by the OTP of potentially exonerating evidence (PEXO)

13. The PTC based its decision to confirm the case against Ambassador Muthaura primarily on the evidence of Witness 4. The OTP’s theory of the case was that, at a meeting at Nairobi State House on 26 November 2007, Ambassador Muthaura and Uhuru Kenyatta obtained the support of the Mungiki criminal gang for the Party of National Unity (“PNU”) in the forthcoming elections and that this was secured in exchange for certain concessions from the government.¹¹ It was further alleged that a criminal planning meeting took place at the Nairobi Members Club [REDACTED]. At this alleged meeting, it was said that Ambassador Muthaura and Uhuru Kenyatta commissioned the Mungiki to carryout retaliatory attacks against perceived supporters of the

¹¹ See Confirmation Decision, paras. 310 and 311.

Orange Democratic Movement (“ODM”) in Nakuru and Naivasha.¹² This was the common plan. On any view, these two meetings were the foundation upon which the case against Ambassador Muthaura rested.¹³

14. The PTC relied principally on the evidence of Witness 4 to establish these meetings. Indeed, the Majority stated at paragraphs 311 and 342 respectively of the Confirmation Decision that *“the occurrence of this meeting is established to the requisite threshold by the testimony of Witness OTP-4 who was present as a Mungiki representative and who provides a detailed account thereof”*. In addition, the PTC relied heavily on Witness 4’s supposed ‘eye-witness’ account in order to support its determination, and to debunk a number of significant inconsistencies exposed by the Defence.¹⁴ It is clear, on any fair reading of the evidence or the Confirmation Decision, that without the evidence of Witness 4, there would not have been any sufficient basis to find the existence of a common plan to commit the crimes alleged in Nakuru and Naivasha, or accordingly, to confirm the case against Ambassador Muthaura.
15. The Defence submits that critical exonerating evidence in the possession of the OTP was not disclosed to the Defence prior to the confirmation of charges hearing. This deprived the Defence and the Chamber from considering this evidence in determining the central question of whether the charges preferred by the Prosecutor against Ambassador Muthaura should be confirmed. The Defence alleges that the non-disclosure of key information in the possession of the OTP vitiated the Confirmation Decision and constitutes a violation of the rights of the Accused as guaranteed by the Rome Statute.

¹² See Confirmation Decision, para. 341.

¹³ Confirmation Decision, para. 376. Note that in the alleged 30 December 2007 meeting at State House, Ambassador Muthaura was not alleged to be present.

¹⁴ See, e.g., Final Written Observations of the Defence Team of Ambassador Francis K. Muthaura on the Confirmation of Charges Hearing, 21 November 2011, ICC-01/09-02/11-374-Conf, para. 60 and ICC-01/09-02/11-374-Conf-AnxB, pgs. 31-35.

16. The PEXO evidence in question is contained in [REDACTED]¹⁵. The PEXO includes: (i) At paragraph 14 [REDACTED] the witness contradicts his evidence contained in paragraph 23 of the same document and in later statements to the OTP when he stated that he was [REDACTED]¹⁶ [REDACTED] – which would have made it impossible for him to participate in the meeting of the same date at State House Nairobi together with Ambassador Muthaura and Mungiki members as he claimed elsewhere; and (ii) In paragraph 33, the witness directly contradicts evidence he provided in later interviews (relied upon by the OTP at confirmation) that he attended and participated in the key meeting of the alleged common plan said to have taken place at Nairobi Members Club [REDACTED].
17. The [REDACTED] was disclosed to the Defence on 19 October 2012 (more than **one year after the confirmation hearing**). The document was received by the OTP on 27 September 2010¹⁷ (**almost one year prior to the commencement of the Confirmation Hearing**). The OTP did not disclose this critical document to the Defence despite the fact that the document contained fundamental contradictions as to key facts underlying the charges and which cast serious doubt on the credibility and reliability of Witness 4 (the only witness relied upon by the OTP for the alleged meeting of [REDACTED]).
18. The OTP's failure to alert and inform the PTC of the critical nature of this PEXO evidence when seeking authorization for non-disclosure of the [REDACTED], constitutes a massive impropriety on the part of the OTP that goes to the heart of fairness in the present case. The Defence is compelled to conclude that the OTP deliberately concealed the true nature of the [REDACTED] from the Single Judge. Instead of highlighting that [REDACTED] contained key PEXO evidence on the most critical allegation in the case, the OTP simply requested non-

¹⁵ [REDACTED].

