

**Cour
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**International
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Court**

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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. UHURU MUIGAI KENYATTA***

Public

Public Redacted Version of the 'Corrigendum of "Defence Observations Regarding the Impact of the Withdrawal of the Charges Against Mr Muthaura on the Case Against Mr Kenyatta Pursuant to the 'Order requesting written submissions following 18 March status conference'" (ICC-01/09-02/11-707-Conf)'

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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I. INTRODUCTION

1. The Defence for Uhuru Muigai Kenyatta submits its written submissions regarding the evidence underlying the charges as confirmed pursuant to Trial Chamber V's ("Chamber") "Order requesting written submissions following 18 March 2013 status conference."¹
2. The Defence submits that the effect of the Prosecution's decision not to rely upon the evidence of OTP-4 and its consequent decision to withdraw the charges against Mr Muthaura has such a significant and fundamental impact on the charges against Mr Kenyatta that the Chamber must either (i) terminate the proceedings;² (ii) stay the proceedings;³ or (iii) remit the case back to the Pre-Trial Chamber pursuant to Article 64(4) of the Rome Statute for reconsideration.
3. This filing is submitted confidentially, as it contains references to the evidence of protected witnesses. The Defence will submit a public redacted version in due course.

¹ ICC-01/09-02/11-699.

² The legal submissions in respect of this requested relief are set out at Section II(iii), Ordering the Termination of Trial Proceedings, Written Submission Following 18 March Status Conference, 28 March 2013.

³ The legal submissions in respect of this requested relief are set out at Section II(ii), Ordering the Stay of Trial Proceedings, Written Submission Following 18 March Status Conference, 28 March 2013.

II. PROCEDURAL HISTORY

4. The hearing on the confirmation of charges (“Confirmation Hearing”) took place between 21 September and 5 October 2011.
5. On 23 January 2012, the Pre-Trial Chamber (“PTC”) issued the “Decision on the Confirmation of Charges” (“Confirmation Decision”), confirming the charges against Mr Muthaura and Mr Kenyatta, and refusing to confirm the charges against General Ali.⁴
6. On 5 February 2013, the Defence submitted its “Application to the Trial Chamber Pursuant to Article 64(4) of the Rome Statute to Refer the Preliminary Issue of the Confirmation Decision to the Pre-Trial Chamber for Reconsideration” (“Article 64(4) Application”).⁵
7. On 7 February 2013, the Defence for Ambassador Muthaura (“Muthaura Defence”) submitted its “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)” (“Muthaura Article 64(4) Application”).⁶
8. On 20 February 2013, the Muthaura Defence submitted an addendum to its Article 64(4) Application.⁷

⁴ ICC-01/09-02/11-382-Conf.

⁵ ICC-01/09-02/11-622.

⁶ ICC-01/09-02/11-628-Conf.

⁷ ICC-01/09-02/11-656-Conf.

9. On 25 February 2013, the Prosecution submitted the “Confidential Redacted Version of the 25 February 2013 Consolidated Prosecution Response to the Defence Applications Under Article 64 of the Statute to Refer the Confirmation Decision back to the Trial Chamber” (“Response”).⁸
10. On 1 March 2013, both the Muthaura Defence and the Kenyatta Defence submitted applications for leave to reply to the Response.⁹
11. On 1 March 2013, the Prosecution submitted its “Response to the Muthaura Defence Application for Leave to Reply to the ‘Public redacted version of the 25 February 2013 Consolidated Prosecution response to the Defence applications under Article 64 of the Statute to refer the confirmation decision back to the Pre-Trial Chamber’”, in which it requested that the Chamber deny the Muthaura Leave Application.¹⁰
12. On 11 March 2013, the Chamber convened a Status Conference to address the Article 64(4) Applications. At this Status Conference, the Prosecution announced that it wished to withdraw the charges against Mr Muthaura.
13. On 13 March 2013, the Prosecution filed its “Observations on the impact of the withdrawal of the charges against Mr Muthaura on Mr Kenyatta”, in which it asserted that the withdrawal of the charges against Mr Muthaura has no legal or factual impact on the case against Mr Kenyatta.¹¹
14. On 18 March 2013, the Chamber held a Status Conference to consider the effect of the impact of the withdrawal of the charges against Mr Muthaura on Mr

⁸ ICC-01/09-02/11-664-Conf-Red.

⁹ ICC-01/09-02/11-667 (“Muthaura Leave Application”); ICC-01/09-02/11-669 (“Kenyatta Leave Application”).

¹⁰ ICC-01/09-02/11-670.

¹¹ ICC-01/09-02/11-692.

Kenyatta. At the Status Conference, the Defence made oral submissions on the impact of the Prosecution's decision not to rely on OTP-4 and its consequent withdrawal of the charges against Mr Muthaura on the evidence underlying the charges as confirmed. During the Status Conference, the Chamber requested that the Defence submit written submissions regarding the consequences of the withdrawal of the charges against Mr Muthaura on the case against Mr Kenyatta.

15. On 20 March 2013, the Chamber issued an "Order requesting written submissions following 18 March 2013 status conference", confirming its request to the Defence to submit any further written submissions by 28 March 2013, such filing not to exceed 40 pages.¹²

III. EVIDENTIAL SUBMISSIONS ON INDIVIDUAL CRIMINAL RESPONSIBILITY

16. The Prosecution's decision not to rely on OTP-4 and the consequent withdrawal of all charges against Mr Muthaura destroys the factual and legal matrix of the common plan as confirmed by the PTC. The Prosecution had alleged that Mr Kenyatta and Mr Muthaura were the two sole principal perpetrators who *devised* the common plan,¹³ which they then took to Maina Njenga who "eventually agreed" with it in return for concessions.¹⁴ Logically, the withdrawal of charges against Mr Muthaura removes a key alleged principal perpetrator, and the sole other individual alleged to have devised the plan with Mr Kenyatta. In the absence of Mr Muthaura, there is no longer sufficient evidence to provide substantial grounds to believe that Mr Kenyatta was a co-perpetrator in a common plan to commit crimes. As pleaded by the

¹² ICC-01/09-02/11-699.

¹³ ICC-01/09-02/11-280-AnxA, para. 19.

¹⁴ ICC-01/09-02/11-382-Conf, para. 362.

Prosecution, the common plan was dependent upon the alleged initial agreement between two individuals, in respect of one of whom the Prosecution now concedes there is insufficient evidence to support the charges.

17. The Defence will examine the evidence underlying each of the headings in Section VII of the Confirmation Decision dealing with individual criminal responsibility, in order to demonstrate the extent of the impact of the Prosecution's recent decisions on the case against Mr Kenyatta and the need for this case to be either terminated, stayed, or referred back for reconsideration to the PTC as a result of the deficiencies in the confirmation process.

(i) Preliminary Contacts between Mr Muthaura and Mr Kenyatta's Intermediaries and the Mungiki¹⁵

18. A close examination of the sources underlying this section of individual criminal responsibility does not link the alleged preliminary contacts between Mr Kenyatta's alleged intermediaries and the Mungiki with the post-election violence. These alleged contacts, all of which are based on hearsay, relate to an attempt by the PNU to obtain the support of the Mungiki for the Presidential elections, and form no part of a common criminal plan to commit crimes thereafter in Nakuru and Naivasha.

¹⁵ ICC-01/09-02/11-382-Conf, paras 301-308.

(ii) *Mr Muthaura and Mr Kenyatta's Participation in Meetings with Mungiki Members*¹⁶

19. The Prosecution's allegation of a joint common plan to commit crimes by Mr Muthaura and Mr Kenyatta is based on three key meetings,¹⁷ all of which were allegedly attended by both Mr Kenyatta and Mr Muthaura.¹⁸ OTP-4 was the principal witness whose evidence was relied upon by the PTC to establish the fact of, and Mr Kenyatta's presence at, the two key meetings, namely those alleged to have taken place on 26 November 2007 and 3 January 2008.

a. Nairobi State House – 26 November 2007¹⁹

20. At the Confirmation Hearing,²⁰ and in written submissions thereafter, the Prosecution alleged that at the 26 November meeting, Mr Kenyatta "adopted a plan to retaliate against perceived ODM supporters in the Rift Valley and instructed Mungiki leaders to execute this plan."²¹ The Prosecution submitted that the 26 November meeting was "the most important" of the alleged meetings held that constituted the common plan.²² The Prosecution submitted that the evidence of OTP-4 "highlighted the specific and essential contribution of Kenyatta to the effective implementation of the common plan".²³ The Prosecution also argued that it established its version of the 26 November

¹⁶ ICC-01/09-02/11-382-Conf, paras 309-359.

