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Criminal
Court

Original: **English**

No.: **ICC-01/09-02/11**
Date: **8 March 2013**

TRIAL CHAMBER V

Before: **Judge Kuniko Ozaki, Presiding Judge**
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 the Additional Prosecution observations on the Defence's Article 64 applications, filed in accordance with order number ICC-01/09-02-11-673

Source: **The Office of the Prosecutor**

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

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Introduction

1. The Prosecution hereby provides its observations on the issues contained in the 5 March 2013 "Order scheduling a status conference and agenda".[1]

Confidentiality

2. This document is filed confidentially because it refers to a decision bearing that designation. It also refers to factual assertions in the Prosecution's pre-trial brief ("PTB"), which [REDACTED].[2] Because that [REDACTED], the Prosecution has, in an abundance of caution, redacted detailed allegations contained in its PTB from the public version of this filing. The unfortunate result is that the public's ability to follow these proceedings is limited. In the event that the Chamber [REDACTED], the Prosecution will file a lesser redacted version of this document.

Submissions

3. In summary, the Prosecution's position is as follows:

   - In ruling on the Defence Applications, the Trial Chamber should undertake a two-step analysis.

   - Under the first step of the analysis, Article 61(11) permits the Trial Chamber to determine, as a matter of law, whether the Pre-Trial Chamber could have reached a different conclusion on the confirmation of charges if apprised of Witness 4's asylum affidavit.

   - If the Trial Chamber concludes that the Pre-Trial Chamber would likely have reached a different conclusion, the analysis proceeds to the second step, which takes place under Article 64(4). That provision gives the Trial Chamber discretion to refer the confirmation decision

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[1] ICC-01/09-02/11-673.
[2] ICC-01/09-02/11-605-Conf.

back to the Pre-Trial Chamber for reconsideration, provided that Article 64(4)'s "necessity" requirement is met.

- Article 64(4)'s necessity requirement will be met only in exceptional circumstances.

- Mr Kenyatta's application fails at the first step of the analysis because even if Witness 4's evidence is discarded, the remaining evidence presented at confirmation was sufficient, as a matter of law, for the Pre-Trial Chamber to confirm the charges against him.

- Mr Muthaura's situation is different because the Trial Chamber could find as a matter of law that had the Pre-Trial Chamber known about Witness 4's asylum affidavit, it likely could have reached a different conclusion regarding the confirmation of charges against Mr Muthaura. He therefore passes the first step of the analysis under Article 61(11). The second step of the analysis is a matter for the Trial Chamber's discretion, but the Prosecution acknowledges that because Witness 4's evidence was the basis upon which the charges against Mr Muthaura were confirmed, and because the disclosure error could conceivably have affected the Pre-Trial Chamber's decision to confirm the charges, Mr Muthaura presents an exceptional case. For this reason, the Prosecution does not oppose the referral to the Pre-Trial Chamber for reconsideration in light of the non-disclosed affidavit. The Pre-Trial Chamber would have the opportunity to consider whether in fact it would have reached a different conclusion on confirmation in light of Witness 4's asylum affidavit. If yes, then the Pre-Trial Chamber can request additional evidence. If no, then the case against Mr Muthaura can proceed to trial.

A. *The anticipated scope of review and relief by the Pre-trial Chamber when the Prosecution "does not oppose the confirmation decision being referred back to the Pre-Trial Chamber for reconsideration with respect to Mr. Muthaura".*

a. Scope of review.

4. The Prosecution anticipates that the Pre-Trial Chamber's review would be to determine whether it would have confirmed the charges against Mr Muthaura, had it been aware of the inconsistency between Witness 4's asylum affidavit and the accounts in his ICC statements submitted at confirmation. Due to the unique set of circumstances related to Mr Muthaura, the Prosecution does not oppose the referral of the confirmation decision to the Pre-Trial Chamber, should the Trial Chamber determine that there is a legal basis to order it.