¹⁶ [REDACTED].

¹⁷ See chain of custody metadata accompanying [REDACTED].

disclosure “to protect the safety of witnesses” and because it “could lead to the identification of the witness’s current place of residence”. Astonishingly, the OTP deliberately misled the Single Judge into believing that even “an anonymous summary of the material is likely to be [...] meaningless”.¹⁸ Whilst of course, the Defence takes issue with the order of the Single Judge granting the OTP’s application, that order was clearly predicated on her expectation that “the Prosecutor had carefully reviewed the evidence in his possession [...] both incriminatory and exculpatory”.¹⁹ It was the overriding duty of the Prosecutor, in furtherance of his statutory obligations, to have highlighted the real nature and import of the evidence he sought to withhold from the Defence.

19. This is a matter that should give the Trial Chamber the most serious cause for concern. The non-disclosure is of so profound a nature and concerns so central a witness that it has violated the fair trial rights of Ambassador Muthaura, and undermined the fundamental basis of the Confirmation Decision itself.
20. Significantly, it appears that the OTP misled the Court regarding the reliability of Witness 4 upon whose testimony the OTP’s case rested. This observation is borne out of the fact that in its oral and written submissions during the confirmation hearing, the OTP, with full knowledge of Witness 4’s exculpatory evidence, emphasised²⁰ or asserted in the strongest terms possible, the

¹⁸ Request for Non-Disclosure of Document – [REDACTED], 15 August 2011 Application, Redacted Annex A1, ICC-01/09-02/11-241-Conf-AnxA1-Red, p. 3.

¹⁹ Decision on the “Prosecution’s application requesting disclosure after a final resolution of the Government of Kenya’s admissibility challenge” and Establishing a Calendar for Disclosure Between the Parties, 20 April 2011, ICC-01/09-02/11-64, para. 17

²⁰ *Regarding Witness 0004, Kenyatta alleged a number of so called inconsistencies in his previous statements. Regarding his first statement, Prosecution Witness 0004 explained that he wanted to be discreet about his presence at the State House with the Mungiki on 26 November 2007 because he wanted to keep his Mungiki membership hidden. In any case, rather than indicating any inconsistencies, the limited purpose of the evidence he gave shows the security concerns of the Witness whilst he provided the statement.*

As regards the statement given to CIPEV, though different in some respects from the first statement, it is fundamentally consistent with the evidence provided by the Witness in the previous statement. Crucially, the third and fourth statements of the Witness do not show any material inconsistency that may warrant the rejection of Witness 0004’s evidence implicating Kenyatta in the common plan. Rather, the evidence of the Witness highlighted the specific and essential contribution of Kenyatta to the effective

consistency of Witness 4 on the issue of his attendance to the aforementioned meetings. These submissions were false to the knowledge of the OTP. At no time did Prosecution counsel refer to the important contradictions in the [REDACTED] of Witness 4, even though they were fully aware of them. Submissions of Prosecution counsel were not tempered in the least by the knowledge that their key witness had given a fundamentally different account on a crucial issue falling for determination at confirmation. It is a fundamental tenet of professional ethics that counsel have a duty to not bring before a court evidence it believes to be false or incorrect.²¹ The OTP paid no heed to such injunction at confirmation with consequences which, the Defence submits, are fatal to the validity of the Confirmation Decision itself.