¹⁷ At the Confirmation Hearing, the Prosecution submitted that its case was supported by (a) an alleged meeting at State House on 26 November 2007 ("26 November meeting"); (b) an alleged meeting at State House on 30 December 2007 ("30 December meeting") and (c) an alleged meeting at the Nairobi Members' Club on 3 January 2008 ("3 January meeting").

¹⁸ Contrary to the PTC's erroneous conclusion that the Prosecution did not allege that Mr Muthaura was present at the 30 December meeting (ICC-01/09-02/11-382-Conf, para. 337), it is clear from the transcript of the Prosecution's oral submissions at the Confirmation Hearing (ICC-01/09-02/11-T-4-ENG ET, p. 52, lines 2-3) and the evidence of OTP-12 (KEN-OTP-0060-0299 at 0313, line 492) that the Prosecution's case was that Mr Muthaura attended.

¹⁹ ICC-01/09-02/11-382-Conf, paras 310-332.

²⁰ See for example ICC-01/09-02/11-T-5-CONF-ENG, p. 22, lines 17-25; p. 23, lines 1-3; ICC-01/09-02/11-T-15-CONF-ENG, p. 10, lines 11-15; ICC-01/09-02/11-T-15-CONF-ENG, p. 14, lines 22-25; p. 15, lines 1-10.

²¹ ICC-01/09-02/11-361, para. 59.

²² ICC-01/09-02/11-T-5-CONF-ENG, p. 22, lines 17-25; p. 23, lines 1-3.

²³ ICC-01/09-02/11-361, para. 67

meeting as a “fact [that was] reliable on its face”.²⁴ At the Confirmation Hearing, the Prosecution accused the Defence of trying to “label Prosecution Witness 0004 a liar”.²⁵

21. On 22 August 2012, the Prosecution disclosed a witness statement from OTP-4 dated May 2012, in which he admitted for the first time that he had in fact lied and that he “did not attend” the meeting he alleged took place on 26 November 2007 (“26 November Retraction Statement”).²⁶ Given the evidential import of this evidence on the PTC’s factual findings in the Confirmation Decision, the 26 November Retraction Statement is centrally relevant to the current application and relief sought by the Defence.
22. In light of the Prosecution’s subsequent decision to withdraw the evidence of OTP-4, and its consequent decision to withdraw the charges against Mr Muthaura, the evidence no longer provides substantial grounds to believe that on 26 November 2007 a meeting was held at Nairobi State House between Mr Muthaura, Mr Kenyatta, Mungiki representatives, President Mwai Kibaki, and others”, as part of a criminal common plan.²⁷
23. The extent of the factual determinations impacted by the Prosecution’s recent disclosure and decisions in respect of OTP-4 and Mr Muthaura are set out below:
 - a. The PTC’s specific finding that the “occurrence, purpose and subject of this meeting are established, to the requisite threshold and in considerable

²⁴ ICC-01/09-02/11-361, para. 48.

²⁵ ICC-01/09-02/11-T-15-CONF-ENG, p. 6, lines 4-25; p. 7, lines 1-5.

²⁶ KEN-OTP-0067-0604_R01, paras 10-13. OTP-4 had previously told both the Prosecution (KEN-OTP-0043, paras 149-174) and the Waki Commission (KEN-OTP-0005-0484) that he had attended the 26 November meeting.

²⁷ The PTC found this to be the case at paragraph 310 of the Confirmation Decision, ICC-01/09-02/11-382-Conf.

detail, by the statement of Witness OTP-4, who was present at this meeting as a Mungiki representative” can no longer be sustained.²⁸

- b. The PTC’s specific finding that “[during the] meeting, Mr Kenyatta spoke...and told the Mungiki to fully support ‘the President’, invoking their allegiance to the same community” can no longer be sustained.²⁹
- c. The PTC’s specific finding that “Mr Kenyatta told the Mungiki representatives that he would contact [REDACTED] and that they would organize more meetings” can no longer be sustained.³⁰
- d. The PTC’s specific finding that the “statement of Witness OTP-4 is independently corroborated by the statement of Witness OTP-11” constitutes a failure to assess properly the evidence in this case and is a deficiency in this confirmation process.³¹ A proper analysis of the evidence of OTP-11 as set out in the passage below reveals that: (i) he did not attend the meeting; (ii) he learnt of the date of the alleged meeting only from [REDACTED]; and (iii) he is not in a position to say what happened in the meeting that did take place at Nairobi State House on 26 November 2007:

[REDACTED].³²

- e. The PTC’s specific finding that “[c]orroboration of [OTP-4 and OTP-11’s] accounts is also provided by Witness OTP-12” constitutes a failure to assess properly the evidence in this case and is a deficiency in this

²⁸ ICC-01/09-02/11-382-Conf, para. 311.

²⁹ ICC-01/09-02/11-382-Conf, para. 311.

³⁰ ICC-01/09-02/11-382-Conf, para. 311.

³¹ ICC-01/09-02/11-382-Conf, para. 312.

³² KEN-OTP-0052-1506 at 1513.

confirmation process.³³ A proper analysis of the evidence of OTP-12 in the passage set out below reveals that: (i) he did not attend the alleged meeting;³⁴ (ii) the date of the meeting is given to OTP-12, albeit incorrectly, during a leading question by the Prosecution investigator; and (iii) OTP-12 does not provide any source for his information, nor any detail as to what he says took place:

[REDACTED].³⁵

- f. The PTC's specific finding that "[f]urther corroboration of the evidence concerning the meeting at State House on 26 November 2007 is provided by the summary of Witness OTP-6" constitutes a failure to assess properly the evidence in this case and is a deficiency in this confirmation process.³⁶ The anonymous witness summary of OTP-6 does not state that Mr Kenyatta was present at any meetings that took place *before* the election, and neither does he provide the source of his alleged generic information.³⁷ Notably, the Prosecution is no longer relying on OTP-6's summary at trial. It is unclear whether OTP-6 was ever asked to be a witness in this case, even prior to confirmation.
- g. The PTC's reliance upon "the summary of the statement provided by Witness OTP-1" in support of its determination regarding the 26 November meeting constitutes a failure to assess properly the evidence in this case and is a further deficiency in this confirmation process.³⁸ The anonymous witness summary of OTP-1 does not provide the dates of the

³³ ICC-01/09-02/11-382-Conf, para. 312.

³⁴ A review of the evidence of OTP-12 reveals that at no point does he ever state that he was present at this meeting.

³⁵ KEN-OTP-0060-0426 at 0449.

³⁶ ICC-01/09-02/11-382-Conf, para. 314.

³⁷ KEN-OTP-0053-0015 at 0019.

³⁸ ICC-01/09-02/11-382-Conf, para. 314.

meetings that he alleged took place, and neither does he provide the source of his alleged generic information.³⁹ Contrary to the determination of the PTC, OTP-1 does not support its finding that meetings took place prior to the elections in order plan to retaliate against perceived ODM supporters in the Rift Valley, rather OTP-1 alleges that pre-election meetings were convened in order for the Mungiki to “support the PNU”.⁴⁰ Notably, the Prosecution is no longer relying on OTP-1’s summary at trial. It is unclear whether OTP-1 was ever asked to be a witness in this case, even prior to confirmation.

- h. The decision of the PTC to reject Defence evidence as a direct consequence of its decision to rely upon the evidence of OTP-4 constitutes a failure to assess properly the evidence in this case and is a deficiency in this confirmation process.⁴¹
- i. The PTC’s specific finding that the “main inconsistencies” within the evidence of OTP-4 are “immaterial” (the fact that OTP-4 did not mention the presence of Mr Kenyatta to CIPEV and the precise timing of the meeting) can no longer be sustained given OTP-4’s concession that he lied about his alleged presence at the 26 November meeting.⁴²
- j. The PTC’s determination as to the evidential value of the Defence witnesses relied upon at the Confirmation Hearing in respect of this meeting must be reassessed in light of OTP-4’s admission that he did not attend this meeting in person as previously alleged, and due to the fact

³⁹ KEN-OTP-0053-0026.

⁴⁰ KEN-OTP-0053-0026.

⁴¹ ICC-01/09-02/11-382-Conf, paras 318-332.