5. The scope of review envisaged by the Prosecution is thus narrow. In the first instance, it would not be a new confirmation hearing to re-offer all previously submitted evidence or to offer new evidence. The referral instead would ask the Pre-Trial Chamber to address the first issue raised in Mr Muthaura's Article 64 application – namely, "[w]hether 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" with respect to Mr Muthaura.[3]

6. The Muthaura Defence also requests the Chamber to refer the following two additional issues to the Pre-Trial Chamber for determination:

> (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

[3] ICC-01/09-02/11-628-Red, para 3.

any judicial scrutiny, require a new confirmation of charges hearing before a Trial Chamber is required or authorised to determine them?[4]

7. Issues (ii) and (iii) fall outside the scope of possible Pre-Trial Chamber review envisaged by the Prosecution. Moreover, given the new provisional trial date of 9 July 2013,[5] it is clearly more efficient for the Trial Chamber to retain these issues for its own determination.

8. While the Prosecution disagrees with the premise of issue (ii), the issue itself is one that the Trial Chamber can effectively and fairly resolve without referring the matter to the Pre-Trial Chamber. The Prosecution has not "drop[ped] the core planning meeting" in question – the January 2008 Nairobi Club meeting.[6] As explained in the Response, the "early January 2008" Nairobi Club meeting referred to in the Prosecution's PTB is the same meeting described in the confirmation decision as the "3 January 2008" Nairobi Club meeting.[7] Additionally, for the reasons previously articulated, the Court's legal framework and case law permits the Prosecution to present different evidence at trial than was presented at confirmation.[8] The Prosecution's decision not to call Witness 4 at trial is consistent with this principle, which defeats the Defence argument under issue (ii). With respect to issue number (iii), the Prosecution's case at trial falls within the four corners of the charges confirmed by the Pre-Trial Chamber. The Defence's arguments to the contrary can and should be adjudicated by the Trial Chamber. Indeed, the Trial Chamber has ruled upon closely analogous issues in its "Decision on the content of the updated document containing the charges",[9] when it largely rejected the Defence's argument that factual allegations could be included in the Updated Document Containing the

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[4] ICC-01/09-02/11-628-Red, para 3.
[5] ICC-01/09-02/11-677, page 7.
[6] ICC-01/09-02/11-628-Red, para 3.
[7] ICC-01/09-02/11-664-Red2, para 27.
[8] ICC-01/09-02/11-664-Red2, paras 16, 18-21.
[9] ICC-01/09-02/11-584.

Charges ("UDCC") only if the Pre-Trial Chamber had made a specific factual finding regarding the fact in question.[10]

b. Scope of relief.

9. If the confirmation decision is referred back to the Pre-Trial Chamber with respect to Mr Muthaura and that Chamber finds that it would not have confirmed the charges against Mr Muthaura had Witness 4's affidavit been disclosed, it may invite the Prosecution to submit additional evidence against Mr Muthaura, consistent with Article 61(7)(c)(i). Alternatively, if it determines that the charges would have been confirmed against Mr Muthaura even if Witness 4's affidavit had been disclosed, the confirmation decision will stand and Mr Muthaura's case would proceed to trial.

B. *The definition of a "preliminary issue" referred to in Article 64(4) of the Statute and whether the relief sought by the Defence falls under the definition.*

10. Article 64(4) provides that a Trial Chamber "may" refer preliminary issues to the Pre-Trial Chamber. There is no clear definition of a "preliminary issue" under Article 64(4). Neither the Statute, the Rules, nor the Regulations, define "preliminary issue", and the French and Spanish versions of Article 64 provide no additional guidance on how it should be interpreted, referring to "*questions préliminaires*" (French) and "*cuestiones preliminares*" (Spanish). The drafting history of Article 64(4) also provides no insight on what was considered to be a "preliminary issue". Notably, nothing in the drafting history indicates that the drafters considered the possibility of Article 64(4) being used to send confirmed cases back to the Pre-Trial Chamber.

11. The Prosecution does not dispute for these purposes that the plain meaning of the phrase could appear to encompass the issue presented here. The

[10] ICC-01/09-02/11-584, paras 16-23.