21. This dereliction of duty by the OTP is further compounded by the its failure to fully disclose (at the time of the confirmation hearing) PEXO evidence in its possession that further contradicted Witness 4 in his claims about his attendance at the 26 November 2007 meeting at State House, his alleged

implementation of the common plan. Furthermore, the core of the evidence of the Witness has remained consistent and corroborated by other sources.” (28 October 2011, ICC-01/09-02/11-361, paras. 66-67)

²¹ In assessing the duty of prosecution counsel it is instructive to recall the draft prepared by the Secretariats of the International Association of Prosecutors and the CICC “The Code of Professional Conduct for Prosecutors of the International Criminal Court”, 2002 (not enacted by the Prosecutor of the ICC). See <http://www.amicc.org/docs/prosecutor.pdf>. Critically, Article 7(2) of the IAP and CICC draft provides that prosecutors before the ICC “not strive for a conviction at all costs”. Article 7(4) requires prosecutors before the ICC “assist the court to arrive at the truth and to do justice for the international community, the victims **and the accused**”; Article 7(5) requires that prosecutors before the ICC “**never knowingly make a false or misleading statement of material fact to the court or offer evidence which he or she knows to be incorrect**”. These essential pre-requisites to ethical prosecutions are also found in the Prosecutor’s Regulation 2/1999 applicable to prosecutors of the United Nations ICTY and ICTR. Provision 2(e) of which provides that prosecutors “**demonstrate respect and candour before the Tribunal, and not knowingly to make an incorrect statement of material fact to the Tribunal, or offer evidence which prosecution counsel knows to be incorrect or false. – should prosecution counsel become aware that a statement made to the Tribunal is incorrect or that evidence presented is false, he or she shall take all the necessary steps to inform the Tribunal as soon as possible.**” See also, Footnote 30 of ICTR Appeals Chamber Decision of *Niyitegeka*, 9 July 2004 which cites *R. v. Early*, 2002 EWCA Crim 1904, 2003 1 Cr App R 288 at para. 10: “Judges can only make decisions and counsel can only act and advise on the basis of the information with which they are provided. The integrity of our system of criminal trial depends on judges being able to rely on what they are told by counsel and on counsel being able to rely on what they are told by each other. This is particularly crucial in relation to disclosure”. Also see Article 70 of the Rome Statute.

attendance of the alleged meeting [REDACTED] at Nairobi Members Club and his Mungiki membership.²²

22. At confirmation, the Defence submitted a statement from [REDACTED].²³ The Chamber rejected the statement of Defence witness [REDACTED], holding that his denials were not determinative of the issues and that they attached low probative value to his statement.²⁴ It has now emerged that the OTP had interviewed [REDACTED] six-months prior to the Confirmation Hearing (and before he was interviewed by the Defence) and that even at that time, he denied the claims of [REDACTED]. [REDACTED] categorically denied any involvement in wrongdoing. While the OTP disclosed the statement in a summary form, it withheld the identity of the witness from the Defence, ostensibly on the ground of witness security, and further withheld the fact that [REDACTED] was the person allegedly [REDACTED]. This is despite the fact that the OTP was on clear notice that the witness in question was a Defence witness whose statement was disclosed to the OTP prior to the confirmation hearing. It turns out that the account that he gave the Defence was, in all important respects, identical to that given to the OTP months before.
23. The OTP's failure to disclose the identity of this witness and the full record of its interview with him deprived the Defence and the Chamber of important pieces of evidence which would have contributed significantly in further showing that [REDACTED]. The OTP ought to have sought guidance from the Chamber regarding the necessity of withholding the identity of [REDACTED] given that he was a Defence witness and in light of the contents of his interview and especially in light of [REDACTED] in the OTP's possession. Witness

²² The Defence underscores that, post-confirmation, Witness 4 [REDACTED] that he lied about his [REDACTED] and with regards to other averments made in the statements which the OTP had relied upon at Confirmation. See [REDACTED].

²³ [REDACTED].

²⁴ See Confirmation Decision, [REDACTED].

security simply could not be properly asserted as a basis to withhold that crucial evidence from the Defence.²⁵ It is the prosecuting authority that had the primary duty to bring such matters to the Chamber and seek such additional orders as were necessary in light of its statutory disclosure obligations. The failure of the OTP in this regard is significant and troubling.