⁴² ICC-01/09-02/11-382-Conf, paras 316, 317.

that the Prosecution do not seek to call him as a witness at trial. The Defence evidence that falls to be reassessed includes the statements of Mwai Kibaki,⁴³ President of Kenya at the time of the Confirmation Hearing, and Hyslop Ipu,⁴⁴ who stated that Mr Kenyatta did not attend the meeting that took place at State House on 26 November 2007, and which occurred in circumstances different from those alleged by OTP-4. The PTC's "with reservation" approach to these statements is no longer tenable given the developments in respect of OTP-4.⁴⁵

- k. The rejection by the PTC of the evidence of [REDACTED]⁴⁶ must be reassessed, and, in particular, his evidence that neither OTP-4 nor Mr Kenyatta were present at the said meeting,⁴⁷ and that nothing about the Mungiki was discussed during the actual meeting that took place.
- l. The evidential value of the list of attendees,⁴⁸ video,⁴⁹ photographs⁵⁰ and press article⁵¹ about the meeting at State House on 26 November 2007 must be reassessed in light of OTP-4's admission that he did not attend this meeting in person, as he had previously alleged.
- m. The evidential value of video footage and newspaper articles regarding Mr Kenyatta's movements on 26 November 2007 must be reassessed in

⁴³ ICC-01/09-02/11-382-Conf, para. 321.

⁴⁴ ICC-01/09-02/11-382-Conf, para. 321.

⁴⁵ ICC-01/09-02/11-382-Conf, para. 321.

⁴⁶ ICC-01/09-02/11-382-Conf, para. 324.

⁴⁷ KEN-D12-0001-0412, para. 38. When [REDACTED] (D12-37) was asked in his [REDACTED] 2012 Prosecution interview to identify the "untrue" parts of his statement to the Muthaura Defence, he *did not* select paragraph 38, which states "I was asked if Uhuru Kenyatta was present at the Statehouse on 26 November 2007 during the youth meeting. He was not present there. If Uhuru Kenyatta was present there or any place where I was present I would certainly have noticed and remember that", KEN-OTP-0074-0053_R01 at 0065.

⁴⁸ ICC-01/09-02/11-382-Conf, para. 326, citing KEN-D12-0010-0069.

⁴⁹ ICC-01/09-02/11-382-Conf, para. 327, citing KEN-D12-0009-0003, KEN-D12-0016-0007.

⁵⁰ ICC-01/09-02/11-382-Conf, para. 327, citing KEN-D12-0009-0003, KEN-D12-0016-0007.

⁵¹ ICC-01/09-02/11-382-Conf, para. 327, citing KEN-D12-0009-0003, KEN-D12-0016-0007.

light of OTP-4's admission that he did not attend this meeting in person, as he had previously alleged.⁵²

- n. The evidential value of Mr Kenyatta's live testimony at the Confirmation Hearing must be reassessed in light of OTP-4's admission that he did not attend this meeting in person, as he had previously alleged.⁵³

24. In essence, a thorough analysis of the quality of the evidence remaining in respect of the Prosecution's version of the 26 November meeting, one of the three central pillars of the common plan, reveals that it is clearly insufficient to meet the confirmation threshold requirement of "substantial grounds to believe."

- b. Nairobi State House – 30 December 2007⁵⁴

25. The evidence in respect of a 30 December meeting based upon OTP-11 and OTP-12, contrary to the submissions of the Prosecution at the 18 March Status Conference,⁵⁵ is wholly insufficient to attach individual criminal responsibility to Mr Kenyatta. The 30 December meeting was relied upon by the PTC as supplemental to the two other key meetings in the Confirmation Decision for which OTP-4 was alleged to be an eye-witness as to his presence and involvement.⁵⁶ The evidence upon the 30 December is not capable of supporting the alleged common plan, because it does not disclose a plan with the Mungiki to commit post-election violence through an organisational policy.

⁵² ICC-01/09-02/11-382-Conf, para. 330, citing KEN-D13-0001-0358, KEN-D13-0001-0357, KEN-D13-0001-0356.

⁵³ ICC-01/09-02/11-382-Conf, para. 330, citing ICC-01/09-02/11-T-11-Red-ENG, p. 25, lines 7-18.

⁵⁴ ICC-01/09-02/11-382-Conf, paras 333-340.

⁵⁵ ICC-01/09-02/11-T-24-ENG ET, p. 42, lines 1-3.

⁵⁶ ICC-01/09-02/11-681-Conf, para. 24.

26. In the Confirmation Decision, the PTC determined that “the evidence placed before [it provided] substantial grounds to believe that, on 30 December 2007, there was a second meeting at State House with Mungiki members and a number of MPs, where Mr Kenyatta was also present.”⁵⁷ The PTC held that this was established “to the requisite threshold by the testimony provided by Witness OTP-11, corroborated by Witness OTP-12 and Witness OTP-6.”⁵⁸
27. In the Confirmation Hearing, the Prosecution submitted, upon the evidence of OTP-12,⁵⁹ that Mr Muthaura participated in the 30 December meeting.⁶⁰ The PTC’s finding that it was not alleged that Mr Muthaura was present illustrates the uncertainty surrounding the credibility of OTP-12’s account and the evidence in respect of the 30 December meeting in general, which now occupies an, albeit artificial, position as the main Prosecution allegation against Mr Kenyatta.⁶¹ The evidential underpinning of this meeting therefore requires particularly careful scrutiny. The Defence submits that a careful analysis of this part of the Confirmation Decision demonstrates that the PTC failed to assess properly the evidence in this case, and reveals further fundamental deficiencies in this confirmation process, a process which did not permit the Defence to appeal the Confirmation Decision.⁶²
28. The Defence submits that the factual determinations made by the PTC in respect of the 30 December meeting are not supported to the requisite standard of “substantial grounds to believe”. The particulars in support of this submission are set out below:

⁵⁷ ICC-01/09-02/11-382-Conf, para 333.

⁵⁸ ICC-01/09-02/11-382-Conf, para 333.

⁵⁹ KEN-OTP-0060-0299 at 0313, lines 492.

⁶⁰ ICC-01/09-02/11-T-4-ENG ET, p. 52, lines 2-3.

⁶¹ ICC-01/09-02/11-382-Conf, para. 337.

⁶² ICC-01/09-02/11-384; ICC-01/09-02/11-406.

- a. OTP-11's account is hearsay. He was not present at the meeting he purports to describe.⁶³

- b. In terms of the date of the alleged meeting, the evidence of OTP-11 and OTP-12 is directly contradictory. Contrary to the account given by OTP-12,⁶⁴ OTP-11's evidence clearly states that the meeting occurred *before* the announcement of the election results,⁶⁵ notwithstanding the OTP investigator's blatant attempt to try to pin the date of the meeting as having taken place on "the day of the election results or the day before the election results."⁶⁶ The consequence of a careful assessment of OTP-11's account concerning the timing of the alleged meeting means that this allegation cannot be sustained as part of a common plan to commit crimes during the post-election violence, as, according to OTP-11, the winner of the election was unknown, and there was no violence against which to retaliate:

[REDACTED].⁶⁷

- c. The PTC's specific finding that "Mr Kenyatta also gave some MPs and Mungiki coordinators 3.3 million Ksh each"⁶⁸ is not sustainable on the evidence to the requisite standard at the confirmation stage. OTP-11 admits to the Prosecution that he is unable to confirm that the alleged handing out of money by Mr Kenyatta took place at the meeting he

⁶³ At no stage in OTP-11's account does he state that he was present at this meeting. He states that he was told the information by D12-47, KEN-OTP-0052-1514, line 308.

⁶⁴ KEN-OTP-0060-0405 at 0408, lines 92-93.

⁶⁵ KEN-OTP-0052-1506 at 1513-1514, lines 273-288.

⁶⁶ KEN-OTP-0052-1506 at 1514, lines 287-288.

⁶⁷ KEN-OTP-0052-1506 at 1514, lines 293-308.

⁶⁸ ICC-01/09-02/11-382-Conf, para 334.

attempts to describe, because he was relying on the account of [REDACTED]:⁶⁹

[REDACTED]...⁷⁰

- d. Notwithstanding the fact that the Defence wholly rejects the allegation regarding the 30 December meeting, even if it is assumed, *arguendo*, that Mr Kenyatta distributed 3.3 million Ksh to certain MPs at the 30 December meeting, OTP-11's account does not provide substantial grounds to believe that Mr Kenyatta intended it to be used to purchase guns or commit retaliatory violence. OTP-11 alleged that he was told [REDACTED] that the meeting occurred prior to the attacks and that Mr Kenyatta "was trying to say that they are not ready to hand over power".⁷¹ OTP-11 states only that Mr Kenyatta gave cash for the coordination of an unspecified "activity".⁷² Further, since OTP-11 alleged that the meeting took place *before* the election results were announced, in response to a *rumour* that it was very possible that Raila Odinga *would have* won the election,⁷³ and "before the attacks",⁷⁴ it is illogical to suggest that this meeting was convened in order to coordinate retaliatory violence. OTP-11 merely states that "part of that money is the money that was used to go and buy these guns."⁷⁵ Accordingly, any money handed over had no clear purpose or objective, and no declaration was made at the time that it was for post-election violence, the purchase of guns or any unlawful activity. Therefore, OTP-11's allegation that money was handed over does not provide support for the alleged common plan.