Oxford English Dictionary and Black's Law Dictionary define "preliminary" as something "preceding and leading up to the main subject or business; introductory; preparatory",[11] or "coming before and usually leading up to the main part of something".[12] The confirmation decision, by definition, "preced[es]" and leads up to the upcoming trial. In this respect, there is a plausible argument that the challenge raised by the Defence to the validity of the confirmation decision could be considered a "preliminary issue".

12. However, this does not end the inquiry. The Trial Chamber must consider whether the proposed referral is "necessary for [the Trial Chamber's] effective and fair functioning".[13] Article 64(4) does not permit the Trial Chamber to refer a matter to the Pre-Trial Chamber for resolution because it would be expedient or desirable to do so; the referral must be *necessary*, both to the effectiveness *and* the fairness of the Trial Chamber's functioning.[14]

13. The drafting history demonstrates the importance of Article 64(4)'s "necessity" requirement and the restrictive manner in which the provision was intended to operate. The original proposal for the provision read: "The Trial Chamber may refer *pre-trial* issues under this article to the Pre-Trial Chamber for resolution".[15] The text was changed substantially before being adopted in its current form, which reads:

> The Trial Chamber may, *if necessary* for its effective and fair functioning, refer *preliminary* issues to the Pre-Trial Chamber or, if necessary, to another judge of the Pre-Trial Division.[16]

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[11] J. Simpson (ed.), *Oxford English dictionary* (1989), available online at http://dictionary.oed.com.

[12] B.A. Garner (ed.), *Black's Law Dictionary* (8th ed., Minnesota 2004), at 1218.

[13] Article 64(4) of the Statute.

[14] The use of the conjunction "and" requires that referral be necessary to ensure both the fairness and the effectiveness of the Trial Chamber's functioning. Article 64(4) does not apply if the proposed referral is necessary to the fair functioning of the Trial Chamber, but not its effectiveness, or *vice versa*.

[15] *Decisions taken by the Preparatory Committee at its Session Held from 4 to 15 August 1997* (A/AC.249/1997/L.8/Rev.1) (emphasis added). The proposal was initially listed under Article 38(5) *bis*, and was bracketed to indicate that there was no consensus on its inclusion.

[16] Article 64(4) of the Statute (emphasis added). There was one interim proposal between the two versions of the provision quoted above, which read: "The Trial Chamber may, if necessary for its

14. The added requirement that the referral be "necessary for [the Trial Chamber's] effective and fair functioning" demonstrates the drafters' intention to limit the situations in which Article 64(4) could be invoked to refer matters to the Pre-Trial Chamber after confirmation. Consistent with the legislative intent, the decisions that have addressed Article 64(4) at this Court have taken a restrictive reading of the provision.[17] Indeed, the Pre-Trial Chamber itself has opined that Article 64(4) [REDACTED].[18]

15. The need for a restrictive application of Article 64(4) is echoed by former Appeals Chamber Judge Pikis, who observes that:

> The provisions of article 64.4 are not propitious to securing the best ends of justice. Preliminary issues are interlinked with the needs of the trial in the context of the requirements of a fair trial. Resolution of preliminary issues is an inseverable aspect of the trial to be addressed by the body trusted to hold the trial, the trial chamber. Assignment of preliminary issues to another body is a derogation from the rule of autonomy of the trial court over the trial and what goes with it.[19]

16. In sum, there is no clear definition of what constitutes a "preliminary issue" under Article 64(4). The Prosecution acknowledges that the term could plausibly be read to include the relief sought by the Defence. Even if the Trial Chamber were to accept such an interpretation, however, Article 64(4) may be used to refer the confirmation decision back to the Pre-Trial Chamber only if the proposed referral also satisfies Article 64(4)'s "necessity" requirement. This is a high bar. The Prosecution submits that Article 64(4)'s necessity requirement requires the Chamber to undertake an

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effective and fair functioning, refer preliminary issues of the Pre-Trial Chamber, or if necessary, to another available judge of the Pre-Trial Chamber." *Report of the Drafting Committee, Draft Statute for an International Criminal Court*, reprinted in *Official Records from the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, at 149-180, U.N. Doc. A/CONF.183/13 (Vol. III) (1998).