24. Apart from its failure to disclose the critical PEXO contained in the [REDACTED] of Witness 4 and the failure to disclose the identity and full statement of [REDACTED], the OTP also failed to disclose other significant PEXO materials that were in its possession during the time of the confirmation hearing.
25. Confidential Annex A lists a selection of the PEXO materials that had been disclosed after the confirmation hearing which were in the possession of the OTP prior to the hearing. In some instances the explanation of the OTP for the non-disclosure of the evidence which was in its possession since 2010, is appalling. For example, Prosecution Counsel, [REDACTED], complacently excused non-disclosure on the basis that it was *"not registered in our evidence collection database. Accordingly when searches were undertaken prior to the confirmation hearing the material was not captured"*.²⁶ No apology or expression of regret was given. After 10 years of the Court's existence, it had been hoped that the OTP would have had adequate systems in place to discharge their statutory obligations. The internal failings and deficiencies of the OTP cannot now properly be prayed in aid to excuse blatant breaches of their legal obligations detrimental to the rights of accused persons.

²⁵ Some of these lies were accepted by Witness 4 subsequently. See footnote 22 above ([REDACTED]). However, proper disclosure would have allowed the Defence to properly challenge the evidence of OTP Witness 4 at confirmation.

²⁶ See Confidential Annexes B and C, which contain copies of relevant email communications between the Defence and Prosecution.

26. In assessing the evidence of Witness 4 regarding the [REDACTED] meeting, the Chamber made an adverse inference in the Confirmation Decision that [REDACTED].²⁷ It has now emerged that the OTP had [REDACTED] – more than one year before the confirmation hearing. The witness in question provided evidence which the OTP assessed to be PEXO.²⁸ In spite of this assessment the OTP failed to disclose the evidence to the Defence until January 2013, more than a year after the Confirmation of Charges hearing.
27. The Defence submits that the OTP's failure to disclose these materials prior to or during the confirmation hearing is both a serious violation of the Prosecutor's obligations under the statute and represents a serious violation of the fundamental rights of Ambassador Muthaura.
28. The Appeals Chamber has determined that in cases of non-disclosure of information to the Defence at the pre-confirmation stage: *"It would be, in every case, for the Pre-Trial Chamber to assess whether the rights of the defendant to a fair hearing were prejudiced on the facts. In circumstances in which the redaction sought would involve withholding exculpatory information which was required to be disclosed, or would result in "a manifest inequality of arms, with little, if any prospect for fair proceedings" the Pre-Trial Chamber would, no doubt, reject the application".*²⁹
29. The Defence submits that the exculpatory information in question was "required to be disclosed" and that the result of such non-disclosure was "a manifest inequality of arms" that resulted in "the rights of the defendant to a fair hearing [being] prejudiced" beyond repair to the extent that the confirmation decision itself has been fatally undermined.

²⁷ Decision on Confirmation of Charges Hearing, ICC-01/09-02/11-382-Conf, [REDACTED].

²⁸ See [REDACTED] and [REDACTED].

²⁹ *Prosecutor v. Katanga*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 13 May 2008, ICC-01/04-01/07-475 OA, para. 62 (emphasis added).

30. As noted by His Honour, Judge Pikis in a dissenting opinion to an Appeals Chamber Judgment on the issue of items collected pursuant to Article 54(3)(e) of the Statute:

“The failure of the Prosecutor to bring forth and disclose evidence tending to exonerate the accused is not confined to the trial, but extends to the confirmation hearing too, where disclosure of exculpatory evidence to the person under investigation is also assured as his/her fundamental right [...] Evidence tending to exonerate a person of the charges levied against him/her could have a bearing on the sufficiency of evidence before the Pre-Trial Chamber for the purpose of determining whether the standard for the confirmation of charges has been satisfied [...] Knowledge of the existence of exonerating evidence not put before the Trial Chamber [or Pre-Trial Chamber] would cloud the proceedings with doubt, rendering them a priori inconclusive.”³⁰

31. Accordingly, the Defence submits that the issue of whether the PEXO information in question was wrongly withheld from the Defence, and if so, whether such withholding resulted in “a manifest inequality of arms, with little, if any prospect for fair proceedings”, must be placed before the PTC or another available judge of the Pre-Trial Division pursuant to Article 64(4) of the Statute. The issue is an appropriate, indeed necessary one for referral pursuant to Article 64(4) as the very validity of the confirmation decision and the fairness of the confirmation proceedings against Ambassador Muthaura is at stake; non-resolution of this issue “would cloud [both] the proceedings” that occurred at confirmation and the trial proceedings arising out of it “with doubt”.