⁶⁹ KEN-OTP-0052-1506 at 1515, lines 327-329.

⁷⁰ KEN-OTP-0052-1506 at 1515, lines 327-328.

⁷¹ KEN-OTP-0052-1506 at 1514, line 311.

⁷² KEN-OTP-0052-1506 at 1514, line 318.

⁷³ KEN-OTP-0052-1506 at 1514, lines 293-295.

⁷⁴ KEN-OTP-0052-1451 at 1463, line 454.

⁷⁵ KEN-OTP-0052-1451 at 1463, line 453-454.

- e. The PTC's specific finding that "Witness OTP-12 corroborates the account provided by OTP-11, stating that there was a meeting at State House, where the logistics of the attack in Naivasha were planned" is not sustainable on the evidence to the requisite standard at confirmation.⁷⁶ The evidence of OTP-12 is that the meeting he describes at State House took place *after* the elections were announced, contrary to the evidence of Witness OTP-11:

[REDACTED].⁷⁷

- f. Notwithstanding the Defence's rejection of the 30 December meeting as alleged, the account provided by OTP-12 is incapable of providing substantial grounds to believe that the 30 December meeting is sufficient to support the alleged common plan, because it is shown to be fundamentally unreliable, and the evidence in fact mutates throughout his various Prosecution interviews:
- i. In OTP-12's [REDACTED] 2011 interview, he alleges that, when "Mr Odinga was still leading in counting the votes,"⁷⁸ a group of individuals, including Mr Kenyatta, from "the Kikuyu, the Embu and the Meru...convened at State House".⁷⁹ In this account, OTP-12 does not allege that Mr Kenyatta directed the use of violence through the Mungiki. At this point, OTP-12 states that the alleged plan is "to see that these people will not rule us".⁸⁰ Further, OTP-12 alleges that "*these MPs* were told to organise themselves and *tried* to reach the

⁷⁶ ICC-01/09-02/11-382-Conf, para 335.

⁷⁷ KEN-OTP-0060-0405 at 0408 (emphasis added).

⁷⁸ KEN-OTP-0061-0187 at 0197, lines 360-361

⁷⁹ KEN-OTP-0061-0187 at 0197, lines 354-355.

⁸⁰ KEN-OTP-0061-0187 at 0197, lines 373-374.

Mungiki men through the networks to the ground...[so] if you are an MP coming from that *you just organise your people* there.”⁸¹ The issue of violence is mentioned by OTP-12 only when he is asked how *he personally* would have “not let them go ahead”, and the remark is made speculatively and without reference to the directions of Mr Kenyatta:

[REDACTED].⁸²

- ii. In OTP-12’s [REDACTED] 2011 interview, he does not state that Mr Kenyatta directed the attendees of the meeting to use or organise violence. Rather, OTP-12, who claims [REDACTED], states that the meeting was chaired by Mr Kenyatta and had been convened in order “to look for a way of shielding ODM from being announced that they had won the elections”.⁸³ OTP-12 claims that Mr Kenyatta stated that “we have to organise ourselves according to the groups”, and, after this, 3.3 million Ksh was distributed to the “big leaders”.⁸⁴ On OTP-12’s account, the “war started there, down in Rift Valley” before the Kikuyus could have acted, and it was *after the outbreak of the post-election violence* that the Kikuyu “now planned for revenge attacks”.⁸⁵ In his account, OTP-12 does not mention that Mr Kenyatta planned or ordered revenge attacks following the outbreak of violence.⁸⁶

- iii. In OTP-12’s [REDACTED] 2011 interview, he does not allege that Mr Kenyatta directed the attendees to carry out acts of violence. Whilst

⁸¹ KEN-OTP-0061-0187 at 0197, lines 378-381 (emphasis added).

⁸² KEN-OTP-0061-0187 at 0200-0201, lines 468-492 (emphasis added).

⁸³ KEN-OTP-0060-0115 at 0115, lines 97-99.

⁸⁴ KEN-OTP-0060-0112 at 0117, lines 176-182.

⁸⁵ KEN-OTP-0060-0112 at 0118, lines 185-186.

⁸⁶ KEN-OTP-0060-0112 at 0118, lines 185-197.

the Prosecution suggests, in the transcript, that OTP-12 is relaying Mr Kenyatta's actual words, it is clear that OTP-12 is not using the direct speech of Mr Kenyatta, and that in fact OTP-12 is embellishing his previous accounts without further support. This meeting does not reflect the common plan with the Mungiki; it was not a declaration of war or call to violence. OTP-12 asserts that Mr Muthaura was present at this meeting; therefore this meeting as alleged by OTP 12 could not have formed a part of the common plan.⁸⁷ The fact that OTP-12 is exaggerating his account can be seen by his reference to a meeting at [REDACTED], which is a [REDACTED], referring to a bar/restaurant [REDACTED]. It is clear that OTP-12 is referring to a fundraising meeting [REDACTED]. [REDACTED].⁸⁸ [REDACTED].⁸⁹ [REDACTED],⁹⁰ and is therefore a clear example that OTP-12 is lying and using unsubstantiated rumour sourced from the public domain in attempt to bolster his false account.

[REDACTED]⁹¹

- iv. In OTP-12's [REDACTED] 2011 interview, which is the extract relied upon by the PTC in the Confirmation Decision in support of the 30 December meeting in respect of OTP-12,⁹² the investigator asks entirely leading questions, introducing the evidence that the meeting was convened in order to organise retaliatory violence. It is not the

⁸⁷ KEN-OTP-0060-0299 at 0313, lines 492.

⁸⁸ KEN-D13-0005-0586 at paras 6, 14, 23, 34; KEN-D13-0005-0622 at paras 4, 6; KEN-D13-0005-0561.

⁸⁹ KEN-OTP-0047-0350; KEN-D13-0005-0586 at paras 28, 29, 31, 32, 45; KEN-D13-0005-0622 at paras 27, 28.

⁹⁰ KEN-D13-0005-0586 at paras 6, 34; KEN-D13-0005-0622 at para. 3; KEN-D13-0005-0561.

⁹¹ 0060-0299 at 0313, lines 507-516 (emphasis added).

⁹² ICC-01/09-02/11-382-Conf, para. 335.

case that OTP-12 stated previously that Mr Kenyatta paid money for retaliatory attacks at this meeting:

[REDACTED]”⁹³

- g. The PTC’s specific finding that “the occurrence and the purpose of the meeting as well as Mr Kenyatta’s presence therein are corroborated by Witness OTP-6 who states that a second meeting with Mungiki members occurred at State House *during* the post-election violence in which logistics of the retaliatory attacks and financing of the Mungiki’s activities for such purpose were discussed” constitutes a failure to assess properly the evidence in this case and is a deficiency in this confirmation process.⁹⁴ Again, this evidence contradicts the account of OTP-11, as it alleges that Mr Kenyatta was present at a meeting *after* the elections. OTP-6’s evidence does not specify the date upon which the meeting is alleged to have taken place and therefore does not support the PTC’s finding that the meeting took place on 30 December 2007. OTP-6’s account, which is provided anonymously, is hearsay evidence from an undisclosed “source close to Mungiki”.⁹⁵ OTP-6’s evidence is no longer relied upon by the Prosecution, and it is unclear whether this witness was ever asked to provide evidence for the ICC proceedings, even before confirmation.
- h. The decision of the PTC to reject or give insufficient weight to the Defence evidence of D12-52,⁹⁶ the list of attendees at State House on 30 December,⁹⁷

⁹³ KEN-OTP-0060-0405 at 0418.

⁹⁴ ICC-01/09-02/11-382-Conf, para 336.

⁹⁵ KEN-OTP-0053-0015 at 0019.

⁹⁶ ICC-01/09-02/11-382-Conf, para. 338, citing KEN-D12-0012-0019, at 0022.