[17] *See* ICC-01/09-02/11-664-Red3, paras 11-13.

[18] [REDACTED].

[19] Georghios Pikis, *The Rome Statute for the International Criminal Court: Analysis of the Statute, the Rules of Procedure and Evidence, the Regulations of the Court and Supplementary Instruments*, (Martinus Nijhoff Publishers, 2010), p 154, para 358. Gilbert Bitti opined that "it is to be hoped that after the confirmation hearing, few 'preliminary issues' will remain". Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, (2nd ed., C.H.Beck Hart Nomos, 2008), p 1211, margin no. 18.

inquiry akin to that involved in an application to stay proceedings, which requires an examination of whether the requested relief is "strictly . . . necess[ary]",[20] and should be granted only in "exceptional" circumstances.[21] For the reasons explained in the Response, Mr Kenyatta's case does not present such an exceptional circumstance.[22] On the other hand, the unique facts with respect to Mr Muthaura make his case the rare instance where it is appropriate for the Chamber to consider sending the confirmation decision back to the Pre-Trial Chamber for reconsideration, should it find that there is a legal basis to do so.[23]

C. *The scope of the Trial Chamber's powers under Article 61(11) to address the defence request.*

17. Article 61(11) empowers the Trial Chamber to rule upon the Applications. It permits the Trial Chamber to determine, as a matter of law, whether the Pre-Trial Chamber reasonably could have reached a different conclusion on the confirmation of charges if appraised of Witness 4's asylum affidavit. It also permits the Trial Chamber to rule upon the Defence's arguments regarding the supposed "shift" in the Prosecution's case.

18. Once charges are confirmed, Article 61(11) provides that the Trial Chamber "shall be responsible for the conduct of subsequent proceedings," with two exceptions (citing articles 61(9) and 64(4)). This savings clause reserves only one function exclusively for the Pre-Trial Chamber – applications to amend the charges under Article 61(9).[24] It also provides the Trial Chamber with discretion to refer preliminary issues to the Pre-Trial Chamber under Article 64(4). In contrast to Article 61(9), Article 64(4) is a permissive ("may")

[20] ICC-02/05-03/09-410, para 78; ICC-01/04-01/06-2690-Red2, para 168.
[21] ICC-02/05-03/09-410, para 78.
[22] ICC-02/05-03/09-Conf-Red2, paras 16-43.
[23] ICC-02/05-03/09-Conf-Red2, paras 44-45.
[24] *See Prosecutor v. Lubanga*, ICC-01/04-01/06-1084, para 40 ("A joint reading of Article 61(9) and Article 61(11) demonstrates in the clearest terms that during the preparation phase of the trial . . . any application to amend the charges must be made to the Pre-Trial Chamber.").

provision, rather than a mandatory provision,[25] though the Trial Chamber's discretion is limited by the existence of preconditions discussed above in paragraphs 12-16. Even when the preconditions are met, however, the Trial Chamber need not refer the matter to the Pre-Trial Chamber; it simply has the discretion to do so if it chooses.

19. Article 61(11) clearly empowers the Trial Chamber to rule upon the Defence's arguments regarding the supposed "shift" in the Prosecution's case. That is a straight forward comparison of the Prosecution's allegations at confirmation and the Prosecution's case at trial, as outlined in the PTB. It in no way requires the Trial Chamber to sit as a court of appeal to review the Pre-Trial Chamber's judgment, which the Trial Chamber in *Lubanga* suggested was beyond a Trial Chamber's statutory remit.[26] Similarly, Article 61(11) permits the Trial Chamber to determine, as a matter of law, whether the Pre-Trial Chamber reasonably could have reached a different conclusion if apprised of Witness 4's asylum affidavit. Again, this does not require the Trial Chamber to review the Pre-Trial Chamber's findings. Rather, it requires the Trial Chamber to evaluate whether the addition of the affidavit could have altered the evidentiary record such that Article 61(7)'s "substantial grounds" threshold could not have been met as a matter of law.