(ii) OTP has decided to no longer maintain core allegations and witnesses

32. In its “Order regarding the content of the charges” the Chamber held that the “‘facts and circumstances’ are the fundamental points of reference throughout the trial, which cannot be amended once the trial started, whereas other

³⁰ *Prosecutor v. Lubanga*, Dissenting Opinion of Judge Pikis, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled “Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008”, 21 October 2008, ICC-01/04-01/06-1486, paras. 43, 46.

information and evidence of the case may be subject to change as the trial evolves, subject to sufficient notice being provided”.³¹

33. This position is confirmed by the highly instructive decision in *Prosecutor v. Katanga*³² where the Trial Chamber stated that:

“In providing for a pre-trial phase, whose culminating point is the decision on the confirmation of the charges, rendered following an adversarial hearing, and in requiring the Trial Chamber to be bound by the facts and circumstances described in the charges as thus confirmed, and by them alone, the Statute does not allow either the Chamber, or even the Prosecutor, to add new facts in the course of the trial as and when they are disclosed by the ongoing investigations [...] In the Chamber’s view, the decision on the confirmation of the charges crystallises the facts and circumstances accepted in that decision in support of the charges it has confirmed. This is one of the fundamental reasons for the existence of the Pre-Trial Chamber, the purpose of which is to enable the trial to be conducted, as expeditiously as possible, on factual bases that are clear and certain, and accessible to the accused. If the Prosecutor were to be entitled to present at the confirmation hearing a mere sample of the facts with which he intends to charge the accused, and to reserve the right subsequently to add new facts at the trial, this requirement of certainty could not be satisfied.”

34. In the case against Ambassador Muthaura, the PTC found the following main facts as underlying the crimes confirmed:

- (a) **Nairobi State House Meeting – 26 November 2007:** That Mr Kenyatta, Ambassador Muthaura, President Mwai Kibaki and others met with Mungiki representatives at Nairobi State House on 26 November 2007.³³ The evidence relied upon was that of Witness 4, whom the PTC found was present at this meeting as a Mungiki representative. This meeting did not constitute a criminal plan and would thus not be considered in this analysis.³⁴

³¹ 20 November 2012, ICC-01/09-02/11-536, para. 13.

³² ICC-01/04-01/07-1547-tENG, para. 22.

³³ ICC-01/09-02/11-382-Conf, para. 310.

³⁴ *Ibid.* at para. 308.

- (b) **30 December 2007 meeting at State House:** Ambassador Muthaura was not alleged to have been present at this meeting and thus the Chamber did not consider the evidence of the Defence showing that Ambassador Muthaura was not in attendance.³⁵
- (c) **Nairobi Club [REDACTED]:** That Ambassador Muthaura, Uhuru Kenyatta and others met with Mungiki members at the Nairobi Club [REDACTED] and directed them to commit the crimes charged.³⁶ The facts relied upon to establish the charges are derived from the testimony of Witness 4.³⁷ The fact this meeting took place was challenged by the Defence,³⁸ and extensive evidence served contradicting the evidence of Witness 4. The Defence evidence was rejected by the PTC. This was the key planning meeting relied upon by the OTP to establish the criminal plan.³⁹

35. With the filing of the Updated DCC and the Pre-Trial Brief, the Defence has observed that the OTP has: (1) withdrawn the core fact and principal witness on which the case confirmed by the PTC was based (i.e. [REDACTED] meeting at Nairobi Members Club and Witness 4); (2) substituted that meeting with a new fact ([REDACTED]); and (3) added other new facts thereby improperly bringing