⁹⁷ ICC-01/09-02/11-382-Conf, para. 338, citing KEN-D12-0012-0014, at 0015-0017.

Mr Kenyatta's live evidence concerning his whereabouts on that date,⁹⁸ the account of D13-20,⁹⁹ and video evidence¹⁰⁰ constitutes a failure to assess properly the evidence in this case and is a deficiency in this confirmation process.

- i. The PTC's mischaracterisation as irrelevant of a video showing the swearing-in ceremony of the cabinet at Nairobi State House on 30 December 2007 as a video dated 17 April 2008 constitutes a further example of the errors made by the PTC in assessing the evidence in this case.¹⁰¹

c. Nairobi Club – 3 January 2008¹⁰²

29. At the Confirmation Hearing,¹⁰³ and in written submissions thereafter, the Prosecution alleged that on 3 January 2008, a "key preparatory meeting" was held at the Nairobi Club,¹⁰⁴ attended by Mr Muthaura, Mr Kenyatta, Mr Saitoti, OTP-4, [REDACTED], Maina Diambo and [REDACTED].¹⁰⁵ It was alleged that this meeting was the location at which "Kenyatta and Muthaura enlisted the

⁹⁸ ICC-01/09-02/11-382-Conf, para. 339, citing ICC-01/09-02/22-T-11-Red-ENG, p.28, line 8, to p.30, line 8.

⁹⁹ ICC-01/09-02/11-382-Conf, paras 338-339, citing KEN-D13-0005-0755.

¹⁰⁰ ICC-01/09-02/11-382-Conf, paras 339, citing KEN-D13-0001-0151.

¹⁰¹ At paragraph 339 of the Confirmation Decision, the PTC mistakenly characterises the evidence referred to by the Kenyatta Defence, KEN-D12-0009-0006, 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 PTC 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.

¹⁰² ICC-01/09-02/11-382-Conf, paras 341-359.

¹⁰³ See for example CC-01/09-02/11-T-4-ENG, p. 52 lines 13-25; p. 53, lines 1-25; ICC-01/09-02/11-T-5-CONF-ENG, p. 14, lines 20 – 25; p. 15, lines 1-25; p. 16, lines 1-23; ICC-01/09-02/11-T-5-CONF-ENG, p. 26, lines 23-25; p. 27, lines 1-6; ICC-01/09-02/11-T-5-CONF-ENG, p. 38, lines 2-6; ICC-01/09-02/11-T-5-CONF-ENG, p. 39, lines 8-17; ICC-01/09-02/11-T-5-CONF-ENG, p. 40, lines 13-25; ICC-01/09-02/11-T-6-ENG, p. 15, lines 22-25; p. 16, lines 1-18; ICC-01/09-02/11-T-6-ENG, p. 16, lines 24-25; p. 17, lines 1-17; ICC-01/09-02/11-T-6-ENG, p. 17, lines 18 – 25; p. 18, lines 1-13; ICC-01/09-02/11-T-6-ENG, p. 18, lines 14-25; p. 19, lines 1-3; ICC-01/09-02/11-T-6-ENG, p. 19, lines 4-25; p. 20, line 1; ICC-01/09-02/11-T-6-ENG, p. 20, lines 5-9; ICC-01/09-02/11-T-6-ENG, p. 22, lines 18-20; ICC-01/09-02/11-T-6-ENG, p. 45, lines 8-19.

¹⁰⁴ ICC-01/09-02/11-361, para. 69.

¹⁰⁵ The detail of the attendees and what was alleged to have happened at this meeting came solely from OTP-4, ICC-01/09-02/11-382-Conf, para. 342.

services of Mungiki leaders and concluded plans for the launching of retaliatory attacks in the Rift Valley.¹⁰⁶ The only evidence relied upon by the Prosecution in respect of this crucial meeting at the Confirmation Hearing was OTP-4 and the anonymous witness summary of OTP-1,¹⁰⁷ neither of which are now relied upon as sources of evidence.¹⁰⁸ During the Confirmation Hearing, the Prosecution had urged upon the PTC both the reliability of OTP-4 as a witness and the consistency of his accounts.¹⁰⁹

30. As a fact underlying the charge, the PTC held that “there are substantial grounds to believe that on 3 January 2008 at the Nairobi Club, Mr Muthaura and Mr Kenyatta met with Mungiki members and directed them to commit the crimes charged.”¹¹⁰ Crucially, the PTC stated that the “occurrence of this meeting is established to the requisite threshold, by the testimony of Witness OTP-4 who was present therein as a Mungiki representative and who provides a detailed account thereof.”¹¹¹

31. In the Confirmation Decision, the PTC held that Mr Muthaura and Mr Kenyatta directed the Mungiki to commit the crimes in Nakuru and Naivasha, and it was at this meeting that the “commission of the crimes” was “triggered by a precise instruction given by Mr Muthaura and Mr Kenyatta”.¹¹² The PTC determined that the alleged action at this meeting that led to the physical commission of the crimes was “the *most important* contribution of both Mr Muthaura and Mr

¹⁰⁶ ICC-01/09-02/11-280-AnxA, para. 51.

¹⁰⁷ KEN-OTP-0053-0026 at 0026.

¹⁰⁸ It is unknown whether OTP-1 was ever asked if he/she would be willing to be a witness in this case. The Defence notes the pertinent question of the Trial Chamber to the Prosecution in its recent “Order requesting written submissions following 18 March 2013 status conference” (ICC-01/09-02/11-699) in which the Chamber poses the question as to “What gave the Prosecution reason to believe, prior to confirmation, that these witnesses were in fact willing to testify?”

¹⁰⁹ See for example ICC-01/09-02/11-T-5-CONF-ENG, p. 7, lines 24-25; p. 8 lines 1-6 ; ICC-01/09-02/11-T-15-CONF-ENG, p. 6, lines 2-25; p. 7, lines 1-5; p. 9, lines 22-25; p. 10, lines 1-25; p. 11, lines 1-12.

¹¹⁰ ICC-01/09-02/11-382-Conf, para. 341.

¹¹¹ ICC-01/09-02/11-382-Conf, para. 342.

¹¹² ICC-01/09-02/11-382-Conf, para. 375.

Kenyatta”¹¹³ and that “in the absence of this action, the common plan to commit the crimes would have been frustrated.”¹¹⁴ The PTC determined that in this sense, Mr Muthaura and Mr Kenyatta’s contribution was to be understood as “essential” within the meaning of the relevant element of indirect co-perpetration.”¹¹⁵

32. In the Confirmation Decision, seven pages of Defence evidence detailing inconsistencies within OTP-4’s accounts and positive evidence about the non-existence of such a meeting, including accounts from staff members present on the day were rejected by the PTC as a direct consequence of its decision to accept the alleged eye-witness account provided by OTP-4.¹¹⁶ Notably, in the Confirmation Decision, the PTC concluded that “no inconsistency exists which would render the statement of Witness OTP-4 unusable for the Chamber in the determination of this particular fact”.¹¹⁷
33. Crucially, at the time of the Confirmation Hearing, the Prosecution had in its possession a statement from OTP-4, which clarified that this witness did not attend the alleged 3 January meeting.¹¹⁸ Critically, this statement was not disclosed to the Defence until 19 October 2012.¹¹⁹ Given OTP-4’s admission that he did not attend the 3 January meeting as alleged, and the subsequent withdrawal of reliance upon his evidence by the Prosecution, the allegation in respect of this meeting, deemed by the PTC to constitute an “essential contribution”¹²⁰ and the “most important contribution”¹²¹ by Mr Kenyatta and Mr Muthaura to the common plan, can no longer be sustained.

¹¹³ ICC-01/09-02/11-382-Conf, para. 376 (emphasis added).

¹¹⁴ ICC-01/09-02/11-382-Conf, para. 404.

¹¹⁵ ICC-01/09-02/11-382-Conf, para. 404.

¹¹⁶ ICC-01/09-02/11-382-Conf, paras 345-359.

¹¹⁷ ICC-01/09-02/11-382-Conf, para. 347.

¹¹⁸ The statement, KEN-OTP-0043-0083, came into the possession of the Prosecution on 27 September 2010.

¹¹⁹ The Defence has made extensive submissions concerning the non-disclosure of this evidence in previous filings, see ICC-01/09-02/11-681-Conf, paras 28-36; ICC-01/09-02/11-622, paras 32-41.

¹²⁰ ICC-01/09-02/11-382-Conf, para. 404.