20. Only if the Trial Chamber determines that the affidavit likely would have altered the Pre-Trial Chamber's decision to commit the case to trial does the question of a referral under Article 64(4) arise. As explained above, the Trial Chamber's analysis under Article 64(4) requires a "necessity" determination

[25] *See* Article 64(4) of the Statute ("The Trial Chamber *may*, if necessary for its effective and fair functioning, refer preliminary issues to the Pre-Trial Chamber") (emphasis added).
[26] *Prosecutor v. Lubanga*, ICC-01/04-01/06-1084, para 43 ("The Trial Chamber has not been given an appellate jurisdiction over any decision of the Pre-Trial Chamber . . . and most particularly the Trial Chamber has not been given a power to review the only decision of the Pre-Trial Chamber that is definitely binding on the Trial Chamber: the Decision on the confirmation of charges.").

and a decision that a referral is an appropriate exercise of the Chamber's discretion.

21. In sum, Article 61(11) provides the Trial Chamber with the authority to rule upon the Applications.

D. *The full and detailed accounts of the Prosecution's pre- and post-Confirmation investigation, respectively, and the amount/proportion of the witnesses/materials produced as a result of post-Confirmation investigation which the Prosecution intends to use at trial stage.*

a. <u>The Prosecution's pre- and post-confirmation investigation.</u>

22. It is important to note at the outset that is not always possible to draw clear distinctions between materials obtained as a result of pre-confirmation, as opposed to post-confirmation, investigations. In several instances, investigative steps undertaken by the Prosecution prior to confirmation bore fruit only after the confirmation hearing was concluded.

23. For example, the Prosecution's efforts to obtain evidence from members of the Mungiki began well before the confirmation hearing. These efforts resulted in several pre-confirmation interviews with Mungiki insiders, some of which were relied upon by the Prosecution at the confirmation hearing. It was only after the charges had been confirmed, however, and there was certainty that the case would proceed to trial, that certain Mungiki members made themselves available to speak to the Prosecution. In this regard, it is not possible to draw bright line distinctions between evidence that resulted from the pre- and post-confirmation stages of the Prosecution's investigation. The Prosecution's investigative efforts were continuous, and sometimes produced evidence months, or years, after investigative steps were made. The data below in part (b) gives the clearest indication of the amount of trial evidence that was obtained prior to confirmation and post-

confirmation. The Prosecution also provides the following overview of its investigations pre- and post-confirmation, to assist the Chamber.

24. Prior to confirmation, the Prosecution decided that in light of the acute security situation in Kenya, and its Article 68(1) duty to protect the safety of witnesses during investigations, it would conduct its investigation in a manner designed to mitigate the risks to witnesses and individuals perceived to be supporting the Court. This led the Prosecution to conduct a staged investigation aimed at minimizing the exposure of witnesses. To this end, the Prosecution took the following investigative steps, among others, prior to confirmation: it (i) obtained materials collated by the Commission of Inquiry into the Post-Election Violence ("CIPEV") and the Kenya National Commission on Human Rights ("KNCHR") during their inquiries into the PEV; (ii) determined the manner in which the CIPEV and KNCHR materials had been collected and evaluated, and the extent to which those materials could be relied upon; (iii) took multiple steps to interview senior members of the Kenya Police – interviews that were blocked by a preliminary injunction, supported by the Government of Kenya ("GoK"), that remains in place two years later, despite the Prosecution's repeated requests to the GoK to ask the Court to designate judges to hear the case on the merits (iv) made Requests for Assistance to the multiple entities, including the GoK, for documentary materials relevant to the Accused's roles in the PEV; (v) expended considerable efforts to obtain co-operation from the GoK with respect to the Requests for Assistance, and to overcome various tactics employed to stall, delay, or altogether thwart the Prosecution's collection of certain evidence in Kenya; (vi) interviewed individuals in a position to provide overview evidence on the crime base sites in Nakuru and Naivasha, whose security profiles were such that contact with the Prosecution did not expose them to undue risk; (vii) interviewed several Mungiki members with

knowledge of the PEV and the Accused's role therein; and (viii) initiated contact with senior Mungiki members and other well placed individuals to obtain leads and evidence regarding the involvement of the organization's members in the PEV.