³⁵ Confirmation Decision, para. 337. As far as contentions regarding Ambassador Muthaura's presence at a meeting at Kagen House the same day, the Prosecution clarified – after defence interventions – that it was not alleged that Ambassador Muthaura attended or participated in that meeting either. See ICC-01/09-02/11-T-11-CONF-ENG ET 29-09-201, p. 88, lines 8-25: “MS. ALAGENDRA: *Your Honours, I'm reading from page 39, lines 18 to 25, and page 40, lines 1 to 2. Q. Sir, my learned friend said this, she said: 'Prosecution Witness 12 explains that on or around 30 December 2007 Muthaura held a meeting in the office of John Michuki in Nairobi on the deployment of the Mungiki to Kibera.' And further down at lines 25 she informed the Court that: 'Kenyatta was present in this meeting along with other PNU officials and Mungiki members.' And my learned friend referred this honourable Court to the following items of evidence EVD-PT-OTP-00652 at 0120 to 0122; EVD-PT-OTP-00661 at 0315 to 0320; and also to EVD-PT-OTP-00662 at 0329 to 0330. Sir, from our reading of these exact items of evidence, and by 'our' I mean the Muthaura team, we do not find a reference to any such meeting where yourself or Ambassador Muthaura are present at Honourable Michuki's office in Nairobi. Nevertheless, I would like to ask you this question based on counsel's submissions to this Court.*” This point was accepted as valid by Prosecution counsel at ICC-01/09-02/11-T-11-CONF-ENG ET 29-09-2011, p. 93, lines 19-22: “MS. ADEBOYEJO: *Not at all, it's just to clarify the record. She referred to EVD-PT-OTP-00652 on page 120, we just wanted to clarify that Mr. Kenyatta is mentioned as being present in Michuki's office but not Ambassador Muthaura. We wanted that to be clarified.*”

³⁶ ICC-01/09-02/11-382-Conf, paras. 341 and 375-76.

³⁷ ICC-01/09-02/11-382-Conf, para. 342.

³⁸ ICC-01/09-02/11-382-Conf, paras. 346-359.

³⁹ ICC-01/09-02/11-382-Conf, para. 375.

to trial a fundamentally different case from that confirmed to the prejudice of the accused.

36. As noted above, the 26 November 2007 meeting was held, based upon the OTP's own case at confirmation, not to amount to a criminal plan. This leaves the allegations regarding the alleged meetings of 30 December 2007 and [REDACTED] as the underlying core facts on which this case was confirmed. This case must therefore proceed to trial ONLY on the basis of these core facts and none other.

ANALYSIS OF CORE FACTS:

[REDACTED]

37. [REDACTED].⁴⁰ The Defence submits that this is a material NEW FACT (omitted from the previous DCC) that exceeds the scope of the confirmed facts and circumstances that underlay the case.
38. The OTP is making this allegation for the first time at the trial stage. In fact, in the Confirmation Decision, the PTC specifically held that [REDACTED]. It thus concluded that there was [REDACTED].⁴¹
39. According to the Trial Chamber in *Katanga*,⁴² echoing the ICTY in the *Kupreskic* Appeal Judgment,⁴³ the Prosecutor "*is expected to know [his] case before it goes to trial. It is not acceptable for the Prosecut[or] to omit the material aspects of its main allegations in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds*".

⁴⁰ Pre-Trial Brief, ICC-01/09-02/11-596-Conf-AnnxD-Red, para. 27.

⁴¹ Confirmation Decision, [REDACTED].

⁴² *Prosecutor v. Katanga*, Decision on the Filing of a Summary of the Charges by the Prosecutor, 21 October, 2009, ICC-01/04-01/07-1547-tENG, para. 23.

⁴³ ICTY, *Prosecutor v. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Vladimir Santic*, Appeal Judgement, 23 October 2001, IT- 95- 16- A, para. 92.

40. The Defence is not suggesting that there is a complete bar for the inclusion of new allegations. According to the jurisprudence of the Court,⁴⁴ new facts and circumstances which fall within the scope of the legal characterisations already accepted by the PTC would first have to be put before the PTC under article 61(9) before the commencement of the trial. In essence, such additions can only be done with the prior authorisation of the PTC.⁴⁵
41. If the OTP saw it fit to go back to the PTC in relation to the allegations of the use of guns in Naivasha, then principle and logic would dictate that the same should apply to all new allegations or allegations previously rejected by the PTC.⁴⁶

[REDACTED] *meeting at Nairobi Club*

42. In the case presented before the PTC, the criminal plan was allegedly hatched [REDACTED] at Nairobi Members Club. The Updated DCC and the Pre-Trial Brief no longer contain this allegation. There is no reference to [REDACTED] meeting at Nairobi Members Club; instead this is now replaced with [REDACTED]⁴⁷ [REDACTED]. It is obvious that this is a different and new [REDACTED] being alleged. That this is so is demonstrated, *inter alia*, by the following:

(a) [REDACTED];

(b) [REDACTED];

(c) [REDACTED].