34. The PTC's reliance upon the anonymous witness summary of OTP-1 in support of the allegation that "after the breakout of violence, a meeting took place between the Mungiki and Government representatives to recruit the Mungiki 'to retaliate against perceived ODM supporters in the Rift Valley' and that both Mr Kenyatta and Mr Muthaura were involved in this meeting" constitutes a failure to assess properly the evidence in this case.¹²² The only "meetings" that OTP-1 refers to are pre-election: "meetings that took place between the Mungiki and Government representatives whereby prior to the elections the Mungiki were recruited to support the PNU."¹²³ OTP-1 does not refer to Mungiki being "recruited" in meetings in order to "retaliate against perceived ODM supporters in the Rift Valley". Neither does OTP-1 provide the date or location of any meeting that he alleges took place, or the source of his alleged knowledge. Notably, the Prosecution is no longer relying on OTP-1's summary at trial. It is unclear whether OTP-1 was ever asked to be a witness in this case, even prior to confirmation.

(iii) Maina Njenga's Agreement with Mr Muthaura and Mr Kenyatta¹²⁴

35. The evidence cited in the Confirmation Decision of Maina Njenga's agreement with Mr Muthaura and Mr Kenyatta ("alleged agreement") cannot, in light of the changed nature of the case absent Mr Muthaura and OTP-4, substantiate to the requisite threshold a finding that Mr Kenyatta is individually criminally responsible for the crimes alleged. The evidence referred to in support of the alleged agreement is not capable of supporting the alleged common plan,

¹²¹ ICC-01/09-02/11-382-Conf, para. 376.

¹²² ICC-01/09-02/11-382-Conf, para. 344.

¹²³ KEN-OTP-0053-0026 at 0026.

¹²⁴ ICC-01/09-02/11-382-Conf, paras 360-374.

because it does not disclose a plan with the Mungiki to commit post-election violence through an organisational policy.

36. For the reasons set out in this section, the PTC's specific finding that "the evidence placed before the Chamber shows that Maina Njenga received a significant amount of money on at least two occasions in order for him to agree to the common plan and make available the services of the Mungiki to the PNU Coalition for the commission of the crimes" constitutes a failure to assess properly the evidence in this case and is a deficiency in this confirmation process.¹²⁵

37. In respect of the PTC's reliance upon OTP-11's allegation that "around mid-December 2007, Maina Njenga was given 8 million Ksh...from Mr Kenyatta",¹²⁶ OTP-11's evidence is hearsay. The witness suggests that he merely "understood", by inference, that Mr Kenyatta was involved, and his evidence is sourced from the words of another unknown individual.¹²⁷ Further, OTP-11 claims that the money was given on the [REDACTED] 2007 because Maina Njenga was complaining that the "PNU have not released him as promised".¹²⁸ OTP-11's evidence therefore suggests that if money was planned to be handed over as alleged, which the Defence denies, it was not in fact concerned with the post-election violence, but rather with the release of Maina Njenga in exchange for cash and the soliciting of Mungiki support for the PNU in the elections. OTP-11's evidence does not suggest that Mungiki support was sought for the "commission of the crimes". To suggest as much is illogical, since the initial violence to which the Mungiki is alleged to have responded had not occurred.

¹²⁵ ICC-01/09-02/11-382-Conf, paras 363.

¹²⁶ ICC-01/09-02/11-382-Conf, paras 363.

¹²⁷ KEN-OTP-0052-1292 at 1296, lines 131-141.

¹²⁸ KEN-OTP-0052-1523 at 1528, line 161.

38. The PTC's finding that "OTP-12...confirms both that 8 million Ksh was brought to Maina Njenga in prison and that the person who gave this money to Maina Njenga was sent by Mr Kenyatta" constitutes a further example of the PTC failing to assess properly the evidence in the case and is a deficiency in this confirmation process.¹²⁹ The evidence of OTP-12 in respect of this allegation is fundamentally inconsistent, both internally and with that of OTP-11. OTP-12 claims that he was both present and not present when the money was allegedly handed over. OTP-12's account fails to identify the source of the information, and does not in fact state with any certainty that Mr Kenyatta personally ordered that money be sent to Maina Njenga, and thereby fails to provide adequate support for the alleged agreement.¹³⁰ In respect of this allegation, and upon close inspection of the numerous conflicting accounts provided by OTP-12, the Defence submits that his evidence is internally inconsistent, fundamentally unreliable and therefore incapable of supporting the common plan as confirmed by the PTC:

- a. In OTP-12's [REDACTED] 2011 account, he states that "first of all they were given 8 million", six million of which was to go to Maina Njenga.¹³¹ At this point, OTP-12 does not mention that he was present; that this money was provided by Mr Kenyatta or pursuant to his orders; that it was intended for violence; and neither does he provide a specific date or location in respect of the allegation.
- b. In OTP-12's [REDACTED] 2011 account, he states that the money was allegedly given [REDACTED] 2007 at State House,¹³² and that [REDACTED], adding that a large number of MPs, including Mr Kenyatta,

¹²⁹ ICC-01/09-02/11-382-Conf, paras 363.

¹³⁰ KEN-OTP-0060-0272 at 0297, lines 868-869.

¹³¹ KEN-OTP-0061-0212 at 0221, lines 310-315.

¹³² KEN-OTP-0060-0047 at 0063, line 544.

were also present.¹³³ The Defence submits that it is utterly implausible that OTP-12 would not have mentioned this key information in his first interview, if it were true. Crucially, he states that the money was to be used for campaign purposes to “tell people to come out in large numbers to vote for PNU”, for the start of “Operation Kibaki Again...[who] were promised 50 million shillings for the movement”,¹³⁴ and had nothing to do with the organisation of violence.¹³⁵ The sum of 50 million Ksh suggests that any later payments could feasibly have been for campaign purposes. In any event, this evidence does not provide adequate support for the alleged agreement.

- c. In OTP-12’s [REDACTED] 2011 statement, he speaks, when addressing the 8 million Ksh allegation, in a manner that suggests he was not [REDACTED]; that he is not speaking from his own knowledge; and that he does not in fact know who supplied the money: “[REDACTED] said he got money from State House. Now, from State House, I don't know whether he got from Kibaki or from whoever but it was money from State House to be taken to Maina NJENGA.”¹³⁶ This clearly undermines his previous accounts, militating against OTP-12’s credibility.
- d. In respect of OTP-12’s [REDACTED] 2011 interview, it is clear that the PTC reference this account to support their finding regarding the 8 million Ksh allegation.¹³⁷ However, this account does not provide any support for the common plan, since it does not mention that the money was handed over for violence.

¹³³ KEN-OTP-0060-0047 at 0063, line 569.

¹³⁴ KEN-OTP-0060-0047 at 0063, lines 561-562.

¹³⁵ KEN-OTP-0060-0047 at 0061, lines 497-500.

¹³⁶ KEN-OTP-0060-0093 at 0109, lines 578-580.

¹³⁷ KEN-OTP-0060-0272 at 0297, lines 868-869.

39. The PTC's finding that "in late January 2008, before the commission of the crimes in Naivasha, Maina Njenga was given another 20 million Ksh, which was brought to him in prison again by Maina Dlambo and [REDACTED], together with [REDACTED] who was sent by Mr Kenyatta for that purpose" constitutes a failure by the PTC to assess properly the evidence in the case and is a deficiency in this confirmation process is.¹³⁸ OTP-12 gives a generic account based upon hearsay regarding the alleged payment of money to the Mungiki during the post-election violence. In respect of this allegation, and upon close inspection of the conflicting accounts provided by OTP-12, the Defence submits that his evidence is internally inconsistent, fundamentally unreliable and therefore incapable of supporting the common plan as confirmed by the PTC:

- a. In OTP-12's [REDACTED] 2011 account, he states that "20 million was taken at another time by [REDACTED] to take it direct so that Maina could be bought to allow his men to be used by PNU".¹³⁹ Whilst he states that this occurred after the start of the violence, at no point does OTP-12 mention that the money was provided by Mr Kenyatta or pursuant to his orders, and neither does OTP-12 state that he physically witnessed the event.¹⁴⁰
- b. In OTP-12's [REDACTED] 2011 account, he states that "before we had gone to elections, they took another 20 million shillings to Maina Njenga in Naivasha. So that Maina would allow his people to support the elections on 31st of the coming month."¹⁴¹ Here, he states that the money was handed over at State House [REDACTED], but that he was not

¹³⁸ ICC-01/09-02/11-382-Conf, paras 364.