25. Once the charges were confirmed, the admissibility challenge was dismissed, and it became clear that the case would proceed to trial, the Prosecution expanded its investigative activities in Kenya, subject to the security situation on the ground. In addition to the above activities, the Prosecution interviewed crime base witnesses living in Kenya and consolidated its efforts to obtain access to Mungiki members in a position to know about the Accused's roles in the PEV. This resulted in interviews of several new witnesses with substantial incriminatory evidence who had not agreed to speak to the Prosecution prior to confirmation. In addition, the Prosecution (i) continued its efforts to secure cooperation from the GoK; (ii) made additional Requests for Assistance to the GoK and other States; (iii) obtained imagery of the crime incident sites; (iv) contacted politicians who allegedly acted as mid-level perpetrators during the PEV and interviewed those willing to provide evidence; (v) identified and instructed expert witnesses; (vi) re-interviewed certain confirmation-stage witnesses; and (vii) sought to replace the evidence of witnesses who decided after confirmation that they would not testify at trial due to security concerns. The net result was an additional body of evidence that further supports the evidentiary record presented at confirmation.

26. Should the Chamber desire further insight into the investigative landscape in this case, the Prosecution has attached, as Annex A, a submission the Prosecution made to the Pre-Trial Chamber regarding its investigation.[27]

b. Proportion of witnesses/materials produced as a result of pre- and post-confirmation investigation to be used at trial.

27. As explained above, it is impossible to draw a bright line distinction between materials that were obtained as a result of pre-confirmation investigations, and materials obtained as a result of post-confirmation investigations. Nonetheless, the Prosecution has attempted below to provide the Chamber with the most instructive data available.

28. **Witnesses**. The Prosecution will rely on 31 fact witnesses and two expert witnesses at trial.[28] Twenty-six of the fact witnesses and the two experts were not relied upon at the confirmation hearing. Investigative steps taken prior to confirmation resulted in many of the "post-confirmation" witnesses agreeing to testify at trial, so it cannot be said that their evidence was produced strictly as a "result of post-Confirmation investigation".[29] Other witnesses were deemed to be necessary because witnesses available at confirmation were no longer willing to testify. The breakdown is demonstrated in the chart attached as Annex B.

29. **Documents and other materials**. The Prosecution's trial list of evidence ("LOE") contains 948 items.[30] The Prosecution's LOE at confirmation contained 350 items.[31] There are 159 items that appear on both the trial and confirmation LOEs. Thus, the trial LOE contains 789 items that were not

[27] The annex is designated *ex* parte because the underlying filing bears that designation: ICC-01/09-02/11-633-Conf-Exp-AnxA. The Defence has been provided with a confidential redacted version of the filing. *See* ICC-01/09-02/11-633-Conf-AnxA-Red.
[28] ICC-01/09-02/11-596-Conf-AnxA-Red.
[29] ICC-01/09-02/11-673, para 3(E).
[30] ICC-01/09-02/11-596-Conf-Exp-AnxC; ICC-01/09-02/11-596-Conf-AnxC-Red.
[31] ICC-01/09-02/11-280-Conf-AnxB.

included on the confirmation-stage LOE (948 – 159 = 789). Of those 789 items, 140 were registered in the Prosecution's evidence database prior to the confirmation hearing. The remaining 649 (789 – 140 = 649) were registered after the confirmation hearing, though some post-confirmation items resulted from investigative steps taken prior to confirmation.

30. The 649 items registered after the confirmation hearing include 27 documents produced by the Defence at confirmation, which leaves 622 items that were obtained after confirmation and are "new" to the Defence (649 – 27 = 622). These 622 items include 242 witness statements/transcripts of trial witnesses (19 statements and 223 interview transcripts). Including the 242 statements/transcripts in the figure of "post-confirmation materials" is effectively double counting because statements/transcripts are simply a proffer of the witnesses' anticipated testimony, and the differential between confirmation and trial witnesses is dealt with above in paragraph 28. The Prosecution suggests that the most accurate way to distinguish these post-confirmation "witnesses" from post-confirmation "materials", as the Chamber requested, is to subtract the 242 statements/transcripts from the figure of 622. This results in 380 items that were obtained after confirmation and are "new" to the Defence (622 – 242 = 380). Lastly, even though the materials are "new", they all relate to facts of the case and fall within the parameters of the UDCC.