⁴⁴ *Prosecutor v. Katanga*, Decision on the Filing of a Summary of the Charges by the Prosecutor, 21 October 2009, ICC-01/04-01/07-1547-tENG, para. 27.

⁴⁵ *Ibid.*

⁴⁶ ICC-01/09-02/11-607-Red.

⁴⁷ Pre-Trial Brief, ICC-01/09-02/11-596-Conf-AnnxD-Red, para. 31.

43. The question now is whether this case may proceed to trial when the OTP has dropped the core allegations and witness upon which the confirmed case was based. According to the jurisprudence of the Court, an accused is entitled to be tried only on those facts and circumstances confirmed by the PTC. The Prosecution must not be permitted, at this stage of the proceedings, to drop the core facts that underpin the charges confirmed by the Judges and to proceed to trial on other facts, never subjected to any previous judicial scrutiny as required. Were such a practice to be countenanced it would amount to a licence to the Prosecutor to circumvent the whole purpose of confirmation in an untrammelled fashion. A Prosecutor would be permitted to proceed with what he or she contended were “core facts” and “core witnesses” at confirmation only to be permitted to drop such facts and such witnesses before trial. Proceeding to trial where wholly different facts and different witnesses are relied upon would circumvent the very object of the confirmation hearing.

(iii) new facts not subjected to any judicial scrutiny

44. Wholly new allegations are made at the Trial stage thereby circumventing judicial scrutiny of the PTC. Completely new allegations made in the Pre-Trial Brief include: (i) [REDACTED];⁴⁸ (ii) [REDACTED];⁴⁹ (iii) [REDACTED];⁵⁰ (iv) [REDACTED];⁵¹ and (v) [REDACTED].⁵² The Defence attaches as Confidential Annex D, a chart that details some of the new allegations now put forward by the Prosecution for the first time.
45. The Defence submits that the accused persons have a right under Article 67(1) to be informed promptly and in detail of the nature, cause and content of the charges against them. Allowing the OTP, under the guise of a Pre-Trial Brief, to

⁴⁸ Pre-Trial Brief, para. 39.

⁴⁹ Pre-Trial Brief, para. 43.

⁵⁰ Pre-Trial Brief, para. 78.

⁵¹ Pre-Trial Brief, para. 78. Once again, the contention by the Prosecution in paragraph 78 of the Pre-Trial Brief regarding [REDACTED].

⁵² Pre-Trial Brief, para. 79.

introduce at the trial stage a new case that was never subjected to judicial scrutiny will not only render redundant the confirmation hearing process enshrined in the Statute, but also fundamentally violate the rights of the accused to be informed promptly of the nature and content of the charges. This is particularly so when these new allegations seek to supplant the witness relied upon at confirmation and his assertion of a criminal meeting involving Ambassador Muthaura [REDACTED]. That the OTP is bringing a whole new case is evidenced by the fact that almost all of its insiders were interviewed following the issuance of the Confirmation Decision. The evidence of OTP witnesses [REDACTED], which are now relevant to the "new case", also arises out of interviews conducted by the OTP in May 2012, after the Confirmation Decision was made public.

RELIEF REQUESTED

46. For the reasons advanced in this application, the Defence respectfully requests the Chamber to remit the preliminary issues identified at paragraph 3 above to the PTC or an available judge of the Pre-Trial Division for adjudication, or in the alternative, to order that the new allegations identified in Confidential Annex D be struck out from the Pre-Trial Brief, and the Prosecution be prohibited from leading any evidence in relation to those allegations.

Respectfully Submitted,



Karim A. A. Khan QC

Dated this 7th Day of February 2013
At Nairobi, Kenya