¹³⁹ KEN-OTP-0061-0212 at 0221, lines 310-315.

¹⁴⁰ KEN-OTP-0061-0212 at 0222, line 332.

¹⁴¹ KEN-OTP-0060-0047 at 0063, lines 577-599.

present at the meeting.¹⁴² The Defence notes that OTP-12 finds [REDACTED] from a book of “recent notes” that he had with him.¹⁴³ It is submitted that the information provided by OTP-12 in respect of this date is fabricated, [REDACTED]. In any event, it confuses OTP-12’s evidence with respect to when and why 20 million Ksh were allegedly handed over.

- c. In OTP-12’s [REDACTED] 2011 statement, he again alleges that 20 million Ksh was taken from State House to Maina Njenga in Naivasha on [REDACTED] 2007.¹⁴⁴ The information is hearsay, and there is no suggestion that the money allegedly provided was to be used for violence. It is clear that OTP-12 cannot say with any certainty that Mr Kenyatta supplied the money: “[t]he *big men* who would coordinate 2007. He got 20 million from those people.”¹⁴⁵ In any event, this allegation cannot support the common plan since it occurs before the outbreak of violence.
- d. In respect of OTP-12’s [REDACTED] 2011 interview, it is clear that the PTC reference this account to support their finding in the Confirmation Decision regarding the 20 million Ksh allegation.¹⁴⁶ However, this account does not specify *which* 20 million Ksh allegation OTP-12 is referring to – either before or the after the outbreak of violence – and therefore cannot support a finding that money was sent by Mr Kenyatta for the purpose of funding violence.
- e. As for OTP-12’s [REDACTED] 2011 interview, whilst he does suggest that there was “another 20 million” provided after the elections,¹⁴⁷ it is clear

¹⁴² KEN-OTP-0060-0047 at 0064, lines 589-591.

¹⁴³ KEN-OTP-0060-0047 at 0062, lines 531-538.

¹⁴⁴ KEN-OTP-0060-0093 at 0106.

¹⁴⁵ KEN-OTP-0060-0093 at 0110, lines 607-608 (emphasis added).

¹⁴⁶ KEN-OTP-0060-0272 at 0297, line 871.

¹⁴⁷ KEN-OTP-0060-0325 at 0334, line 312.

that the witness cannot confirm that the authority for the Mungiki to take part in the post-election violence came from Mr Kenyatta, or that he personally organised the providing of the money.¹⁴⁸ OTP-12 states only that that the authority for the violence came from [REDACTED].¹⁴⁹ As such, the PTC's finding that Mr Kenyatta supplied 20 million Ksh for the purpose of funding the post-election violence cannot be sustained.

40. The PTC's finding that "OTP-11 also confirms that 20 million Ksh were indeed given to Maina Njenga" constitutes a further example that the PTC failed to assess properly the evidence in the case and is a deficiency in this confirmation process.¹⁵⁰ OTP-11's hearsay account is vague to the point of incomprehensibility, and he merely alleges that Maina Njenga was "promised" the money, but that he "doesn't know how it was delivered to him...or whether it was 20 million".¹⁵¹

*(iv) The Role of Mr Muthaura and Mr Kenyatta in the Events Leading to the Commission of the Crimes in or around Nakuru and Naivasha*¹⁵²

- a. Without "the most important contribution" there is no control over the crimes

41. The Confirmation Decision found that "the most important contribution"¹⁵³ to the crimes made by Mr Kenyatta and Mr Muthaura was "the precise

¹⁴⁸ KEN-OTP-0060-0325 at 0334.

¹⁴⁹ KEN-OTP-0060-0325 at 0334, line 316-317.

¹⁵⁰ ICC-01/09-02/11-382-Conf, paras 364.

¹⁵¹ KEN-OTP-0052-1292, at 1295.

¹⁵² ICC-01/09-02/11-382-Conf, paras 375-397.

¹⁵³ ICC-01/09-02/11-382-Conf, para. 375.

instruction”¹⁵⁴ given by them at the Nairobi Club on 3 January 2008, directing the Mungiki to commit the crimes in Nakuru and Naivasha, pursuant to the common plan which had been agreed with Maina Njenga.¹⁵⁵ This event is now wholly unsupported following the withdrawal of OTP-4. Without “the most important contribution,”¹⁵⁶ only “additional contributions”¹⁵⁷ remain. These piecemeal contributions, supported largely by hearsay, are inadequate for the purpose of the common plan and do not amount to substantial grounds to believe that Mr Kenyatta exercised control over the crimes.

42. It is alleged that as part of his financial and logistical support for the attacks, Mr Kenyatta gave 3.3 million Kenyan shillings to MPs, which was used in various ways to action the attacks in Nakuru and Naivasha.¹⁵⁸ The Defence submits that there is no evidence demonstrating that Mr Kenyatta directed the money to be used for the attacks as explained in Section (ii)(b) above. In relation to the 3.3 million Kenyan shillings allegedly given to [REDACTED],¹⁵⁹ OTP-11 does not allege that Mr Kenyatta gave this money for the purchase of guns. Instead, he states only that “[p]art of that money is the money that *was used* to go and buy these guns.”¹⁶⁰ Indeed, OTP-11 gives evidence refuting the common plan when he states that he was told that out of all the money Mr Kenyatta had given, “we are not seeing that money.”¹⁶¹

43. OTP-11’s assertion that the money given to [REDACTED] was “to coordinate these things in NAIVASHA”¹⁶² is baseless. In fact, he states that “[t]hose people [REDACTED] would come and they give the coordinators in Mungiki that

¹⁵⁴ ICC-01/09-02/11-382-Conf, para. 375.

¹⁵⁵ ICC-01/09-02/11-382-Conf, para. 375.

¹⁵⁶ ICC-01/09-02/11-382-Conf, para. 375.

¹⁵⁷ ICC-01/09-02/11-382-Conf, para. 375.

¹⁵⁸ ICC-01/09-02/11-382-Conf, paras 385 and 386.

¹⁵⁹ ICC-01/09-02/11-382-Conf, para. 385.

¹⁶⁰ KEN-OTP-0052-1451 at 1463, lines 451-454 (emphasis added).

¹⁶¹ KEN-OTP-0052-1451 at 1463, lines 464-466 (emphasis added).

¹⁶² KEN-OTP-0052-1469 at 1485, lines 654-655.

money.”¹⁶³ The Defence submits that it would be wholly inappropriate to infer that actions taken by [REDACTED] are attributable to Mr Kenyatta without adequate supporting evidence. The PTC held that this provision of funds was corroborated by OTP-12.¹⁶⁴ However, the citation provided in the Confirmation Decision makes no reference to money being given by Mr Kenyatta to [REDACTED], citing only “money from State House.”¹⁶⁵

44. The PTC found only that “the money [REDACTED] *used* for the operations in preparation of the attack in Naivasha was provided to him” by Mr Kenyatta.¹⁶⁶ There is an absence of evidence that any money was in fact ever provided by Mr Kenyatta to [REDACTED]. Even if it were true that Mr Kenyatta had paid money to [REDACTED] during the electoral period, without the trigger instruction which OTP-4 had alleged was passed on 3 January 2008, there is no support for a finding that Mr Kenyatta intended money to be transferred to the Mungiki as part of a common plan to commit attacks in Nakuru and Naivasha.

b. The “additional contributions” are supported only by hearsay evidence

45. OTP-11 has admitted that he was not involved in the violence in Nakuru and Naivasha.¹⁶⁷ Accordingly, he was not present at key meetings and his knowledge of the events which are essential to establishing the “additional contributions”¹⁶⁸ of Mr Kenyatta in the common plan contains inherent weaknesses. For example, with respect to the events in Nakuru, OTP-11 cannot be relied upon to identify who was co-ordinating the Mungiki. He admits, “*how*

¹⁶³ KEN-OTP-0052-1487 at 1494, line 263.

¹⁶⁴ ICC-01/09-02/11-382-Conf, para. 386.

¹⁶⁵ KEN-OTP-0060-0112 at 0118, lines 189-190.

¹⁶⁶ ICC-01/09-02/11-382-Conf, para 389 (emphasis added).

¹⁶⁷ KEN-OTP-0052-1590 at 1599-1600, lines 360-366.

¹⁶⁸ ICC-01/09-02/11-382-Conf, para. 375.