E. *The evidentiary case against Mr Muthaura at the time of the Confirmation Hearing and the current proceedings.*

31. In terms of factual allegations, the Prosecution's evidentiary case against Mr Muthaura at trial is consistent with the case presented at the confirmation hearing, confirmed by the Pre-Trial Chamber, and articulated in the UDCC. To prove the factual allegations at trial, the Prosecution is relying on

evidence that adds to, and differs from, the evidence presented at the confirmation hearing.

32. The evidentiary case presented against Mr Muthaura at confirmation is exhaustively detailed in the Prosecution's pre-confirmation DCC,[32] list of evidence,[33] in-depth analysis chart,[34] oral submissions regarding Mr Muthaura's individual responsibility,[35] and written observations following the confirmation hearing.[36] In a highly abbreviated summary of these hundreds of pages, the Prosecution's core evidentiary case against Mr Muthaura at confirmation was that he:

- Established close links to the Mungiki prior to the 2007 elections through his intermediaries/subordinates, and, as part of the efforts to secure an alliance between the PNU and the Mungiki, intervened to secure the release of Mungiki members arrested at the November 2007 Muranga meeting.[37]

- Met with Mungiki leaders at Nairobi State House on 26 November 2007 as part of the efforts to secure the PNU-Mungiki alliance.[38]

- Held a meeting (in John Michuki's office) on or around 30 December 2007 to organise the deployment of Mungiki attackers to Kibera.[39]

- Procured the services of Mungiki leaders and directed and mobilized them to implement the common plan, as demonstrated by his alleged role at the January 2008 Nairobi Club meeting.[40]

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[32] ICC-01/09-02/11-280-AnxA.
[33] ICC-01/09-02/11-257-Conf-AnxB.
[34] ICC-01/09-02/11-257-Conf-AnxC1-5.
[35] ICC-01/09-02/11-T-6-ENG ET, pages 13-37.
[36] ICC-01/09-02/11-361, paras 38-58.
[37] ICC-01/09-02/11-T-5-Red-ENG CT, page 21; ICC-01/09-02/11-280-AnxA, paras 52-53.
[38] ICC-01/09-02/11-T-5-Red-ENG CT, pages 22-23
[39] ICC-01/09-02/11-T-5-Red-ENG CT, pages 39-40.

- Operated a "network [of intermediaries] on the ground", who provided logistical support for the Mungiki operations, such as weapons, uniforms, transport and money, and helped organize the Mungiki and pro-PNU youth to carry out the retaliatory attacks.[41]

- Used his authority over Commissioner of Police Ali to issue instructions to the Kenya Police not to interfere in the operations of the Mungiki and pro-PNU youth and thereby created a "free zone".[42]

- Used his authority to ensure that the main perpetrators escaped punishment for the crimes committed.[43]

33. The Pre-Trial Chamber confirmed the charges against Mr Muthaura on the basis of the above. In doing so, the Pre-Trial Chamber summarised Mr Muthaura's alleged role in the common plan as "securing the support of the Mungiki and directing the latter to commit the crimes in Nakuru and Naivasha", as well as "provid[ing] institutional support for the execution of the crimes on behalf of the PNU Coalition, using the tools available to him by virtue of his *de facto* authority".[44]

34. The Prosecution case at trial, as articulated in the PTB, is the same.[45] Consistent with the confirmation decision, the Prosecution continues to allege in the PTB that:

- Mr Muthaura helped "secur[e] the support of the Mungiki" for the PNU Coalition,[46] including through his (i) [REDACTED];[47] (ii)