*exactly they did in NAKURU, I have no proper information about that*¹⁶⁹ and “I thought I would meet [REDACTED] *and be told what really happened in NAKURU.*”¹⁷⁰ Similarly, in Naivasha, OTP-11 concedes that he has no knowledge of the preparatory meetings allegedly organised by [REDACTED]: “*I don’t know anything about these meetings because even [unintelligible. 00:54:32] did not ... did not have ... did not give me a full disclosure what exactly happened.*”¹⁷¹

46. As a result, OTP-11’s evidence largely consists of hearsay. OTP-11 states that “[REDACTED] received the money from Uhuru. [REDACTED] received the money, [REDACTED] received money from Uhuru, even [REDACTED] and [REDACTED].”¹⁷² This allegation is based entirely on hearsay. OTP-11 was not positioned to know whether in fact any money was passed from Mr Kenyatta to [REDACTED] and, if so, for what reason. Even if Mr Kenyatta had made payments to his [REDACTED], which is denied, there is insufficient evidence to demonstrate that he intended the money to be used for violence, or that he possessed intent for this money to be transferred to Mungiki leaders for the purpose of organised violence.
47. OTP-11 alleges that [REDACTED] intervened for the release of Mungiki members that had been arrested. When asked “what do you do when you intervene to release someone?”¹⁷³ OTP-11 speculates, “the first person [REDACTED] *would have talked to*, one is Uhuru KENYATTA who gives the money.”¹⁷⁴ In its finding that [REDACTED] was given logistical command for the purposes of the commission of the crimes in Naivasha, the PTC did not

¹⁶⁹ KEN-OTP-0052-1469 at 1482, line 525 (emphasis added).

¹⁷⁰ KEN-OTP-0052-1469 at 1482, lines 507-508 (emphasis added).

¹⁷¹ KEN-OTP-0052-1469 at 1484, lines 596-597 (emphases added).

¹⁷² KEN-OTP-0052-1487 at 1494, lines 261-263.

¹⁷³ KEN-OTP-0052-1469 at 1485, line 658.

¹⁷⁴ KEN-OTP-0052-1469 at 1485, lines 659-660 (emphasis added).

identify who had given [REDACTED] logistical command.¹⁷⁵ Significantly, the PTC did not find that it was Mr Kenyatta.

48. In light of OTP-12's concession that he was not involved in the violence,¹⁷⁶ the PTC places undue weight on his untested hearsay evidence by relying upon it. In particular, when asked by the Prosecution if he was "involved in coordinating any violence in NAKURU," or if he was "involved in that in any way, shape or form," he answers "No."¹⁷⁷ However, regarding the attacks in Nakuru, he states, "[REDACTED] was acting with Uhuru KENYATTA. Now, [REDACTED] was being called by Uhuru and advised on where to get money."¹⁷⁸ Upon making this allegation, OTP-12 is not asked to delineate Mr Kenyatta's role, nor is he asked how he knows that [REDACTED] received phone calls from Mr Kenyatta. OTP-12 neglects to explain how he knows that Mr Kenyatta advised on where to get the money. In a similar vein, OTP-12's comments on the role of [REDACTED] in the Naivasha attacks are entirely based on hearsay. He alleges that "[t]hey were hired to go and kill Luos in NAIVASHA TOWN. The commander there was [REDACTED],"¹⁷⁹ and that "[REDACTED] just told them to attack the Luos who are against our Government."¹⁸⁰ OTP-12 was not present at this meeting.

49. Further, in relation to the finding that Mr Kenyatta contacted [REDACTED] and gave [REDACTED] 6 million Kenyan shillings in order to gather another group of Mungiki from Thika to participate in the attack in Naivasha,¹⁸¹ OTP-12's evidence, which states that Mr Kenyatta came to the Blue Post Hotel and

¹⁷⁵ ICC-01/09-02/11-382-Conf, para 386.

¹⁷⁶ KEN-OTP-0060-0385 at 0396, lines 407-409; KEN-OTP-0060-0365 at 0368, lines 92-99 ; KEN-OTP-0074-0463 at 0473, lines 432-434.

¹⁷⁷ KEN-OTP-0060-0385 at 0396, lines 407-409.

¹⁷⁸ KEN-OTP-0060-0112 at 0126, lines 352-353.

¹⁷⁹ KEN-OTP-0060-0365 at 0373, lines 276-277.

¹⁸⁰ KEN-OTP-0060-0365 at 0377, line 435.

¹⁸¹ ICC-01/09-02/11-382-Conf, para. 391.

personally handed over the money, is second-hand hearsay.¹⁸² OTP-11's supposedly corroborative account does not specify which individual met [REDACTED],¹⁸³ failing even to state that Mr Kenyatta attended the Blue Post Hotel as alleged by OTP-12,¹⁸⁴ and is also based on second-hand information.¹⁸⁵

50. The PTC's findings in respect of the alleged meeting between [REDACTED] and Mungiki members at Blue Post Hotel to discuss logistics and financing immediately before the attack in Naivasha,¹⁸⁶ is based exclusively upon the evidence of OTP-11 and OTP-12. Neither of these witnesses were present at the meeting.¹⁸⁷ In fact, they were both told what happened by the same person: "we have somebody called [REDACTED]".¹⁸⁸ Whilst they allege that at the meeting [REDACTED] said the money had been brought by Mr Kenyatta,¹⁸⁹ this hearsay evidence does not substantiate an allegation that Mr Kenyatta ordered violence or indeed participated in the alleged common plan.

c. [REDACTED] was not a part of the common plan

51. In the Confirmation Decision, the PTC found that [REDACTED] was a Mungiki leader who had been in contact since November 2007 with the PNU Coalition and who had been requested, at least as of January 2008, to conduct the recruitment of Mungiki members for the attacks.¹⁹⁰ In this respect, OTP-11 states that in these operations, [REDACTED] was directly answerable to Mr Kenyatta who had specifically entrusted him with the task of recruiting as many people

¹⁸² KEN-OTP-0060-0405 at 0413, line 276.

¹⁸³ KEN-OTP-0052-1305 at 1308, lines 116-117.

¹⁸⁴ KEN-OTP-0052-1305 at 1308, lines 116-123.

¹⁸⁵ KEN-OTP-0052-1305 at 1308, lines 116-117.

¹⁸⁶ ICC-01/09-02/11-382-Conf, para. 395.

¹⁸⁷ KEN-OTP-0052-1305 at 1309, lines 137-138, "he chose to disclose to us what was happening," and OTP-11: KEN-OTP-0052-1487, at 1490, lines 104-105, "[REDACTED] told me."

¹⁸⁸ KEN-OTP-0052-1305 at 1309, lines 133-134 and 137-138, "he chose to disclose to us what was happening," and KEN-OTP-0052-1487 at 1490, lines 104-105, "[REDACTED] told me."

¹⁸⁹ KEN-OTP-0052-1305 at 1309; and KEN-OTP-0052-1487 at 1490.

¹⁹⁰ ICC-01/09-02/11-382-Conf, para. 396.

as possible for the retaliatory attacks.¹⁹¹ This evidence is unsourced hearsay. Furthermore, given the split in the Mungiki, from which, according to OTP-12, [REDACTED] “defected”¹⁹² and “did not use the Mungiki directly,”¹⁹³ [REDACTED] remnant grouping does not even form part of the Mungiki ‘organisation’ alleged by the Prosecution in this case.

¹⁹¹ ICC-01/09-02/11-382-Conf, para, 396.

¹⁹² KEN-OTP-0060-0250 at 0256, lines 202-205.

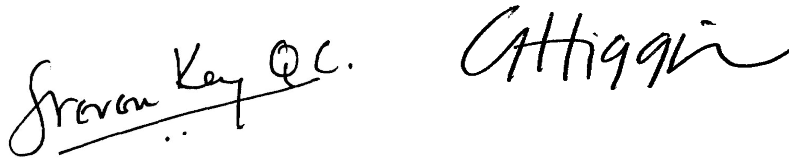
¹⁹³ KEN-OTP-0060-0250 at 0256, lines 223-224.

V. RELIEF

52. For the reasons set out above, the Defence respectfully requests that the Chamber:

- i. Terminate the proceedings;
- ii. Stay the proceedings; or
- iii. Remit the case back to the Pre-Trial Chamber pursuant to Article 64(4) of the Statute for reconsideration.

Respectfully submitted,

The block contains two handwritten signatures in black ink. The signature on the left is 'Steven Kay QC.' and the signature on the right is 'Gilligan'. Both are written in a cursive, flowing style.

.....
Steven Kay QC and Gillian Higgins

On behalf of Uhuru Muigai Kenyatta

Dated this 3rd day of April 2013

At London, England