[40] ICC-01/09-02/11-T-6-ENG ET, pages 14, 16-17; ICC-01/09-02/11-T-5-Red-ENG CT, pages 14-16, 40; ICC-01/09-02/11-280-AnxA, para 51, 54.
[41] ICC-01/09-02/11-T-6-ENG ET, pages 14, 23-24, 26-28, 30; [REDACTED]; ICC-01/09-02/11-280-AnxA, paras 55, 78, 81
[42] ICC-01/09-02/11-T-6-ENG ET, pages 15, 19, 33; ICC-01/09-02/11-T-5-Red-ENG CT, pages 15, 20, 40; ICC-01/09-02/11-280-AnxA, paras 54, 80-81
[43] ICC-01/09-02/11-280-AnxA, paras 72-73, 81.
[44] ICC-01/09-02/11-382-Red, para 377.
[45] *See, e.g.*, ICC-01/09-02/11-596-Conf-AnxD-Red-Corr, paras 115-116.
[46] ICC-01/09-02/11-382-Red, para 377.

[REDACTED];[48] (iii) [REDACTED];[49] (iv) [REDACTED];[50] and (v) [REDACTED].[51]

- Mr Muthaura "direct[ed] the [Mungiki] to commit the crimes in Nakuru and Naivasha",[52] including (i) [REDACTED];[53] and (ii) [REDACTED].[54]

- Mr Muthaura "provided institutional support for the execution of the crimes",[55] including by (i) [REDACTED];[56] (ii) [REDACTED];[57] and (iii) [REDACTED].[58]

35. As the above demonstrates, the Prosecution's case has not "undergone a metamorphosis" since confirmation, as the Defence contends.[59] The factual allegations contained in the Prosecution's PTB fall within the four corners of the charges confirmed by the Pre-Trial Chamber and are consistent with the Pre-Trial Chamber's characterization of Mr Muthaura's alleged role in the PEV.[60] The Prosecution's allegations are also consistent with the UDCC, which has been approved by this Chamber.[61] The Prosecution's decision to rely on different and/or additional evidence at trial than at confirmation is permissible under this Court's legal framework, which allows for changes in evidence between confirmation and trial.[62] The only restriction is that no matter what the evidence, the Prosecution's factual allegations at trial must

[47] ICC-01/09-02/11-596-Conf-AnxD-Red-Corr, paras 19-22.
[48] ICC-01/09-02/11-596-Conf-AnxD-Red-Corr, para 23.
[49] ICC-01/09-02/11-596-Conf-AnxD-Red-Corr, para 24.
[50] ICC-01/09-02/11-596-Conf-AnxD-Red-Corr, para 24.
[51] ICC-01/09-02/11-596-Conf-AnxD-Red-Corr, para 41.
[52] ICC-01/09-02/11-382-Red, para 377.
[53] ICC-01/09-02/11-596-Conf-AnxD-Red-Corr, para 31.
[54] ICC-01/09-02/11-596-Conf-AnxD-Red-Corr, para 78.
[55] ICC-01/09-02/11-382-Red, para 377.
[56] ICC-01/09-02/11-596-Conf-AnxD-Red-Corr, para 42.
[57] *See, e.g.*, ICC-01/09-02/11-596-Conf-AnxD-Red-Corr, paras 32, 43, 78-79.
[58] *See, e.g.*, ICC-01/09-02/11-596-Conf-AnxD-Red-Corr, paras 46, 53, 78.
[59] ICC-01/09-02/11-628-Red, para 1.
[60] ICC-01/09-02/11-382-Red, para 377.
[61] *See* ICC-01/09-02/11-584.
[62] ICC-01/09-02/11-664-Red2, paras 18-21.

remain consistent with the charges confirmed by the Pre-Trial Chamber. As explained above, they are.[63]

Fatou Bensouda,
Prosecutor

Dated this 8th of March 2013
At The Hague, The Netherlands

[63] There is no merit to the Defence argument that the PTB presents a "new case". ICC-01/09-02/11-628-Red, para 45. The PTB simply provides additional detail on the allegations in the DCC, which are broader in nature. By providing these additional details, the Prosecution has put the Defence on notice of the precise nature of its case and has complied with the Chamber's instruction "to provide a detailed document explaining its case with reference to the witnesses it intends to call and the other incriminating evidence it intends to rely on". ICC-01/09-02/11-451, para 11.